

Cross-claim 17/2

Form 7A (version 4)
UCPR 14.3

THIRD CROSS-CLAIM DEFENCE

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General List
Registry	Sydney
Case number	2014/148790

TITLE OF PROCEEDINGS

Plaintiff	Sean Johnston
First Defendant	Endeavour Energy
Second Defendant	Osborne Aviation Services Pty Ltd

TITLE OF THIS CROSS-CLAIM

Cross-Claimant	BMG Aviation Pty Ltd atf the BMG Aviation Unit Trust (AFS AR 427044)
Cross-Defendant	PI Direct Insurance Brokers Pty Ltd

FILING DETAILS

Filed for	PI Direct Insurance Brokers Pty Ltd, Cross-Defendant
Filed in relation to	Third Cross-Claim
Legal representative	James Berg, DLA Piper Australia
Legal representative reference	JDB:CLE:03129693-995280
Contact name and telephone	Carmen Elder, (02) 9286 8000
Contact email	Carmen.Elder@dlapiper.com

HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at

PLEADINGS AND PARTICULARS

In answer to the Statement of Cross-Claim filed by BMG Aviation Pty Ltd (**BMG Aviation**) on 30 November 2015 (SCC), the Cross-Defendant (**PID**) says:

1. As to paragraph 1, it admits the allegation.
2. As to paragraph 2, it admits the allegation.
3. As to paragraph 3, it does not plead to the paragraph as it contains no allegation of material fact.
4. As to paragraph 4, it:
 - 4.1 admits sub-paragraphs (a) and (b);
 - 4.2 admits it was aware BMG Aviation was an insurance broker specialising in the placement of aviation risks but otherwise does not admit sub-paragraph (c).
5. As to paragraph 5, it does not admit the allegations.
6. As to paragraph 6, it:
 - 6.1 denies it was retained by BMG Aviation as alleged in paragraph 6 or at all;
 - 6.2 says it was retained by BMG General Pty Ltd ACN 154 458 090 (**BMG General**) on or around 23 April 2013 on the following terms:
 - 6.2.1 PID was to seek (on behalf of BMG General) quotations for professional indemnity insurance for Osborne Aviation Services Pty Ltd (**Osborne**) with respect to Osborne's activity of aerial inspection and reporting on power lines, and to submit such quotations to BMG General (**2013 PID Retainer**);

Particulars

- (a) Email Nicole Ralph to Carol Scotson 23 April 2013.
- 6.3 says that BMG General provided PID with the following instructions to enable PID to perform the 2013 PID Retainer:
 - 6.3.1 Osborne's professional business was "aerial services" and "helicopter operators";
 - 6.3.2 the risk to be covered was Osborne's professional indemnity risk under a sub-contract for Endeavour Energy following Osborne's aerial inspection of powerlines;

6.3.3 that Osborne had video equipment set up to their helicopters to record the information on the flights which they then would use to produce a report for their client Endeavour Energy;

Particulars

- (a) Emails Nicole Ralph to Carol Scotson 23 April and 1 May 2013;
- (b) Proposal attached to email Nicole Ralph to Carol Scotson 1 May 2013.

6.4 says that in accordance with the terms of the 2013 PID Retainer, PID sought quotes from, at least, Woodina Underwriting Agency, Resource Underwriting, Dual Australia Pty Ltd (**Dual**), Vero and CFC Underwriting;

Particulars

- (a) File note titled "new business enquiry".
- (b) Email Carol Scotson to Resource Underwriting 26 April 2013.
- (c) Email Carol Scotson to Anthony Morgan 26 April 2013.
- (d) Email Carol Scotson to Sami Jaghbir 26 April 2013.
- (e) Email Carol Scotson to Oliver Box 26 April 2013.

