

DEFENCE TO AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law Division
List	General List
Registry	Sydney
Case number	2015 / 00310264

TITLE OF PROCEEDINGS

Plaintiff	Laurence Kelvin Eades
First defendant	Endeavour Energy (ABN 59 253 130 878)
Second defendant	Asplundh Tree Expert (Australia) Pty Ltd (ABN 83 055 140 424)
Third defendant	Pinnacle Career Development Pty Limited (ABN 73 115 138 326)
Number of defendants	3

FILING DETAILS

Filed for	Asplundh Tree Expert (Australia) Pty Ltd (ABN 83 055 140 424) Second defendant
Legal representative	Melissa Helen Fenton of Colin Biggers & Paisley Pty Ltd
Legal representative reference	MHF:FCP:1604525
Contact name and telephone	Melissa Fenton (02) 8281 4555
Contact email	melissa.fenton@cbp.com.au

PLEADINGS AND PARTICULARS

In relation to the Amended Statement of Claim (ASOC) filed on 1 July 2016, the second defendant (hereafter referred to as Asplundh):

1. Admits paragraph 1.
2. Admits paragraph 2.
3. As to paragraph 3, Asplundh:
 - (a) admits that there was a fire in or around Mount York Road, Mt Victoria in New South Wales on 17 October 2013; and
 - (b) does not admit the remainder of paragraph.

4. As to paragraph 4:
 - (a) refers to and repeats paragraph 3 above;
 - (b) admits that the proceedings are brought by group members in the classes described in subparagraphs 4.1 to 4.4 of the ASOC; and
 - (c) does not know and cannot admit the existence of the losses or the identity of anyone who may have suffered losses who fall within the classes described in subparagraphs 4.1 to 4.4 of the ASOC.

5. As to paragraph 5, Asplundh:
 - (a) admits that Seven or more persons claim to have sustained loss or damage as pleaded in subparagraphs 4.1 to 4.4 of the ASOC;
 - (b) refers to and repeats paragraph 4 above; and
 - (c) otherwise does not know and cannot admit paragraph 5.

6. Admits paragraph 6.

7. Does not know and cannot admit paragraph 7.

8. Admits paragraphs 7A and 7B.

9. Does not plead to paragraphs 8, 9, 10, 11, 12 and 13 as those paragraphs contain no allegations against it.

10. As to paragraph 14, Asplundh
 - (a) says that the potential risks set out in sub-paragraphs 14.1 to 14.9 could, in certain very specific conditions, arise;
 - (b) admits that the consequences set out in subparagraphs 14.10 to 14.12 could potentially occur if one or more of the risks identified in subparagraphs 14.1 to 14.9 actually occurred; and
 - (c) otherwise does not admit the remainder of the paragraph.

11. Does not know and cannot admit paragraph 15.

12. As to paragraph 16, Asplundh:

- (a) refers to and repeats paragraph 4 above; and
 - (b) does not know and cannot admit the remainder of paragraph 16.
- 13. Does not plead to paragraph 17 as it contains no allegations against it.
- 14. As to paragraph 18, Asplundh:
 - (a) admits that Mount Victoria is in a bushfire-prone area;
 - (b) admits that parts of Mount York Road, Mount Victoria, including the drive way of 80-92 Mount York Road was in an area containing a number of large trees; and
 - (c) does not admit the remainder of the matters pleaded therein.
- 15. Does not know and cannot admit paragraph 19.
- 16. As to paragraph 20, Asplundh:
 - (a) admits subparagraph 20.1; and
 - (b) does not know and cannot admit the remainder of the paragraph.
- 17. Does not plead to paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 as they contain no allegations against it.
- 18. As to paragraph 35, Asplundh:
 - (a) admits that in or around August 2012 it entered into a contract with Endeavour Energy to provide vegetation management services limited to vegetation control delivery (cutting) in the Katoomba area from 1 October 2012;
 - (b) Says the contract comprised:
 - (i) a document titled "Endeavour Energy Request for Expression of Interest, RFEOI number 1523/12E" dated 25 January 2012;
 - (ii) Supply Schedule No 1523/12C signed by Gregory Fitzgerald on behalf of Asplundh on 13 July 2012;
 - (iii) Documents appended to the Supply Schedule;
 - (iv) Master Supply Agreement for the Supply of Goods and Services effective on or around August 2012; and

