

OUTCOME DETAILS

**Supreme Court - Civil
at Supreme Court Sydney
on 1 June 2023**

2021/00245787-001 / Summons: LAITH & FADI INVESTMENTS PTY LTD v Fogo Brazilia Holdings Pty Limited

This matter is listed for Directions (Commercial) on 21 July 2023 10:00 AM before the Supreme Court - Civil at Supreme Court Sydney.

Estimated duration: 5 Minutes

HH makes orders in terms of short minutes of order initialled and dated today's date.

Short Minutes of Order

The Court orders that:

1 Pursuant to s 162(1) of the Civil Procedure Act 2005 (NSW) (the Act), 14 July 2023 is fixed as the date on or before which a group member may opt out of this proceeding.

2 Group members be given notice pursuant to s 175(1)(a) and 175(5) of the Act of the fact that they may opt out of this proceeding in accordance with paragraphs 4 and 5 of these Orders.

3 The form and content of the Notice of Opt Out Rights (Notice), which is Annexure A to these Orders, are approved pursuant to s 176(1) of the Act.

4 Pursuant to s 183 of the Act, any group member who wishes to opt out of this proceeding must, on or before 14 July 2023, deliver to the New South Wales Supreme Court Sydney Registry an appropriate opt out notice in the form of the opt out notice which is Schedule A to the Notice of Opt Out Rights which is Annexure A to these Orders.

5 Pursuant to ss 176(2) and 176(5) of the Act, the Notice is to be provided according to the following procedure:

a. Prior to 9 June 2023, the plaintiffs provide Annexure A to each person listed in Annexure B (being an exhaustive list of all group members), by sending Annexure A by:

i. separate email where possible; or

ii. post to their known postal address where no email address is available or where the particular email address does not accept the requisite notification.

6 The costs of sending, displaying and publishing the Notices described in Order 5 above be paid by the plaintiffs on the basis that all of the above costs will subsequently fall to be dealt with by the Court as part of the costs of the proceeding.

7 If, on or before 14 July 2023, the solicitors for any party receive a notice purporting to be an opt out notice referable to this proceeding, the solicitors file that notice with the Supreme Court of New South Wales Sydney Registry within three (3) days of receipt of the notice by

the solicitors and the notice shall be treated as an opt out notice received by the Court at the time it was received by the solicitors.

8 The solicitors for the parties be granted leave to inspect the Court file from time to time to the extent that material in the Court has not been the subject of a confidentiality order and to copy any opt out notices filed.

9 The opt out notices referred to in these Orders may be amended by agreement between Lazarus Legal, Levitt Robinson, Sparke Helmore, and APA Lawyers before they are posted, emailed or published in order to correct any postal, website, email address or telephone number or any typesetting or typographical error.

10 The parties have liberty to apply on three (3) days' notice in respect of the costs of providing Annexure A in accordance with order 5 above and generally.

11 The proceedings are listed for directions on 21 July 2023.

Justice M Ball

Signed

Date

Schedule "A"

Form 115 (version 2)
UCPR 58.2

OPT OUT NOTICE**COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial
Registry	Sydney
Case number	2021/00245787
Court	Supreme Court of New South Wales

TITLE OF PROCEEDINGS

First plaintiff	Laith & Fadi Investments Pty Ltd (ACN 608 512 223)
Second plaintiff	Laith Karim Hana
First defendant	Fogo Brazilia Holdings Pty Limited (ACN 132 050 214)
Second defendant	Ian Dresner
Number of defendants	4

FILING DETAILS

Filed for	[name] , person opting out of representative proceedings
Legal representative	[solicitor] [firm]
Legal representative reference	[reference number]
Contact name and telephone	[name] [telephone]
Contact email	[email address]

OPT OUT NOTICE

Name of person opting out

Address of person opting out

I, a group member in these representative proceedings, opt out of the proceedings.

I understand that in opting out:

- 1 I forego the right to share in any relief obtained by the representative party in the representative proceedings;
- 2 I am not entitled to receive any further notification about the conduct or disposition of the proceedings; and

- 3 To the extent that I have a claim against the defendant(s), any limitation period suspended by the commencement of the representative proceedings has recommenced to run.

