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Form 3A/B RO 1..25/05/2018
Rule 8.2

AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Supreme Court Sydney
Case number	2018/00068748

FILING DETAILS

Filed for	Plaintiff[s]
Legal representative	SIMON MORRISON
Legal representative reference	
Telephone	(02) 8754 7200
Your reference	CSUTTON:6156303

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Amended Statement of Claim (e-Services), along with any other documents listed below, were filed by the Court.

Amended Statement of Claim (Amended Statement of Claim.pdf)

[attach.]

(Form 3A (version 7)
UCPR 62

AMENDED STATEMENT OF CLAIM

Amended pursuant to orders of Garling J on 24 April 2018

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2018/00068746

TITLE OF PROCEEDINGS

Plaintiff	JOE CACHIA
first defendant	DPG SERVICES PTY LTD (ACN 090 007 999) (formerly known as PRINCIPAL HEALTHCARE FINANCE No.3 PTY LIMITED) trading as QUAKERS HILL NURSING HOME
Second-defendant	ROGER-DEAN

FILING DETAILS

Filed for	JOE CACHIA plaintiff
Legal representative	Simon Morrison of Shine Lawyers
Legal representative reference	CRS: 6156303
Contact name and telephone	Christopher Sutton: 02 8754 7200
Contact email	<u>csutton@shine.com.au</u>

NOTATION

NOTE - these proceedings are listed for an initial case conference at 9.00am on _____ being the Wednesday after the expiration of 42 days following the filing of this Statement of Claim.

TYPE OF CLAIM

Representative proceedings - Negligence – Breach of Contract - Breach of Australian Consumer Law - Mental Harm - Nervous Shock

NATURE OF THESE PROCEEDINGS

1. These are representative proceedings brought pursuant to Part 10 of the *Civil Procedure Act 2005*.

THE GROUP MEMBERS

2. The group members to whom these proceedings relate are people who suffered mental harm, nervous shock, loss and damage caused by the death of a close family member as a result of a fire at the Quakers Hill Nursing Home on 18 November 2011
3. The group comprises 7 or more persons,
4. The claims of the group members arise out of the same, similar or related circumstances.
5. The claims of the group members give rise to substantial common questions of law and fact.

NATURE OF THE CLAIMS AND THE RELIEF SOUGHT

6. Claims are brought for damages, costs and interest arising out of:
 - 6.1 Negligence.
 - 6.2 Breach of Contract.
 - 6.3 Breach of the Australian Consumer Law.

CIRCUMSTANCES GIVING RISE TO CLAIMS

7. The first defendant is, and was at all material times, a body corporate liable to be sued in its said corporate name and style.

8. At all material times, the first defendant operated the Quakers Hill Nursing Home situated at 35 - 37 Hambledon Road, Quakers Hill, New South Wales (the **Nursing Home**).
9. At all material times, the first defendant provided care and facilities for elderly residents at the Nursing Home (**the residents**).
10. The residents required high levels of care due to advanced age and ill-health, with many suffering from dementia and some being bed-ridden.
11. Each of the residents was admitted to the Nursing Home pursuant to a contract which, inter alia, included terms that the first defendant;
 - 11.1 would ensure that the Nursing Home was safe and secure for the residents,
 - 11.2 would provide high quality care to the residents.
 - 11.3 would take reasonable care to ensure the health, safety and wellbeing of the residents.
 - 11.4 would ensure that the services provided at the Nursing Home were rendered with due care and skill.
 - 11.5 would ensure that staff working at the Nursing Home were qualified, competent and did not present a risk to the health, safety and wellbeing of the residents
12. At all material times, the first defendant in its operation of the Nursing Home was:
 - 12.1 providing "services",
 - 12.2 engaged in "trade or commerce";within the meaning of s.2 of the Australian Consumer Law (**ACL**), in Schedule 2 of the Competition and Consumer Act 2010.
13. At all material times, the close family members who retained the first defendant to provide Nursing Home services to the residents were "consumers" within the meaning of s.3 of the ACL.
14. At all material times, the first defendant held out and represented that:

