

DEFENCE

COURT DETAILS

Court	Supreme Court of New South Wales
Division	General
List	Common Law
Registry	Sydney
Case number	2017/00126664

TITLE OF PROCEEDINGS

Plaintiff	Margaret Ritchie
Defendant	Advanced Plumbing & Drains Pty Ltd ACN 142 633 350

FILING DETAILS

Filed for	Advanced Plumbing & Drains Pty Ltd ACN 142 633 350, Defendant
Legal representative	Allyson Mary Hogan, Namadgi Legal
Legal representative reference	AMH:20170092
Contact name and telephone	Allyson Mary Hogan – 0414 724 017

HEARING DETAILS

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

PLEADINGS AND PARTICULARS

1. As to paragraph 1 of the Statement of Claim dated 27 April 2017 (**the Claim**):
 - (a) the defendant admits that a fire (**the Fire**) started at 78 Brindabella Place, Carwoola, in the State of New South Wales (**the Property**) at around 11/11.30am (**the Relevant Time**) on 17 February 2017 (**the Relevant Date**); and
 - (b) the defendant does not admit that the Fire burnt over an area of approximately 3,500 hectares.
2. As to paragraph 2 of the Claim:
 - (a) the defendant admits that the plaintiff is and was at all material times the sole registered proprietor of the real property situated at 358 Widgiewa Road, Carwoola;

- (b) the defendant does not admit that the plaintiff's land (or any other real or personal property owned by the plaintiff) was damaged in the Carwoola bushfire as alleged in paragraph 2 of the Claim or at all.
3. The defendant does not admit the allegations contained in paragraph 3 of the Claim.
4. The defendant does not admit the allegations contained in paragraph 4 of the Claim.
5. (a) The defendant admits the allegation contained paragraph 5(a) of the Claim.
- (b) The defendant denies the allegation contained in paragraph 5(b) of the Claim and says that at all material times the defendant carried on business providing the following plumbing and plumbing-related services: commercial hydraulics; drains; and civil work.
6. The defendant admits that on the Relevant Date at the Property a Husqvarna K970 II Rescue (**the Quick Cut**), properly and securely fitted with a masonry cutting blade, was used to cut 3-bar 6mm steel mesh, but otherwise does not admit the allegations contained in paragraph 6 of the Claim.
7. The defendant does not admit the allegations contained in paragraph 7 of the Claim.
8. The defendant admits that it at all relevant times knew that the act of cutting 3-bar 6mm steel mesh with the subject Quick Cut, properly and securely fitted with a masonry cutting blade, would produce sparks, but otherwise denies the allegations contained in paragraph 8 of the Claim.
9. The defendant admits that it was reasonably foreseeable that using the Quick Cut, properly and securely fitted with a masonry cutting blade, to cut 3-bar 6mm steel mesh would produce sparks but otherwise denies the allegations contained in paragraph 9 of the Claim says further that neither it nor any of its workers are qualified to hold or express any opinion regarding the most likely behaviour or most likely consequences of any fire ignited anywhere in Carwoola by any cause or in any circumstance at any time.
10. The defendant denies the allegations contained in paragraph 10 of the Claim and says further that:
- (a) all members of the Class (as defined in paragraph 10 of the Claim) either knew or acting reasonably ought to have known that Carwoola is "bush fire prone land" (within the meaning of section 79BA of the *Environmental Planning and Assessment Act 1979* (NSW));
- (b) in the premises, it either was or ought to have been obvious to members of the Class (as defined in paragraph 10 of the Claim) that there was a risk that a bush fire may occur in Carwoola during February during any given year lit either on purpose or by accident or as a consequence of nature such as lightning strike;
- (c) it either was or ought to have been obvious to members of the Class (as defined in paragraph 10 of the Claim) that any bush fire lit in any circumstance in Carwoola during February during any given year may and probably would, if not promptly controlled or in the alternative promptly extinguished, cause property damage or personal injury or both;
- (d) a reasonable person in the position of members of the Class (as defined in paragraph 10 of the Claim) would take reasonable steps to:
- (i) minimise or reduce the risk of property damage due to bush fire;
- (ii) minimise or reduce the risk of personal injury due to bush fire; and

