

FILED IN COURT

12 APR 2021



Form 20 (version 3)  
UCPR 18.1 and 18.3

## NOTICE OF MOTION

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Professional Negligence
Registry	Sydney
Case number	2017/279308

### TITLE OF PROCEEDINGS

First plaintiff	<b>Amy Rickhuss</b>
Number of plaintiffs	12
First defendant	<b>The Cosmetic Institute Pty Ltd (In Liquidation)</b>
Number of defendants	19

### FILING DETAILS

Person seeking orders	<b>Niroshan Sivathasan</b> , sixth defendant
Filed in relation to	Plaintiffs' claim
Legal representative	Jas Sekhon, Goldman & Co Lawyers
Legal representative reference	329
Contact name and telephone	Jas Sekhon, (02) 8880 0750
Contact email	legal@goldman-lawyers.com

### PERSON AFFECTED BY ORDERS SOUGHT

**Amy Rickhuss, Kylie Pollock, Jessica Bruen, Kirsty-Anne Rowlands, Lily Knowland, Tiffany Rutherford, Alysha Axen, Sherine Zahr, Emma Love, Candiece Gielisse (nee Bailey), Ali Turner, Stefanie Sanches**, the plaintiffs

### HEARING DETAILS

The sixth defendant will seek leave to file in Court and have returnable instanter this notice of motion returnable at the hearing of other applications listed at 10:00am on 12 April 2021 before the Honourable Justice Garling

**ORDERS SOUGHT**

Upon the solicitor for the sixth defendant undertaking to pay the applicable filing fee for this notice of motion, the sixth defendant seeks the following orders:

- 1 Leave to the sixth defendant to file this notice of motion in Court on 12 April 2021 and order that the notice of motion be returnable instanter.
- 2 Order that the questions set out in annexure "A" to this notice of motion be determined as common questions in the proceedings.
- 3 Order that the questions set out in annexure "B" to this notice of motion be determined as separate questions in the proceedings.
- 4 To the extent necessary, upon the making of orders 2 and 3 above, direct the parties to confer within 14 days as to any further common questions and further separate questions for determination and whether there is any need for sub-groups to be formed for the determination of any questions.
- 5 If agreement cannot be reached in respect of the matters in paragraph 4 above, grant liberty to the parties to re-list the matter before Justice Garling for appropriate case management directions.
- 6 The plaintiffs pay the sixth defendant's costs of this application and of the hearing of the matters fixed for 12 – 14 April 2021.
- 7 Such other order as the Court deems fit.

**SIGNATURE**

Signature of legal representative



Capacity solicitor for the sixth defendant

Date of signature 12 April 2021

**NOTICE TO PERSON AFFECTED BY ORDERS SOUGHT**

If you do not attend, the court may hear the motion and make orders, including orders for costs, in your absence.

**REGISTRY ADDRESS**

Street address	Law Courts Building, 184 Phillip Street, Sydney
Postal address	Supreme Court of NSW, GPO Box 3, Sydney NSW 2001, Australia
Telephone	1300 679 272

## **ANNEXURE "A"**

### **COMMON QUESTIONS FOR DETERMINATION**

1. Was BAS performed at the Premises?
2. For what period was BAS performed at the Premises?
3. Was BAS performed at the Premises using the TCI Facilities?
4. Which of the sixth to sixteenth defendants was a servant or agent of the first to fourth defendants?
5. Were the TCI Anaesthetists the servants or agents of any of the first to fourth defendants?

## **ANNEXURE "B"**

### **QUESTIONS FOR SEPARATE DETERMINATION**

1. What BAS techniques and procedures were performed by each TCI Surgeon?
2. Did Eddy Dona design or devise, supervise and implement the One Size Fits All Approach performed at the Premises?
3. Did the first defendant control or direct the provision of BAS services and facilities by any of the second to fourth defendants?
4. Did the fifth defendant Eddy Donna control or direct the provision of BAS services, namely the One Size Fits All Approach, by any of the first to fourth or sixth to sixteenth defendants?
5. Which of the fifth to sixteenth defendants:
  - (a) Performed BAS using the One Size Fits All Approach at the Premises;
  - (b) Supervised or assisted in the performance of BAS using the One Size Fits All Approach at the Premises;
  - (c) Conducted Pre-Surgery Consultations;
  - (d) Conducted Post-Surgery Consultations;
  - (e) Treated complications arising from the performance of BAS using the One Size Fits All Approach at the Premises?
6. Was the One Size Fits All Approach performed at the Premises for the BAS Purpose?
7. If yes (to 6 above), which of the defendants knew of that purpose?
8. Was the One Size Fits All Approach performed at the Premises with the reasonable expectation of achieving the BAS Results?
9. If yes (to 8 above), which of the defendants knew of the expectation of achieving those results?
10. Did the One Size Fits All Approach adopted at the Premises put the plaintiffs and group members at an increased risk of any of the BAS Complications?
11. If yes (to 10 above), which of the BAS Complications were at an increased risk of occurring?

