

DEFENCE

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	General
Registry	Sydney
Case number	2014/148790

FILED

19 JUN 2015



TITLE OF PROCEEDINGS

Plaintiff	Sean Johnston
First defendant	Endeavour Energy (ABN 59 253 130 878)
Second defendant	Osborne Aviation Services Pty Ltd (ACN 072 380 226)

FILING DETAILS

Filed for	Second defendant
Legal representative	Robert Patrick Higgins by his Partner Carroll & O'Dea Lawyers ABN 70 355 352 183 Level 18, 111 Elizabeth Street SYDNEY NSW 2000 DX 183 SYDNEY Tel (02)9291 7100 Fax (02)9221 1117 Email cod@codea.com.au
Legal representative reference	AOD LJP 150898
Contact name and telephone	Lara Piercy 9291 7189

PLEADINGS AND PARTICULARS

The Second Defendant ("Osborne") pleads as follows in answer to the Second Further Amended Statement of Claim filed on 6 March 2015

- 1 Osborne admits paragraphs 1, 2, 7A, 8, 9, 10, 11, 12 and 25F
- 2 Osborne does not admit paragraphs 4, 5, 7, 14, 15, 16, 17, 22, 23, 24, 24A, 24B, 24C, 24D, 24E, 24F, 25, 25A, 25B, 25C, 25D, 25E, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 40, 41, 42, 43, 44, 45, 46, and 48
- 3 Osborne denies paragraphs 31B, 31D, 33A, 38, 39 and 47

4. In response to paragraph 3, Osborne admits there was a fire in the Springwood and Winmalee areas from 17 October 2013 ("**the fire**") but otherwise does not admit that paragraph.
5. Osborne admits paragraph 6 save that the First Defendant ("**Endeavour Energy**") is an energy distributor and not an electricity distributor within the meaning of the *Energy Services Corporation Act 1995*. Osborne further says that the First Defendant is a network operator for the purpose of the *Electricity Supply Act 1995* and *Electricity Supply (Safety and Network Management) Regulation 2008* with statutory duties under the Act and Regulations.
6. Osborne admits paragraph 13.1 but otherwise does not admit paragraph 13.
7. As to paragraph 20, Osborne:
 - (a) admits that Linksvie Road Springwood contained large numbers of trees, and that one such tree was an acacia located on private land bordering 108 Linksvie Road in the vicinity of pole JU 267 on map U55675; and
 - (b) otherwise does not admit the paragraph.
8. As to paragraph 21, Osborne:
 - (a) admits paragraph 21.1 on the basis that "conductors" means street lines only;
 - (b) otherwise does not admit paragraph 21.
9. In response to paragraph 25G, Osborne:
 - (a) admits paragraph 25G.1 and 25G.4;
 - (b) denies 25G.2 and 25G.3;
 - (c) denies that the Osborne Contract included, as Policies or otherwise, MMI-0001, or MMI-0031 (or MM I-0013 if that is intended by the reference to MMI-0031); and
 - (d) makes the further response in paragraph 10 below.
10. In further answer to paragraph 25G, Osborne says:
 - (a) The services that Osborne was required to perform pursuant to the Osborne Contract were those set out or contemplated in the Specification following requests by Endeavour Energy from time to time for it to supply those services (clause 4.1(a) of the Contract, and Schedule 2).
 - (b) The Specification required the ground and air inspections to be undertaken by Osborne to identify 'Defects' (as provided in the scope of works pleaded

below) that could cause the ignition of a bushfire and notify defects on the networks owned by Endeavour or owned privately to Endeavour Energy (clause 3.0).

