

**SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERICAL COURT
GROUP PROCEEDINGS LIST**

S ECI 2021 00431

BETWEEN

LESTER BUCH

Plaintiff

and

FREEDOM FOODS GROUP LIMITED (ACN 002 814 235)

First Defendant

DELOITTE TOUCHE TOHMATSU (A FIRM)

Second Defendant

ORDER

JUDGE:

The Honourable Justice Nichols

DATE MADE:

18 November 2021

ORIGINATING PROCESS:

Writ

HOW OBTAINED:

By Summons dated 2 July 2021

ATTENDANCE:

Mr G Donnellan with Ms K Brazenor of counsel for the plaintiff

Mr A Pound SC with Ms E Levine of counsel for the plaintiff in proceeding S ECI 2020 04505

Mr R Craig QC with Mr A McRobert of counsel for the first defendant

Ms W Harris QC with Ms J Williams of counsel for the second defendant

Ms C Harris QC with Ms K Burke as contradictor

OTHER MATTERS:

1. It is noted that corresponding orders have been made by the Court in proceeding S ECI 2020 04505 (*Gehrke v Freedom Foods Ltd & Anor*) (**Gehrke Proceeding**).

2. The defendants do not object to orders 1 to 5, order 6 is made by consent and the plaintiffs do not object to order 7.

3. The undertakings required by order 2 of these orders be filed by **4.00pm on 25 November 2021**.



THE COURT ORDERS THAT:

1. Pursuant to s 33ZF of the *Supreme Court Act 1986* (Vic) (**SCA**) and rule 9.12 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**SCR**) until further order:
 - (a) this proceeding and the Gehrke Proceeding (together, **Proceedings**) be consolidated and the consolidated proceeding be known as *Nicholas John Gehrke and Lester Buch v Freedom Foods Group Limited and Anor* to be identified as S ECI 2020 04505 (**Consolidated Proceeding**);
 - (b) the plaintiff in this proceeding (**Buch Plaintiff**) and the plaintiff in the Buch Proceeding (**Gehrke Plaintiff**) (together, **plaintiffs**) are to be the joint representative plaintiffs in the Consolidated Proceeding;
 - (c) Slater & Gordon, solicitors for the Gehrke Plaintiff, and Phi Finney McDonald, solicitors for the Buch Plaintiff, (together, the **Solicitors**) are granted leave to be jointly named as solicitors on the record for the plaintiffs in the Consolidated Proceeding.
2. Order 1 above is subject to the provision of:
 - (a) an undertaking in the terms of Annexure A to these orders by each of the Gehrke Plaintiff and the Buch Plaintiff; and
 - (b) an undertaking in the terms of Annexure B to these orders by each of Slater & Gordon and Phi Finney McDonald.
3. Subject to further order, costs incurred in the Gehrke Proceeding and the Buch Proceeding will be costs in the Consolidated Proceeding.
4. Any costs in the Consolidated Proceeding incurred by or on behalf of the plaintiffs on or after the date of these orders which exceed costs which would reasonably have been incurred if there was a single law firm acting as solicitors for the plaintiffs, including any costs incurred in complying with clauses 5.2(d) and (e), 6.6, 6.7, 11.2 and 8 of the Cooperation Protocol in Annexure C to these orders (**Duplicated Costs**):
 - (a) will not be recoverable against group members in the Consolidated Proceeding;
 - (b) will not be recoverable against the defendants in the Consolidated Proceeding.

Consolidated pleading

5. By **4pm on 16 December 2021**, the plaintiffs are to file and serve a consolidated writ and consolidated statement of claim.

Costs of the multiplicity summonses



6. The plaintiff pay the first and second defendants' costs thrown away by reason of the amendments to the Summons dated 4 June 2021.
7. By **4.00pm on 2 December 2021**, the parties file and serve written submissions of not more than 3 pages on the costs of the Amended Summons dated 2 July 2021.

DATE AUTHENTICATED:

18 November 2021

A handwritten signature in blue ink is written over a red circular seal. The seal features the coat of arms of Victoria in the center, surrounded by the text "SUPREME COURT OF VICTORIA".

