

**IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
GROUP PROCEEDINGS LIST**

S ECI 2020 02588

BETWEEN:

**LYNDEN IDDLES AND GEOFFREY IDDLES**

Plaintiffs

and

**FONTERRA AUSTRALIA PTY LTD (ACN 006 483 665) and  
ors according to the attached Schedule**

Defendants

- and -

**LLS FUND SERVICES PTY LTD (ABN 51 627 975 213)  
AS TRUSTEE FOR LITIGATION LENDING FUND 1**

Intervenor

**ORDER**

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JUDGE: The Honourable Justice Delany

DATE MADE: 14 April 2023

ORIGINATING PROCESS: Writ filed 17 June 2020

HOW OBTAINED: At the return of the Plaintiffs' summons filed on 4 November 2022

ATTENDANCE: LWL Armstrong KC with MW Guo and PE Kelly,  
counsel for the Plaintiffs

RA Heath KC with L Dawson, counsel for the  
Defendants

WAD Edwards SC with O Nanlohy, counsel for the  
Intervenor



OTHER MATTERS:

A. Following the hearing of the Plaintiffs' summons on 28 February 2023 the following matters remained in issue for determination by the Court:

- i. whether a Common Fund Order can and should be made;
- ii. whether the proposed deduction of 27.5% commission for the Funder should be deducted from the Settlement Sum;
- iii. what amount is an appropriate amount to be paid to the Funder as 'Reimbursement of Project Costs', as defined in the Settlement Distribution Scheme (SDS);
- iv. what amount is an appropriate amount to be allowed as a deduction for unpaid legal costs and disbursements; and
- v. whether it is appropriate to allow the Funder's costs of after the event insurance,

(together, the **unresolved matters**).

B. The parties have previously provided written and oral submissions in relation to the unresolved matters.

C. These Orders provide a mechanism and a timetable for dealing with:

- i. further submissions and a supplementary report in relation to legal costs; and
- ii. further submissions in relation to the power of the Court to make a Common Fund Order,

(the **procedural timetable**).

D. It is desirable that the Orders for the approval of the settlement of the proceeding are not further delayed pending the completion of the procedural timetable and the determination of the unresolved matters.

E. It is the intention of the Court to deliver its reasons in support of the substantive orders approving the settlement at the same time that it delivers reasons in relation to the unresolved matters.



In these Orders, unless the context otherwise requires:

- a. **Act** means the *Supreme Court Act 1986* (Vic).
- b. **Appeal Period** has the meaning given to it in the Settlement Agreement.
- c. **Approval Judgment** means the judgment comprising the orders set out in paragraphs 3, 5, 6 and 7 of these orders.
- d. **Approval Judgment Appeal Period** means the period of time commencing on the day on which the Approval Judgment is granted and ending:
  - i. if there is no appeal by a Claimant or any other person from the granting of the Approval Judgment – either (A) on the date that is 42 days after the date on which Approval Judgment is granted (if the Court does not allow further time for the filing of an application for leave to appeal or a notice of appeal relating to the Approval Judgment) or (B) at the end of the period of further time allowed by the Court for the filing of an application for leave to appeal or a notice of appeal relating to the Approval Judgment (if the Court allows such further time); or
  - ii. if there are any appeals by a Claimant or any person from the granting of the Approval Judgment – upon the final determination of all such appeals (including any subsequent appeals or applications to appeal) and the expiration of time for any further appeals or application to appeal.
- e. **Funder** means the Intervenor, being LLS Fund Services Pty Ltd (ABN 51 627 975 213) as trustee for Litigation Lending Fund 1, the Plaintiffs’ commercial litigation funder in the proceeding.
- f. **Group Member** means all persons, other than any persons who were otherwise group members but opted out of the proceeding prior to the date of these orders, who:
  - i. during the milk-supply season from 1 July 2015 to 30 June 2016 supplied milk to the Defendants from farms located in Victoria, Tasmania, South Australia, or New South Wales pursuant to:
    1. a “Fonterra Australia Milk Supply Handbook” (but not the Fonterra Australia “Milk Supply Handbook – Wagga Wagga”); and / or
    2. a Fonterra Australia “Exclusive Milk Supply Agreement”; and
  - ii. as at 5 May 2016 continued to supply milk, or had committed to supply milk, during the milk-supply season from 1 July 2015 to 30 June 2016 as described in paragraph (d)(i) above; and
  - iii. were not a director or officer of the Defendants during the period from 1 June 2015 to 31 July 2016, or a related entity of such a director or officer (within the meaning of the *Corporations Act 2001* (Cth)); and
  - iv. are not a justice of the High Court of Australia, the Supreme Court of Victoria or the Federal Court of Australia.
- g. **Settlement Agreement** means the agreement at DSB-1 of the Affidavit of David Burstyner affirmed 4 November 2022.
- h. **Settlement Sum** means the sum so identified in the Settlement Agreement.