- (iii) minimise the personal and financial consequences of any such damage;
- (e) the reasonable steps referred to in paragraph 10(d) of this defence include:
- (i) creating and following a “bush fire survival plan”, and following other fire risk awareness and mitigation recommendations and tools made freely and publicly available by agencies such as the NSW Rural Fire Service and Fire and Rescue NSW;
 - (ii) becoming familiar with the requirements of and taking appropriate and reasonable steps to implement the recommendations contained in:
 - (A) the NSW Rural Fire Service publication *Planning for Bush Fire Protection 2006* (proscribed for the purposes of section 79BA of the *Environmental Planning and Assessment Act 1979* (NSW));
 - (B) Australian Standard 3959-2009 (Construction of buildings in bushfire-prone areas);
 - (iii) implementing minimal protection measures such as:
 - (A) basic ember proofing;
 - (B) regularly managing fuel loads (for example avoiding stockpiles of excess dry wood, removing dry leaf litter, carefully selecting vegetation and managing vegetation growth); and
 - (C) establishing Asset Protection Zones;
 - (iv) purchasing fire-fighting equipment (such as pumps and hoses to use with water tanks and other static water sources) and undertaking appropriate training regarding their use; and
 - (v) purchasing and maintaining insurance adequate to cover the full replacement value of any and all property (including without limitation private and business property, rural farm property, outbuildings, fences and livestock) which may potentially be damaged or injured in the event of bush fire.
11. The defendant does not admit the allegations contained in paragraph 11 of the Claim.
12. The defendant denies the allegations contained in paragraph 12 of the Claim.
13. (a) The defendant denies the allegations contained in paragraph 13(a) of the Claim and says further that:
- (i) neither the defendant nor any of its workers measured the temperature, level of humidity, wind direction, wind strength or vegetation moisture content at the Property on the Relevant Date at the Relevant Time or otherwise;
 - (ii) however, the workers who were at the Property on the Relevant Date have reported to the defendant a perception that:
 - (A) the temperature at the Relevant Time appeared to be around 25°C; and
 - (B) at the Relevant Time, there was no noticeable wind; and
 - (iii) at 9am on 17 February 2017, the temperature at Canberra Airport was 21.6°C with 38% relative humidity and a 6 km/h Southerly wind; and

Particulars

- (A) Bureau of Meteorology Daily Weather Observations from Canberra Airport station 070351. A copy of this document is available for inspection at the offices of the solicitors for the defendant.
- (iv) neither the defendant nor any of its workers are qualified to hold or express any opinion regarding whether the weather and/or fuel conditions at or in the vicinity of the Property on the Relevant Date were favourable for the ignition and spread of fire at the Relevant Time or otherwise.
- (b) As to paragraph 13(b) of the Claim, the defendant admits that the Commissioner of NSW Fire Service declared a total fire ban in the "Southern Ranges" district from 00:01 hours on the Relevant Date to 23:59 hours on the Relevant Date but says that the terms of the declaration did not prohibit essential building & construction work, or the use of spark generating tools such as the Quick Cut.

Particulars

- (i) NSW Government Gazette number 24 published on 17 February 2017, Schedule 14. A copy of this document is available for inspection at the offices of the solicitors for the defendant.
14. (a) The defendant denies the allegations contained in paragraph 14(a) of the Claim.
- (b) The defendant admits that at the Relevant Time on the Relevant Date the Quick Cut, properly and securely fitted with a masonry cutting blade, produced sparks when used to cut 3-bar 6mm steel mesh, but otherwise denies the allegations contained in paragraph 14(b) of the Claim.
- (c) The defendant denies the allegations contained in paragraph 14(c) of the Claim.
- (d) The defendant denies the allegations contained in paragraph 14(d) of the Claim.
15. The defendant denies the allegations contained in paragraph 15 of the Claim and in direct response to paragraph 15(a) says that:
- (a) there was a minimum of 15m of clear earth (dirt, and rock) between each place where the Quick Cut was used on the Property on the Relevant Date and any grass or other type of vegetation; and
 - (b) at the Property at the Relevant Time on the Relevant Date, the temperature appeared to the defendant's workers to be around approximately 25°C and there was no noticeable wind.
16. The defendant denies the allegations contained in paragraph 16 of the Claim and says further that at the Property on the Relevant Date, reasonable precautions were taken to identify, assess and manage fire risk associated with use of the Quick Cut.

Particulars

- (a) The defendant had in place a written, safe work method statement dealing with the safe use of power tools and fire risk associated with grinding work.

Particulars

- (i) Page 8 and 11 of the Safe Work Method Statement on "General Site Safety" approved by Tony Cappello. A copy of this document is available for inspection at the offices of the solicitors for the defendant.

- (b) On the Relevant Date, work at the Property was actively supervised by a suitably qualified and experienced civil foreperson (Mr Shannon Lindsay Orford).

Particulars

- (i) Mr Orford has approximately 20 years experience in the plumbing, building and construction industry.
- (ii) Mr Orford holds accreditations with Sydney Water in Sewer and Water, is licenced to drive heavy machinery and holds a "blue card" issued by the Queensland government.
- (iii) Mr Orford has used spark generating tools such as the subject Quick Cut regularly throughout his 20 years of industry experience to cut a variety of materials including 3-bar, 6mm steel mesh.
- (iv) Up to the Relevant Date, Mr Orford had used the subject Quick Cut in excess of 100 times in the course of his duties for the defendant.
- (c) Before the Quick Cut was first used at the Property on the Relevant Date, Mr Orford checked to ensure that:
- (i) the muffler of the Quick Cut was not visibly damaged;
- (ii) the first blade to be used on the Quick Cut was securely fitted and not visibly damaged; and
- (iii) the fuel cap for the Quick Cut was tight.
- (d) Further, from time to time on the Relevant Date, as work progressed, Mr Orford continued to check to ensure that:
- (i) the muffler of the Quick Cut was not visibly damaged;
- (ii) each blade to be used on the Quick Cut was at all times securely fitted and not visibly damaged;
- (iii) the fuel cap for the Quick Cut was tight;
- (iv) the Quick Cut was started more than 3m from the refuelling point;
- (v) other than the fuel inside the Quick Cut, there were no flammable gasses or liquids anywhere near the Quick Cut at any material time; and
- (vi) the Quick Cut was used no more than was reasonably necessary in order to complete the required work.
- (e) At all times when operating the Quick Cut:
- (i) Mr Orford ensured that there was a minimum of 15m of clear earth (dirt, and rock) between each place where the Quick Cut was used and any grass or other type of vegetation; and
- (ii) Mr Oford worked with his back facing away from the nearest grass so that the bulk of the sparks generated by use of the Quick Cut travelled towards the dirt and rock foundations of the house rather than towards any grass.
- (f) A 1000 Litre portable water tank, mounted to a trailer, was located on the Northern side of the site near a fully functional water tap.