The Honourable Justice Nichols

ANNEXURE A

FORM OF JOINT PLAINTIFFS UNDERTAKINGS

**SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERICAL COURT
GROUP PROCEEDINGS LIST**

S ECI 2021 00431

BETWEEN

LESTER BUCH

Plaintiff

and

FREEDOM FOODS GROUP LIMITED (ACN 002 814 235)

First Defendant

DELOITTE TOUCHE TOHMATSU (A FIRM)

Second Defendant

Lester Buch undertakes to the Court to enter into the Cooperation Protocol annexed to the orders of the Court dated 18 November 2021, and undertakes to instruct his solicitors Phi Finney McDonald to comply with the Cooperation Protocol in conducting the Consolidated Proceeding.

Signature _____

Lester Buch

Date of signature: [insert]



ANNEXURE B

SOLICITORS ON THE RECORD FORM OF UNDERTAKING

**SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERICAL COURT
GROUP PROCEEDINGS LIST**

S ECI 2021 00431

BETWEEN

LESTER BUCH

Plaintiff

and

FREEDOM FOODS GROUP LIMITED (ACN 002 814 235)

First Defendant

DELOITTE TOUCHE TOHMATSU (A FIRM)

Second Defendant

Phi Finney McDonald, as solicitors for the plaintiff, undertakes to the Court to conduct the Consolidated Proceeding in accordance with the Cooperation Protocol annexed to the orders of the Court dated 18 November 2021.

Signature _____

On behalf of: Phi Finney McDonald

Signatory: [insert]

Capacity: [insert]

Date of signature: [insert]



ANNEXURE C

FORM OF COOPERATION PROTOCOL

Cooperation Protocol

Recitals

- A. On 7 December 2020, Mr Nicholas John Gehrke (**Gehrke Plaintiff**) commenced proceeding S ECI 2020 04505 (**Gehrke Proceeding**) in the Supreme Court of Victoria (**Supreme Court**) against Freedom Foods Group Limited (ABN 79 002 814 235) (**Freedom Foods**) and Deloitte Touch Tohmatsu (ABN 74 490 121 060) (**Deloitte**).
- B. The Gehrke Proceeding was issued by Slater & Gordon Limited (**Slater & Gordon**), the solicitors for the Gehrke Plaintiff.
- C. On 19 February 2021, Mr Lester Buch (**Buch Plaintiff**) commenced proceeding S ECI 2021 00431 (**Buch Proceeding**) in the Supreme Court against Freedom Foods and Deloitte.
- D. The Buch Proceeding was issued by Phi Finney McDonald, the solicitors for the Buch Plaintiff, with financing from Omni Bridgeway (Fund 5) Australian Inv. Pty Ltd (**Omni**).
- E. On 25 February 2021, the Honourable Justice Nichols ordered that Slater & Gordon and Phi Finney McDonald (together, the **Solicitors**) confer in relation to the future conduct of the two proceedings, having regard to the similarity of allegations and commonality of group members in the proceedings.
- F. On 5 October 2021, Slater & Gordon, on behalf of the Gehrke Plaintiff, and Phi Finney McDonald, on behalf of the Buch Plaintiff, agreed to consolidate the two proceedings.
- G. On 18 November 2021, the Honourable Justice Nichols made orders consolidating the Gehrke Proceeding and the Buch Proceeding (**Consolidated Proceeding**) and granting leave to the Solicitors to be jointly named as solicitors on the record for the Plaintiffs in the Consolidated Proceedings, on the provision of:
 - a. undertakings by each of the Plaintiffs that they would enter into this Cooperation Protocol (**Protocol**) and that they would instruct their respective solicitors to comply with this Protocol in conducting the Consolidated Proceeding; and
 - b. undertakings by each of the Solicitors that they would conduct the Consolidated Proceeding in accordance with the Protocol.
- H. This Protocol sets out the manner in which the Solicitors are to cooperate in the conduct of the Consolidated Proceeding.



1 Commencement Date

- 1.1 The term of this Protocol shall begin from the date on which it is executed (**Commencement Date**).
- 1.2 The term of this Protocol shall continue until terminated pursuant to clause 15.