6.5 says that in accordance with the terms of the 2013 PID Retainer, on 30 April 2013 PID informed BMG General that it had tried 5 underwriters and 3 of those underwriters had told PID they would not be able to consider the risk as it was outside of their underwriting guidelines;

Particulars

- (a) Email Carol Scotson to Nicole Ralph 30 April 2013.

6.6 says that in accordance with the terms of the 2013 PID Retainer, PID received two quotes from Dual as agent acting on behalf of certain Underwriters at Lloyds;

Particulars

- (a) Email Carol Scotson to Anthony Morgan 26 April 2013.
- (b) Email Anthony Morgan to Carol Scotson 26 April 2013.
- (c) Email Carol Scotson to Anthony Morgan 2 May 2013.

- (d) Email Anthony Morgan to Carol Scotson 2 May 2013.
- (e) Email Anthony Morgan to Ted Dore 3 May 2013.
- (f) Email Anthony Morgan to Ted Dore 10 May 2013.

6.7 says that in accordance with the terms of the 2013 PID Retainer, PID provided the quotes received from Dual to BMG General;

Particulars

- (a) Email Ted Dore to Nicole Ralph 3 May 2013, 11:34am.
- (b) Email Ted Dore to Damian Hooper 10 May 2013.

6.8 says on 13 May 2013, PID was instructed by BMG General to bind cover with Dual as agent acting on behalf of certain Underwriters at Lloyds for Osborne's business of "*Aerial Surveying in connection with power lines for Endeavour Energy only*";

Particulars

- (a) Email Nicole Ralph to Ted Dore 13 May 2013.

6.9 says that following the receipt of instructions from BMG General, PID conveyed those instructions to Dual;

Particulars

- (a) Email Ted Dore to Anthony Morgan 13 May 2013.

6.10 says Dual bound cover as agent acting on behalf of certain Underwriters at Lloyds for a policy of professional indemnity insurance identifying:

- 6.10.1 the policy number as P-PI/0/40226/13/E-O;
- 6.10.2 the period of cover as 13 May 2013 to 13 May 2014;
- 6.10.3 the business description as aerial surveying in connection with power lines for Endeavour Energy only;

(2013 Policy)

Particulars

- (a) Email Anthony Morgan to Ted Dore 13 May 2013.

6.11 says it informed BMG General that cover had been bound;

Particulars

(a) Email Ted Dore to Nicole Ralph 13 May 2013.

6.12 otherwise denies the paragraph.

7. As to paragraph 7, it:

7.1 denies that it owed a duty of care to BMG Aviation;

7.2 says that it was an implied term of the 2013 PID Retainer that PID would use reasonable skill, care and diligence as a wholesale insurance broker in:

7.2.1 seeking quotes on behalf of BMG General, based on the documents and information provided to it by BMG General; and/or

7.2.2 conveying BMG General's instructions to Dual;

7.3 otherwise denies the paragraph.

First Policy

8. As to paragraph 8, it:

8.1 says that on or about 10 May 2013, PID provided BMG General with a quotation for professional indemnity insurance to be placed with Dual on behalf of certain Underwriters at Lloyds;

8.2 refers to and repeats paragraph 6 above; and

8.3 otherwise denies the paragraph.

9. As to paragraph 9, it:

9.1 says that on or about 13 May 2013, BMG General provided PID with a completed proposal and instructed PID to bind cover as pleaded in paragraph 6.8 above ;

9.2 otherwise denies the allegation.

10. As to paragraph 10, it:

10.1 repeats paragraph 6.10 above;

10.2 otherwise admits the allegation.

11. As to paragraph 11, it admits the allegation.

Run-Off Policy

12. As to paragraph 12, it does not admit the allegation.

13. As to paragraph 13, it:

13.1 says it was retained by BMG Aviation to seek on its behalf terms from Dual for the renewal of the 2013 Policy providing run-off professional indemnity insurance for three years (**2014 PID Retainer**);

Particulars

(a) Email Shari Chatham to Ted Dore 11 April 2014.

