

## DEFENCE TO FURTHER AMENDED STATEMENT OF CLAIM

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2016/169197

### TITLE OF PROCEEDINGS

Plaintiff	<b>Bernard King</b>
Defendant	<b>Liverpool City Council</b>

### FILING DETAILS

Filed for	<b>Liverpool City Council</b> , Defendant
Legal representative	Stephen Taylor-Jones, Moray & Agnew
Legal representative reference	STJ:370705 (PCN: 17638)
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Contact email	STaylor-Jones@moray.com.au

### HEARING DETAILS

6 March 2018

### PLEADINGS AND PARTICULARS

1. The defendant admits paragraph 1 of the Further Amended Statement of Claim.
2. The defendant admits paragraph 2 of the Further Amended Statement of Claim.
3. As to paragraph 3 of the Further Amended Statement of Claim the defendant:
  - (a) says that between 2008 and 2014 unauthorised dumping of waste by third parties had occurred at Newbridge Road and Rickard Road, Chipping Norton (**the unauthorised dumping**);
  - (b) says that in or about mid-2014, and in response to the unauthorised dumping, the defendant deposited material to create twelve mounds at the locations and in the dimensions identified in the map annexed hereto and marked 'A' (**the Mounds**) in order to prevent vehicles from accessing the area upon which the unauthorised dumping had previously occurred;
  - (c) says that the Mounds were comprised of silty clay, gravel, mulch, tile and/or concrete transported from one and/or two stockpiles (**the Tested Stockpiles**)

located at the defendant's Western Depot at Devonshire Road, Kemps Creek **(the Western Depot)**;

- (d) says that the defendant retained Geotechnique Pty Ltd (**Geotechnique**) to undertake an assessment of the Tested Stockpiles at the Western Depot to determine, *inter alia*, if the Tested Stockpiles contained asbestos;
  - (e) says that on 11 October 2013 and 28 March 2014 Geotechnique produced reports (**the Geotechnique Tested Stockpile Reports**) in relation to each of the respective Tested Stockpiles which stated that each of the Tested Stockpiles did not contain asbestos;
  - (f) says that the defendant relied upon the Geotechnique Tested Stockpile Reports to collect the material from the Tested Stockpiles, and thereafter deposit the material to create the Mounds at the relevant locations indicated in Annexure 'A'; and
  - (g) otherwise denies the allegations.
4. As to paragraph 4 of the Further Amended Statement of Claim the defendant:
- (a) denies that it deposited any material on the nature strip outside 5 Newbridge Road, Chipping Norton as alleged or at all;
  - (b) alternatively, repeats the matters pleaded in paragraph 3 above in relation to any Mound created by it at any location proximate to 5 Newbridge Road, Chipping Norton; and
  - (c) otherwise does not admit the allegations.
5. As to paragraph 5 of the Further Amended Statement of Claim the defendant:
- (a) denies that any Group Member sustained loss as alleged or at all;
  - (b) denies that any Group Member has suffered damage to property as alleged or at all; and
  - (c) otherwise does not admit the allegations.
6. The defendant does not know and cannot admit paragraph 6 of the Further Amended Statement of Claim.
7. The defendant admits paragraph 7 of the Further Amended Statement of Claim.
8. As to paragraph 8 of the Further Amended Statement of Claim the defendant:
- (a) As to sub-paragraph (a):
    - (i) admits that it was in control of, and responsible for, its servants and agents who created the Mounds in accordance with the matters pleaded in paragraph 3 above;
    - (ii) denies that it was in control of, or responsible for, any other person or persons who dumped any contaminated waste on the nature strips outside

the premises of the Group Members at Newbridge Road and Rickard Road, Chipping Norton; and

