



IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

No. S ECI 2020 04505

Case 2020-04505
Filed on: 13/05/2022 07:22 PM

BETWEEN

NICHOLAS JOHN GEHRKE AND LESTER BUCH

Joint Plaintiffs

-and-

NOUMI LIMITED (FORMERLY FREEDOM FOODS GROUP LIMITED) (ACN 002 814 235)
First Defendant

DELOITTE TOUCHE TOHMATSU (A FIRM) (ABN 74 490 121 060)

Second Defendant

DEFENCE TO STATEMENT OF CLAIM ON THIRD PARTY NOTICE

Date of document: 13 May 2022
Filed on behalf of: the First Defendant
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NOTE: Unless otherwise stated, a defined term in this document has the same meaning as assigned to it in the Statement of Claim endorsed on the Third-Party Notice filed by the second defendant (**Deloitte**) on 12 April 2022 (**DSOC**).

NOTE: Headings, definitions and sub-headings used in the DSOC have been replicated in this document. The first defendant (**Noumi**) does not make any admissions by use of them.

NOTE: Where the contents of a document are admitted or otherwise referred to, the admission or reference to that document is subject to reference to the full terms and effect of the document at trial.

In answer to the DSOC, Noumi says as follows.

A. BACKGROUND MATTERS

A.1 Parties

1. It admits paragraph 1.

2. It admits paragraph 2.

A.2 The Plaintiffs' claims against Noumi

3. It admits paragraph 3.

A.3 The Plaintiffs' claims against Deloitte

4. It admits paragraph 4.

A.4 Basis of Deloitte's claim against Noumi

5. It admits paragraph 5.

6. It does not plead to paragraph 6 as there are no allegations pleaded against it.

B. NOUMI'S CONTRAVENTIONS AS ALLEGED BY THE PLAINTIFFS

7. It does not plead to paragraph 7 as there are no allegations pleaded against it.

C. NOUMI'S COMPLIANCE REQUIREMENTS AND LEGAL DUTIES

8. It admits paragraph 8.

D. DELOITTE'S RETAINERS WITH NOUMI

9. It admits paragraph 9.

10. As to paragraph 10, it:

(a) admits that the Deloitte Retainers each contained the following express terms:

(i) Deloitte would audit the subject Full-Year Financial Report prepared by FNP and obtain reasonable assurance about whether the financial report as a whole was free from material misstatement, whether due to fraud or error, and express an opinion:

(1) that the financial report was in accordance with the *Corporations Act 2001* (Cth) (**Corporations Act**), including:

A. giving a true and fair view of the consolidated entity's financial position as at the end of the applicable financial year and of its performance for the year ended on that date; and

B. complying with Australian Accounting Standards and the *Corporations Regulations 2001* (Cth); and

(ii) Deloitte would review the subject Half-Year Financial Report prepared by FNP and express a conclusion whether Deloitte had become aware of any matter that made Deloitte believe that the half-year report was not prepared, in all material respects, in accordance with the Corporations Act and Accounting Standard AASB 134 *Interim Financial Reporting*;

- (b) admits paragraph 10(b);
- (c) admits paragraph 10(c);
- (d) admits that the Deloitte Retainers contained an express term that Deloitte's engagement under each Deloitte Retainer would be conducted on the basis that the directors acknowledged and understood that they had the responsibility for the matters alleged in paragraph 10(d) of the DSOC;
- (e) admits paragraph 10(e) as to the FY14 Deloitte Retainer, the FY15 Deloitte Retainer, the FY17 Deloitte Retainer, the FY18 Deloitte Retainer, the FY19 Deloitte Retainer, and the HY20 Deloitte Retainer;
- (f) admits paragraph 10(f) as to the FY14 Deloitte Retainer, the FY15 Deloitte Retainer, the FY17 Deloitte Retainer, the FY18 Deloitte Retainer, the FY19 Deloitte Retainer, and the HY20 Deloitte Retainer;
- (g) admits paragraph 10(g) as to the FY14 Deloitte Retainer, the FY15 Deloitte Retainer, the FY17 Deloitte Retainer, the FY18 Deloitte Retainer, the FY19 Deloitte Retainer, and the HY20 Deloitte Retainer;
- (h) says that the phrase "applicable financial reporting framework" in paragraph 10(a)(i) of the DSOC is not defined in paragraph 10 or otherwise; and
- (i) otherwise denies paragraph 10.

