

DEFENCE TO CROSS-CLAIM

COURT DETAILS

Court Supreme Court of NSW
Division Common Law
List General
Registry Sydney
Case number 2014/148790

FILED

19 JUN 2015

fa



TITLE OF PROCEEDINGS

Plaintiff Sean Johnston
First defendant Endeavour Energy (ABN 59 253 130 878)
Second defendant Osborne Aviation Services Pty Ltd (ACN 072 380 226)

FIRST **CROSS-CLAIM**

Cross -claimant Endeavour Energy (ABN 59 253 130 878)
Cross-defendant Osborne Aviation Services Pty Ltd (ACN 072 380 226)

FILING DETAILS

Filed for Cross-defendant
Legal representative Robert Patrick Higgins by his Partner
Carroll & O'Dea
Lawyers
ABN 70 355 352 183
Level 18, 111 Elizabeth Street
SYDNEY NSW 2000
DX 183 SYDNEY
Tel: (02)9291 7100
Fax: (02)9221 1117
Email: cod@codea.com.au
Legal representative reference AOD:LJP:150898
Contact name and telephone Lara Piercy
9291 7189

PLEADINGS AND PARTICULARS

The Cross-Defendant ("Osborne") pleads as follows in answer to the Statement of Cross-Claim filed on 2 April 2015:

1. Osborne does not plead to paragraph 1.
2. Osborne admits paragraphs 2, 3, 4, 5, 6, 7, 10, 12, 13, 14 and 23

3. Osborne does not admit paragraph 14.
4. Osborne denies paragraphs 16, 17, 19, 20, 21, 24 and 25.
5. In response to paragraphs 8 and 9, Osborne:
 - (a) Osborne admits paragraph 8, save that the obligation to identify and notify defects is subject to the matters pleaded in the following paragraph.
 - (b) Osborne denies paragraph 9, and in further answer says:
 - (i) The services that Osborne was required to perform pursuant to the Osborne Contract were those set out or contemplated in the Technical Specification appended to Schedule 2 (the "**Specification**") following requests by Endeavour Energy from time to time for it to supply those services (clause 4.1(a) of the Osborne Contract).
 - (ii) The Specification required the ground and air inspections to be undertaken by Osborne to ensure that all 'Defects' (as provided in the scope of works pleaded below) that could cause the ignition of a bushfire have been identified and that all defects on the networks owned by Endeavour or owned privately be notified to Endeavour Energy (clause 3.0).
 - (iii) The scope of works was set out in clause 5 of the Specification.
 - (iv) The scope of works included a requirement to conduct ground line patrols so as to identify, classify, prioritise, photograph, record and report 'Defects' on Company and private poles and lines which could lead to the ignition of a bushfire (Clause 5.4 of the Specification).
 - (v) The requirement for inspection was "a visual inspection of the pole top and hardware, conductors and vegetation encroachment to identify 'Defects' as detailed" in the Specification. There was no requirement to inspect vegetation that did not encroach on the poles and lines.
 - (vi) The Osborne Contract specified that the identification of 'Defects' for the purposes of the Osborne Contract (described as PSBI Defect identification) would be the subject of instruction at an induction (clause 13.0).
 - (vii) On 13 May 2013 at the induction conducted pursuant to clause 13.0, employees and contractors of Osborne were instructed as to the 'Defects' for the purposes of the Osborne Contract in the following manner:

- (A) They were provided with WNV 1012 Pre-Summer Bushfire Map Patrols, Inspections and Defect Reporting (Amendment 8) ("**WNV 1012**").
 - (B) They were given an oral presentation which included reference to the tables which are Annexures C, D and E to WNV 1012 and given an oral presentation accompanied by a slide presentation of photographic samples of the assets to inspect and the defects to report.
 - (C) There was no reference in either the oral presentation or the documents provided to any need for Osborne to identify defects relating to vegetation otherwise than for vegetation in the minimum safety clearances specified in Annexure E of WNV 1012.
 - (D) Specifically, no instruction was given concerning "hazardous trees".
- (viii) Further, or in the alternative, the obligations on Osborne in the Osborne Contract were subject to any reasonable direction given to Osborne by Endeavour Energy pursuant to clause 5.1a(4) of the Osborne Contract.
- (ix) "Directions" to Osborne by Endeavour Energy pursuant to clause 5.1a(4) of the Osborne Contract included:
- (A) The instructions given at the induction, pleaded above; and
 - (B) The delivery by email to John Osborne on 20 May 2013 of the Endeavour Energy Pole and Line Inspection Defect Prioritisation Photo Handbook dated January 2013 (41 pages).
- (x) In the premises the 'Defects' for the purposes of the Osborne Contract did not include any defect in relation to vegetation, except for "Trees into Mains" or "Insufficient Clearances between mains and trees" and did not otherwise include any requirement in respect of hazardous trees.
- (xi) In the alternative to the foregoing contentions, the content of the requirement (which is not admitted) to identify as a defect "hazardous trees" was not express in the Osborne Contract.

