

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS

Not Restricted

S ECI 2022 00739

IN THE MATTER of

TINA LOMBARDO & ORS (according to the
schedule attached)

Plaintiffs

v

DERMATOLOGY AND COSMETIC
SURGERY SERVICES PTY LTD (ACN 055 927
618) & ORS (according to the schedule
attached)

Defendants

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| <u>JUDGE:</u> | FORBES J |
| <u>WHERE HELD:</u> | Melbourne |
| <u>DATES OF HEARING:</u> | 21 February 2025 |
| <u>DATE OF RULING:</u> | 1 April 2025 |
| <u>CASE MAY BE CITED AS:</u> | Lombardo v Dermatology and Cosmetic Surgery Services Pty Ltd (discontinuance) |
| <u>MEDIUM NEUTRAL CITATION:</u> | [2025] VSC 159 |

PRACTICE AND PROCEDURE — Group proceeding — Approval of discontinuance —
Where discontinuance against one of multiple defendants — Discontinuance or settlement
— Notice to the group members — Discontinuance but remain as a party.

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|--------------------------|---|--------------------|
| <u>APPEARANCES:</u> | <u>Counsel</u> | <u>Solicitors</u> |
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| For the First Defendant | L Warren, solicitor | L A Warren Lawyers |
| For the Second Defendant | A McClelland KC A Christophersen | Kennedys Law |

| | | |
|---|--------------------------|------------------------------------|
| For the Third, Fifth and Sixth Defendants | D Guidolin SC | Gilchrist Connell |
| For the Seventh Defendant | F McLeod SC L Barrett | Colin Biggers & Paisley Lawyers |
| For the Eighth Defendant | D Bongiorno | Colin Biggers & Paisley Lawyers |

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HER HONOUR:

A Introduction

- 1 This is a representative proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) (the **group proceeding**). It relates to cosmetic surgery procedures performed on four representative plaintiffs and group members by clinics providing cosmetic surgery services (the **clinics**). The clinics were operated by the First Defendant, Dermatology and Cosmetic Surgery Services Pty Ltd (**DCSS**). The second defendant, Dr Lanzer is a/the director of DCSS. There are a further six defendants to the proceeding: individuals described as ‘cosmetic doctor defendants’ and a psychologist who provided services at the clinics.
- 2 By summons filed 26 November 2024 the plaintiffs seek leave to discontinue claims against the seventh defendant, Dr Wong. Dr Wong is one of the cosmetic doctor defendants in the proceeding. The plaintiffs also seek discontinuance of certain claims made by the fourth plaintiff against the first defendant. The application to discontinue is made pursuant to s 33V of the *Supreme Court Act 1986* (Vic) (the **Supreme Court Act**).

B The discontinuance application

- 3 The orders proposed for discontinuance are:
1. Pursuant to s 33V of the *Supreme Court of Victoria Act 1986* (Vic) (Act), the Plaintiffs have leave to discontinue the claims identified at paragraph 6 of the affidavit of Lydia Margaret Tawse dated 4 November 2024.
 2. The Court declares that Order 1 does not affect any rights of any group member in the proceeding to pursue the claims that are the subject of this proceeding in another proceeding.
 3. Pursuant to s 33V and 33ZF of the Act, any limitation period that applies to any claim of any group member which has been discontinued by reason of Order 1 shall begin to run again from a date 90 days from the date of the order [which would be 28 July 2025].
- 4 In summary, the discontinuance affects the following claims:
- (a) all claims against the seventh defendant, being:
- (i) the fourth plaintiff, Julie Morrison’s claim in negligence;

- (ii) the fourth plaintiff's claim that the seventh defendant directly contravened ss 18, 29 and 34 of the Australian Consumer Law (ACL);¹
 - (iii) the plaintiffs' claim that the seventh defendant was accessorially liable for DCSS and the second defendant's contraventions of ss 18, 29, and 34 of the ACL; and
 - (iv) the fourth plaintiff's claim that the seventh defendant breached the statutory guarantees in s 60 and 61 of the ACL.
- (b) the following claims made by the fourth plaintiff against DCSS:
- (i) in negligence, both direct and vicarious;
 - (ii) for breach of contract; and
 - (iii) for breach of statutory guarantee pursuant to s 60 of the ACL.

5 The proposed amendments that would give effect to these matters are set out in a table contained in an affidavit of Lydia Margaret Tawse sworn 4 November 2024.² That table is annexed to these reasons for convenience. The reason the amendments are not in the conventional form of a proposed amended statement of claim is because although leave has been granted to make various amendments to the filed statement of claim,³ it is not presently clear whether all of those amendments will be permitted to be filed. The amendments consequent on discontinuance therefore are proposed to an amended statement of claim that has not yet been filed.

6 Ancillary orders are sought concerning confidentiality, consequential amendment of the statement of claim, the process for notice of the discontinuance to be given to group members and costs.

¹ Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (ACL).

² Plaintiffs', 'Affidavit of Lydia Margaret Tawse', sworn 4 November 2024 (the **first Tawse Affidavit**).

³ See *Lombardo v Dermatology and Cosmetic Surgery Services Pty Ltd* (summary dismissal and pleadings) [2024] VSC 608.

