

REPLY

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Representative Proceedings
Registry	Sydney
Case number	2018/263841

TITLE OF PROCEEDINGS

Plaintiff	Rosa Maria Colagrossi
Defendant	Transport for New South Wales

FILING DETAILS

Filed for	Rosa Maria Colagrossi, Plaintiff
Legal representative	Rick Mitry, Mitry Lawyers
Legal representative reference	RM:13137
Contact name and telephone	Amanda Charchar (02) 9222 2833
Contact email	amanda.charchar@mitry.com.au

PLEADINGS AND PARTICULARS

Save insofar as it contains admissions, the Plaintiff joins issue with the matters pleaded in the Defence to the Amended Statement of Claim (**Defence**) and further pleads as follows (adopting the terms defined in the Defence and in the Amended Statement of Claim (**ASOC**)):

No Public Nuisance

- 1 In reply to paragraphs 21A to 21J of the Defence, the Plaintiff says that:
 - (a) section 144C(2) of the Roads Act provides, *inter alia*, that the provisions of the Roads Act apply to the granting of any consent or approval by the RMS under section 144C as if the relevant roads authority were the RMS;
 - (b) Part 9, Division 3 of the Roads Act applies to, *inter alia*, the granting of consent by a roads authority to the erection of a structure or the carrying out of a work in, on or over a public road, and to the digging up or disturbing the surface of a public road (see section 138(1)(a) and (b) of the Roads Act);
 - (c) section 141 of the Roads Act provides that the taking of action pursuant to a consent granted under Part 9, Division 3 of the Roads Act is taken not to constitute a public nuisance if the action is taken in accordance with the consent;
 - (d) in the premises, the carrying of the Works will only be taken, by reason of section 141 of the Roads Act, not to constitute a Public Nuisance if the Works were carried out in accordance with the RMS Approval;
 - (e) the RMS Approval required that, *inter alia* (all capitalised terms being as defined in the RMS Approval):
 - (i) the Defendant develop, design and construct the Works in accordance with law, including in compliance with the Consent Conditions (Schedule 3, clause 1(a));
 - (ii) the Defendant develop, design and construct the Works in a manner which appropriately manages impacts on road users, the Affected Roads and the effective operation and maintenance of the road network (Schedule 3, clause 1(c));
 - (iii) the Defendant ensure that the Relevant Design Documentation complies with the requirements of the Consent Conditions, and is fit for its intended purpose (Schedule 3, clause 16);

- (iv) the Defendant ensure that the design and specification of the Works are performed with due skill, care and diligence (Schedule 3, clause 18);
 - (v) the Defendant ensure that the Applicant's Activities and the Works are carried out and constructed in full compliance at all time with, *inter alia*, applicable laws and the conditions of all Approvals, including the Consent Conditions (Schedule 3, clauses 34(c) and (e));
 - (vi) the Defendant must, in constructing the Works, ensure that the welfare of all people, including members of the public and road users, who may be affected by the Works or the Defendant's undertaking of the Works is maintained (Schedule 3, clause 35(e));
 - (vii) the Defendant carry out the Applicant's Activities with professional skill and care consistent with best industry practice (Schedule 4, clause 9(a));
 - (viii) the Defendant carry out the Applicant's Activities with due diligence so that construction is completed as soon as reasonably practicable (Schedule 4, clause 9(b));
 - (ix) the Defendant carry out the Applicant's Activities so as to minimise obstruction and inconvenience to the public (Schedule 4, clause 9(f));
 - (x) the Defendant carry out the Applicant's Activities so as to minimise disruption to road using public at all times (Schedule 4, clause 9(g));
 - (xi) the Defendant carry out the Applicant's Activities so as to maintain access to affected properties and land (Schedule 4, clause 9(h))
- (collectively, the **Relevant Conditions**);
- (f) the Defendant has not complied with one or more of the Relevant Conditions;

Particulars

- (i) Paragraphs 12A to 15 of the ASOC are repeated.
 - (ii) Further particulars may be provided following discovery and evidence.
- (g) in the premises, the Works have not been carried out in accordance with the RMS Approval and are not taken not to constitute a public nuisance by reason of section 141 of the Roads Act; and

- (h) the granting of the RMS Approval under the Roads Act does not curtail the public's right of passage on public roads other than by reason of section 141 of the Roads Act.

Statutory Authority

2 In reply to paragraphs 21K to 21S of the Defence, the Plaintiff says that:

- (a) authorisation to develop the Project, within the meaning of the TAA is conferred on the Defendant by section 104O of the TAA in terms which do not precisely define the work to be done;
- (b) in the premises, the Project, and any nuisance caused by it, is only to be considered the inevitable consequence of the Defendant's statutory power to develop the Project if the Defendant demonstrates that:
 - (i) the work done was reasonably necessary;
 - (ii) the work done was properly performed in all respects; and
 - (iii) there was, in light of the scientific knowledge then available at the time of carrying out the work, no reasonable way in which the development of the Project could have been achieved without causing the damage resulting from that development;
- (c) the matters set out in sub-paragraphs (b)(i) to (iii) above are not admitted;
- (d) the work done by the Defendant in developing the Project was not properly performed in all respects; and

Particulars

- (i) Paragraphs 12A to 15 of the ASOC are repeated.
- (ii) Further particulars may be provided following discovery and evidence.
- (e) the nuisance complained of in the ASOC was not the inevitable consequence of the Defendant's statutory power to develop the Project.

Public Authority

3 In reply to paragraph 21T of the Defence, the Plaintiff says that:

- (a) section 42 of the CLA applies only in determining whether a public or other authority has a duty of care or has breached a duty of care;
- (b) these proceedings do not concern whether the Defendant has a duty of care or has breached a duty of care; and

- (c) in the premises, section 42 of the CLA has no application to these proceedings.

Special Statutory Power

4 In reply to paragraph 21U of the Defence, the Plaintiff says that:

- (a) the manner in which the Defendant has developed out the Project is, in the circumstances, so unreasonable that no authority having the power to develop the Project under section 104O of the TAA could properly consider the development of the Project to be a reasonable exercise of its power; and

Particulars

- (i) Paragraphs 12A to 15 of the ASOC are repeated.
- (ii) Further particulars may be provided following discovery and evidence.
- (b) in the premises, section 43A does not prevent civil liability arising in respect of the Defendant's development of the Project.

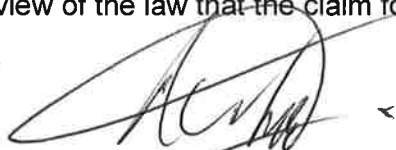
SIGNATURE OF LEGAL REPRESENTATIVE

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 claim for damages in this reply has reasonable prospects of success.

Signature

Capacity

Date of signature


Solicitor on record
6/12/18

AFFIDAVIT VERIFYING

Name Rick Mitry
 Address 1/167 Castlereagh St Sydney NSW 2000
 Occupation Solicitor
 Date 6 December 2018

I say on oath:

- 1 I am the solicitor on record for the Plaintiff.
- 2 I believe that the allegations of fact contained in the reply are true.
- 3 I believe that the allegations of fact that are denied in the reply are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the reply are true.

SWORN at

Signature of deponent

Name of witness

Address of witness

Capacity of witness

Sydney 

Amanda Kharchen


1/167 Castlereagh St Sydney NSW 2000

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.

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.]