2 Cooperation

- 2.1 The Plaintiffs will jointly:
- a. nominate one email address for service;
 - b. file a consolidated writ and consolidated statement of claim in the Consolidated Proceeding;
 - c. engage one set of counsel to represent the Plaintiffs and the Group Members in the Consolidated Proceeding;
 - d. make any interlocutory applications;
 - e. respond to any interlocutory applications filed by the Defendants;
 - f. retain, brief and instruct expert witnesses;
 - g. conduct the discovery process;
 - h. prepare, file and serve any evidence; and
 - i. confer on any major decisions and listing dates.

3 Major decisions

- 3.1 Any major decision in the litigation will be:
- a. made in accordance with clauses 5.4 and 5.5;
 - b. subject to the operation of, and compliance with, retainers, legal costs agreements (which continue to be operative subject to this protocol), and any orders of the Court; and
 - c. if applicable, made following and taking into account any advice from counsel.
- 3.2 Subject to clause 3.3, 'major decisions' shall include the following in respect of the Consolidated Proceeding:
- a. a decision requiring the Plaintiffs to seek approval from the Court;
 - b. the making of any interlocutory applications or the response to any interlocutory applications filed by another party;



- c. the claims made in, and parties to, the pleadings in the Consolidated Proceeding, including to add, remove or substantially amend the claims or the claim period;
- d. a decision to amend the definition of “group member”;
- e. a decision to open or close the class;
- f. the making, acceptance or rejection of a settlement offer and any terms of settlement;
- g. discovery to be sought from, provided to or negotiated with another party;
- h. a decision to accept or amend the loss methodology used to calculate the damages claimed by (or otherwise assessed on behalf of) the Plaintiffs and Group Members;
- i. a decision to issue any notices or respond to any notices under the Supreme Court Act (including any issued by the Court under its own motion);
- j. a decision to appeal or not appeal any order, judgment or decision of the Court (including a decision to defend or not defend any appeal by another party);
- k. a decision to retain or change counsel;
- l. a decision to retain, brief or instruct an independent expert witness or consulting expert (together, **Experts or Consultants**);
- m. a decision to terminate any retainers with Experts or Consultants;
- n. the filing of any evidence from Experts or Consultants including responding to any responsive evidence filed by another party;
- o. the filing of any lay evidence (other than evidence from the Gehrke Plaintiff or the Buch Plaintiff);
- p. the approval of the fee structure of any contracts or fee agreements with Experts or Consultants;
- q. a decision to undertake a piece of work likely to cost \$10,000 or more;
- r. a decision to terminate this Protocol pursuant to clause 15;
- s. a decision to discontinue the Consolidated Proceeding; and
- t. subject to 3.3 below, any other decision which any member of the Litigation Committee identifies as being a decision of significant importance to the conduct of the Consolidated Proceeding.



3.3 For the avoidance of doubt, the following matters do not comprise a 'major decision' and are excluded from this section:

- a. decisions as to any security for costs to be provided by the Plaintiffs, with all matters in respect of security to remain at the sole discretion of each Plaintiff; and
- b. any other matters that the Litigation Committee (as defined in clause 5.1) has deemed not to comprise a 'major decision', or any matters falling within the delegation described at clause 5.7.

4 Avoidance of Duplication of Work and Costs

4.1 The Solicitors will work together in seeking to avoid duplication of work in accordance with this Protocol.

4.2 The Gehrke Plaintiff and the Buch Plaintiff shall instruct Slater & Gordon and Phi Finney McDonald respectively, with a view to avoiding duplicated work.

5 Litigation Committee

5.1 To ensure efficient cooperation in relation to the Consolidated Proceeding, the Solicitors will convene a committee comprising two lawyers appointed by each firm. The identity of the lawyers so appointed will be, initially:

- a. Emma Pelka-Caven and Rohan Foley of Slater & Gordon; and
- b. Brett Spiegel and Muhammad Arayne of Phi Finney McDonald,

but may be amended at the discretion of the appointing firm,

(Litigation Committee).

5.2 The Litigation Committee shall be responsible for:

- a. the making of major decisions in accordance with clause 3;
- b. management of the litigation;
- c. determining the efficient distribution and coordination of work in the Consolidated Proceeding between the Solicitors in accordance with clause 3;
- d. seeking to resolve, in the first instance, any concerns or disputes in relation to the conduct of the Consolidated Proceeding in accordance with clause 13;
- e. overseeing the process referred to in clause 11.1 for the sharing of disbursements which are incurred for the joint benefit of the Plaintiffs and the Consolidated Proceeding.