SIGNATURE

#Signature of legal representative

#Signature of or on behalf of person opting out if not legally represented

Capacity

[eg solicitor, authorised officer of person opting out, person opting out]

Date of signature

NOTICE TO PERSON OPTING OUT

You must, within the time specified in the notice to group members:

- 1 file this form in the registry of the court at the address below, or in the manner provided in the notice to group members; and
- 2 serve a copy of this form on the representative party at the address, or in the manner provided, in the notice to group members.

REGISTRY ADDRESS

Street address	Supreme Court of NSW Law Courts Building, Queen's Square 184 Phillip Street Sydney NSW 2000
Postal address	Supreme Court of NSW GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

ANNEXURE “B” TO THE ORDERS MADE BY BALL J ON 2 JUNE 2023**Supreme Court of New South Wales****Fogo Brazilia Representative Proceedings****List of Group Members**

Franchise	Franchisee	Director / Guarantor
Merrylands, NSW	Abu Syeed	None
Liverpool, NSW	NAS Enterprises (NSW) Pty Ltd	Abu Syeed and Nuzhat Tazeen Huq
Bankstown, NSW	RRZ Pty Ltd	Rafique Khan
Rouse Hill, NSW	Saha Enterprises Pty Ltd	Subrata Kumar Saha and Moli Saha
Bondi Junction, NSW	Golden Peak Australia Pty Ltd	Mafizul Islam and Farhad Hossen
Penrith, NSW	Four Minds Pty Ltd	MD Saiful Kabir Sumon and MD Saidul Karim and Kazi Rakibul Alam
Penrith, NSW	A&L Dominguez Pty Ltd	Luis Dominguez and Amelia Dominguez
Wetherill Park, NSW	The First Plaintiff	The Second Plaintiff and Fadi Youssef
Narellan, NSW	DOAA & JAWAD Pty Ltd	Mohammed Rana and MD Mostafa Hassan
Highpoint, Victoria	VSKM Pty Ltd	Mahathi Jammula, Kamalakar Reddy Akavaram and Sarika Mogili
Frankston, Victoria	Melbourne United Group Pty Ltd	Mohamed Abdel Moaty and Elsayed Elmahrakawy
Darling Harbour, NSW	R & F Innovation Enterprise Pty Ltd	Farhad Hossen
Rhodes, NSW	Waseemu Pty Ltd	Mr Mahmud Jawad Bin Rashid.
Liverpool NSW	RZ Group Pty Ltd	MD Mostafizur Rahman and Tanmoy Sen
Macarthur Square, NSW	Swapno Pty Ltd	Mohd Dowla, Ishrak Hasnain, and Touhidul Islam
Rouse Hill, NSW	Active Food and Beverage Pty Ltd	Mohammed Rahman, Nurul Chowdhury, and Towha Mohammad
Liverpool, NSW	Arvin Australia Pty Ltd	S Mazumder and Fahria Nusrat

ANNEXURE “A” TO THE ORDERS MADE BY BALL J ON 2 JUNE 2023

Supreme Court of New South Wales

Fogo Brazilia Representative Proceedings

Notice of Opt Out Rights

A. ABOUT THIS NOTICE

1. Why are you receiving this Notice?

- 1.1. The Supreme Court has ordered that this Notice be published for the information of persons who might be members of the class on whose behalf the action is brought and may be affected by the action. **You have been identified as a potential group member.**
- 1.2. **You should read this Notice carefully. Any questions you have concerning the matters contained in this Notice should NOT be directed to the Court.** If there is anything in it that you do not understand, you should seek legal advice.
- 1.3. You are receiving this Notice because between 17 June 2014 and 23 August 2018 (**Relevant Period**) you were either:
- (a) a franchisee pursuant to a franchise agreement with Fogo Brazilia Franchise Holdings Pty Ltd (In Liquidation) (**Franchisee**); or
 - (b) a director of a Franchisee or a guarantor of a Franchisee’s obligations under a franchise agreement with Fogo Brazilia Franchise Holdings Pty Ltd (In Liquidation) (**Director or Guarantor of a Franchisee**).
- 1.4. The Representative Proceedings referred to and explained in this Notice are proceedings in the Supreme Court of New South Wales against Fogo Brazilia Holdings, Ian Dresner, Hilton Seskin, and Lazarus Legal Group Pty Ltd (ACN 072 964 008) seeking compensation for Franchisees and Directors or Guarantors of Franchisees including you. These Representative Proceedings may affect your rights.