- (iii) otherwise does not admit the allegations.
- (b) As to sub-paragraph (b):
- (i) admits that it employed and/or controlled the work activities of its servants and agents who drove the vehicles and/or worked in the vehicles that carried the material from the Tested Stockpiles used to create the Mounds in accordance with the matters pleaded in paragraph 3 above;
  - (ii) denies that it employed and/or controlled the activities of any other persons driving vehicles that contained contaminated waste that was dumped on the nature strips outside the premises of the Group Members at Newbridge Road and Rickard Road, Chipping Norton; and
  - (iii) otherwise does not admit the allegations.
- (c) As to sub-paragraph (c):
- (i) repeats paragraphs 8(a) and 8(b) above;
  - (ii) denies that it directed any persons to dump any contaminated waste on the nature strips outside the premises of the Group Members at Rickard and Newbridge Roads, Chipping Norton; and
  - (iii) otherwise does not admit the allegations.
9. As to paragraph 9 of the Further Amended Statement of Claim the defendant:
- (a) admits that it had an entitlement to undertake the class of work identified in paragraph 9 of the Further Amended Statement of Claim; and
  - (b) says that it was ultimately responsible for all work of the class identified in paragraph 9 of the Further Amended Statement of Claim that it had authorised its servants or agents to undertake.
10. As to paragraph 10 of the Further Amended Statement of Claim the defendant:
- (a) denies that it was reasonably foreseeable that a significant risk of loss to real property would be created if the Mounds contained asbestos;
  - (b) denies that it was reasonably foreseeable that a significant risk of loss to personal property would be created if the Mounds contained asbestos;
  - (c) denies that it was reasonably foreseeable that a significant risk of physical damage to real property would be created if the Mounds contained asbestos;
  - (d) denies that it was reasonably foreseeable that a significant risk of physical damage to personal property would be created if the Mounds contained asbestos;

- (e) does not admit that it was reasonably foreseeable that a significant risk of vexation, worry, distress and inconvenience would be created if the Mounds contained asbestos;
  - (f) says, further, that to the extent that it is contended that any alleged vexation, worry, distress and inconvenience arose from the physical consequences of asbestos (as per paragraph 10 of the Further Amended Statement of Claim), such harm constitutes a form of personal injury within the meaning of section 11 of the *Dust Diseases Tribunal Act 1989* (NSW) such that by operation of s10(1) of the said Act the Dust Diseases Tribunal has exclusive jurisdiction to entertain any such claim;
  - (g) does not admit that it was reasonably foreseeable that a significant risk of economic loss due to the physical consequences of asbestos would be created if the Mounds contained asbestos; and
  - (h) otherwise denies the allegations.
11. As to paragraph 11 of the Further Amended Statement of Claim the defendant:
- (a) says that the plea in relation to "causative substantial losses in relation to resultant bank valuations/security issues of various lending institutions" is, without greater specificity, embarrassing;
  - (b) says that it was reasonably foreseeable that, depending on the nature and extent of contamination, the extent of any pre-existing contamination unrelated to any contamination arising from the Mounds (which is denied), the unauthorised dumping and the depositing of material contaminated with asbestos in and around the dwellings of the plaintiff and Group Members could result in a temporary or transient reduction in value of those dwellings until such time as any contamination is remediated;
  - (c) says, further, that any such temporary or transient reduction in value, absent any sale of the relevant property, would not be compensable in damages; and
  - (d) otherwise denies the allegations.
12. The defendant admits paragraph 12 of the Further Amended Statement of Claim.
13. As to paragraph 13 of the Further Amended Statement of Claim the defendant admits that it owed a duty of care to avoid or limit asbestos contamination and the risk of economic loss consequential to property damage and personal injury arising from the presence or exposure to asbestos dust and/or fibres from the Mounds.
14. As to paragraph 14 of the Further Amended Statement of Claim the defendant:
- (a) repeats the matters pleaded in paragraphs 10 and 11 above;
  - (b) says that, depending on the nature and extent of contamination in the Mounds, and the location of the Mounds by comparison to the adjacent properties, there

was a foreseeable risk that asbestos fibres might attach to adjacent land and buildings;