- 7 The application is supported the first Tawse Affidavit,⁴ parts of which have been marked as confidential and subject to legal professional privilege. The application seeks orders to preserve the confidentiality of that information. It also relies on further affidavits of Lydia Tawse, sworn 3 December 2024⁵ and 17 February 2025.⁶
- 8 All defendants filed submissions on the application for discontinuance and appeared at the application.
- 9 The seventh defendant supported the application to discontinue. The other defendants generally did not object to the application to discontinue in substance but raised various concerns which are each discussed below.
- 10 The first to sixth and eighth defendants (the **other defendants**) object to an order that the seventh defendant be removed as a party to the proceeding. At hearing neither the plaintiffs nor the seventh defendant pressed such an order. Both maintained their position that Dr Wong's continued participation was only because of disputes as between defendants and, if he remained as a party, his active participation was not required by the plaintiffs.
- 11 Notice of this application for approval has been given to group members in two ways. The fifth Tawse affidavit describes registration of approximately 1000 group members, 31 of whom say they underwent surgery performed by Wong, either by him alone or where another surgeon was the primary surgeon.⁷
- 12 First, notification was given to each of those 31 individuals by letter dated 10 February 2025. That letter set out the fourth plaintiff's instructions to discontinue and the approval application listed for 21 February 2025.⁸ A copy of that letter, and identification of the enclosures that accompanied it, is annexed to the affidavit. Further, Tawse describes Madden's solicitors attempting to contact all 31 group members by phone. A legal secretary was able to speak with 19 of the 31 group

⁴ The first Tawse Affidavit.

⁵ Plaintiffs', 'Affidavit of Lydia Margaret Tawse', sworn 3 December 2024 (the **third Tawse Affidavit**). The third Tawse Affidavit is only relevant to this application as at [18] of the affidavit in so far as the plaintiffs' proposed orders do not provide for the filing of any further amended statement of claim.

⁶ Plaintiffs', 'Affidavit of Lydia Margaret Tawse', sworn 17 February 2025 (the **fifth Tawse Affidavit**).

⁷ Fifth Tawse Affidavit, [6].

⁸ Ibid [7]–[8].

members. Nine of the 31 identified group members initiated contact with Madden's in response to the letter.⁹

13 Two of the 31 group members objected by email to the removal of Dr Wong. A subsequent discussion with Ms Coffey, a legal secretary at Maddens, led to both group members indicating that they maintained no objection.

14 Second, all registered group members received an emailed newsletter (**MailerLite newsletter**) advising of the instructions to discontinue. The MailerLite newsletter also invited any group member who believed they had been treated by Wong, and who had not received an individual letter about the discontinuance application, to contact the plaintiffs' solicitors as a matter of urgency.¹⁰

15 The group members affected by the proceeding is broader than the members who have contacted Maddens and registered. No public notification of the discontinuance has been made to reach potential group members.

16 If the discontinuance is approved notice is proposed pursuant to s 33X of the Supreme Court Act by orders 7 to 13 sought in the plaintiffs' summons.

C Principles

17 Section 33V of the Supreme Court Act requires approval of settlement or discontinuance of any claims by the plaintiffs. The requirement for approval arises because the Court maintains a role protecting the interests of group members who are not directly represented in the proceeding.

18 The protection of interests is necessary because a settlement or discontinuance may reflect a conflict of duty or interest between an applicant for approval and group members, or between different group members.¹¹

⁹ Ibid [11].

¹⁰ Ibid [15]–[16].

¹¹ *Turner v TESA Mining (NSW) Pty Ltd (No 2)* [2022] FCA 435 [6]–[7], citing *Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47 at [130]–[131] (Murphy and Lee JJ with Beach J agreeing), citing *Kelly v Willmott Forests (No 4)* [2016] FCA 323.

19 A discontinuance against one of a number of defendants is a matter requiring court approval notwithstanding the fact that the proceeding continues against other defendants.¹²

20 In order to approve a settlement, a court must be satisfied that the outcome is 'a fair and reasonable one'.¹³ Where approval of a discontinuance is sought in some cases the same test has been applied.¹⁴ However, a slightly less onerous test was applied by Dixon J in *Laine v Theiss*, who found that discontinuance is not 'unfair or unreasonable or adverse to'¹⁵ the interests of group members.

21 Murphy J said in *Turner v TESA*:

At least in the context of a proposed discontinuance where the practical effect will be to return group members to the position they were in before the commencement of the class action, I consider the *Laine* test to be appropriate. It could be said that group members will always have an interest in the applicant being forced to press on with the litigation, even if the prospects of success are remote, because they will share the benefits of any success in the case without having any of the costs and risks. If that approach is taken, a proposed discontinuance may never be positively fair and reasonable in their interests. That would be an unworkable test and in the circumstances of the present case it is appropriate to decide whether to approve the proposed discontinuance through the prism of what would be positively *unfair* or *unreasonable* having regard to group members' interests.¹⁶

22 In *Turner v Bayer*, John Dixon J said:

An application for approval of a settlement involves a bargain reached between the parties, where the benefits and drawbacks may be more readily apparent, permitting a balancing exercise to be undertaken between the advantages and disadvantages to group members.

In contrast, a discontinuance is a unilateral decision by a plaintiff to bring to an end some or all claims in the litigation. There is no agreement between the parties that can be assessed through the prism of a fair and reasonable test. Any favourable consequences that may flow to group members are uniform and inherent in the act of withdrawing an issue from judicial determination;...The Court's task in approving a discontinuance, in exercising its protective jurisdiction, is best served by considering

¹² Section 3 of the *Supreme Court Act 1986* and *Matthews v SPI Electricity Ltd (Ruling 16)* [2013] VSC 74 [8]-[13]; *Turner v Bayer* [2021] VSC 241 [32].