- (c) The scope of works was set out in clause 5 of the Specification.
- (d) The scope of works included a requirement to conduct ground line patrols so as to identify, classify, prioritise, photograph, record and report 'Defects' on Company and private poles and lines which could lead to the ignition of a bushfire (Clause 5.4 of the Specification).
- (e) The requirement for inspection was "a visual inspection of the pole top and hardware, conductors and vegetation encroachment to identify 'Defects' as detailed" in the Specification. There was no requirement to inspect vegetation that did not encroach on the poles and lines.
- (f) The Osborne Contract specified that the identification of 'Defects' for the purposes of the Osborne Contract (described as PSBI Defect identification) would be the subject of instruction at an induction (clause 13.0).
- (g) On 13 May 2013 at the induction conducted pursuant to clause 13.0, employees and contractors of Osborne were instructed as to the 'Defects' for the purposes of the Osborne Contract in the following manner:
 - (i) They were provided with WNV 1012 Pre-Summer Bushfire Map Patrols, Inspections and Defect Reporting (Amendment 8) ("**WNV 1012**").
 - (ii) They were given an oral presentation which included reference to the tables which are Annexures C, D and E to WNV 1012 and given an oral presentation accompanied by a slide presentation of photographic samples of the assets to inspect and the defects to report.
 - (iii) There was no reference in either the oral presentation or the documents provided to any need for Osborne to identify defects relating to vegetation otherwise than for vegetation in the minimum safety clearances specified in Annexure E of WNV 1012.
 - (iv) Specifically, no instruction was given concerning "hazardous trees".
- (h) Further, or in the alternative, the obligations on Osborne in the Osborne Contract were subject to any reasonable direction given to Osborne by Endeavour Energy pursuant to clause 5.1a(4) of the Osborne Contract.

- (i) "Directions" to Osborne by Endeavour Energy pursuant to clause 5.1a(4) of the Osborne Contract included:
 - (i) The instructions given at the induction, pleaded above; and
 - (ii) The delivery by email to John Osborne on 20 May 2013 of the Endeavour Energy Pole and Line Inspection Defect Prioritisation Photo Handbook dated January 2013 (41 pages).
- G) In the premises the 'Defects' for the purposes of the Osborne Contract did not include any defect in relation to vegetation, except for "Trees into Mains" or "Insufficient Clearances between mains and trees" and did not include any requirement in respect of hazardous trees.
- (k) In the alternative to the foregoing contentions, the content of the requirement (which is not admitted) to identify as a defect "hazardous trees" was not express in the Osborne Contract.
- (l) The Osborne Contract required Osborne to inspect in a period of approximately three months approximately 100,000 poles from the air and approximately 50,000 poles from the ground.
- (m) Ground inspection was only required where air inspection could not be performed (clause 5.4 of the Specification).
- (n) The key personnel for the performance of the services were identified in schedule 5 of the Osborne Contract, their qualifications and experience having been provided to Endeavour Energy. None of those personnel had or were represented to have any arboreal expertise or experience.
- (o) In the course of negotiations preceding the Osborne Contract, Osborne offered to supply at additional cost, additional services, described as "Value Added Options" including a service described as "fall-in tree analysis" which would have identified all trees which, if they fell, would make contact with network assets, and "tree health analysis" which would have used infra-red analysis to identify dead trees. Endeavour Energy did not accept the offer of those additional services.

Particulars

Technical Proposal Endeavour Energy Pre-Summer Bushfire Inspection Program (PSBI) Alternative Quote 16 December 2012, Appendix E.

- (p) In the premises the meaning of "hazardous trees" in the Osborne Contract was a tree that could be observed, in a short period of time, by a person with

no arboreal expertise or experience conducting an inspection of the conditions on the network owned by Endeavour Energy or a privately owned network from the cabin of a helicopter or motor vehicle, to be hazardous.