- (c) denies that there was a foreseeable risk that the values of adjacent buildings would be severely diminished and repeats the matters pleaded in paragraph 11 above;
  - (d) denies that there was any obligation to ensure that the Mounds were free from asbestos;
  - (e) says that the scope of the defendant's responsibility was to take reasonable steps to ensure that the Mounds were created from material that had been tested by a qualified and reputable entity, and that the defendant acted in accordance with the advice from that entity; and
  - (f) repeats the matters pleaded in paragraph 3 above and says that in the premises it took reasonable precautions against the risk of any harm occurring by reason of asbestos exposure.
15. As to paragraph 15 of the Further Amended Statement of Claim the defendant:
- (a) repeats the matters pleaded in paragraph 11 above; and
  - (b) in the premises, denies the allegation because the risk was insignificant.
16. As to paragraph 16 of the Further Amended Statement of Claim the defendant:
- (a) As to sub-paragraph (a), denies the allegation;
  - (b) As to sub-paragraph (b), denies the allegation;
  - (c) As to sub-paragraph (c):
    - (i) says that it arranged for inspection of the Mounds;
    - (ii) admits that it did so inspect and repeats the matters pleaded in paragraph 3 above; and
    - (iii) otherwise does not admit the allegations.
  - (d) As to sub-paragraph (d), denies the allegation.
17. As to paragraph 17 of the Further Amended Statement of Claim the defendant:
- (a) As to sub-paragraph (a):
    - (i) repeats the matters pleaded in paragraph 3 above;
    - (ii) in the premises:
      - (A) says that it had in place a system of inspection that identified asbestos dust and/or fibres in material that it intended to use on nature strips and other public places within the municipality; and
      - (B) otherwise denies the allegation.

- (b) As to sub-paragraph (b) denies that it had an obligation to ensure that all material deposited by it outside the relevant properties on Rickard Road and Newbridge Road, Chipping Norton was free of asbestos particles.
18. As to paragraph 18 of the Further Amended Statement of Claim the defendant:
- (a) says that on 16 June 2015 chrysotile asbestos was detected on the surface of the verandah of the plaintiff's residence;
  - (b) says that on about 27 April 2015 amosite asbestos was detected on the Mound identified as 'Stockpile 1' in Annexure 'A';
  - (c) says that no asbestos was detected on the other Mounds identified in Annexure 'A';
  - (d) does not admit that the contamination detected at the plaintiff's residence emanated from any of the Mounds;
  - (e) does not admit that asbestos has been detected at any of the premises of the Group Members identified in Annexure 'A' to the Further Amended Statement of Claim; and
  - (f) otherwise denies the allegation.
19. As to paragraph 19 of the Further Amended Statement of Claim the defendant:
- (a) denies the allegations;
  - (b) repeats the matters pleaded in paragraph 10(f) above;
  - (c) says that, further or in the alternative:
    - (i) to the extent that any vexation, worry, distress and inconvenience was caused by the presence of any asbestos particles in the Mounds, the recovery of damages for that form of injury is regulated by Part 2 of the *Civil Liability Act 2002* (NSW);
    - (ii) any loss arising therefrom is below the threshold identified in section 16 of the *Civil Liability Act 2002* (NSW); and
    - (iii) in the premises no damages are recoverable for vexation, worry, distress and inconvenience.

20. In further answer to paragraph 19 of the Further Amended Statement of Claim, the defendant says that if (which is denied) the plaintiff or Group Members suffered loss or damage by reason of the propinquity of asbestos particles on or around their respective properties, they failed to mitigate such loss or damage.

**Particulars**

The plaintiff and Group Members unreasonably failed to protect their interests, including their interests in property by:

- (a) raising timely complaint about the presence of asbestos particles in or near the properties they owned or occupied;
  - (b) undertaking remediation works to remove the presence of asbestos particles, and thereafter seeking reimbursement from the defendant for the cost; and
  - (c) requesting that the defendant itself undertake remediation works at its cost.
21. As to paragraph 20 of the Further Amended Statement of Claim, the defendant:
- (a) denies the allegations;
  - (b) denies that there was any interference, or unreasonable interference with the enjoyment of land by the plaintiff or Group Members;
  - (c) says that in the absence of establishing actual damage to the plaintiff and Group Members, no action lies against the defendant in nuisance; and
  - (d) says, further, that to the extent that there was any interference with the enjoyment of land, the defendant is not liable for damages to such interference as has been acquiesced in by Group Members.
22. As to paragraph 21 of the Further Amended Statement of Claim the defendant:
- (a) denies the allegation;
  - (b) says, further, that on 3 June 2015, 4 June 2015, 9 June 2015 and 26 June 2015 the Mounds were removed by three qualified subcontractors retained by or on behalf of the defendant; and
  - (c) says that no asbestos remained (if, as is denied, it ever existed) in Lot 64-74, Lot 49-53, and Lot 46-55 Rickard Road after the removal pleaded above.
23. The defendant denies paragraph 22 of the Further Amended Statement of Claim.
24. The defendant denies paragraph 23 of the Further Amended Statement of Claim.
25. In further answer to paragraphs 20-23 of the Further Amended Statement of Claim the defendant:
- (a) says that in the absence of establishing negligence against the defendant, no action lies against the defendant in nuisance; and