## THE COURT ORDERS THAT:

### Confidentiality

1. Pursuant to the inherent power of the Court and rule 28A.06 of the *Supreme Court (General Civil Procedure) Rules 2015 (Rules)*, and subject to any further order, in order to prevent a real and substantial risk of prejudice to the proper administration of justice:
  - a. the evidence identified in:
    - i. Annexure A of these Orders; and
    - ii. the Schedule to the affidavit of Stephen James Conrad affirmed 16 February 2023;  
is not to be disclosed to any person or entity except to the parties making the respective claims for confidentiality, their legal representatives and the Funder (except where the evidence has already been provided to another party or their legal representatives); and
  - b. any person or entity to whom such disclosure is or has been made may not disclose that material or any part thereof to any other person or entity without prior leave of the Court.

### Registration by participating Group Members

2. Pursuant to s 33ZF of the Act, the deadline by which any Group Member wishing to make a claim for a share of the Settlement Sum must register such a claim is extended to 4:00pm on the day that is 7 days from the date of the authentication of these Orders.

### Settlement approval

3. Pursuant to s 33V of the Act, the settlement of the proceeding upon the terms set out in:
  - a. the Settlement Agreement; and
  - b. the SDS, being the scheme at Annexure B of these orders,  
(together the **Fonterra Class Action Settlement**) is approved by the Court.



4. Pursuant to ss 33V of the Act, the amount of \$30,000 for the Plaintiffs as the “Plaintiffs’ Reimbursement Payment” is approved for the purposes of the SDS (utilising defined terms from it) provided that, for the avoidance of doubt, no payment is approved to be made before the end of the Approval Judgment Appeal Period and no payment is approved to be made other than in accordance with the terms of the Settlement Agreement.

**Authority and binding effect**

5. Pursuant to ss 33V and/or 33ZF of the Act, the Court authorises the Plaintiffs *nunc pro tunc* to enter into and give effect to the Settlement Agreement, for and on behalf of the Group Members.
6. Pursuant to s 33ZB, further or alternatively s 33ZF of the Act, the persons bound by the Fonterra Class Action Settlement are:
  - a. the Plaintiffs;
  - b. the Group Members (which for the avoidance of doubt excludes persons who were Group Members but opted out of the proceeding);
  - c. the Defendants;
  - d. the Plaintiffs’ solicitors (Adley Burstyner and David Burstyner); and
  - e. the Funder.
7. For the avoidance of doubt, any Group Member who does not, before 4:00pm on the day that is 7 days from the date of the authentication of these Orders, lodge a claim to participate in the SDS shall:
  - a. remain a Group Member for all purposes of this proceeding; and
  - b. be bound by and have the benefit of the releases given in the Settlement Agreement; but
  - c. not be entitled to any distribution pursuant to the SDS or the Settlement Agreement.



## **SDS Administrator**

8. Pursuant to s 33V and/or 33ZF of the Act, David Burstyner be appointed as the SDS Administrator.
9. The SDS Administrator has liberty to apply in respect of any matter arising in or in relation to the administration of the SDS upon at least three (3) clear business days' notice to each other party and the Court.

## **Costs**

10. All *inter partes* costs orders in the proceeding as between the Plaintiffs and the Defendants be vacated.
11. The Plaintiffs' summons be adjourned to 29 May 2023 (**Costs Hearing**) insofar as it relates to orders sought for deductions in respect of:
  - a. amounts to be paid to the Funder as "Reimbursement of Project Costs";
  - b. amounts to be paid to the Plaintiffs' solicitors as "Unpaid Plaintiffs' Legal Costs and Disbursements", as defined in the SDS;
  - c. amounts to be paid to the SDS Administrator for "Administration Costs", as defined in the SDS,**(Costs Issues).**
12. By the day that is two business days from the date of the authentication of these Orders, the Costs Referee produce to the solicitors for the Plaintiffs and Intervenor a document or documents recording the calculations which form the basis for her conclusions in her reports dated 24 February 2023 and 27 February 2023, including any document showing the amounts she has allowed for each time entry for professional fees and for each disbursement.
13. By **20 April 2023**, the Plaintiffs and Intervenor provide to the Costs Referee any further material which they wish the Costs Referee to consider for the purposes of the questions referred to her by the orders of 18 November 2022, including in response to her reports



dated 24 February 2023 and 27 February 2023 and the matter referred to at paragraph 65 of the Costs Referee's report dated 24 February 2023.