- (v) refers to and relies on the terms of the contract including all annexures, attachments and appendices (however displayed) full its full meaning and effect;
 - (c) says that it was a term of the contract that Asplundh provide vegetation management services limited to vegetation control delivery (cutting) to Endeavour Energy in the Katoomba region and relies on Part C2 Specification - Vegetation Control Delivery for its full meaning and effect;
 - (d) says that Asplundh was not retained to scope and audit the annual cut in the year commencing 1 October 2012 in the Katoomba region; and
 - (e) says that Pinnacle was retained by Endeavour Energy to perform the scope and audit contract during the 2012/2013 period in the Katoomba region.
19. As to paragraph 36, Asplundh:
- (a) says that it was a term of the contract that Asplundh agreed to perform quarterly inspections on a rolling basis as set out in the contract;
 - (b) says that it was a term of the contract that Asplundh agreed to achieve minimum clearance for vegetation in proximity to Endeavour Energy's network assets as set out in MMI0013 and the vegetation control delivery specification (Clause 2.1 Objective) in the Katoomba region;
 - (c) says that it was a term of the contract that Asplundh would submit a three month continuous inspection submission to declare that no vegetation was within safety clearances;
 - (d) relies on the definition of Vegetation Defects as set out on page 5 of Part C2 Specification;
 - (e) says that it was a term of the contract that Asplundh would carry out PSBI in accordance with the provisions of the contract;
 - (f) says that Endeavour Energy was required under the terms of its Network Management Plan and the Primary Documentation (as defined in the ASOC) to conduct an annual PSBI in all designated bushfire prone areas;
 - (g) says that:
 - (i) it was a term of the contract that Asplundh would carry out an inspection and defect rectification of designated bushfire prone areas each 12

months prior to the commencement of the declared bushfire season
(clause 7.3)

- (ii) it was a term of the contract that any identified defects would be cut to MMI0013 minimum trimming clearances
 - (iii) pursuant to the terms of the contract, Asplundh submitted to Endeavour Energy a map identifying that no encroachments were found in the span between poles 3 and 4;
 - (iv) Endeavour Energy completed its own PSBI audit and aerial patrol/LiDAR program for the relevant year;
- (h) admits that Asplundh was permitted under Part C2 Specification to perform discretionary works that had been approved by Endeavour Energy's Vegetation Control Manager and says that such discretionary work at all times depended on Endeavour Energy approving the works including but not limited to:
- (i) Endeavour Energy assessing the tree and determining whether or not it required removal;
 - (ii) Endeavour Energy issuing a private tender to certain approved providers to remove the identified tree;
 - (iii) Endeavour Energy assessing the quotations submitted by interested parties to carry out the discretionary work; and
- (i) says that it was a term of the Part C2 Specification that all of Asplundh's staff, and any subcontractors, would comply with the training requirements set out in clause 4.7; and
- (j) otherwise does not admit the remainder of the paragraph.

20. As to paragraph 37:

- (a) relies on the contract between Endeavour Energy and Asplundh as set out in paragraph 18(b) above for its full force and effect; and
- (b) otherwise does not admit the remainder of the paragraph.

21. Admits paragraph 38.

22. Admits that Pinnacle were retained by Endeavour Energy to scope and audit within the Northern Region and otherwise does not admit the remainder of paragraph 39.

23. Does not plead to paragraph 40 as it contained no allegations against it.
24. As to paragraph 41, Asplundh:
- (a) will, at any hearing of these proceedings, refer to and rely on the terms of the contract between it and Endeavour Energy as set out in paragraph 18(b) above;
 - (b) will, at any hearing of these proceedings, refer to and rely on the terms of the Primary Documentation (as defined in the ASOC) including MMI 0001 and MMI 0013; and
 - (c) otherwise does not admit the remainder of the paragraph.
25. As to paragraph 42, Asplundh:
- (a) admits that Endeavour Energy provided a copy of MMI0013 (Amendment no.8) at or around the time Asplundh entered into the contract with Endeavour Energy as referred to in paragraph 18 (b) above;
 - (b) does not know and cannot admit subparagraph 42.2; and
 - (c) otherwise does not admit the remainder of the paragraph.
26. As to paragraph 43, Asplundh:
- (a) admits that Endeavour Energy entered into a contact with Heli-Aust Pty Ltd; and
 - (b) as necessary, relies on the terms of that contract (as defined in the ASOC) for its full force and effect.
27. As to paragraph 44, Asplundh:
- (a) admits that Endeavour Energy entered into a contact with Osborne; and,
 - (b) as necessary, relies on the terms of that contract (as defined in the ASOC) for its full force and effect.
28. As to paragraph 45, Asplundh:
- (a) repeats the matters pleaded in paragraph 27 above in answer to paragraph 44 of the ASOC; and
 - (b) otherwise does not admit the remainder of the paragraph.
29. As to paragraph 46, Asplundh:

- (a) admits that Endeavour Energy entered into a contact with Active Tree Services; and,
 - (b) as necessary, relies on the terms of that contract (as defined in the ASOC) for its full force and effect.
30. As to paragraph 47, Asplundh:
- (a) repeats the matters pleaded in paragraph 29 above in answer to paragraph 46 of the Amended Statement of Claim; and
 - (b) otherwise does not admit the remainder of the paragraph.
31. Does not know and cannot admit paragraph 48.
32. As to paragraph 49, Asplundh:
- (a) says that in the period from 1 October 2012 to the date of the Mount Victoria fire, Asplundh performed services for Endeavour Energy in the Katoomba region, including in the Mount Victoria area and along Mount York Road comprising vegetation management services limited to vegetation control delivery (cutting);
 - (b) in answer to subparagraph 49.3(d):
 - (i) Asplundh inspected the trees and vegetation along Mount York road, including the driveway to the premises at 80-92 Mount York Road;
 - (ii) says that on or around 28 October 2012, Asplundh identified two trees that required trimming and 3 small trees that required ground line clearing;
 - (iii) admits that it identified a defect in a tree that overhung the power line between poles 5 and 4 and recommended the tree overhang be trimmed but noted that to perform the work in this span, a power outage was necessary;
 - (iv) in or around November 2012, Pinnacle also identified a defect in the tree that overhung the power line between poles 5 and 4 and recommended the tree overhang be trimmed;
 - (v) in or around November 2012, Pinnacle identified that a eucalyptus tree in between poles 3 and 4 was inside trimming clearances but outside safety clearances and recommended the eucalyptus tree and scrub be trimmed near the gate noting that the line was running down a driveway on private property;

- (vi) on or around 15 November 2012, Asplundh received the cutting scope data for the Katoomba map (U28827) from Pinnacle; and
 - (vii) at a date between 15 November 2012 and 20 December 2012, Asplundh undertook the cutting work in accordance with the cutting scope data provided by Pinnacle; and
 - (viii) on or around 20 November 2012, Asplundh submitted to Endeavour Energy the cutting scope map; and
- (c) does not admit the sub-paragraphs 49.4, 49.5 and 49.6; and
- (d) otherwise does not know and cannot admit paragraph 49.
33. As to paragraph 50, Asplundh:
- (a) does not plead to subparagraph 50.1 as it contains no allegations against it;
 - (b) does not know and cannot admit subparagraph 50.2;
 - (c) as to subparagraph 50.3, says that it received the cutting scope data from Pinnacle on or around 15 November 2012;
 - (d) admits subparagraph 50.4;
 - (e) says that it notified Endeavour Energy that the cutting work was completed on 20 December 2012 and does not admit the remainder of the subparagraph 50.5; and
 - (f) does not know and cannot admit the matters in subparagraphs 50.6 and 50.7.
34. Does not admit the matters pleaded in paragraphs 51, 52, and 53.
35. As to paragraph 54, Asplundh:
- (a) in response to the matters pleaded at 13.1 to 13.4 of the Amended Statement of Claim:
 - (i) admits that Endeavour Energy used power lines, including power lines at Mount Victoria to conduct electricity
 - (ii) says that unintended discharges of electricity from the power line may in certain circumstances lead to the consequences referred to in subparagraphs 13.3.1 to 13.3.3;

- (iii) does not admit the balance of paragraphs 13 including subparagraphs 13.3 13.4 and 13.5; and
 - (b) otherwise does not admit paragraph 54.
- 36. Does not admit the matters pleaded in paragraph 55.
- 37. As to paragraph 56, Asplundh:
 - (a) admits that it provided services in the Katoomba region, including Mount York Road, under the terms of the contract with Endeavour Energy referred to above in paragraph 18; and
 - (b) otherwise does not admit the remainder of the paragraph.
- 38. As to paragraph 57, Asplundh:
 - (a) repeats the matters pleaded in answer to paragraphs 35-37 and 56 of the ASOC;
 - (b) says that, consistent with its contractual arrangements, Asplundh had a degree of control over the implementation and observance of the requirements of the contract and Endeavour Energy's policies and procedures;
 - (c) says that it had a degree of control over the knowledge, training and experience of its employees engaged to perform services under its contract with Endeavour Energy; and
 - (d) otherwise does not admit the remainder of the paragraph.
- 39. Does not admit paragraph 58.
- 40. As to paragraph 59, Asplundh:
 - (a) denies the matters pleaded in subparagraph 59.2 of the Amended Statement of Claim; and
 - (b) otherwise does not admit the remainder of the paragraph.
- 41. As to paragraph 60, Asplundh:
 - (a) relies on the contract between it and Endeavour Energy referred to in paragraph 18 above for its full force and effect;