- (b) alternatively, says that the circumstances in which the defendant discharged its duty of care also rendered the conduct of the defendant reasonable in response to any nuisance.
26. Further, and in answer to the whole of the Further Amended Statement of Claim, the defendant:
- (a) says that the creation of the Mounds on or near land or property owned or occupied by the plaintiff and Group Members was performed pursuant to functions required to be exercised by the defendant;
- (b) says that its aforesaid reliance upon the Geotechnique Tested Stockpiles Reports and omission to conduct its own testing and/or monitoring of the condition of the Mounds after their creation is appropriate in the light of the scarce financial resources available to the defendant; and
- (c) in the premises, such conduct:
- (i) is not open to challenge pursuant to s42 of the *Civil Liability Act 2002* (NSW);
- (ii) constituted a discharge of the duty of care and; and
- (iii) constituted reasonable steps in the elimination of any nuisance.
27. Further, and/or alternatively, in answer to the whole of the Further Amended Statement of Claim the defendant:
- (a) says that each of the claims made against it by the plaintiff, and Group Members, is a claim for damage to property, or economic loss, and is an apportionable claim pursuant to s34(1) of the *Civil Liability 2002* (NSW), as each respective claim arises from a failure by the defendant to take reasonable care; and
- (b) says that the defendant's liability (which is denied) is limited by s35 of that Act to that which the Court considers is just, having regard to the extent of the defendant's responsibility for the loss or damage.

#### **Particulars**

- (i) The Tested Stockpiles used to create the Mounds were contained at the Western Depot;
- (ii) Prior to use of the Tested Stockpiles the defendant retained Geotechnique to undertake assessment to determine if the Tested Stockpiles were appropriately classified as Excavated Natural Material and to provide recommendations on reuse of the material;
- (iii) In a report dated 11 October 2013 Geotechnique advised that the material qualified as Excavated Natural Material and could be applied to land as engineering fill or used in earthworks including civil work such as creation of the Mounds;



- (iv) In a report dated 28 March 2014 Geotechnique advised that the material qualified as Excavated Natural Material and could be applied to land as engineering fill or used in earthworks including civil work such as creation of the Mounds;
- (v) The said advice was conduct by Geotechnique in trade or commerce;
- (vi) If (which is denied), any, or all or part of the Mounds created in proximity to the land or properties occupied by the plaintiff or Group Members was affected by sufficient asbestos particles so as to cause loss or damage to the land, or properties, or other loss to the plaintiff and Group Members, then the said advice was misleading or deceptive, or likely to mislead or deceive;
- (vii) But for the said advice, the defendant would not have collated and sourced from the Tested Stockpiles the material for creation of the Mounds in the vicinity of the land or properties of the plaintiff and Group Members;
- (viii) Further, if (which is denied), the plaintiff and/or Group Members suffered loss or damage caused by the defendant's responsibility for the condition of the Mounds created in proximity to their respective land, or properties, then such loss or damage was caused by the misleading or deceptive conduct of Geotechnique; and
- (ix) In the premises, Geotechnique is a concurrent wrongdoer for the purposes of s 34(2) of the *Civil Liability Act 2002* (NSW).

#### **Common Questions**

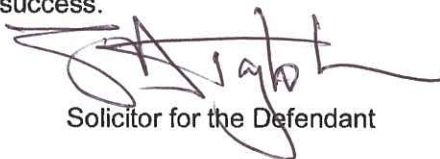
1. What was the scope, or content, of the duty of care owed by the defendant to the plaintiff and Group Members?
2. What, if any, precautions did the defendant take in order to determine whether the Mounds created in proximity to the properties owned or occupied by the plaintiff and Group Members comprised asbestos particles?
3. Were such precautions reasonable?
4. Was the defendant's conduct attributable to the exercise of statutory powers, or functions and, if so, the relevance of that circumstance or circumstances to the question of whether the defendant breached its duty of care?
5. Whether, and if so how, the defendant breached its duty of care;
6. Whether by reason of the exercise, or failure to exercise, statutory powers or functions, the defendant was, in the absence of any negligence, immune from liability in nuisance;
7. Whether the defendant is liable in nuisance in the absence of:
  - (a) any actual damage to the plaintiff or Group Members; and/or
  - (b) any complaint of damage by the plaintiff or Group Members.