(b) Email Blake Hanna to Ted Dore 22 April 2014.

13.2 says that in accordance with the terms of the 2014 PID Retainer, it sought a quote from Dual on 25 April 2014;

Particulars

(a) Email Ted Dore to Anthony Morgan 25 April 2014.

13.3 says that in accordance with the terms of the 2014 PID Retainer, on 8 May 2014 it received a quote from Dual, which it forwarded to BMG Aviation;

Particulars

(a) Email Anthony Morgan to Ted Dore 8 May 2014.

(b) Email Ted Dore to Blake Hanna 8 May 2014.

13.4 says on 8 May 2014, BMG Aviation instructed PID to seek Dual's agreement to extend the 2013 Policy for a period of 3 months rather than arrange run off cover;

Particulars

(a) Email Blake Hanna to Ted Dore 8 May 2014.

13.5 says it conveyed the instructions pleaded in paragraph 13.4 above to Dual, but the request was declined by Dual;

Particulars

(a) Email Ted Dore to Anthony Morgan 8 May 2014.

(b) Email Anthony Morgan to Ted Dore 8 May 2014.

13.6 says on 12 May 2014 it received a quote from Dual, which it forwarded to BMG Aviation in accordance with the terms of the 2014 PID Retainer;

Particulars

(a) Email Ted Dore to Anthony Morgan 12 May 2014.

(b) Email Anthony Morgan to Ted Dore 12 May 2014.

13.7 says that BMG Aviation next instructed PID to seek a quote from Dual on its behalf for the renewal of the 2013 Policy providing run-off professional indemnity insurance for 1 year with a sum insured of \$10 million, which it then did and conveyed to BMG Aviation;

Particulars

(a) Email Damian Hooper to Ted Dore 12 May 2014.

(b) Email Ted Dore to Anthony Morgan 12 May 2014.

(c) Email Anthony Morgan to Ted Dore 12 May 2014.

(d) Email Ted Dore to Anthony Morgan 12 May 2014.

13.8 says that also on 12 May 2014, BMG Aviation instructed it to obtain a 1 week extension of the 2013 Policy from Dual, which PID sought and obtained;

Particulars

(a) Email Blake Hanna to Ted Dore 12 May 2014.

(b) Email Ted Dore to Anthony Morgan 12 May 2014.

(c) Email Anthony Morgan to Ted Dore 12 May 2014.

(d) Email Ted Dore to Blake Hanna and Damian Hooper 12 May 2014.

13.9 says it was instructed by BMG Aviation to renew the 2013 Policy for a limit of \$20m for 3 years, which instructions PID conveyed to Dual in accordance with the terms of the 2014 PID Retainer;

Particulars

(a) Email Blake Hanna to Ted Dore 20 May 2014.

(b) Email Alyssa Wood to Anthony Morgan 20 May 2014.

13.10 says Dual bound cover as agent acting on behalf of certain Underwriters at Lloyds for a policy of professional indemnity run-off insurance identifying:

13.10.1 the policy number as P-PI/0/65274/14/F-9;

13.10.2 the period of cover as 13 May 2014 to 13 May 2017;

13.10.3 the business description as aerial surveying in connection with power lines for Endeavour Energy only;

(2014 Policy)

Particulars

(a) Email Anthony Morgan to Alyssa Wood 20 May 2014.

13.11 says it informed BMG Aviation that cover had been bound;

Particulars

(a) Email Alyssa Wood to Anthony Morgan 20 May 2014.

13.12 otherwise denies the allegation.

14. As to paragraph 14, it:

14.1 admits BMG Aviation provided to PID on 24 April 2014 a proposal form signed by Osborne on 24 April 2014 seeking renewal of the 2013 Policy;

14.2 says that the proposal form and cover email referred to in 14.1 above contained information including that:

14.2.1 Osborne was prime contractor for "the Endeavour Project" in 2013;

14.2.2 *"Covered under our PI policy was our major aerial inspection subcontractor, GeoDigital, and our ground inspection program (4 ground asset inspectors). \$20m limit"*;

14.2.3 Osborne was only seeking run-off cover;

14.3 otherwise denies the allegation.