2. What does this Notice tell you and why is it important?

- 2.1. This Notice contains important information about the background to the Representative Proceedings and your rights as a Franchisee or Director or Guarantor of a Franchisee. In particular, it tells you about your right to opt out of the litigation. You will find this information **in Section B** of this notice.

Your opt out deadline is 14 July 2023.

- 2.2. A list of the Fogo Brazilia franchises which are subject to these Representative Proceedings is included at paragraph 4.1 below.

3. What is a representative proceeding?

- 3.1. A representative proceeding is an action that is brought by one or more persons ("plaintiffs") on their own behalf and on behalf of a group of people ("group members") against other persons ("defendants") where the plaintiffs and the group members have similar claims against the defendants.
- 3.2. Group members in a representative proceeding are not individually responsible for the legal costs associated with bringing the representative proceeding. Generally, in a representative proceeding, only the plaintiff is responsible for those costs.
- 3.3. Group members are "bound" by the outcome in the representative proceeding, unless they opt out of the proceeding. A binding result can happen in two ways: either by a *judgment* following a trial, or by a *settlement* which might happen at any time. If there is a judgment or a settlement of a representative proceeding, group members *will not* be able to pursue the same claims and *are unlikely to* be able to pursue similar or related claims against the defendants in other legal proceedings. Group members should note that:
- (a) in a *judgment* following trial, the Court will decide various common factual and legal issues in respect of the claims made by the plaintiffs and group members. Unless those decisions are successfully appealed, they bind the plaintiffs, group members and the defendants. Importantly, if there are other proceedings between a group member and the defendants, it is likely that neither of them will be permitted to raise arguments in that proceeding which are inconsistent with a factual or legal issue decided in the representative proceeding.
 - (b) in a *settlement* of a representative proceeding, where the settlement provides for compensation to group members, it may extinguish all rights to compensation which a group member might have against the defendants which arise in any way out of the events or transactions which are the subject matter of the representative proceeding.
- 3.4. If you consider that you have claims against any defendant in the representative proceedings referred to in this Notice which are based on your individual circumstances or otherwise additional to the claims described in the representative proceeding, then it is important that you seek legal advice from Levitt Robinson (or other independent solicitors) about the potential binding effects of the representative proceeding before the deadline for opting out (see paragraph 2.1 for the opt out deadline) and whether, if you opt out, you are within the limitation period prescribed by law to bring your own claim against any of the defendants if you opt out.

B. INFORMATION ABOUT THE REPRESENTATIVE PROCEEDING AND YOUR OPT OUT RIGHTS

4. Affected Franchises

4.1. The Fogo Brazilia franchises which may be the subject of claims covered by the representative proceedings are as follows:

Franchise	Franchisee	Director / Guarantor
Merrylands, NSW	Abu Syeed	None
Liverpool, NSW	NAS Enterprises (NSW) Pty Ltd	Abu Syeed and Nuzhat Tazeen Huq
Bankstown, NSW	RRZ Pty Ltd	Rafique Khan
Rouse Hill, NSW	Saha Enterprises Pty Ltd	Subrata Kumar Saha and Moli Saha
Bondi Junction, NSW	Golden Peak Australia Pty Ltd	Mafizul Islam and Farhad Hossen
Penrith, NSW	Four Minds Pty Ltd	MD Saiful Kabir Sumon and MD Saidul Karim and Kazi Rakibul Alam
Penrith, NSW	A&L Dominguez Pty Ltd	Luis Dominguez and Amelia Dominguez
Wetherill Park, NSW	The First Plaintiff	The Second Plaintiff and Fadi Youssef
Narellan, NSW	DOAA & JAWAD Pty Ltd	Mohammed Rana and MD Mostafa Hassan
Highpoint, Victoria	VSKM Pty Ltd	Mahathi Jammula, Kamalakar Reddy Akavaram and Sarika Mogili
Frankston, Victoria	Melbourne United Group Pty Ltd	Mohamed Abdel Moaty and Elsayed Elmaharakawy
Darling Harbour, NSW	R & F Innovation Enterprise Pty Ltd	Farhad Hossen
Rhodes, NSW	Waseemu Pty Ltd	Mr Mahmud Jawad Bin Rashid.
Liverpool NSW	RZ Group Pty Ltd	MD Mostafizur Rahman and Tanmoy Sen
Macarthur Square, NSW	Swapno Pty Ltd	Mohd Dowla, Ishrak Hasnain, and Touhidul Islam
Rouse Hill, NSW	Active Food and Beverage Pty Ltd	Mohammed Rahman, Nurul Chowdhury, and Towha Mohammad
Liverpool, NSW	Arvin Australia Pty Ltd	S Mazumder and Fahria Nusrat

