

DEFENCE TO AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial List (Class Actions)
Registry	Supreme Court Sydney
Case number	2019/00101980

TITLE OF PROCEEDINGS

Plaintiff	Greenshades Pastoral Co Pty Ltd ACN 003951933
Defendant	Hardi Australia Pty Ltd ACN 076150617

FILING DETAILS

Filed for	Hardi Australia Pty Ltd ACN 076 150 617, Defendant
Legal representative	James Kearney, MinterEllison
Legal representative reference	1215840
Contact name and telephone	James Kearney (08) 8233 5685
Contact email	james.kearney@minterellison.com

HEARING DETAILS

The matter has been listed for Directions (Commercial List) at Supreme Court Sydney on 28 February 2020 at 9.45 am.

COMMON QUESTIONS, PLEADINGS AND PARTICULARS

In response to the Statement of Claim (**Claim**), the Defendant denies that the Plaintiff is entitled to the relief sought against the Defendant. The Defendant denies that the Group Members are entitled to the relief sought against the Defendant. The Defendant further responds as follows:

A. COMMON QUESTIONS

The Defendant denies that the asserted common questions of law or fact arise and further says that the Claim, as presently pleaded, does not permit ascertainment of common questions.

B. PLEADINGS

The Proceedings and the Parties

1. In answer to paragraph 1 of the Claim, the Defendant:
 - (a) says that the Plaintiff does not bring a claim in respect of, or arising out of, the same, similar or related circumstances as those of the purported Group Members;
 - (b) otherwise does not know and cannot admit paragraph 1 of the Claim.
2. The Defendant denies paragraph 2 of the Claim.
3. In answer to paragraph 3 of the Claim, the Defendant denies any negligence or contravention of the Australian Consumer Law.
4. In answer to paragraph 4 of the Claim, the Defendant denies that the Plaintiff or any Group Member is entitled to the relief sought, or to any relief.
5. In answer to paragraph 5 of the Claim, the Defendant:
 - (a) says that, to the extent that the Plaintiff or any Group Member has suffered damage (which is denied), that will require individual assessment in every instance;
 - (b) otherwise denies paragraph 5.
6. The Defendant admits paragraph 6 of the Claim.
7. The Defendant admits paragraph 7 of the Claim.
8. In answer to paragraph 8 of the Claim, the Defendant:
 - (a) says that it is, and was at all material times, engaged in the business of:
 - (i) importing into Australia agricultural spraying equipment manufactured in Europe, including spraying equipment designed and manufactured by Préciculture SAS in France (**HARDI equipment**), including the HARDI Presidio 2700 self-propelled spray unit (**Unit**);
 - (ii) assembling HARDI equipment that it had imported into Australia and distributing the assembled HARDI equipment to an established network of dealer groups with agricultural equipment retail expertise and agricultural

machinery service expertise in Australia (**dealer groups**) pursuant to orders placed by those dealer groups on behalf of specific customers;

(b) otherwise denies paragraph 8 of the Claim.

9. In answer to paragraph 9 of the Claim, the Defendant:

(a) denies that the Unit was designed for a single purpose;

(b) says that the Unit:

(i) is a self-propelled agricultural spraying unit with a 2700L spray tank capacity, and available boom widths between 24m and 36m;

(ii) utilises a proprietary fluid delivery system designed to allow precision application of agricultural chemicals to crops;

(iii) is assembled, commissioned and delivered to order, as it can be configured in a customised manner within a confined range of available specifications;

(c) otherwise denies paragraph 9 of the Claim.

10. In answer to paragraph 10 of the Claim, the Defendant:

(a) says that:

(i) from time to time it sold Units to dealer groups with whom it has established relationships (the **Dealer Network**);

(ii) when it sold a Unit to a dealer group, it did so:

(A) on the basis that the Unit was configured and assembled by the Defendant for delivery, pursuant to a specific order placed on behalf of a customer of the dealer group and communicated to the Defendant;

(B) with an expectation that the dealer group would thereafter sell the Unit to the customer according to that customer's specific order;

(C) subject to terms and conditions specified in a limited manufacturer's warranty recorded in writing and signed by both the dealer group

and the customer on or proximate to delivery of the Unit (**Warranty Terms**);

- (b) admits that it sold Units to dealer groups in trade or commerce;
- (c) otherwise denies paragraph 10 of the Claim.

11. The Defendant denies paragraph 11 of the Claim.

Alleged Representations

12. In answer to paragraph 12 of the Claim, the Defendant:

- (a) save for the words set out at paragraph (b1), admits that each of the words set out at subparagraphs 12(a) to (km) of the Claim was contained in a brochure produced by the Defendant in or about January 2014 and distributed to its Dealer Network;
- (b) says that the pleaded words were neither misleading nor deceptive in relation to the Units having regard to the context of those words and the terms of the brochure produced in or about January 2014 taken as a whole;
- (c) otherwise denies paragraph 12 of the Claim.

13. The Defendant denies paragraph 13 of the Claim.

14. In answer to paragraph 14 of the Claim, the Defendant:

- (a) admits that it caused the publication of an advertisement on page 35 of *Power Farming* magazine Vol 125(5) in 2015 (**the Advertisement**), which stated that the Unit had 4WD hydrostatic transmission;
- (b) says that the Units did and do have 4WD hydrostatic transmission;
- (c) otherwise denies paragraph 14 of the Claim.