11. In response to paragraph 29 Osborne:
 - (a) admits that on or about 30 July 2013 it did a ground line inspection pursuant to the Osborne Contract of networks owned by Endeavour and privately owned networks in the vicinity of pole JU 267 in Linksvie Road, Springwood;
 - (b) admits paragraphs 29.2 and 29.3; and
 - (c) otherwise does not admit the paragraph.
12. In response to paragraph 30, Osborne:
 - (a) refers to paragraph 10 above;
 - (b) says that the pleaded condition of the Tree (which is not admitted) could not be observed, in a short period of time, by a person with no arboreal expertise or experience conducting an inspection of conditions on the network owned by Endeavour Energy or a privately owned network from the cabin of a helicopter or motor vehicle, to be hazardous;
 - (c) denies that the Osborne Contract required Osborne to identify the Tree as hazardous or otherwise report the Tree to Endeavour Energy; and
 - (d) otherwise does not admit the paragraph.
13. In response to paragraph 30A Osborne:
 - (a) denies the paragraph insofar as the allegations are addressed to Osborne; and
 - (b) otherwise does not admit the allegations in paragraph 30A.
14. In response to paragraph 31A, Osborne:
 - (a) admits that it was aware of the matter in paragraph 13.1; and
 - (b) otherwise denies the paragraph.
15. In response to paragraph 31C, Osborne:
 - (a) denies any duty of care to the Plaintiff and Group members;
 - (b) says that, in the alternative, the content of any such duty of care could only be to undertake the requirements of the Osborne Contract with reasonable care;

- (c) refers to paragraph 10 above for the requirements of the Osborne Contract; and
- (d) otherwise does not admit the paragraph.

Proportionate Liability

16. If, contrary to the foregoing, Osborne is liable to the Plaintiff or Group members as alleged in the Second Further Amended Statement of Claim, then for the purpose of pleading a proportionate liability defence only, Osborne repeats without admission the allegations made by the Plaintiff against Endeavour in the Second Further Amended Statement of Claim at paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 17, 20, 21, 22, 23, 24, 24A, 24B, 24C, 24D.2, 24F, 25, 25A, 25B, 25C, 25D, 25E, 26, 27, 28, 30, 30A, 31, 32, 33, 34, 35, 36, 37, 39.1, 40, 42, 43, 44, 45, 46, and 47.1.
17. In addition to the duties in the statement of claim, Endeavour owed a non-delegable duty to the plaintiffs and the group members to implement its Network Management Plan and MMI-0001 and MMI-0013.

Particulars

Electricity Supply (Safety and Network Management) Regulation 2008 Regulations 8 and 12 and Endeavour Energy Network Management Plan 2011 Chapter 4 [3.2]

18. If the allegations in the statement of claim are correct, then the first and second defendants are liable for the same loss or damage;
19. In the premises:
 - (a) the claims made by the Plaintiff and Group Members against Osborne is an apportionable claim for the purpose of s 34 of the *Civil Liability Act 2002*
 - (b) Endeavour Energy is a concurrent wrongdoer in relation to the plaintiffs' claims against Osborne; and
 - (c) Pursuant to s 35 of the *Civil Liability Act 2002*, the liability of Osborne is limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just having regard to the extent of Osborne's responsibility for the loss and damage.

SIGNATURE OF **LEGAL** REPRESENTATIVE

I certify under section 347 of the Legal Profession Act 2004 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

Handwritten signature in black ink that reads "R. Higgins Lythe Hartner". The signature is written in a cursive style with a large initial "R".

Capacity

Solicitor for the second defendant

Date of signature

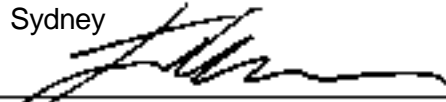
19 JUNE 2015

AFFIDAVIT VERIFYING

Name John Osborne
 Address RA 21534 Bass Highway
 STANLEY TAS 7331
 Occupation CEO
 Date 19 June 2015

I say on oath:

- 1 I am the CEO of the Second Defendant, Osborne Aviation Services Pty Ltd.
- 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 Sydney
 Signature of deponent 
 Name of witness Lara Jane Piercy
 Address of witness Level 18, 111 Elizabeth Street, 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:

NSW Driver Licence # 21221183

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.]