- (xii) The Osborne Contract required Osborne to inspect in a period of approximately three months approximately 100,000 poles from the air and approximately 50,000 poles from the ground.
- (xiii) Ground inspection was only required where air inspection could not be performed (clause 5.4 of the Specification).
- (xiv) In the course of negotiations preceding the Osborne Contract, Osborne offered to supply at additional cost, additional services, described as "Value Added Options" including a service described as "fall-in tree analysis" which would have identified all trees which, if they fell, would make contact with network assets, and "tree health analysis" which would have used infra-red analysis to identify dead trees. Endeavour Energy did not accept the offer of those additional services.

Particulars

Technical Proposal Endeavour Energy Pre-Summer Bushfire Inspection Program (PSBI) Alternative Quote 16 December 2012, Appendix E.

- (xv) The key personnel for the performance of the services were identified in schedule 5 of the Osborne Contract, their qualifications and experience having been provided to Endeavour Energy. None of those personnel had or were represented to have any arboreal expertise or experience.
- (xvi) In the premises the meaning of "hazardous trees" in the Osborne Contract was a tree that could be observed, in a short period of time, by a person conducting an inspection of the conditions on the network owned by Endeavour Energy or a privately owned network and with no arboreal expertise or experience, from the cabin of a helicopter or motor vehicle, to be hazardous.

6. In response to paragraph 11, Osborne:

- (a) denies that the Osborne Contract included, as Policies or otherwise, MMI-0001, or MMI-0013;
- (b) says that the Policies under the Osborne Contract were those referred to in Schedule 8 of the Osborne Contract;

- (c) Says that MMI-0001, MMI-0013 were instructions and standards developed by the Cross-Claimant (**'Endeavour'**) in order to discharge its obligation to prepare and implement a Network Management Plan; and
- (d) Otherwise does not admit the paragraph.

Particulars

Electricity Supply (Safety and Network Management) Regulation 2008 Regs 8 and 12(2). Endeavour Energy Network Management Plan 2011-2013 Chapter 4 [3.2].

7. In response to paragraph 15 Osborne:
 - (a) admits that on or about 30 July 2013 it did a ground line inspection pursuant to the Osborne Contract of networks owned by Endeavour and privately owned networks in the vicinity of pole JU 267 in Linksvie Road, Springwood;
 - (b) otherwise does not admit the paragraph.
8. In response to paragraph 16, Osborne:
 - (a) says that the particularised condition of the Tree (which is not admitted) could not be observed, in a short period of time, by a person conducting an inspection of conditions on the network owned by Endeavour Energy or a privately owned network and with no arboreal expertise or experience, from the cabin of a helicopter or motor vehicle, to be hazardous;
 - (b) denies that the Osborne Contract required Osborne to identify the Tree as hazardous or otherwise report the Tree to Endeavour Energy; and
 - (c) otherwise denies the paragraph.
9. In response to paragraph 17 Osborne:
 - (a) admits clause 5.1 (a)(6);
 - (b) denies that the effect of the clause is as set out in the paragraph; and
 - (c) otherwise does not admit the paragraph.
10. In response to paragraph 18 Osborne:
 - (a) denies that it owed the first defendant a duty to take reasonable care to ensure that the first defendant did not incur a liability to the plaintiffs or group members; and
 - (b) otherwise does not admit the paragraph.
11. In response to paragraph 22, Osborne

- (a) admits clause 11.3(c);
- (b) relies on the words of the clause for its meaning and effect; and
- (c) otherwise does not admit the paragraph.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

R Higgins by his partner

Capacity

Solicitor for the cross-defendant

Date of signature

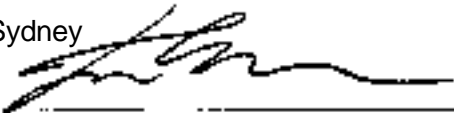
19 JUNE *2XD15

AFFIDAVIT VERIFYING

Name John Osborne
Address RA 21534 Bass Highway
 STANLEY TAS 7331
Occupation CEO
Date 19 June 2015

I say on oath:

- 1 I am the CEO of the cross-defendant.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

SWORN at Sydney
Signature of deponent 
Name of witness Lara Jane Piercy
Address of witness Level 18, 111 Elizabeth Street, Sydney NSW 2000
Capacity of witness Solicitor

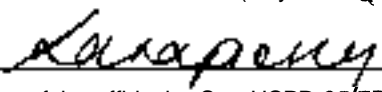
And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have confirmed the deponent's identity using the following identification document:

NSW Driver Licence # 21221183

Identification document relied on (may be original or certified copy)¹

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]