¹³ *Turner v TESA Mining (NSW) Pty Ltd (No 2)* [2022] FCA 435 (*Turner v TESA Mining*) quoting *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 [7].

¹⁴ See, for example, *Mercedes Holdings Pty Ltd v Waters (No 1)* [2010] FCA 124.

¹⁵ *Laine v Theiss* [2016] VSC 689 (*Laine*), [34] (as described in *Turner v Bayer Australia Ltd* [2021] VSC 241, [35]).

¹⁶ *Turner v TESA Mining*.

whether any detriment would be occasioned by group members that would be unfair, unreasonable or adverse.¹⁷

- 23 Frequently, the difference in application of the tests will be illusory.
- 24 The distinction between a settlement and a discontinuance is not always crystal clear.¹⁸ In *Babsday Pty Ltd v Pitcher Partners*, Anastassiou J drew out the distinction:

The discontinuance of a proceeding in the strict sense is the unilateral act of the applicant. Leaving to one side the cost consequences, the discontinuance of the proceeding puts the applicant in the same position as if the proceeding had not been commenced, save for the effluxion of time in relation to any limitation period within which the action must be brought.

...

The legal effect of a unilateral discontinuance compared with a settlement agreement may be readily summarised as follows. In the case of a discontinuance, the applicant is free to commence a new proceeding against the same respondents if so advised. As there is no agreement by which the proceeding is compromised, there can be no merger of the applicant's rights in the proceeding. Similarly in the absence of any judicial determination, there can be no *res judicata* or issue estoppel.

In contrast where a settlement agreement has been reached it will be binding upon all group members who have not opted out of the representative proceeding...Subject to Court approval under s 33V of the Act, the rights of group members merge in the settlement agreement, ... merge upon performance of the terms of the agreement. The legal consequences for group members are therefore more significant, as the agreement will operate to extinguish their rights in the proceeding and bar them from bringing later proceedings in relation to the same causes of action.¹⁹

- 25 Section 33X of the Supreme Court Act provides for notice to be given to group members. Section 33X(4) provides:

Unless the Court is satisfied that it is just to do so, an application for approval under section 33V must not be determined unless notice has been given to group members.

- 26 Section 33Y requires the Court to approve the form and content of any notice required under s 33X.

¹⁷ *Turner v Bayer Australia Ltd* [2021] VSC 241 [48]–[49].

¹⁸ See *Moshinsky J Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCA 1234 [45] as discussed in *Babsday Pty Ltd v Pitcher Partners* [2020] FCA 1610 [25] (*'Babsday v Pitcher Partners'*).

¹⁹ *Babsday v Pitcher Partners* [20], [22]–[23].

27 If the proposed discontinuance is approved, section 33Y requires notice to be given in the form approved by the Court. The notice must, by order, specify who is to give the notice and the manner in which it is to be given. Other matters may also be prescribed by order.

28 The discretion to dispense with or modify the statutory notice requirement is to be exercised considering the consequence of a group member being bound by any determination adverse to their interest of which they have had not notice. Relevant factors include the Court's obligation under s 8 of the *Civil Procedure Act 2010* (Vic) to facilitate the just, timely, efficient and cost effective resolution of the real issues in dispute in the proceeding, whether there was a real prospect of rational opposition to the proposed orders by an affected group member, and the expense and inconvenience of providing notice in proportion to the benefit that might arise from such notice in protecting their interest.²⁰

D Submissions in support of approval

29 The plaintiffs' submissions articulate the basis of the discontinuance sought as following 'an agreement with the seventh defendant'.²¹ The deed of release and settlement is annexed, although its contents are marked confidential and are not available to the other defendants.

30 Despite the document titled 'deed of release and settlement', the plaintiffs submit that in substance what is sought is a discontinuance. It is intended by the parties to that document, and reflected in the proposed orders, that the rights of any group member to pursue their claims against Dr Wong or DCSS that are the subject of this proceeding can be maintained in another proceeding. The plaintiffs submit that there is no exchange or rights and obligations or 'bargain'²² that has been struck affecting or extinguishing the rights of group members.

31 The plaintiffs submit that there are two features of the proposed orders that confirm the protection of rights of group members.²³ First, for clarity, the plaintiffs seek the

²⁰ The listed factors are from Dixon J in *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation (Ruling No 16)* [2013] VSC 74.

²¹ Plaintiffs, 'Plaintiffs' Outline of Submissions', filed 14 February 2025 (**Plaintiffs' Submissions**) [1.2].

²² *Turner v Bayer* [2021] VSC 241 [48].

²³ *Ibid* [2.10].

declaration in proposed order 2 above. Second, to address the effect of the discontinuance on the suspension of time limits, it is proposed that an order extend suspension for a further 90 days from the date of the discontinuance order so as to ameliorate any difficulty with limitation periods re-commencing should any group member wish to commence an individual claim.