- 14.1 it was accredited to operate a residential aged care facility,
 - 14.2 the Nursing Home would provide high quality care to its residents,
 - 14.3 in providing services it would ensure the health, safety and wellbeing of the residents.
 - 14.4 the services it provided at the Nursing Home would be rendered with due care and skill
 - 14.5 staff working at the Nursing Home were qualified, competent and did not present a risk to the health, safety and wellbeing of the residents.
15. In early September 2011, the ~~second~~-defendant Roger Dean made an application for employment with the first defendant and submitted a resume in support of that application.
16. Subsequently, on or about 6 September 2011, without checking any of the ~~second~~ ~~defendant's~~ Roger Dean's referees or contacting his prior employers, nor carrying out any medical screening of him, the first defendant employed the ~~second~~-defendant Roger Dean as a registered nurse.
17. The ~~second~~-defendant's Roger Dean's background in fact included the following;
- 17.1 in 2007, the ~~second~~-defendant he had resigned from his position as a registered nurse with St George Hospital in the area of mental health and drug and alcohol rehabilitation, in circumstances where he was suspected of maliciously damaging a supervisor's car and an investigation of that incident was pending;
 - 17.2 the ~~second~~-defendant he subsequently worked as a permanent registered nurse at the St John of God psychiatric hospital, where on 18 June 2011 he was found to be drug-affected and had been discovered in the medication room, and
 - 17.3 the ~~second~~-defendant he was consequently suspended from the St John of God Hospital on 21 June 2011;
 - 17.4 the ~~second~~-defendant he had disclosed to the Director of Nursing at the St John of God Hospital that he had **bi-polar** disorder and had been seeing a psychologist for a major depressive disorder;
 - 17.5 the ~~second~~-defendant he resigned from St John of God Hospital in September 2011. Prior to that resignation, the ~~second~~-defendant he had been advised by

his employer that he was to be taken off night shift, inter alia, because of concerns about patient safety.

18. On or about 13 September 2011, the ~~second~~-defendant Roger Dean commenced working as the sole registered nurse on the night shift at the Nursing Home.
19. Whilst working night shift, the ~~second~~-defendant Roger Dean was:
 - 19.1 unsupervised and was responsible for the health, safety and wellbeing of the residents,
 - 19.2 the only person with a key to the treatment room at the Nursing Home where Schedule 8 medication was stored.
20. Subsequent to the commencement of the ~~second~~-defendant's Roger Dean's employment:
 - 20.1 the ~~second~~-defendant Roger Dean was observed to behave in a way that caused concern to other staff members;
 - 20.2 some staff members made complaints about the ~~second~~-defendant Roger Dean to Ms Stofan, the first defendant's Facility Manager,
21. The ~~second~~-defendant Roger Dean attended work at the Nursing Home on the night shift which commenced on 16 November 2011 and concluded on 17 November 2011 **(the 16th November Shift)**.
22. During the 16th November Shift, the ~~second~~-defendant Roger Dean, to the observation of other staff at the Nursing Home:
 - 22.1 attended the treatment room on a large number of occasions;
 - 22.2 spent over 2 hours of his shift in the treatment room;
 - 22.3 otherwise behaved in an unusual and inappropriate way.
23. The ~~second~~-defendant Roger Dean, whilst in the treatment room during the 16th November Shift, stole a large amount of Schedule 8 medication including 237 Endone tablets **(the missing medication)**.

24. Following the end of the 16th November shift, the fact that medication was missing was discovered by staff of the first defendant.
25. Following inquiry, Ms Stofan and Ms Mateo, the first defendant's Clinical Manager, suspected the-second-defendant Roger Dean had stolen the missing medication.
26. As a result, Ms Mateo contacted Quakers Hill Police Station and reported the missing medication.
27. On further inquiry, prior to the start of the night shift which commenced on 17 November 2011 and concluded on 18 November 2011 (**the 17th November Shift**), Ms Mateo was advised by other staff members of matters indicating or tending to indicate that the-second-defendant Roger Dean:
 - 27.1 had stolen the missing medication;
 - 27.2 had, whilst working at the Nursing Home, acted erratically and had an appearance consistent with drug use;
 - 27.3 had acted unusually when administering care to patients;
 - 27.4 had caused a staff member to be scared of him.
28. The-second-defendant Roger Dean was nonetheless allowed to commence the 17th November Shift as normal.
29. During the 17th November Shift, the-second-defendant Roger Dean was informed by a nurse about the inquiry occurring into the missing medication.
30. To the observation of the-second-defendant Roger Dean, police attended the Nursing Home during the 17th November Shift but were called away before any action was taken.
31. Ms Mateo, along with Ms Mitchell, a registered nurse employed by the first defendant, were thereafter able to view CCTV footage which implicated the-second defendant Roger Dean in the theft of the missing medication.
32. The-second-defendant Roger Dean continued to work the 17th November Shift during which he demonstrated signs of anxiety and expressed concerns about being a suspect in the theft of the missing medication.