5. What is the Fogo Brazilia representative proceeding about?

- 5.1. The representative proceedings were commenced by the lead plaintiffs on 27 August 2021. There are two lead plaintiffs. Laith & Fadi Investments Pty Ltd ACN 608 512 223 is the lead plaintiff representing all group members who entered into a franchise agreement with the franchisor (Fogo Brazilia Franchise Holdings Pty Ltd (In Liquidation)). Mr Laith Hana is the lead plaintiff representing all directors and guarantors of the franchisees.
- 5.2. Fogo Brazilia Holdings Pty Ltd, a separate entity to the franchisor, is the first defendant. Ian Dresner is the second defendant. Hilton Seskin is the third defendant and Lazarus Legal Group Pty Ltd is the fourth defendant.
- 5.3. The lead plaintiffs contend that they, and group members, suffered loss in reliance on various alleged pre-contractual representations allegedly made to the lead plaintiffs and group members. According to the lead plaintiffs, they and the group members relied on misleading or deceptive information allegedly given to them about:
- (a) the profitability of a proposed Fogo Brazilia franchise, including projected revenue and costs of goods sold;
 - (b) establishment costs (including fit out costs) for a new Fogo Brazilia franchise;
 - (c) the intellectual property and know how (including the systems and processes) that the franchisor could or would licence to each franchisee;
 - (d) the extent to which the franchised business had been in successful operation, the extent to which the franchised business had been successfully marketed and the future marketing of the franchised business;
 - (e) the key people (including Hilton Seskin, the third defendant) who would contribute their business acumen to the success of the Fogo brand; and
 - (f) the continuing solvency of the franchisor, Fogo Brazilia Franchise Holdings Pty Ltd (In liquidation)
- 5.4. The lead plaintiffs allege that this conduct amounted to misleading or deceptive conduct within the meaning of s 18 of the Australian Consumer Law and breaches of s 51AD of the *Competition and Consumer Act 2010* (Cth) (as in force prior to 1 January 2015) and section 51ACB of the *Competition and Consumer Act 2010* (Cth) (as in force from 1 January 2015).
- 5.5. These claims are subject to a statutory limitation period of 6 years.
- 5.6. These allegations are denied by the defendants, including because some or all of the defendants allege that:
- (a) Annexure A to the franchise agreements required each franchisee to either receive independent advice (legal, financial and/or business advice)

prior to entering into the franchise agreement or that they elected of their own free will not to receive advice;

- (b) each franchise agreement contained an “entire agreement” clause. The entire agreement clauses contained an express acknowledgment from each franchisee, director and guarantor that Fogo Brazilia Franchise Holdings Pty Ltd (In Liquidation) did not make any pre-contractual representation to them as to turnover or profitability of the franchised operation;
- (c) almost all of the franchise agreements (they are not all the same) contained a “Pre-Contractual Negotiation” clause, which:
 - i. reiterated that the franchise agreements expressed and incorporated the entire agreement between the parties and (except as set out in the Disclosure Document) superseded and excluded any prior or collateral negotiation, understanding, communication, agreement, representation or warranty by or between the parties in relation to the subject matter of the franchise agreements; and
 - ii. provided that the franchisees expressly acknowledged and warranted that they had either received independent legal, business and financial advice or had elected not to do so prior to entering into the franchise agreement;
- (d) different pre-contractual representations were made to franchisees, directors and guarantors. No common question arises between the plaintiffs and group members in relation to pre-contractual representations. In any event, any pre-contractual representation made by the First or Second Defendant to any franchisee prior to entry into a franchise agreement was made on reasonable grounds.