- 32 The plaintiffs submit that the confidential opinion of Counsel supports approval of the discontinuance of all claims against the seventh defendant and the particular claims against the first defendant. It demonstrates that the outcome for group members is not prejudicial to any rights they hold; therefore, discontinuance in terms of the settlement document will not be unfair, unreasonable or adverse to the interests of group members.
- 33 The plaintiffs confirm that group members who have received services from Dr Wong retain some claims within the group proceeding. Their claims that remain are confined to the ACL claims for misleading or deceptive conduct arising from what are described as 'common content representations' in standard documents or representations on the DSSC website or on the social media of other defendants, and claims for contraventions of s 61 of the ACL 'fitness for purpose guarantee'.
- 34 In support of the application, the seventh defendant submits that the effect of the proposed discontinuance removes any claim against Dr Wong by group members in negligence or contract or based upon direct representations made by him. It also removes any accessory claims against him and claims for breach of the due care and skill guarantee contained in s 60 of the ACL.
- 35 On the question of notice, the plaintiffs submit that sufficient notice of this application has been given to those 31 group members identified as having received services from Dr Wong by letter. with follow-up as described in the fifth Tawse affidavit, All registered group members have been given notification through the MailerLite newsletter. The plaintiffs' submit that advice to group members of their right to seek independent legal advice about the discontinuance application was not necessary. The letter to the individual group members made reference to the right to seek

independent legal advice to pursuing a claim against Dr Wong outside of the class action.²⁴

36 The regime of Notice to be given if the discontinuance is approved is set out in the proposed orders 7 to 12. The orders themselves were not contentious. The terms of the Notice were the subject of discussion and submissions during the hearing and consequently the plaintiffs have provided the Court with a revised Annexure A that would accompany orders approving the discontinuance. A timetable is then proposed for the following steps from the date of the discontinuance order including:

- (a) engagement of a third party mail house within one week;
- (b) first defendant to provide the mail house with a list of all persons who according to its records are or may be group members together with contact information within two weeks;
- (c) notice be given by the plaintiffs solicitors within three weeks as prescribed; and
- (d) an affidavit of compliance be served within four weeks.²⁵

37 No party took issue with the notification steps following any order for discontinuance.

38 The seventh defendant consents to all the orders sought by the plaintiffs.

39 Counsel highlights that Dr Wong was joined as a defendant ‘belatedly’²⁶ on 7 October 2022. He participated in DCCS between September 2019 and October 2021. For much of that time he was in training, under supervision or acted as an assistant to other doctors, largely Dr Lanzer. Dr Wong worked on his own only in Western Australia. By reference to Ms Tawse’s affidavit only a small number of group members registered to date underwent procedures in Perth, approximately 1.4% of all registrations. Additionally the seventh defendant points to difficulty encountered so far by the plaintiffs in pleading and particularising the claims against Dr Wong. The

²⁴ Fifth Tawse Affidavit 8.

²⁵ Plaintiffs, ‘Plaintiffs’ Summons’, filed 26 November 2024.

²⁶ Seventh Defendant, ‘Submissions of Seventh Defendant’, filed 14 February 2025 (**Seventh Defendant’s submissions**).

seventh defendant notes costs orders already made in his favour regarding difficulties in articulating the plaintiffs' claims.

- 40 The seventh defendant identifies utility in making the declaration sought in order 2 in circumstances where the class is not a closed class and potential group members may not have had the benefit of information about the preservation of their rights by discontinuance of claims against Dr Wong in the group proceeding.

E Issues raised by the Defendants

- 41 Although none of the other defendants opposed discontinuance, four matters were raised by their submissions.

- 42 The first is whether the application at hand is for a discontinuance or a settlement. The second is whether the notice of this application and its effect on group members has been sufficient and accurate. The third question is if the application is approved, what form of notice should be given to group members. Finally, the other defendants contended that the seventh defendant should remain a party to the group proceeding even if the application succeeds.

- 43 The first defendant sought clarification as to whether the claims of group members who had surgery performed by the seventh defendant maintained negligence and breach of contract claims against the first defendant. It otherwise neither consents nor opposed the application, including the discontinuance of claims against the first defendant save for the position regarding costs.

- 44 The second defendant's written submissions only addressed the removal of Dr Wong as a party. Those submissions were supported by the affidavit sworn by Nicholas James Driver on 4 February 2025.²⁷ The oral submissions raised one further issue – the inadequacy of the notification of the discontinuance application. It was submitted that notification of only the 31 identified as having received services from Dr Wong was inadequate as all group members make a claim against Dr Wong under the ACL. Also, the MailerLite newsletter contained a factual error as it also suggested that only those group members operated on by Dr Wong were affected. All group members

²⁷ Second Defendant, 'Affidavit of Nicholas James Driver', sworn 4 February 2025 (the **Driver Affidavit**).

make claims of direct liability for Dr Wong's own social media posts and accessorial liability for misleading or deceptive conduct of representations of other defendants under the ACL. To the extent that the group members' claims under the ACL, or otherwise, are apportionable claims, the second defendant notes that the group members have not been advised that the discontinuance of claims against Dr Wong may affect the quantum of damages recovered from other defendants. Consequently, the plaintiffs may receive only a portion of the damages recoverable if the apportionment defences succeed.

45 The third to sixth defendants made the following observations for the Court's consideration:

- (a) They raise the question of adequacy of notice to group members beyond those operated on by Dr Wong as articulated by the second defendant, and submit that discontinuance of the ACL claims against Dr Wong has not been properly notified to group members. Accordingly, they submit that the application ought be adjourned until adequate notice has been given to group members more broadly, which should include the right to object to discontinuance and seek independent legal advice on the terms of discontinuance.
- (b) They question whether the plaintiffs are in substance seeking a discontinuance or a settlement. If the former, then the facts at hand are not analogous to *Babscaj* or *Turner v TESA Mining* as these cases involved discontinuance of the entire proceeding. Where some part of the proceeding remains on foot, the Court must have regard to the interests of the group members vis the other defendants (aside from the seventh defendant). It must also then consider the rights of the group members as a whole. On that analysis, the remaining defendants have extant defences for apportionment against Dr Wong. If Dr Wong is to remain a party to the proceeding as the remaining defendants contend, then any discontinuance should be one on terms identified as matters within the broad discretion conferred by s 33V.
- (c) They raise a difficulty in assessing the merit of claims against the seventh defendant prior to discovery and in the absence of open information about any communications between the fourth plaintiff and seventh defendant.