14. By **8 May 2023**, the Costs Referee shall:
  - a. in accordance with r 50.03 of the Rules submit any supplementary report on the questions referred to her by the orders of 18 November 2022, including the matter referred to at paragraph 65 of her report dated 24 February 2023 and any response to her reports dated 24 February 2023 and 27 February 2023, to the Court addressed to the Chambers of the Honourable Justice Delany; and
  - b. provide a copy of the supplementary report to the solicitors for the Plaintiffs and Intervenor.
  
15. By **25 May 2023**, the Plaintiffs, the Intervenor, and the Defendants should they wish to be heard, file and serve any further evidence and submissions upon which they propose to rely in relation to the Costs Issues.
  
16. In the event the Defendants do not file and serve any evidence or submissions on the Costs Issues, the Defendants be excused from appearing at the Costs Hearing.

### **Security for costs**

17. All amounts of security for costs provided by or on behalf of the Plaintiffs be released.
  
18. All undertakings given by the Funder for security for costs provided on behalf of the Plaintiffs be discharged.

### **Dismissal**

19. Upon the SDS Administrator being satisfied that the implementation of the SDS has been completed:
  - a. the SDS Administrator file and serve an affidavit deposing to that fact;



- b. the parties submit proposed consent orders providing for the proceeding to be dismissed with no order as to costs, being a draft order signed by the Plaintiffs and the Defendants.

**Other matters**

20. The Plaintiffs, the Defendants, the Administrator and the Funder each have liberty to apply on not less than three (3) business days' notice to each other.
21. No order as to costs of and incidental to the hearing on 28 February 2023, save that Plaintiffs' costs are part of the Plaintiffs Legal Costs and Disbursements within the meaning and operation of the SDS.
22. The parties and Intervenor have leave to file and serve written submissions in relation to the question reserved for consideration by the Full Court of the Federal Court of Australia in proceeding VID 726 of 2021 (*Elliott-Cardé v McDonald's Australia Limited* (ACN 008 496 928)) (**McDonald's Referral**) within 14 days after the delivery of Orders or Reasons (whichever is first) in disposition of the McDonald's Referral.

**DATE AUTHENTICATED:** 14 April 2023



**The Hon. Justice Delany**



## **SCHEDULE OF PARTIES**

**Lynden and Geoffrey Iddles**

Plaintiffs

-and-

**Fonterra Australia Pty Ltd ACN 006 483 665**

First Defendant

**Fonterra Milk Australia Pty Ltd ACN 114 326 448**

Second Defendant

**Fonterra Brands (Australia) Pty Ltd ACN 095 181 669**

Third Defendant

**Annexure A—evidence subject to confidentiality orders**

**Affidavit of David Sandor Burstyner affirmed 4 November 2022**

	<b>Passage</b>	<b>Basis</b>	<b>Party making claim</b>
1.	Exhibit DSB-1, [6.3]	Defendants’ bank account details. These are confidential.	Defendants

**Affidavit of David Sandor Burstyner affirmed 16 December 2022**

	<b>Passage</b>	<b>Basis</b>	<b>Party making claim</b>
2.	Table at [32]	Litigation privilege. Prejudicial to Plaintiffs as it reveals extent to which proceeding has been subject of funding deliberations.	Plaintiffs
3.	[34], third and fourth sentences	Litigation privilege. Prejudicial to Plaintiffs as it reveals extent to which proceeding has been subject of funding deliberations.	Plaintiffs
4.	[75], figure in penultimate sentence	Litigation privilege.	Plaintiffs
5.	[76], last three sentences	Litigation privilege. Confidential communications in relation to proof of claims in the proceeding.	Plaintiffs
6.	[78], words after ‘estimated’	Litigation privilege. Reference to matters in previous item.	Plaintiffs
7.	[109], words after ‘favour’	Litigation privilege.	Plaintiffs
8.	[110], after ‘settlement which ...’ to ‘... seemed reasonable’	Litigation privilege. See item 4.	Plaintiffs
9.	Exhibit DSB-2, pp 22-59	Litigation privilege. Counsel opinion on prospects.	Plaintiffs

**Affidavit of Stephen James Conrad affirmed 14 February 2023**

As indicated in the Schedule thereto.

**Affidavit of Matthew David Lees filed 17 February 2023**

The image in paragraph 89, page 117 of exhibit MDL-1 and the entirety of exhibit MDL-2.