33. Notwithstanding concerns and fears about the ~~second~~-defendant Roger Dean which were expressed by staff at the Nursing Home and despite requests by staff that she remain, Ms Mateo, with the knowledge of Ms Stofan, left the Nursing Home at about 3.43am on 18 November 2011, leaving the ~~second~~-defendant Roger Dean:
- 33.1 in possession of the key to the treatment room where Schedule 8 medication was stored,
- 33.2 as the sole registered nurse on duty responsible for the health, safety and wellbeing of the residents.
34. At around 4.53am on 18 November 2011, the ~~second~~-defendant Roger Dean deliberately set fire to a sheet on a bed in Ward 19 of the A2 wing of the Nursing Home.
35. Some time between 4.53am and 5.02am on 18 November 2011, the ~~second~~ defendant Roger Dean deliberately ignited a second fire in Ward 3 of the A1 wing of the Nursing Home.
36. As a consequence of the deliberate actions of the ~~second~~-defendant Roger Dean, large sections of the Nursing Home were engulfed in fire leading to the extensive deployment of Fire, Police, Ambulance and other emergency services.
37. Fourteen elderly residents of the Nursing Home were killed as a result of the fire.
38. As a result of the deaths of those residents and the circumstances in which they died, close family members of deceased residents and others have suffered psychiatric injury, loss and damage.

Claim by the Plaintiff

39. The plaintiff is the son of Emmanuela Cachia (**the plaintiff's mother**).
40. The plaintiff contracted with the first defendant to provide his mother with aged care in terms which included those set out in paragraph 11 of this Statement of Claim.

41. The plaintiffs mother was one of the residents killed as a result of the fire described in paragraphs 34 –37 of this Statement of Claim.

~~42. At all material times, the defendants owed the plaintiff a duty of care, which included a duty to take reasonable care to avoid causing him mental harm as a result of a failure to take reasonable care for the safety and wellbeing of his mother:~~

42 At all material times, the defendant owed a non-delegable duty to each of the residents to take reasonable care to avoid causing foreseeable risk of injury by its acts or omissions.

42A That duty of care included a duty to ensure the premises were safe in the event of a fire, to employ appropriate and competent staff, to monitor, regulate and supervise the behaviour of its staff and to ensure that its staff members were emotionally suitable and did not pose a risk to the safety and wellbeing of the residents.

42B Additionally, the defendant owed a duty to take reasonable care not to cause mental harm to close members of the residents' families, including the plaintiff, as a result of a failure by the defendant to take reasonable care for the safety and wellbeing of the residents.

42C The duty of care owed by the defendant to the plaintiff and other close members of the residents' families arose out of the following factors:

- (a) the residents were elderly, suffering from various physical and mental ailments and needing of high levels of care.
- (b) the residents had been entrusted to the care and control of the defendant.
- (c) the defendant had been relied upon to ensure the safety and wellbeing of the residents and thereby had a proximity of relationship with the residents and close members of the residents' families.
- (d) The relationship between the residents and close members of the residents' families was such that those family members were vulnerable to mental harm in the event that the residents were killed or injured whilst in the care of the defendant.
- (e) it was reasonably foreseeable that the plaintiff and other close members of the residents' families would suffer mental harm if the residents were killed or injured whilst in the care of the defendant.

42D The scope of the duty owed by the defendant to the plaintiff and other close members of the residents' families included:

- (a) ensuring that the premises were safe and adequately equipped to deal with an outbreak of fire.
 - (b) ensuring that the residents were properly cared for whilst at the Nursing Home.
 - (c) ensuring that the residents were not exposed to a risk of injury or death as a result of the acts or omissions of staff at the Nursing Home.
 - (d) properly vetting people employed to administer care to the residents.
 - (e) employing appropriate, competent and emotionally suitable staff.
 - (f) monitoring and supervising its staff.
 - (g) ensuring that staff did not present a risk to the safety and wellbeing and safety of the residents.
 - (h) responding promptly and effectively to any potential dangers to residents, including dangers presented by staff.
43. At all material times, the plaintiff was exposed to a risk of harm, namely the risk of mental harm, loss and damage if his mother suffered injury or death in the Nursing Home.
44. That risk of harm was foreseeable and not insignificant.
45. The defendants were was negligent and failed to take precautions against that risk of harm, which a reasonable person in the defendants¹ position would have taken in the circumstances.