- 5.7. The defendants also contend that, even if a finding is made that some or all of the defendants engaged in misleading or deceptive conduct, any award of compensation is to be reduced having regard to each of the plaintiffs and group members’ shares in the responsibility for their own loss and damage. This will require the Court to consider and determine the degree to which each plaintiff and franchisee is responsible for their own loss, including with respect to their running of their franchise.
- 5.8. The defendants deny that the franchise agreements and disclosure documents breached the *Competition and Consumer Act 2010* (Cth) and contend that, even if they did, any such contravention did not cause any of the Plaintiffs or group members’ loss or damage.
- 5.9. The lead plaintiffs also allege that the first to third defendants engaged in unconscionable conduct within the meaning of s 21 of the ACL by allegedly soliciting payments from the Plaintiffs or group members to the First Defendant on the premise of providing the Plaintiffs or group members with rights or assets and/or know-how, systems and processes and operational procedures, while knowing that Fogo Brazilia Franchise Holdings Pty Ltd (In Liquidation) could not grant the rights or assets either because it did not own such intellectual property (in the case of intellectual property owned by the First Defendant or Second Defendant) or no such

rights and assets were developed (in the case of know-how, systems and processes and operational procedures for the franchised business).

- 5.10. The defendants deny these allegations and contend that inter-company arrangements between the First Defendant, Second Defendant, and Fogo Brazilia Franchise Holdings Pty Ltd (In Liquidation) did not make it impossible for Fogo Brazilia Franchise Holdings Pty Ltd (In Liquidation) to grant the plaintiffs or group members rights or assets and/or know-how, systems and processes, and operational procedures.
- 5.11. The lead plaintiffs allege that Lazarus Legal Group Pty Ltd is liable to them and the group members for breach of a duty of care that they are alleged to have owed to franchisees in the preparation of franchise agreements and disclosure documents. These allegations are denied by Lazarus Legal Group Pty Ltd.
- 5.12. The lead plaintiffs' claims are subject to a statutory limitation period of 6 years. Any cause of action that accrued prior to 27 August 2015 is statute barred. Group members concerned about the limitation periods applicable to their own claims should seek legal advice.

6. Are you a group member?

- 6.1. You are a group member if between 17 June 2014 and 23 August 2018 you were a Franchisee of one of the Fogo Brazilia Franchises listed in column 1 of the table in paragraph 4.1 or a Director of Guarantor of a Franchisee of one of the Fogo Brazilia Franchises listed in column 1 of the table in paragraph 4.1 above.
- 6.2. You are automatically regarded as a group member if you are one of the companies or people listed in column 2 or column 3 of the table in paragraph 4.1 above. It does not matter whether or not you have agreed to be a group member or whether you are aware that you are a group member.
- 6.3. If you are unsure whether or not you are a group member, you should:
 - (a) contact Levitt Robinson:
 - i. on +61 (2) 9286 3133 (by asking for Blaise Prentice-Davidson or Angelique Gebrayel) or;
 - ii. by email to Fogo@levittrobinson.com; or
 - (b) seek your own independent legal advice without delay.

7. Do you need to enter into a retainer agreement with Levitt Robinson in order to be a group member in the representative proceeding?

- 7.1. No. You do not need to enter into a retainer agreement with Levitt Robinson in order to be a group member.
- 7.2. If you would like Levitt Robinson to represent you, please contact the firm at the phone number or email address set out above.

8. What is opt out?

- 8.1. A plaintiff does not need to seek the consent of group members to commence a representative proceeding on their behalf or to identify a specific group member. However, group members can cease to be group members by opting out of the representative proceeding. An explanation of how group members are able to opt out is found below in the section headed "How can you opt out of the representative proceeding?". **Please note that the opt out deadline for the Representative Proceeding is 14 July 2023.**