12. Did any of the defendants make any of the Representations to the plaintiffs and group members?
13. If yes (to 12 above), which Representations were made by each of the defendants?
14. Were any of the Representations:
  - (a) inaccurate or untrue;
  - (b) likely to be relied on by, or induce, the plaintiffs and group members in deciding to undergo BAS at the Premises.
15. Did those defendants who deployed the One Size Fits All Approach owe the plaintiffs and group members a duty to exercise reasonable care and skill in:
  - (a) the provision of advice about BAS using the One Size Fits All Approach;
  - (b) the performance of BAS using the One Size Fits All Approach; and
  - (c) management after the performance of BAS using the One Size Fits All Approach?"
16. Was there a not insignificant risk that the plaintiffs and group members would suffer the BAS Complications if reasonable care and skill were not taken in the provision of advice about BAS using the One Size Fits All Approach, in the performance of BAS using the One Size Fits All Approach, and in management after the performance of BAS using the One Size Fits All Approach (**'the Risk'**)?
17. Of those defendants who performed BAS using the One Size Fits All Approach, did they know of the Risk, and if not, ought they have known of it?
18. Did any of the first to fourth defendants breach their duty of care to the plaintiffs and group members by failing to exercise reasonable care and skill in the provision of advice about BAS using the One Size Fits All Approach, in the performance of BAS using the One Size Fits All Approach, and in management after the performance of BAS using the One Size Fits All Approach?
19. If yes (to 18 above), which of the first to fourth defendants breached its duty of care, and in which of the ways alleged in paragraph 81 of the second further amended statement of claim did the breach of duty occur?
20. Did the fifth defendant breach his duty of care to the plaintiffs and group members by failing to exercise reasonable care and skill in the provision of advice about BAS using the One Size Fits All Approach, in the performance of BAS using the One Size Fits All Approach, and in management after the performance of BAS using the One Size Fits All Approach?

21. If yes (to 20 above), in which of the ways alleged in paragraph 81A of the second further amended statement of claim did the fifth defendant breach his duty of care?
22. Did any of the sixth to sixteenth defendants breach his or her duty of care to the plaintiffs and group members by failing to exercise reasonable care and skill in the provision of advice about BAS using the One Size Fits All Approach, in the performance of BAS using the One Size Fits All Approach, and in management after the performance of BAS using the One Size Fits All Approach?
23. If yes (to 22 above), which of the sixth to sixteenth defendants breached his or her duty of care, and in which of the ways alleged in paragraphs 81B to 81L of the second further amended statement of claim did the breach of duty occur?
24. Was the BAS using the One Size Fits All Approach performed on the plaintiffs and the group members at the Premises not provided with due care and skill in contravention of the guarantee under s.60 of the ACL?
25. If yes (to 24 above), in what respects was the BAS using the One Size Fits All Approach not provided with due care and skill?
26. Was the BAS using the One Size Fits All Approach performed on the plaintiffs and the group members at the Premises not reasonably fit for the BAS Purpose in contravention of the guarantee under s.61(1) of the ACL?
27. Was the BAS using the One Size Fits All Approach performed on the plaintiffs and the group members at the Premises not of a nature, quality, state or condition that might reasonably be expected to achieve the BAS Results in contravention of the guarantee under s.61(2) of the ACL?
28. Were any of the contraventions of ss60 or 61 of the ACL:
- (a) failures within the meaning of the ACL; or
  - (b) major failures within the meaning of s268(a), (d) and (e) of the ACL;
  - (c) such that the plaintiffs and group members would not have acquired BAS using the One Size Fits All Approach had they been fully aware of the nature and extent of these failures;
  - (d) such that BAS using the One Size Fits All Approach would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of these failures?
29. Were any of the Representations:
- (a) misleading with respect to future matters for the purpose of s.4 of the ACL;

- (b) made in contravention of ss 18, 29(1)(b), 29(1)(m) or 34 of the ACL?
30. Which of the defendants is liable to compensate a group member who can prove she suffered an injury because of a contravention of s.60 of the ACL?
31. Which of the defendants is liable to compensate a group member who can prove she suffered an injury because of a contravention of s.61(1) of the ACL?
32. Which of the defendants is liable to compensate a group member who can prove she suffered an injury because of a contravention of s.61(2) of the ACL?
33. Which of the defendants is liable to compensate a group member who can prove she suffered an injury or damage because of a contravention of ss 4, 18, 29(1)(b), 29(1)(m) or 34 of the ACL?