- 46 The eighth defendant took no position on the discontinuance application other than the need for the seventh defendant to remain a party.
- 47 The plaintiffs submitted that any inadequacy in the notice given of the application was not raised prior to the hearing notwithstanding a letter seeking clarification of the issues in dispute.²⁸
- 48 The seventh defendant submitted that it had made 'early and complete discovery',²⁹ and that the plaintiff has had all required documents in his possession from early on in the proceeding. For this reason, the defendant has been excluded from earlier discovery orders, which the other defendants took no issue with. The parties therefore were able to assess the merit of their claims in light of all relevant documents.

F Should the application be approved?

- 49 The starting point is the question of whether the outcome sought by the plaintiffs and consented to by the seventh defendant is a settlement or a discontinuance of the proceeding between those parties. While the agreement is reduced to writing in a document headed 'Deed of Settlement and Release' (**deed**) made 24 October 2024, I am satisfied that in substance, the outcome is a discontinuance of the plaintiffs' identified claims.
- 50 The document, evidencing an agreement between the plaintiffs on their own behalf and on behalf of group members and the seventh defendant, refers to settlement and release. However, it is in form that does not compromise any of the relief sought from the seventh defendant in the proceeding. Although the terms of the deed are confidential, those terms are accurately reflected in the proposed orders. Importantly, in substance, the outcome agreed to by the deed does not preclude any group member from commencing a new proceeding against Dr Wong arising from the same discontinued causes of action.
- 51 A discontinuance is described as a unilateral act of the plaintiff. It is an act that does not require any bargain to be struck or any compromise of rights to be agreed to by the person subject to the discontinuance. Consent of the affected defendant is a

²⁸ T 119, referencing the letter dated 6 February 2025.

²⁹ T 118.

relevant matter for the Court to consider on an application to discontinue, however, agreement or acquiescence to a discontinuance does not detract from it being a unilateral act. It cannot be said that the discontinuance has any legal consequence for the rights of group members beyond restoring them to the position that existed before Dr Wong was joined as a defendant. The question of costs always remains a matter for the court notwithstanding that the starting point in rule 63.15 of the *Supreme Court (General Civil Procedure) Rules 2015 (Rules)* is that the party discontinuing shall pay the costs of the party to whom the discontinuance relates. The fact that the seventh defendant consents but does not seek an order for costs does not change the characterisation of the outcome.

52 As a discontinuance and not a settlement of the proceeding between these parties, I propose to apply the test as set out by Dixon J in *Laine*. I am satisfied that the outcome is not unfair or unreasonable nor adverse to the interests of group members. I have reached this conclusion for the following reasons:

- (a) First, and critically, the effect of the proposed orders is that group members are restored to the legal position that existed prior to the joinder of Dr Wong to the group proceeding. The merit of their legal claims against Dr Wong, and group member's ability to prosecute those claims outside the group proceeding, is unaffected by his joinder and discontinuance. Subject to adequate notice of the order discussed below, the discontinuance is not adverse to any individual group member.
- (b) Second, the applicable limitations periods that were suspended while Dr Wong was a party to the group proceeding and will commence to run again. However, the suspension will be extended for a period beyond the order granting leave to discontinue in order to afford group members time to take necessary steps to protect their interests should they wish to do so.
- (c) Third, Dr Wong raises the outstanding costs orders in his favour in respect of inadequacies in the pleading of claims against him to date in support of his submission that there would be difficulty in articulating or establishing his liability to group members. This is so despite the fact that he has made full discovery to the plaintiffs.

- (d) Fourth, discontinuing claims against Dr Wong is principally likely to affect the small number of group members who have received services from Dr Wong. The impact on the larger cohort of group members, confined to the ACL claims that are apportionable claims, will arise only where the defendants succeed in establishing that Dr Wong, is also a wrongdoer by his acts or omissions. The apportionable claims exclude claims for damages for personal injury and so are relatively confined.³⁰ As Dr Wong's submissions highlight, the pleading difficulties faced by the plaintiffs with respect to Dr Wong are likely to face the other defendants in articulating the arguments that they wish to advance.
- (e) Fifth, I have had regard to the confidential advice of Counsel dated 4 November 2024, which maintains that discontinuance is in the interest of the plaintiffs and group members and will not have an adverse impact upon their legal position. Because the group members retain their individual rights outside the group proceeding it is neither desirable nor necessary to canvas the confidential advice save to say that it provided sufficient detail for me to form the necessary conclusion as to the effect upon group members.

53 I would reach the same conclusion if assessing the outcome as one that is fair and reasonable in the interests of the group members impacted by the discontinuance, on the basis that they remain able to pursue claims individually as they were prior to the joinder of Dr Wong.

54 No claims remain in the group proceeding against Dr Wong directly. He remains identified in respect of actions undertaken by him, but the proposed amendments remove reference to any relief sought against him. What remains therefore are claims by plaintiffs and group members against other defendants for circumstances where Dr Wong is described as the 'vehicle by which the services are provided',³¹ but where the relief is sought only against other defendants.

55 While the first defendant in particular had concerns that references to Dr Wong in the proposed amendments might be thought to leave alive claims against Dr Wong, it was

³⁰ See s 137C of the ACL, and s 24XX *Wrongs Act 1958* (Vic).