15. As to paragraph 15, it:

15.1 repeats paragraphs 6 and 7 above and denies the alleged terms of the PI Retainer;

- 15.2 says the work performed by PID in 2014 was not referable to the alleged PI Retainer or the 2013 PID Retainer;
 - 15.3 denies the existence of the alleged further retainer incorporating the same terms and giving rise to the same duties as alleged in paragraph 7 above;
 - 15.4 repeats paragraph 13 above concerning the 2014 PID Retainer and says the matters pleaded in 13.2, 13.3 and 13.9 were in performance of the 2014 PID Retainer;
 - 15.5 denies it owed the alleged duty of care to BMG Aviation;
 - 15.6 in the alternative to paragraph 15.5 above, says that any duty owed by PID to BMG Aviation in the performance of the 2014 PID Retainer was to use reasonable skill, care and diligence as a wholesale insurance broker in:
 - 15.6.1 seeking quotes from Dual on behalf of BMG Aviation pursuant to the 2014 PID Retainer; and/or
 - 15.6.2 conveying BMG Aviation's instructions to Dual;
 - 15.7 otherwise does not admit the allegation.
16. As to paragraph 16, it admits BMG Aviation accepted the quote pleaded in paragraph 13.6 above on behalf of Osborne, causing the events pleaded in paragraph 13.10.
 17. As to paragraph 17, it admits the allegation.
 18. As to paragraph 18, it:
 - 18.1 repeats paragraph 6, 7, 15.2, 15.3, 15.4, 15.5 and 15.6 above;
 - 18.2 otherwise denies the allegation.
 19. As to paragraph 19, it:
 - 19.1 admits the matters pleaded in paragraphs 13, 14, 16 and 18 of the Second Cross-Claim;
 - 19.2 does not admit the matters pleaded in paragraphs 15 and 42 of the Second Cross-Claim.
 20. As to paragraph 20, it admits the allegation.

21. As to paragraph 21, it:
- 21.1 repeats paragraphs 5 and 12 above;
 - 21.2 otherwise does not admit the allegation.
22. As to paragraph 22, it:
- 22.1 repeats paragraph 6, 7, 15.2, 15.3, 15.4, 15.5 and 15.6 above;
 - 22.2 otherwise denies the allegation.
23. As to paragraph 23, it denies the allegation.
24. As to paragraph 24, it does not admit the allegation.
25. As to paragraph 25, it:
- 25.1 does not admit BMG Aviation suffered any loss and damage;
 - 25.2 denies PID caused BMG Aviation to suffer any loss and damage;
 - 25.3 relies upon the matters pleaded in paragraph 27 below as to the cause of BMG Aviation's alleged loss and damage.

FURTHER PLEADINGS OF THE CROSS-DEFENDANT

Section 50 of the *Civil Liability Act 2002* (NSW)

26. In further answer to the allegations made against it in the SCC, PID says that it acted in a manner widely accepted in Australia by peer professional opinion as competent professional practice and, accordingly, it has no liability pursuant to section 50 of the *Civil Liability Act 2002* (NSW) (CLA).

Contributory negligence

27. In further answer to the whole of the SCC, and in the alternative to the denials of liability pleaded in this defence, if BMG Aviation did suffer loss and damage as contented (which is not admitted), or at all, by reason of any wrongdoing on the part of PID (which is denied), then such loss or damage was suffered as a result of BMG Aviation's own conduct and failure to take reasonable care and any loss and damages BMG Aviation may recover from PID should be reduced by reason of its own contributory negligence, either at:
- 27.1 common law; and/or
 - 27.2 by reason of section 137B of the *Competition and Consumer Act 2010* (Cth); and/or

- 27.3 by reason of section 1041I of the *Corporations Act 2001* (Cth); and/or
 27.4 s.5R of the CLA.