- (g) Several vehicles fitted with towbars capable of towing the water tank trailer were on the Property at all times on the Relevant Date.
- (h) A 12 Tonne and a 6 Tonne excavator, each in good working order, were on the Property at all times on the Relevant Date.
- (i) As soon as the fire was spotted all workers at the Property reacted promptly to take all steps reasonably available to them to prevent the Fire from escaping the Property or in the alternative to control the Fire or in the alternative to extinguish the Fire.

Particulars

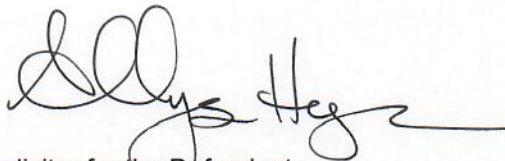
- (i) The 12 Tonne and 6 Tonne excavators were used to cut fire breaks on the Property around the perimeter of the Fire (to the South, East and West).
 - (ii) Mr Orford promptly called 000 to report the Fire and request urgent fire brigade support.
 - (iii) The trailer housing the 1000 Litre portable water tank was mounted to one of the nearby vehicles and the water in the tank was then used to attempt to extinguish the Fire along the Eastern front.
 - (iv) Later, after the Fire escaped the Property:
 - (A) the defendant's workers continued to use the same excavators to cut fire breaks on immediately neighbouring property; and
 - (B) Mr Jason Hooper (sole director of the defendant) who, as soon as he was informed by Mr Orford that the Fire had started left another of the defendant's work sites to travel to the Property, also continued to use the 1000 Litre portable water tank to attempt to extinguish the fire along the Eastern front.
17. The defendant denies the allegations contained in paragraph 17 of the Claim.
18. The defendant denies the allegations contained in paragraph 18 of the Claim.
19. The defendant denies the allegations contained in paragraph 19 of the Claim.
20. The defendant denies the allegations contained in paragraph 20 of the Claim.
21. The defendant does not admit the allegations contained in paragraph 21 of the Claim.
22. The defendant admits paragraph 22 of the Claim and says that the common questions of law or fact are also likely to include:
- (a) Whether the defendant is vicariously liable for the actions of Harrison William Elliott?
23. In further answer to the whole of the Claim the defendant says that:
- (a) Mr Orford and another person – Mr Harrison William Elliott – are charged with criminal offences relating to the Fire.
 - (b) Mr Orford was an employee of the defendant on the Relevant Date.
 - (c) Mr Elliott was not an employee of the defendant on the Relevant Date, and was present on the Property without Mr Hooper's prior knowledge or consent.
 - (d) The defendant understands that Mr Orford is charged with offences against ss. 99(6) and 100 (1)(a) of the *Rural Fires Act 1997* (NSW).

- (e) The defendant is not aware of the charges against Mr Elliott.
- (f) The defendant does not know how Mr Orford or Mr Elliott intend to plead to the charges. Mr Orford is independently represented, and Mr Elliott is self-represented.
- (g) The NSW State Coroner's Court has opened a file in anticipation of receipt of a police brief (file number is 2017/57857).
- (h) The Claim ought to be temporarily stayed pending resolution of the criminal charges against Mr Orford and Mr Elliott and/or completion of the coronial inquiry (*L & W Developments Pty Ltd v Della* [2003] NSWCA 140 and the authorities cited therein).

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* (NSW) 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 of Legal Representative



Capacity

Solicitor for the Defendant

Date of signature

1 September 2017

AFFIDAVIT VERIFYING

Name Jason Hooper
 Address 78 Knox Close, Carwoola NSW 2620
 Occupation Managing Director
 Date 1 September 2017

JA I affirm: *say on oath*

1. I am the sole director and secretary of the 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.

JA ~~SWORN~~
~~AFFIRMED~~ at

Canberra

Signature of deponent

JA Hooper

Name of witness

Allyson Mary Hogan

Address of witness

Level 4, London Circuit, Canberra ACT 2601

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 known the deponent for at least 12 months.

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

Signature of witness

Allyson Hogan

FURTHER DETAILS ABOUT DEFENDANT**Filing Party**

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Address Unit 9/157 - 161 Gladstone Street, Fyshwick, ACT 2609
Frequent User Identifier

Legal representative for filing party

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