11. As to paragraph 11, it:

- (a) refers to and repeats paragraph 10(d) above;
- (b) admits that the FY17 Deloitte Retainer, the FY18 Deloitte Retainer, the FY19 Deloitte Retainer and the HY20 Deloitte Retainer contained express terms that Deloitte's

engagement under those Deloitte Retainers would be conducted on the basis that the directors acknowledged and understood that they had the responsibility:

- (i) “to inform [Deloitte] of all the documents that the directors expect to issue that may comprise other information”;
 - (ii) “for ensuring that the financial reports and any other information [Deloitte] may obtain, both prior to, or after the date of [Deloitte’s] auditor's report is provided to [Deloitte] on a timely basis, and will be consistent with one another, and the other information will not contain any material misstatements”; and
 - (c) otherwise denies paragraph 11.
12. It denies paragraph 12.
- E. NOUMI’S ALLEGED REPRESENTATIONS**
13. As to paragraph 13, it:
- (a) refers to and repeats paragraph 46 of its Defence filed in this proceeding on 8 April 2022 (**Principal Defence**);
 - (b) says that the allegations in paragraph 46 of the SOC concern the Full-Year Financial Reports and Half-Year Financial Reports *as published*; and
 - (c) otherwise denies paragraph 13.
14. As to paragraph 14, it:
- (a) refers to paragraph 13 above; and
 - (b) otherwise denies paragraph 14.
15. As to paragraph 15, it:
- (a) admits that the FNP Full-Year Representations Letters were provided to Deloitte on or about the dates alleged in that paragraph; and
 - (b) otherwise denies paragraph 15.
16. As to paragraph 16, it:
- (a) admits paragraph 16(a);
 - (b) admits that the FNP Full-Year Representation Letters contained statements by the

authors of each letter as required by s 295A of the Corporations Act:

- (i) as set out in paragraphs 16(b)(i), (ii), (iii), (v), (vi), (viii), (ix), (x), (xi), (xii) and (xiii);
 - (ii) that Noumi management “are responsible for the design, implementation and maintenance of internal control to prevent and detect fraud”;
 - (iii) that there had “been no allegations of fraud, or suspected fraud, affecting the entity’s financial report communicated by employees, former employees, analysts, regulators or others”; and
- (c) otherwise denies paragraph 16.
17. As to paragraph 17, it:
- (a) admits that each author of a Management Representation Letter represented, on or about the date of that letter, that the matters set out in paragraphs 16(a) and 16(b) above were true; and
 - (b) otherwise denies paragraph 17.
18. As to paragraph 18, it:
- (a) refers to and repeats paragraph 17(a) above; and
 - (b) otherwise denies paragraph 18.
19. As to paragraph 19, it:
- (a) admits that the FNP Half-Year Representations Letters were provided to Deloitte on or about the dates alleged in that paragraph; and
 - (b) otherwise denies paragraph 19.
20. As to paragraph 20, it:
- (a) admits paragraph 20(a);
 - (b) admits that each of the FNP Half-Year Representation Letters contained the acknowledgements by the authors of each letter alleged in paragraph 20(b);
 - (c) admits that each FNP Half-Year Representation Letter contained statements by the

authors of each letter:

- (i) as set out in paragraphs 20(c)(i), 20(c)(ii)(B), 20(c)(ii)(E), 20(c)(ii)(G), 20(c)(ii)(H), 20(c)(ii)(I), 20(c)(ii)(N) and 20(c)(ii)(O)(1);
- (ii) that various matters set out in each such letter had been properly recorded and, when appropriate, adequately disclosed in the Half-Year Financial Report, including share options, warrants, conversions or other requirements;
- (iii) that where assets and liabilities were recorded at their fair value, the value attributed to those assets and liabilities was, in the opinion of the Board of Directors, the fair value, and that the authors were responsible for the reasonableness of any significant assumptions underlying the valuation, including consideration of whether they appropriately reflected management's intent and ability to carry out specific courses of action;
- (iv) in relation to 1H2020, that "all completed assets that are operating in the manner intended by management have been transferred to Plant and Equipment and that they have been depreciated in accordance with the Group's accounting policy for depreciation";
- (v) that the authors:
 - (1) "are responsible for the design, implementation and maintenance of internal control to prevent and detect fraud and error";
 - (2) had disclosed to Deloitte the results of its assessment of the risk that the Half-Year Financial Report may be materially misstated as a result of fraud;
 - (3) had made available to Deloitte the material alleged in paragraph 20(c)(ii)(F);
 - (4) were responsible for an adequate internal control structure to facilitate the preparation of a reliable Half-Year Financial Report, that adequate financial records had been maintained, and that there were no material transactions that had not been recorded properly in the accounting records underlying the Half-Year Financial Report;
 - (5) had considered the requirements of Accounting Standard AASB 136

Impairment of Assets when assessing the impairment of assets and in ensuring that no assets were stated in excess of their recoverable amount, and had communicated to Deloitte all indicators of impairment and where those existed, the authors had conducted appropriate impairment testing on the relevant asset(s); and

(d) otherwise denies paragraph 20.