- 5.3 The Litigation Committee will communicate by whatever means and at whatever frequency is necessary for the efficient and effective conduct of the Consolidated Proceeding.
- 5.4 Each member of the Litigation Committee will act on the basis of utmost good faith in accordance with their obligations to the Court and under any existing conditional legal costs agreement and other relevant financing arrangements in the Consolidated Proceeding.
- 5.5 If the Litigation Committee is not able to reach unanimous agreement on any decision relating to the Consolidated Proceeding, then the dispute resolution procedure set out at clause 13 will apply.
- 5.6 Omni may attend any formal Litigation Committee Meetings held at the request of Phi Finney McDonald, with the prior agreement of Slater & Gordon, such agreement not to be unreasonably withheld.
- 5.7 Upon agreement by at least one Litigation Committee member from each of the Solicitors, the Litigation Committee may delegate, to either Slater & Gordon or Phi Finney McDonald (and their legal personnel), sole carriage and responsibility for decision-making including sending correspondence without the approval of the other firm in relation to any aspect of the Consolidated Proceeding so as to promote efficiency and reduce duplication in the conduct of the Consolidated Proceeding.
- 5.8 In respect of all matters except for matters individual to the Gehrke Plaintiff or the Buch Plaintiff, for the purposes of avoiding duplication of costs and effort, work is to be distributed between the personnel of Slater & Gordon and Phi Finney McDonald in a manner which so far as possible ensures the number and seniority of legal personnel conducting a task will be no more than if there was only a single representative proceeding conducted by a single firm. The primary determinant of the allocation of work shall however be the interests of group members having regard to:
- a. the skills and experience of the Solicitors and their respective staff;
 - b. the objective of ensuring that the total legal costs are reasonable and proportionate; and
 - c. the objective of avoiding legal costs incurred through overlapping or duplicated work.
- 5.9 Nothing in this Protocol provides:
- a. Slater & Gordon, or the Gehrke Plaintiff, with the right to provide instructions to Phi Finney McDonald;
 - b. for the termination or discontinuance of the legal costs agreements entered into between the Gehrke Plaintiff and other Gehrke proceeding group members, and Slater & Gordon;



- c. Phi Finney McDonald, the Buch Plaintiff, or Omni with the right to provide instructions to Slater & Gordon;
- d. for the termination or discontinuance of the legal costs agreements or Omni Litigation Funding Scheme entered into between the Buch Plaintiff and other Buch proceeding group members, and Phi Finney McDonald and / or Omni as relevant.

6 Division of legal work

- 6.1 The Solicitors will each perform approximately 50% of the legal work by professional staff and paralegals in the Consolidated Proceeding.
- 6.2 Costs incurred by the Solicitors (as applicable) associated with:
 - a. securing funding, "book building";
 - b. internal reporting as to the Consolidated Proceeding; and
 - c. communications with Omni;are not to be treated as legal work for the purposes of clause 6.1 above.
- 6.3 Where particular tasks, such as conferences with expert witnesses, are to occur in circumstances where such tasks may have a significant bearing on the course or conduct of the litigation, where possible and practical, a representative from each of Slater & Gordon and Phi Finney McDonald will be involved.
- 6.4 The Solicitors will each work together and coordinate tasks actively to:
 - a. reduce any duplicated work to the maximum extent possible;
 - b. ensure that the other has a sufficient degree of oversight as to be comfortable with the work performed; and
 - c. ensure that the work is conducted in a timely manner and the Plaintiffs meet Court deadlines.
- 6.5 The Solicitors will cooperatively share their work product with each other, as appropriate, subject to the following:
 - a. each party maintains the intellectual property in its own work product, precedents and systems; and
 - b. the sharing of work product, precedents and systems does not entitle one party to access the entire file of the other party.
- 6.6 Every three months the Solicitors will exchange a professional fee summary which lists each fee earner and the total amount of 6-minute units performed by those fee earners during the previous month.



- 6.7 If a party has any concerns regarding the division of legal work after receiving the professional fee summary, the party must raise those concerns within 30 days. A failure to do so within 30 days will disentitle the party from later disputing the division of legal work undertaken within the relevant month.