Particulars of Negligence and Failure to take Precautions by the First Defendant, its Servants or Agents

- (a) Failing to have any or any adequate sprinkler system in place.
- (b) Failing to comply with prevailing Australian Standards and Codes in relation to the location and placement of fire hydrants.
- (c) Failing to investigate the ~~second-defendant's~~ Roger Dean's employment history.
- (d) Failing to contact the ~~second-defendant's~~ Roger Dean's referees when assessing his application for employment.
- (e) Failing to have any or any adequate regard to the ~~second-defendant's~~ Roger Dean's demeanour, behaviour and presentation in the work place.

- (f) Allowing the second-defendant Roger Dean to be in charge of the residents,
- (g) Allowing the second-defendant Roger Dean to be in charge of access to Schedule 8 medication.
- (h) Failing to have in place any or any adequate system for dealing with staff concerns about other staff members.
- (i) Through its senior staff, including Ms Stofan and Ms Mateo, failing to have any or any proper regard to concerns and fears voiced by staff members about the second-defendant Roger Dean.
- (j) Failing to remove the second-defendant Roger Dean from the Nursing Home and/or suspend him in light of the circumstances surrounding the missing medication.
- (k) Allowing the second-defendant Roger Dean to remain in the Nursing Home and to be the sole registered nurse in circumstances where he was affected by drugs, was unstable and was behaving in an erratic and unusual way.
- (l) Failing to take prompt and decisive action to quarantine the second-defendant Roger Dean who was acting suspiciously and possibly dangerously.
- (m) Failing to have in place protocols and clear principles emphasising risk management to prevent potential harm to residents.
- (n) Allowing the second-defendant Roger Dean to be in control of the safety of the residents in the circumstances.

~~Particulars of Negligence of the Second Defendant~~

- ~~(a) — Setting fire to the premises in circumstances where there were vulnerable people present~~
- ~~(b) — Failing to notify the first defendant of his prior history, mental health problems and drug dependence.~~

- 46. As a result of the circumstances of the death of the plaintiff's mother, the plaintiff has suffered injury by way of nervous shock and serious mental harm.
- 47. The plaintiffs injuries were caused by the negligence of the defendants detailed above.

Particulars of Causation

- 47.1 The negligence of the defendants was a necessary condition of the occurrence of the plaintiff's injuries.
- 47.2 It is appropriate for the scope of the defendant's liability to extend to the plaintiff's injuries.
48. Further, the plaintiff's injuries were caused by the first defendant's breach of each of the terms of the contract pleaded in paragraph 11 above.

Particulars of Breach of Contract

- 48.1 The plaintiff repeats each of the Particulars of Negligence of the first defendant pleaded in paragraph 45 of this Statement of Claim, as particulars of the first defendant's breach of contract.
49. Further, the plaintiff's injury was caused by the first defendant's breach of the ACL.

Particulars of Breach of the ACL

- 49.1 In breach of s. 18 (1) of the ACL, the first defendant made the representations pleaded in paragraphs 14.2 –14.5 of this Statement of Claim, which, having regard to the circumstances giving rise to the deaths of the residents were untrue, misleading and deceptive, or likely to mislead and deceive.
- 49.2 In breach of s.21 of the ACL, the first defendant engaged in trade or commerce in connection with the supply of services which was unconscionable.

Further Particulars

- 49.2.1 The first defendant made the representations pleaded in paragraphs 14.2 - 14.5 of this Statement of Claim which, having regard to the circumstances giving rise to the deaths of the residents were untrue.
- 49.2.2 The plaintiff relies upon those matters pleaded in paragraphs 7 - 45 of this Statement of Claim,

- 49.3 In breach of s.29 of the ACL, the first defendant, in trade or commerce, in connection with the supply of services made representations that the services it provided would be of the standard and quality pleaded in paragraphs 14.2 - 14.5 of this Statement of Claim. Having regard to the circumstances giving rise to the deaths of the residents, those representations were untrue, false and misleading.
- 49.4 In breach of s.34 of the ACL, the first defendant in trade or commerce, by making the representations pleaded in paragraphs 14.2 – 14.5 of this Statement of Claim, engaged in conduct liable to mislead the public as to the nature, characteristics and suitability for their purpose of the services it provided.
- 49.5 The first defendant rendered its services in breach of a guarantee, pursuant to s.80 of the ACL, that those services would be rendered with due care and skill.