Particulars

- (a) Failed to take adequate instructions from Osborne as to the work to be performed by Osborne under the PSBI Contract (as that term is defined in paragraph 10 of the Second Cross-Claim Statement of Cross-Claim filed on 27 October 2015).
- (b) Failed to obtain from Osborne a copy of the PSBI Contract and consider the work to be performed by Osborne under the PSBI Contract.
- (c) Failed to instruct PID to seek quotes and bind cover on the basis Osborne's professional business or business activity was "Power Line Inspection".
- (d) Failed to advise Osborne as to the suitability or otherwise of the 2013 Policy and 2014 Policy.
- (e) Failed to understand, or take steps to understand, the quote pleaded in paragraph 6.6 above, the quote pleaded in paragraph 13.6 above, the 2013 Policy and 2014 Policy.
- (f) Failed to seek advice or explanation about the quote pleaded in paragraph 6.6 above, the quote pleaded in paragraph 13.6 above, the 2013 Policy and 2014 Policy.
- (g) Failed to pay any, or any adequate, notice to PID's warning that it BMG Aviation should:
 - (i) read the 2013 Policy to ensure that cover is in accordance with BMG Aviation's and/or BMG General's and/or Osborne's requirements;
 - (ii) notify PID of any errors or omissions in the 2013 Policy.
- (h) failed to pay any, or any adequate, notice to PID's warning that it BMG Aviation and/or BMG General should:
 - (i) read the 2014 Policy to ensure that cover is in accordance with BMG Aviation's and/or Osborne's requirements;
 - (ii) notify PID of any errors or omissions in the 2014 Policy.

- (i) Failed to inform PID it had been informed by Osborne it was employing linesmen to inspect and record power pole defects.
- (j) Failed to inform PID it had been informed by Osborne its employed linesmen will carry out ground inspections of power poles.
- (k) Failed to inform PID that Osborne had been provided with a resume for John Sinton Gray, "linesman".
- (l) Failed to inform PID it had been informed by Osborne that John Grey's title was "Head Lineman".
- (m) Failed to inform PID the description of Osborne's business as "aerial surveying of power lines" was inaccurate or incomplete.
- (n) Failed to inform PID the description of Osborne's business as "aerial surveying in connection with power lines for Endeavour Energy only" was inaccurate or incomplete.
- (o) Further particulars may be provided following discovery and service of evidence.

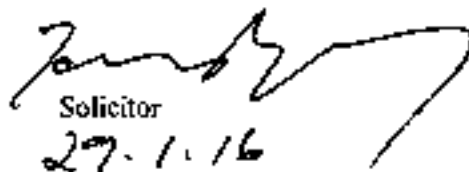
SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform 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
27.1.16

AFFIDAVIT VERIFYING

Name Paul Burton
 Address 2/3350 Pacific Highway, Springwood, Queensland
 Occupation Company director
 Date 22 January 2016

I say on oath:

- 1 • I am the managing director of the Cross-Defendant.
2. I believe that the allegations of fact 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 Brisbane

Signature of deponent P Burton

Name of witness MICHAEL CHARLES @ EAM

Address of witness 6C SUSSEX COURT CARINA HEIGHTS

Capacity of witness Justice of the peace OR Solicitor OR Barrister

And as a witness, I certify the following matters concerning the perwhmade thi affidav(the deponent)

- 1 • I saw the face of the deponent.
2. I have known the deponent for at least 12 months.

~~3. OR~~

I have confirmed the deponent's identity using the following identification document:

~~a current Australian driver's licence OR a current Australian passport OR a current credit card OR an original Australian birth certificate:~~

Signature of witness [Handwritten Signature]

Note The deponent and witness must sign each page of the affidavit See UCPR 35 7B