7 Correspondence

- 7.1 The Solicitors will create and host an email account in order to allow correspondence to be received from the Court and the solicitors for other parties to the Consolidated Proceeding (**Joint Service E-mail Address**). The Joint Service E-mail Address will be configured so that any e-mail sent to it is immediately forwarded to each member of the Litigation Committee and any other employees of the Solicitors.
- 7.2 As far as practicable, correspondence to another party or to the Court shall be jointly sent on behalf of the Plaintiffs in the Consolidated Proceeding and will be approved by at least one Litigation Committee member from each of the Solicitors.
- 7.3 The Solicitors may send correspondence only to their respective clients at their own discretion.
- 7.4 The Plaintiffs will nominate one physical address for service of the Plaintiffs for the purpose of the Consolidated Proceeding.

8 Discovery

- 8.1 The Plaintiffs agree and, if necessary at a later time, will seek orders to the effect that the Defendants need only produce one set of discovered documents to the Plaintiffs in the Consolidated Proceeding.
- 8.2 The Plaintiffs will jointly conduct the discovery process in the Consolidated Proceeding.
- 8.3 A discovery protocol will be developed (and shall be updated from time-to-time if necessary) and approved by the Litigation Committee to ensure a consistent approach is adopted in respect of the management and usage of the document database and approach to discovery review.

9 Counsel

- 9.1 One set of counsel (**Joint Counsel**) will be briefed to represent the Plaintiffs and the Group Members in the Consolidated Proceeding.
- 9.2 Alistair Pound SC, Guy Donnellan, Katherine Brazenor and Eugenia Levine are presently briefed by the Plaintiffs, and upon consolidation the Litigation Committee will rationalise the composition of the Joint Counsel team for the purpose of the conduct of the Consolidated Proceeding and on an ongoing basis will make decisions as to the briefing of counsel as needed in order to prosecute the Consolidated Proceeding.
- 9.3 In the event that any counsel is or becomes unavailable to continue in this matter for any reason, that counsel may be replaced by alternative counsel as selected and agreed by the Solicitors.



10 Plaintiffs and Group Members

10.1 The Gehrke Plaintiff and the Buch Plaintiff have each given their instructions to be joint representative plaintiffs in the Consolidated Proceeding.

10.2 Slater & Gordon is and will be instructed by the Gehrke Plaintiff.

10.3 Phi Finney McDonald is and will be instructed by the Buch Plaintiff.

10.4 In the event that either of the Gehrke Plaintiff and/or the Buch Plaintiff ceases to be a representative plaintiff in the Consolidated Proceeding (**Former Representative Plaintiff**), then:

- a. the Former Representative Plaintiff will no longer be bound by the terms of this Protocol other than clause 11;
- b. in the event that any other person who is a group member in the Consolidated Proceeding (**Group Member**) instructs the solicitors for the Former Representative Plaintiff that it will act as a representative plaintiff (**Replacement Representative Plaintiff**) and those instructions are accepted by the solicitors for the Former Representative Plaintiff, then:
 - i as soon as reasonably practicable, the Former Representative Plaintiff will enter into an accession deed poll with the Replacement Representative Plaintiff by which the Replacement Representative Plaintiff undertakes to step into the shoes of the Former Representative Plaintiff in respect of their rights, obligations and liabilities in respect of the Consolidated Proceeding, and to become bound by the terms of this Protocol, as if they were named as a representative plaintiff (in respect of the proceeding associated with the Former Representative Plaintiff) under the terms of this Protocol; and
 - ii the Solicitors are instructed to jointly take all necessary steps to secure the appointment of the Replacement Representative Plaintiff as a representative plaintiff in the Consolidated Proceeding;
- c. in the event that there is no proposed Replacement Representative Plaintiff pursuant to clause 10.4(b), then the remaining representative plaintiff will use reasonable endeavours to enter into a Protocol replacing this Protocol to govern the further conduct of the Consolidated Proceeding as soon as is reasonably practicable.

10.5 Slater & Gordon will not be required, and it is agreed that Slater & Gordon is not intending, to enter into a retainer with any Phi Finney McDonald client for the purpose of the Consolidated Proceeding.

10.6 Phi Finney McDonald will not be required, and it is agreed that Phi Finney McDonald is not intending, to enter into a retainer with any Slater & Gordon client for the purpose of the Consolidated Proceeding.