9. Will you be liable for legal costs if you remain a group member?

- 9.1. You will **not become liable for any legal costs** simply by remaining as a group member for the determination of the common questions. However:
- (a) if you have not already, you may choose to retain Levitt Robinson to act on your behalf in the representative proceeding. A copy of the terms upon which Levitt Robinson is acting in the representative proceeding (known as a costs agreement or retainer) may be obtained at the contact details listed at the end of this Notice;
 - (b) if any compensation becomes payable to you as a result of any order, judgment or settlement in the representative proceeding, the Court may make an order that some of that compensation be used to help pay a share of the costs which are incurred by the plaintiffs in running the representative proceedings but which are not able to be recovered from the defendants;
 - (c) representative proceedings are often settled out of court. If this occurs in the representative proceeding, you may be able to claim from the settlement amount without retaining a lawyer. In that event, the Court may nonetheless require you to contribute to the plaintiffs' own legal costs (as to which, see subparagraph 9.1.(b) above); and
 - (d) after the determination of common questions and to become eligible for compensation, a group member may need to prove that they suffered individual loss and damage due to the conduct of one or more of the defendants. If you choose to take steps to prove your individual loss and damage, you may need to incur costs and you could be at risk of paying the defendants' costs of defending your individual claim if you were not successful in proving your individual claim. If you do intend on making an individual claim against the defendants, you should consider the costs of you doing so. If you are unsure about what this means to you, you should seek legal advice.

10. What will happen if you remain a group member?

- 10.1. Unless you opt out, you are a group member and you will be bound by any settlement or judgment of the representative proceeding. If the representative proceeding of which you are a group member is successful, you may be entitled to share in the benefit of any order, judgment or settlement in favour of the plaintiff(s) and group members, although you may have to satisfy certain conditions before your entitlement arises.

- 10.2. If the representative proceeding is unsuccessful, or is not as successful as you might have wished, you will not be able to pursue the same claims and may not be able to pursue related claims against the defendants in other legal proceedings.

11. What do group members need to do?

11.1 Do I need to do something to remain a group member?

No. If you wish to remain a group member there is nothing you need to do at the present time. The plaintiffs will continue to bring the representative proceedings on your behalf up to the point where the Court determines those questions that are common to the claims of the applicants and the group members.

11.2 How can you opt out of the representative proceeding?

- (a) **If you do not wish to remain a group member** of the representative proceeding, you must opt out of the representative proceeding by completing and returning the Opt Out Notice marked Schedule A below prior to or on the Opt Out date, being **14 July 2023**.
- (b) **If you opt out of the representative proceeding**, you will not be bound by or entitled to share in the benefit of any order, judgment or settlement in the representative proceeding, but you will be at liberty to bring your own claim against the defendants provided that you issue Court proceedings within the time limit applicable to your claim. If you wish to bring your own claim against the defendants, you should seek your own legal advice about your claim and whether you remain within the applicable time limit for bringing your own claim prior to opting out.
- (c) **If you wish to opt out of the representative proceedings**, you **must** do so by completing an "Opt Out" notice (Schedule A to this Notice), and returning it to the Sydney Registry of the Supreme Court of New South Wales at the address on the form.

11.3 **IMPORTANT: the Notice must reach the Sydney Registry by no later than 14 July 2023 otherwise it will not be effective.**

- 11.1. You should submit the Opt Out Notice if you qualify as a group member and you wish to opt out of the representative proceedings.
- 11.2. Each group member seeking to opt out should fill out a separate Opt Out Notice form. If you are opting out on behalf of a company or business, please provide your name, the name of the company or business and your position within the company or business (e.g. director).

12. Where can you obtain copies of relevant documents?

- 12.1. Copies of relevant documents, including the Commercial List Statement and the Commercial List Responses, may be obtained by:
- (a) inspecting them between 9am and 5pm at the office of Levitt Robinson, contact details are available from the Levitt Robinson website

(<https://www.levittrobinson.com/>); or by calling Levitt Robinson on the contact numbers below; or

- (b) by contacting the Sydney Registry of the Supreme Court of New South Wales (contact details are available from the Supreme Court's website, <https://www.supremecourt.justice.nsw.gov.au/>) and paying the appropriate inspection fee.

12.2. Please consider the above matters carefully. If you are unsure, you should:

- (a) contact Levitt Robinson
 - i. on +61 (2) 9286 3133 (by asking for Blaise Prentice-Davidson or Angelique Gebrayel); or
 - ii. by email to Fogo@levittrobinson.com; or
- (b) seek your own independent legal advice.

You should not delay in making your decision.