Further **Particulars**

- 49.5.1 The plaintiff was a consumer to whom the first defendant agreed to supply Nursing Home services in trade or commerce.
- 49.5.2 Pursuant to s.60 of the ACL, there was a guarantee by the first defendant that the services would be rendered with due care and skill.
- 49.5.3 The plaintiff relies upon those matters pleaded in paragraphs 7 - 4.5 of this Statement of Claim as particulars of the first defendant's breach of its guarantee.
- 49.6 The first defendant rendered its services in breach of a guarantee under s.61 of the ACL that those services would be of such a nature and quality that they might reasonably be expected to achieve the result the plaintiff wished them to achieve.

Further **Particulars**

- 49.6.1 At all material times, the plaintiff was a consumer of the services provided by the first defendant.

49.6.2 The plaintiff either expressly or by implication made known to the first defendant the result he wished the services provided by the first defendant to achieve, namely that;

- (a) his mother be provided with a high standard of care, and
- (b) the first defendant would ensure the health, safety and wellbeing of his mother;
- (c) his mother would be safe and properly cared for.

49.6.3 The plaintiff relies upon those matters pleaded in paragraphs 7 –45 of this Statement of Claim as particulars of the first defendant's breach of its guarantee.

50 The Plaintiff has suffered loss or damage because of the conduct of the first and second defendant in terms of ss.236 and 237 of ACL and claims damages accordingly.

51 By reason of the negligence, breach of contract and breach of the ACL pleaded above, the plaintiff has suffered injury, loss and damage.

Particulars

These will be particularised in accordance with the directions and Rules of the Court.

COMMON QUESTIONS

52 The common questions of law or fact arising in the proceedings are:

52.1 the nature and scope of the duty of care owed by the defendants.

52.2 breach of duty.

52.3 causation of loss,

52.4 the terms of the contracts between the first defendant and close family members of the residents killed in the fire lit by the second defendant Roger Dean.

52.5 the application of the ACL.

52.6 the circumstances of the fire.

52.7 the role and conduct of the first defendant, its servants or agents in the circumstances giving rise to the fire and deaths of residents.

52.8 the first defendant's compliance with prevailing Australian Standards and Codes.

52.9 the remedies available against the defendants.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity

For Jawad Chrara for Solicitor for the Plaintiff

Date of signature

14 May 2018

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- You will be in default in these proceedings.
- The court may enter judgment against you without any further notice to you.

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you,

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from'

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed**, by
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.

- * Filing an acknowledgement of the claim.
- Applying to the court for further time to pay the claim.

3 If money is claimed, and you believe you owe part of the money claimed, by:

- Paying the plaintiff that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales, Law Courts Building, Queens Square, 184 Phillip Street, Sydney NSW 2000[
Postal address	Supreme Court of New South Wales GPO Box 3 Sydney NSW 2001 DX 829 Sydney
Telephone	02 9230 8111

FURTHER DETAILS ABOUT PLAINTIFF

Plaintiff

Name	Joe Cachia
Address	59 Saint Clair Avenue ST CLAIR NSW 2759

Legal representative for plaintiff

Name	Simon Morrison
Practising certificate number	4608 (Old)
Firm	Shine lawyers Ltd
Contact solicitor	Christopher Sutton
Address	Level 6, 299 Elizabeth St, Sydney NSW 2000
DX address	236 Sydney
Telephone	02 8754 7200
Fax	02 9267 5650
Email	<u>csutton@shine.com.au</u>

DETAILS ABOUT DEFENDANT

first Defendant

Name DPG Services Pty Ltd (ACN 090 007 999) (formerly known as Principal Healthcare Finance No.3 Pty Limited) trading as Quakers Hill Nursing Home

~~Second defendant~~

~~Name Roger Dean~~

~~Address Goulburn-Correctional-Centre,-Maud-St,-Goulburn-NSW
2380~~