- (b) says that it was a term of the contract that Asplundh provide vegetation management services limited to vegetation control delivery (cutting) to Endeavour Energy in the Katoomba region;
- (c) says it was not retained to scope and audit the annual cut in the year commencing 1 October 2012 in the Katoomba region;
- (d) says that Pinnacle was retained by Endeavour Energy to perform the scope and audit contract during the 2012/2013 period in the Katoomba region; and
- (e) otherwise does not admit the remainder of paragraph 60.

42. As to paragraph 61, Asplundh:

- (a) says that Pinnacle identified the span between poles 4 and 3 as requiring trimming, and identified the works required in its cutting scope as provided to Asplundh on or around 15 November 2012;
- (b) admits that it performed cutting works between poles 4 and 3 on Mount York Road during the period 15 November 2012 and 20 December 2012;
- (c) says that Asplundh quality audited the cut post trimming and submitted the map for audit to Endeavour Energy on 20 December 2012;
- (d) admits that it undertook work in accordance with the terms of its contract with Endeavour Energy as set out in paragraph 18 above, including performing cutting works on a number of trees between various poles located along Mount York Road; and
- (e) otherwise does not admit the remainder of the paragraph.

43. Does not admit paragraphs 62 and 63.

44. Does not plead to paragraphs 64, 65, 66, 67, 68, 69, 70 and 71 as they contain no allegations against it.

45. Denies paragraph 72 insofar as it refers to Asplundh.

46. Does not plead to paragraphs 73, 74, 75, 76, 77, 78, 79, 80.

47. Does not admit paragraph 81 and further says that the services provided by Asplundh to Endeavour Energy pursuant to the contract referred to in paragraph 18 above were carried out with due, care and skill.

48. As to paragraph 82, Asplundh:
- (a) says that the services provided by Asplundh to Endeavour Energy pursuant to the contract referred to in paragraph 18 above were carried out with due, care and skill;
 - (b) says that, at the relevant time, its employees who performed the services on behalf of Asplundh pursuant to the contract referred to in paragraph 18 above had Appropriate Training (as defined); and
 - (c) otherwise does not admit the remainder of paragraph.
49. Denies paragraph 83, 84 and 85.
50. As to paragraph 86, Asplundh:
- (a) denies that it was negligent as alleged or at all;
 - (b) does not admit that:
 - (i) the plaintiff;
 - (ii) each of the group members referred to in subparagraphs 4.1 to 4.3 of the Amended Statement of Claim; and
 - (iii) each of the deceased persons referred to in sub-paragraph 4.4 of the Amended Statement of Claim
- as the case may be, suffered loss and damage as alleged, or at all.
51. Denies paragraphs 87.
52. Does not admit the matters pleaded in paragraphs 88, 89 and 90.
53. Does not know and cannot admit paragraph 91.
54. Does not know and cannot admit paragraph 92.
55. As to paragraph 93, Asplundh:
- (a) admits that a fire erupted in the Mount Victoria region on 17 October 2013; and
 - (b) otherwise does not admit the remainder of paragraph 93.
56. Does not plead to paragraphs 94 and 95 as they contains no allegations against it.

57. As to paragraph 96, Asplundh:
- (a) repeats the matters pleaded in answer to paragraph 82 of the Amended Statement of Claim; and
 - (b) otherwise does not admit the remainder of the paragraph.
58. Denies paragraph 97.
59. Does not plead to the matters raised in paragraphs 98, 99 and 100 as there are no allegations against it.
60. As to paragraph 101, Asplundh:
- (a) repeats the matters pleaded in answer to paragraph 4 of the ASOC; and
 - (b) otherwise does not admit the remainder of the paragraph.
61. As to paragraph 102, Asplundh:
- (a) repeats the matters pleaded in answer to paragraph 14 of the ASOC;
 - (b) Otherwise does not admit the remainder of the paragraph.
62. Does not plead to paragraphs 103 and 104 as they contain no allegations against it.
63. As to paragraph 105, Asplundh:
- (a) admits that the Mount Victoria fire had adverse consequences for some owners or occupiers of land in the fire affected areas; and
 - (b) otherwise does not admit the remainder of the paragraph.
64. Does not admit paragraph 106.
65. Denies paragraph 107 insofar as it contains allegations against it.
66. As to paragraph 108, Asplundh:
- (a) admits subparagraph 108.1;
 - (b) says that, insofar as sub-paragraphs 108.2 through to 108.10 relate to it, the questions as to whether it owed and breached the alleged duties are not necessarily common to the Plaintiff and all group members because the circumstances in which a duty may be recognised and the content of any duty which is recognised vary in part according to the nature of the loss claimed; and

- (c) does not know what is meant by the matters pleaded in 108.12 and cannot plead to that paragraph.