11 Payment of Disbursements

11.1 The Solicitors agree to engage the same counsel, experts and all other third-party service providers and to arrange to be invoiced such that each invoice is issued separately to:

- a. Gehrke Plaintiff; and
- b. Buch Plaintiff,

but ensuring that both Gehrke Plaintiff and Buch Plaintiff are obliged to pay 50 percent each of the total amount owing to the third-party service provider under the relevant terms of that invoice.

11.2 The Solicitors will periodically confer and, having regard to the information exchanged pursuant to clause 11.1, allocate the incurring and payment of expenses so as to promote equal sharing.

11.3 Where a disbursement (other than counsel's fees) is likely to exceed \$10,000 then both Slater & Gordon and Phi Finney McDonald must confer and agree that the expenditure is in the best interests of advancing the claims against the Defendants.

12 Privilege and Confidentiality

12.1 The Plaintiffs and Solicitors acknowledge that all information passed between parties to this Protocol is strictly confidential and subject to legal professional and common interest privilege, subject to any agreement to the contrary (**Confidential Information**).

12.2 Confidential Information will only be used for the purposes of the Consolidated Proceeding.

12.3 Confidential Information may be disclosed to:

- a. the Supreme Court and Judges of the Supreme Court of Victoria;
- b. solicitors and counsel employed or engaged by Phi Finney McDonald or Slater & Gordon in relation to the conduct of the Consolidated Proceeding; and
- c. third parties (including Omni) subject to a confidentiality agreement.

12.4 This clause 12 survives any termination of this Protocol.

13 Dispute Resolution

13.1 Any dispute arising between the Solicitors in relation to the Consolidated Proceeding will:

- a. at first instance, be sought to be resolved by the Litigation Committee as per clause 5.2(d);



- b. if the matter remains unresolved by the step taken in 13.1(a), be referred to both Ben Hardwick of Slater & Gordon and Ben Phi of Phi Finney McDonald;
- c. if the matter remains unresolved by the step taken in 13.1(b), be referred to the most senior member of counsel by title, and then tenure of title, briefed in the Consolidated Proceeding, for a final decision, by which the parties agree to be bound;
- d. if a dispute arises which would be referred to the most senior member of counsel pursuant to clause 13.1(c) and any member of the Litigation Committee or counsel considers that it is not appropriate for such counsel to determine the dispute, then the most senior counsel on the matter may refer the decision to an alternative senior counsel.

13.2 The process in 13.1 above remains subject to instructions received from the Plaintiffs in accordance with the terms of their respective conditional legal costs agreements. The Solicitors acknowledge and agree that the interests of the respective Plaintiffs and Group Members in the Consolidated Proceeding are paramount.

13.3 The individuals at 13.1(b) may be amended at the discretion of the appointing firm.

14 Best Interests of Group Members

14.1 The Plaintiffs instruct the Solicitors to interpret and give effect to this Protocol in a manner whereby the primary consideration shall be the interests of Group Members in the Consolidated Proceeding.

15 Termination

15.1 Subject to this clause 15, this Protocol may only be terminated by an order of the Court.

15.2 If there is a purported or attempted termination of this Protocol which is not provided for in this clause 15, the Plaintiffs and the Solicitors will attempt to agree on the appropriate course, and if they cannot agree, the dispute will be resolved in accordance with the dispute resolution provisions in clause 13.

15.3 This Protocol (except those clauses which are expressly stated to survive termination) will terminate when the Court delivers a final judgment and any appeal period expires or any appeal is determined, or in the event of a settlement following settlement approval or dismissal of the Consolidated Proceeding.

16 Miscellaneous

16.1 Any variation to the terms of this Protocol should be agreed by the Solicitors in writing. Such amended Protocol is to be filed with the Court within 5 business days of execution by both Plaintiffs.

16.2 This Protocol is governed by the law applicable in Victoria and the parties irrevocably and unconditionally submit to the exclusive jurisdiction of the Courts of Victoria.



- 16.3 The parties intend this Protocol to supersede any provision to the contrary contained in any conditional legal costs agreement or the terms of any funding scheme and will seek to amend those documents to the extent required to give effect to this intention.