³¹ Transcript of Proceedings, *Lombardo v Dermatology and Cosmetic Surgery Services Pty Ltd* (Supreme Court of Victoria, Forbes J, 21 February 2025) 14.21 ("T").

clear that the remaining references did not link the described activity to Dr Wong's liability to the plaintiffs or group members. In particular, this includes removal of claims that the first defendant is vicariously liable for any negligence of the seventh defendant in the provision of services.³² The remaining references to Wong are relevant only to liability alleged against remaining defendants.

- 56 The issue of notice of the application in accordance with s 33X(4) was raised because detailed notice had only been given to 31 group members known to have received treatment from Dr Wong and because the notice that was given stated that the effect of discontinuance did not impact on those group members who were not operated on or treated by Dr Wong.
- 57 The pleadings identify that Dr Wong is an accessory to misleading or deceptive conduct of other defendants as a result of representations in 'standard documents' provided to potential patients and on social media. I accept that those claims are made by group members beyond those operated on by Dr Wong. For those who did not receive services from Dr Wong, the potential claims discontinued relate to the ACL claims which persist against the remaining defendants. The effect of the discontinuance means that group members no longer claim damages for misleading or deceptive conduct from Dr Wong. This will only affect the quantum of damages recovered under s 236 of the ACL where a defendant succeeds in a defence that Dr Wong is a concurrent wrongdoer, by limiting recovery from that defendant.
- 58 Therefore quantum of group members' apportionable claims in the group proceeding may be affected by the discontinuance of their claims against Dr Wong. This arises not from the abandonment of the claims but from the existence of the defences. I accept that group members who have not received treatment from Dr Wong, but who may have been influenced by social media in a way that implicates Dr Wong, may have

³² By reference to the Seventh Defendant's submissions at [4(b)(i)] and [4(c)(iv)], and to the Plaintiffs' submissions at [6(a)(i)] and [6(b)(i)]. Although the Plaintiffs' submissions only refer to the fourth plaintiff's claims in these paragraphs, the table of amendments contained in the Fifth Tawse affidavit makes clear that Dr Wong is removed from the definition of 'Other Cosmetic Doctor Defendants' in [7], and therefore excluded from the allegation that the first defendant is vicariously liable for the actions of others as pleaded at [127], together with the removal of [133].

some part of any damages recovered affected by defences if the discontinuance is approved.

- 59 The absence of advice to registered group members of this potential effect of this aspect of discontinuance in the notice given of the application does not prevent me from dealing with the application as it is presently before the Court. In my view, it is just and reasonable to consider the application on the basis of the notice that has been given to date. There are three reasons for this. First, because this is a discontinuance rather than a settlement, lack of adequate notice of the application itself will not preclude any group member pursuing rights against Dr Wong, including any claim for representations that breach s 18 of the ACL that give rise to a claim for damages under s 236 of the ACL. For example, if a group member considers that even though they did not receive services from Dr Wong, his representations nevertheless played an important role in the decision to approach DCSS to provide services, then the discontinuance will not deprive them of an opportunity to obtain independent advice and commence a claim outside the group proceeding if so advised. What will be important is the limited time to do so after the discontinuance orders are made. This application is unlike a settlement which would be binding on rights of group members from the time orders are made.
- 60 Second, as the potential class is not limited to those registered with Maddens Lawyers to date, it follows that there are group members who have had no notice at all of this application. Any inadequacies or inaccuracies in the notice given thus far can be addressed in the Notice that is approved by the Court under ss 33X and 33Y to be distributed when the orders are made.
- 61 Third, the discontinuance of apportionable claims against Wong does not of itself affect group members who did not receive services from Dr Wong. It would only do so if the defence raised by other defendants to limit their own liability succeeded by showing that Dr Wong was also responsible for loss and damage suffered by that group member. This would affect the quantum of damages recoverable by a group member from any other defendant whose defence succeeded.

G Why the seventh defendant should remain a party

- 62 The reason for maintaining the seventh defendant as a party, notwithstanding discontinuance of plaintiffs and group members' claims against him, is the potential for prejudice to the position of other defendants. That prejudice is limited to the operation of defences of the remaining defendants and has the capacity to affect the amount for which judgment can be entered against each remaining defendant in some claims only.
- 63 In support of submissions that the seventh defendant remain a party to the proceeding, the second defendant relies on an affidavit of Nicholas James Driver sworn 4 February 2025 and the third to sixth defendants relies on an affidavit sworn by Emily Jane Brett on 4 February 2025.³³ Both affidavits identify a prejudice to the defendants who had raised proportionate liability defences. Presently the second to sixth defendants have, by their defences, pleaded that the seventh defendant is a person whose acts or omissions in breach of s 18 of the ACL and so is a person who is a concurrent wrongdoer under relevant proportionate liability legislation.³⁴
- 64 The eighth defendant also seeks leave to plead in its defence proportionate liability of the other defendants including the seventh defendant under the ACL.
- 65 The defendants submit that if the seventh defendant is removed as a party they would be prejudiced in their defence of any claims to which Victorian law applied and would be prejudiced by being unable to subsequently join Dr Wong if he were removed as a party.
- 66 It seems uncontroversial that in the various legislative provisions that deal with apportionable claims,³⁵ only the *Wrongs Act 1958* (Vic) (the '**Victorian Wrongs Act**') requires a concurrent wrongdoer to be a party to the proceeding in order that a defendant can obtain the benefit of the defence.