21. As to paragraph 21, it:

(a) admits that each author of a FNP Half-Year Representation Letter represented, on or about the date of that letter, that the matters set out in paragraphs 20(a) to 20(c) above were true; and

(b) otherwise denies paragraph 21.

22. As to paragraph 22, it:

(a) refers to and repeats paragraph 78 of its Principal Defence; and

(b) otherwise denies paragraph 22.

F. NOUMI'S ALLEGED MISLEADING AND DECEPTIVE CONDUCT

23. As to paragraph 23, it:

(a) says that the rolled-up allegations in paragraph 23 are embarrassing and further that the “financial product” and “financial service” alleged in that paragraph are not identified; and

(b) under cover of that objection:

(i) admits that to the extent that any of the FNP Accounts Representations, FNP Accounts Opinion Representations, Management Representation Letter Representations, Management Representation Letter Opinion Representations and/or Half-Year Management Representation Letter Representations are admitted herein, those representations constituted conduct:

(1) in relation to a financial product or a financial service within the meaning of s 1041H of the Corporations Act;

(2) in trade or commerce in relation to financial services within the meaning of s 12DA of the *Australian Securities and Investments Commission Act*

2001 (Cth); and/or

(3) in trade or commerce within the meaning of s 18 of the *Australian Consumer Law*; and

(ii) otherwise denies paragraph 23.

24. As to paragraph 24, it:

- (a) refers to and repeats paragraphs 13 to 22 above;
- (b) refers to and repeats paragraph 79 of its Principal Defence; and
- (c) otherwise denies paragraph 24.

25. It denies paragraph 25.

G. DELOITTE'S ALLEGED RELIANCE

26. As to paragraph 26, it:

- (a) refers to and repeats paragraph 10 above;
- (b) refers to and repeats paragraphs 80(b)(ii) and 110 to 113 of its Principal Defence;
- (c) otherwise denies paragraph 26.

27. As to paragraph 27, it:

- (a) refers to and repeats paragraph 26 above; and
- (b) otherwise denies paragraph 27.

H. ALLEGED BREACH OF RETAINER

28. As to paragraph 28, it:

- (a) refers to and repeats paragraphs 12 and 26 above;
- (b) refers to and repeats paragraph 79 of its Principal Defence; and
- (c) says that the allegation is embarrassing in that the “accurate and complete information and all information that was relevant to the services” is not identified;
- (d) under cover of that objection otherwise denies paragraph 28.

29. It denies paragraph 29.
30. As to paragraph 30, it:
- (a) refers to and repeats paragraph 26 above; and
 - (b) otherwise denies paragraph 30.

I. ALLEGED LOSS AND DAMAGE

31. It denies paragraph 31.
32. As to paragraph 32, it:
- (a) denies paragraph 32;
 - (b) alternatively, as to paragraph 32(a), in respect of the loss and damage alleged in paragraph 31(b) of the DSOC, subject to any application of section 24(4) of the *Wrongs Act 1958* (Vic), any action pursuant to section 1041I of the Corporations Act, section 12GF of the *Australian Securities and Investments Commission Act 2001* (Cth) and/or section 236 of the *Australian Consumer Law*, in respect of any loss and/or damage suffered by Deloitte more than 6 years prior to the commencement of this proceeding, is statute-barred.

PARTICULARS

Section 1041I(2) of the Corporations Act, section 12GF(2) of the *Australian Securities and Investments Commission Act 2001* (Cth) and/or section 236(2) of the *Australian Consumer Law*.

- (c) alternatively, as to paragraph 32(b), subject to any application of section 24(4) of the *Wrongs Act 1958* (Vic), the action for the Retainer Breach, in respect of any breach by Noumi more than 6 years prior to the commencement of this proceeding, is statute-barred.

PARTICULARS

Section 5(1)(a) of the *Limitation of Actions Act 1958* (Vic).

J. CLAIMS FOR CONTRIBUTION AND INDEMNITY IN RESPECT OF NON-APPORTIONABLE CLAIMS

33. It denies paragraph 33.

34. It denies paragraph 34.

DATED 13 MAY 2022

RG Craig
JA Findlay
AN McRobert



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Arnold Bloch Leibler
Solicitors for the First Defendant