8. Whether vexation, worry, distress or inconvenience is a form of 'personal injury' regulated by Part 2 of the *Civil Liability Act 2002* (NSW);
9. Whether a fall in value in real property is compensable as a head of damage in the absence of sale of the said property;
10. Whether the claim for damages in nuisance, as pleaded, is an 'apportionable claim' within the meaning of s 34(1) of the *Civil Liability Act 2002* (NSW); and
11. Whether Geotechnique is, by reason of its alleged conduct, a 'concurrent wrongdoer' within the meaning of s 34(2) of the *Civil Liability Act 2002* (NSW).

**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 of legal representative



Solicitor for the Defendant

Capacity

Date of signature

10 March 2017


**AFFIDAVIT VERIFYING**

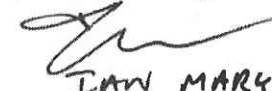
Name Christopher Gary White  
Address 33 Moore Street, Liverpool NSW 2170  
Occupation General Counsel  
Date 9 MARCH 2017

I say on oath:

1. I am the General Counsel – Manager, Legal Services & Procurement of Liverpool City Council.
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 LIVERPOOL

Signature of deponent 

Signature of witness 

Name of witness IAN MARK CAEY

Address of witness 33 Moore St Liverpool

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 [~~or, delete whichever option is inapplicable~~]  
~~# I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.\*~~

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

2. # I have known the deponent for at least 12 months [*or, delete whichever option is inapplicable*]  
~~# I have confirmed the deponent's identity using the following identification document:~~

~~Identification document relied on (may be original or certified copy)<sup>†</sup>~~

Signature of witness



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

<sup>†</sup> "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.

**FURTHER DETAILS ABOUT FILING PARTY****Filing party**

Name Liverpool City Council  
Address Level 6, 33 Moore Street, LIVERPOOL NSW 2170

**Legal representative for filing party**

Name Stephen Taylor-Jones  
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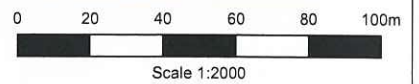
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**LEGEND**

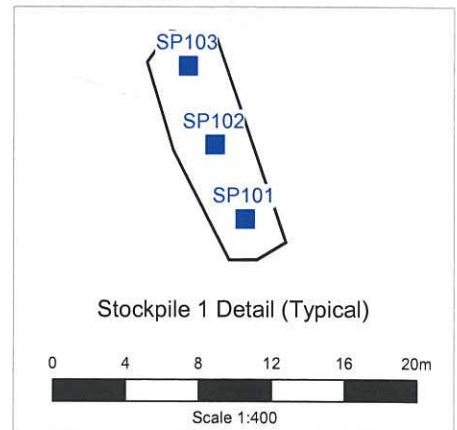
■ Test Pit

Imagery ©2015 NearMap.com



Stockpile No.	Estimated Base Area (m <sup>2</sup> )	Estimated Height (m)	Average Height (m)	Estimated Volume (m <sup>3</sup> ) *
1	49	0.6	-	15
2	32	0.4-0.6	0.5	8
3	28	0.3-0.9	0.6	8
4	32	0.7-1.0	0.9	14
5	41	0.5-0.6	0.6	11
6	21	0.6	-	6
7	31	0.6	-	9
8	40	0.5	-	10
9	43	0.5	-	11
10	37	0.5	-	9
11	31	0.5	-	8
12	32	0.5	-	8

\* Estimated Volume = (Estimated Base Area X Estimated / Average Height) X 0.5



PREPARED BY:



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Liverpool City Council  
 Rickard Road  
 Chipping Norton

Drawing No: 13458/1-AA1  
 Job No: 13458/1  
 Drawn By: MH  
 Date: 22 May 2015  
 Checked By: JX

Stockpile & Test Pit Locations

File No: 13458-1  
 Layers: 0, AA1