³³ Third, Fourth, Fifth and Sixth Defendants, 'Affidavit of Emily Jane Brett', sworn 4 February 2025 (the **Brett Affidavit**).

³⁴ Second Defendant, 'Defence to Amended Statement of Claim', filed 20 December 2024.

³⁵ The following legislation is pleaded Part VIA of the *Competition and Consumer Act (2010)* (Cth), Part 4 of the *Civil Liability Act 2002* (NSW), Part IVAA of the *Wrongs Act 1958* (Vic), Part 1F of the *Civil Liability Act 2002* (WA) and Chapter 2, Part 2 of the *Civil Liability Act 2003* (Qld).

- 67 On this basis, all other defendants oppose any order removing Dr Wong as a defendant. At hearing neither the plaintiffs nor the seventh defendant pressed an order removing Dr Wong as a party. The seventh defendant's submissions highlighted the difficulty in establishing other than a minimal contribution as a concurrent wrongdoer to those group members whose claims are governed by Victorian law. The plaintiffs indicated their position that they would no longer require any active participation of the seventh defendant if he was not removed as a party.
- 68 Given that no party is pressing for an order removing the seventh defendant, it is not necessary to engage in a detailed consideration of the consequences of him remaining a party. The extent of any prejudice to defendants that might arise on removal is yet to be fully explored as is the number of claims that are potentially affected by the particular considerations under the Victorian Wrongs Act. Any risk of maintaining the seventh defendant as a party for the purpose of defences raised, lies primarily with the parties seeking this course.

H Notice of the discontinuance orders

- 69 In light of the matters raised at the hearing, the plaintiffs prepared a revised notice to inform group members of the orders made and their effect. That revised notice was provided to the Court on 28 February 2025 and copied to all parties. The notice in revised form addresses the concerns raised save for one issue. The effect of discontinuing apportionable claims against Wong is confined to a statement that 'This may have an impact on any claims you may wish to pursue outside this proceeding'.³⁶ It does not identify the potential effect on defences to apportionable claims within the proceeding by the other defendants.

I Other directions

- 70 The first defendant by summons has sought leave to file a claim for indemnity or contribution in respect of the seventh defendant. The summons was listed for directions. The eighth defendant also has a summons returnable for directions at this

³⁶ Plaintiff, 'Discontinuance Application – Annexure A', emailed to the Court and copying in all other parties, on 28 February 2025.

hearing. That summons is supported by an affidavit of Alexandra Doddridge sworn 7 February 2025.³⁷

- 71 The first defendant's proposed notice of indemnity and contribution references the 7 November 2024 statement of claim and seeks indemnity or contribution from Dr Wong for any amount recoverable by the fourth plaintiff or defined 'Wong claimants' (those group members who underwent surgery performed by the seventh defendant). Although the summons presently confines matters to a notice directed at the seventh defendant, the first defendant indicated that notices of contribution may be sought against other defendants as well and was given leave to amend its summons to seek this. In light of the claims to be discontinued by the present orders, identification of any plaintiff or group member claims that are subject to notices of contribution of indemnity should be precisely identified.
- 72 The eighth defendant seeks leave to file an amended defence to rely on s 87CD(1)(a) of the *Competition and Consumer Act 2010* (Vic), which provides for a defence of proportionate liability.³⁸ The proposed amended defence also raises an issue of compliance with s 28LE of the Wrongs Act which is not relevant to the discontinuance application. The defence under s 87CD does not require Dr Wong to remain a party.³⁹
- 73 The eighth defendant's summons also seeks leave to file Notices of Contribution against the other defendants, including the seventh defendant pursuant to Rule 11.15(5) for a cause of action under s 23B of the Wrongs Act.
- 74 In my view, given the proposed leave to discontinue certain claims and the amendments to the statement of claim that will supersede the existing pleadings, it is appropriate that any notice of contribution or indemnity be accompanied by a statement of claim that identifies for what claims indemnity or contribution is sought. This is desirable whether or not a statement of claim is required by the rules. Accordingly, I made directions as to the preparation of a proposed statement of claim

³⁷ Eighth Defendant, 'Affidavit of Alexandra Doddridge', sworn 7 February 2025 (the **Doddridge Affidavit**).

³⁸ Ibid 13, 15–16. Referencing the proposed amended defence through the addition of paragraph [219] and other amendments contained in paragraph [192A].

³⁹ Ibid 16, referencing s 87CD(4) of the *Competition and Consumer Act 2010* (Vic).

for indemnity or contribution to accompany the notice for which leave is sought, that will be available when the summons is determined.⁴⁰

75 For his part, the seventh defendant opposes leave being granted to the first or eighth defendants to serve contribution notices on him on the basis that the time to file any such notices expired no later than 60 days after service of the Statement of Claim. That required service by 20 November 2023. There has been no explanation for the failure to do so. Nor is the basis or scope of such notices clear. I have adjourned the applications in relation to notices of contribution by these two defendants with a direction that they provide proposed pleadings to address the second basis of opposition.

76 I directed that any proposed Notice of Contribution sought to be filed by the first or eighth defendants against the seventh defendant be accompanied by a proposed statement of claim to be provided prior to the next case management conference. The purpose is to allow the seventh defendant to understand precisely what claims of the plaintiffs or group members are subject to the notices.

⁴⁰ By the First Defendant, 'First Defendant's Amended Defence', filed 23 December 2024 at [225]–[228], the first defendant pleads proportionate liability in respect of the misleading or deceptive conduct claims.