Proportionate Liability Defence - Endeavour Energy

67. If, contrary to the foregoing denials, the second defendant is liable or partly liable to the plaintiff and/or any group members as alleged in the ASOC, then in the alternative, and for the purpose of pleading a proportionate liability defence only, the second defendant pleads as follows.
68. For the purposes of this proportionate liability defence only, the second defendant repeats and relies on paragraphs 6 to 17, 18 to 31, 33, 34, 43 to 48, 49 (excluding 49.3(d) (i) - (iii)), 53, 73 - 80, 91 - 95, 102 - 106 of the ASOC.
69. If (which is denied) the second defendant is found to be liable or partly liable to the plaintiff and/or any group members as alleged in the ASOC, then:
- (a) the second defendant and Endeavour Energy will have caused the same loss or damage;
 - (b) accordingly, in respect of the claims made in these proceedings other than claims in respect of personal injury, the second defendant and Endeavour Energy will be concurrent wrongdoers within the meaning of the *Civil Liability Act 2002*, section 34(3); and
 - (c) pursuant to the *Civil Liability Act 2002*, section 35, the liability of the second defendant in respect of the claims made in these proceedings other than claims in respect of personal injury, is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just having regard to the extent of the second defendant's responsibility for the said damage or loss.

Proportionate Liability Defence - Pinnacle

70. If, contrary to the foregoing denials, the second defendant is liable to the plaintiff and/or any group members as alleged in the ASOC, then in the alternative, and for the purpose of pleading a proportionate liability defence only, the second defendant pleads as follows.
71. For the purposes of this proportionate liability defence only, the second defendant repeats and relies on paragraphs 38 to 42, 64 to 72 and 88 to 90 of the ASOC.
72. If (which is denied) the second defendant is liable to the plaintiff and/or any group members as alleged in the ASOC, then:
- (a) the second defendant and Pinnacle will have caused the same loss or damage;

- (b) accordingly, in respect of the claims made in these proceedings other than claims in respect of personal injury, the second defendant and Pinnacle will be concurrent wrongdoers within the meaning of the *Civil Liability Act 2002*, section 34(3); and
- (c) pursuant to the *Civil Liability Act 2002*, section 35, the liability of the second defendant in respect of the claims made in these proceedings, other than claims in respect of personal injury, is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just having regard to the extent of the second defendant's responsibility for the said damage or loss.

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 defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

Capacity

Date of signature



Solicitor

27 September 2016


Affidavit verifying not required for any Local Court proceedings, or proceedings in Supreme or District Court for defamation, malicious prosecution, false imprisonment, trespass to the person, death or personal injury]

AFFIDAVIT VERIFYING

Name Greg Fitzgerald
Address Unit 1, 197 Power Street, Glendenning NSW 2761
Occupation Managing Director, Asplundh Tree Expert
Date 27 September 2016

I affirm:

1. I am the Managing Director of the Second 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.

AFFIRMED at SYDNEY
Signature of deponent 
Name of witness Melissa Fenton
Address of witness 2 Park St 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:

Drivers' licence
Identification document relied on (may be original or certified copy)†

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 or JP Ruling 003 - Confirming identity for NSW statutory declarations and affidavits, footnote 3.]

FURTHER DETAILS ABOUT FILING PARTY

Filing party

Name Asplundh Tree Expert (Australia) Pty Ltd (ABN 83 055 140 424)
Address Unit 1, 197 Power Street, Glendenning NSW 2761

Legal representative for filing party

Name Melissa Helen Fenton
Practising certificate number 36858
Firm Colin Biggers & Paisley Pty Ltd
Contact solicitor Melissa Fenton
Address Level 42, 2 Park Street
Sydney NSW 2000
DX address 280 Sydney
Telephone (02) 8281 4555
Fax (02) 8281 4567
Email melissa.fenton@cbp.com.au
Electronic service address melissa.fenton@cbp.com.au