SCHEDULE OF PARTIES

S ECI 2022 00739

BETWEEN:

TINA LOMBARDO First Plaintiff

TINA BONNICI Second Plaintiff

SIMONE RUSSELL Third Plaintiff

JULIE ROSE MORRISON Fourth Plaintiff

- v -

DERMATOLOGY AND COSMETIC SURGERY
SERVICES PTY LTD (ACN 055 927 618) First Defendant

DANIEL LANZER Second Defendant

DANIEL ARONOV Third Defendant

JACQUELINE DARBYSHIRE AND TONY
DARBYSHIRE (ON BEHALF OF THE ESTATE OF THE
LATE DANIEL DARBYSHIRE) Fourth Defendant

RYAN WELLS Fifth Defendant

ALIREZA FALLAHI Sixth Defendant

GEORGE SHU-KHIM WONG Seventh Defendant

CANDICE WAINSTEIN Eighth Defendant

ANNEXURE

| Paragraph | Amendment |
|---------------------|---|
| [1] | Delete the words " <i>and/or Seventh Defendant (Wong)</i> " and add the words " <i>Dr George Wong (Wong)</i> " in their place. |
| [7] | Delete the words " <i>and Wong</i> " |
| [87] | After the words " <i>Other Cosmetic Doctor Defendants</i> " add the words " <i>and Wong</i> " |
| [88] | After the words " <i>Other Cosmetic Doctor Defendants</i> " in subparagraphs (aa)-(e) add the words " <i>and Wong</i> " |
| [88A] | After the words " <i>Other Cosmetic Doctor Defendants</i> " in subparagraphs (b) and (c) add the words " <i>and Wong</i> " |
| [89] | After the words " <i>Other Cosmetic Doctor Defendants</i> " in subparagraph (c) add the words " <i>and Wong</i> " |
| [90] | After the words " <i>Other Cosmetic Doctor Defendants</i> " add the words " <i>and Wong</i> " |
| [93] | After the words " <i>Other Cosmetic Doctor Defendants</i> " add the words " <i>and Wong</i> " |
| [94] (Particulars) | In the paragraph commencing " <i>the Specialist Surgeon Representation was further conveyed by...</i> " and after the words " <i>the Other Cosmetic Doctor Defendants</i> " add the words " <i>and Wong</i> " |
| [95] | Delete the words " <i>and Wong made the Pre-Eminence and Excellent Service Representations</i> " |
| [95] (Particulars) | Delete all references to Dr Wong, including posts allegedly made by Dr Wong |
| [96] (Particulars) | Delete all references to Dr Wong |
| [103] | Delete sub-paragraphs (d) and (g) |
| [103] (Particulars) | Delete all words following " <i>As to the allegation at (g)</i> " |
| [104] | Delete sub-paragraph (d) |
| [117] | Amend to the effect that Ms Morrison no longer claims against DCSS under section 60 of the <i>Australian Consumer Law</i> , in [117], but maintains her claim under section 61 of the <i>Australian Consumer Law</i> , in a new paragraph [117A]. |
| [117] (Particulars) | In the paragraph beginning " <i>Morrison refers to...</i> ", delete the words " <i>and paragraphs 136, 184 below</i> ". |
| [119] (Particulars) | In the paragraph beginning " <i>Morrison refers to...</i> ", delete the words " <i>and paragraphs 136, 184 below</i> " |
| [123] | Add the words " <i>Because of the Statutory Guarantee Non-Compliance (insofar as that arose by contravention of section 61 of the ACL, and as a result of...</i> " |

| | |
|-------------|--|
| [133] | Delete entire paragraph |
| [136] | Delete all references to Morrison (including in the particulars) |
| [137] | Delete all references to Morrison |
| [138] | Delete all references to Morrison |
| [148]-[150] | Delete entire paragraphs |
| [184]-[187] | Delete entire paragraphs |
| [194] | Delete entire paragraph (note that particulars will need to be moved due to defined term Morrison's Injury, Loss and Damage being used elsewhere in pleading). |
| [195] | Delete the words " <i>each Plaintiff</i> " and " <i>the Plaintiffs</i> " and replace with words " <i>Lombardo, Bonnici and Russell</i> " |
| [196] | Delete the words " <i>the Plaintiffs</i> " and replace with the words " <i>Lombardo, Bonnici and Russell</i> " |
| [196A] | Delete the words " <i>the Plaintiffs</i> " and replace with the words " <i>Lombardo, Bonnici and Russell</i> " |
| [196B] | Delete the words " <i>the Plaintiffs</i> " and replace with the words " <i>Lombardo, Bonnici and Russell</i> " |
| [200] | Delete entire paragraph |
| [202] | Delete the words " <i>the Plaintiffs</i> " and replace with the words " <i>Lombardo, Bonnici and Russell</i> ". Delete the references to paragraph "184" in the particulars. |
| [202A] | Delete the words " <i>the Plaintiffs</i> " and replace with the words " <i>Lombardo, Bonnici and Russell</i> ". Delete the references to Morrison in the particulars. |
| [213] | Delete sub-paragraph (g) |
| [216] | Delete the words " <i>the Plaintiffs</i> " and replace with the words " <i>Lombardo, Bonnici and Russell</i> ". Delete the reference to Morrison in the particulars. |
| [217] | Delete the words " <i>the Plaintiffs</i> " and replace with the words " <i>Lombardo, Bonnici and Russell</i> ". |

CERTIFICATE

I certify that this and the 23 preceding pages are a true copy of the reasons for ruling of Forbes J of the Supreme Court of Victoria delivered on 1 April 2025.

DATED this first day of April 2025.