15. In answer to paragraph 15 of the Claim, the Defendant:

- (a) refers to and repeats subparagraph 14(a) herein;
- (b) admits that the Advertisement was placed with the intention of advertising the Unit to potential purchasers of self-propelled sprayers;

- (c) says further that each of the "4WD Representations in the Brochure" (as defined in the Claim) was neither misleading nor deceptive in relation to the Plaintiff's Presidio;
- (d) otherwise denies paragraph 14 of the Claim.

15A. In answer to paragraph 15A of the Claim, the Third Defendant:

- (a) admits that it uploaded the Videos (as defined in the Claim) onto YouTube on or about the dates pleaded;
- (b) says that it was not the author of the content of the February 15 Video (as defined in the Claim); and
- (c) otherwise denies the allegations contained in paragraph 15A of the Claim.

15B. In answer to paragraph 15B of the Claim, the Third Defendant:

- (a) admits that the words pleaded in subparagraphs 15B(a), 15B(b) and 15B(c) are spoken during the April 14 Video (as defined in the Claim);
- (b) admits that the image extracted in subparagraph 15B(d) appears momentarily during the April 14 Video;
- (c) says that the image in paragraph 15B(d) is not a proper allegation, is embarrassing and that the Third Defendant is not able to respond;
- (d) says further that the image extracted in subparagraph 15B(d) is not sufficiently clear to discern the precise specifications of the Presidio;
- (e) denies that the image extracted in subparagraph 15B(d) shows planetary gearboxes fitted to each of the front and rear wheels;
- (f) says further that to the extent any representations were made by reason of the uploading of the April 2014 Video to YouTube as pleaded or at all, they were neither misleading nor deceptive;
- (g) otherwise denies the allegations contained in paragraph 15B of the Claim.

15C. In answer to paragraph 15C of the Claim, the Third Defendant:

- (a) admits that the words pleaded are spoken during the February 15 Video;

- (b) denies that it was the author of the words pleaded or made any representation in those terms;
- (c) says further or in the alternative that to the extent any representations were made by reason of the uploading of the February 2015 Video to YouTube as pleaded or at all, they were neither misleading nor deceptive; and
- (d) otherwise denies the allegations contained in paragraph 15C of the Claim.

15D. Paragraph 15D of the Claim does not contain an allegation against the Third Defendant and therefore the Third Defendant does not plead in answer to it.

15E. Paragraph 15E of the Claim does not contain an allegation against the Third Defendant and therefore the Third Defendant does not plead in answer to it.

15F. The Third Defendant denies the allegations contained in paragraph 15F of the Claim.

Four Wheel Drive ("4WD")

16. In answer to paragraph 16 of the Claim, the Defendant:

- (a) says that there is no single accepted technical definition of a four-wheel drive vehicle and a range of different technologies are employed in different contexts and for different objectives to provide drive to the four wheels of a vehicle;
- (b) admits that a four-wheel drive vehicle includes a vehicle in which:
 - (i) all four wheels are connected to a source of power;
 - (ii) there exists a transmission system with the ability to provide power to all four wheels;
- (c) says that improved tractive performance while travelling over uneven terrain may be a desired objective for which four-wheel drive technologies are employed in vehicle design;
- (d) otherwise denies paragraph 16 of the Claim.

Hydraulic Power

16A. In answer to paragraph 16A of the Claim, the Defendant:

- (a) admits mechanical power can be calculated by applying the pleaded formula;

- (b) otherwise denies paragraph 16A of the Claim.

16B. In answer to paragraph 16B of the Claim, the Defendant:

- (a) repeats and refers to paragraph 16A(a);
- (b) admits that if either the torque or speed reduce to negligible values, then on application of the pleaded formula there is no or negligible mechanical power transmitted; and
- (c) otherwise denies paragraph 16B of the Claim.

17. In answer to paragraph 17 of the Claim, the Defendant:

- (a) admits that:
 - (i) the amount of power generated within a hydraulic circuit can be calculated by applying the pleaded formula;
 - (ii) in relation to vehicles that use hydraulic power within their transmission system, the controlled movement of pressurised fluid (oil) within one or more circuits is used to transmit power to wheel motors;
- (b) otherwise denies paragraph ~~48~~17 of the Claim.

17A. In answer to paragraph 17A of the Claim, the Defendant:

- (a) repeats and refers to paragraphs 16 and 17 above; and
- (b) otherwise denies paragraph 17A of the Claim.

17B. In answer to paragraph 17B of the Claim, the Defendant:

- (a) repeats and refers to paragraph 17 above;
- (b) admits that if either the pressure or flow reduce to negligible values, then on application of the pleaded formula there is no or negligible hydraulic power transmitted; and
- (c) otherwise denies paragraph 17B of the Claim.

17C. In answer to paragraph 17C of the Claim, the Defendant:

- (a) admits propulsion power can be calculated by applying the pleaded formula; and
- (b) otherwise denies paragraph 17C of the Claim.

17D. In answer to paragraph 17D of the Claim, the Defendant:

- (a) repeats and refers to paragraph 17C above;
- (b) admits that if either the tractive force or velocity reduce to negligible values, then on application of the pleaded formula there is no or negligible power transmitted; and
- (c) otherwise denies paragraph 17D of the Claim.

Tractive Force

17E. The Defendant denies the allegations in paragraph 17E of the Claim.

17F. The Defendant refers to paragraph 17G below and otherwise denies the allegations in paragraph 17F of the Claim.

17G. In answer to paragraph 17G of the Claim, the Defendant:

- (a) admits peak force can be calculated by applying the pleaded formula;
- (b) otherwise denies paragraph 17G of the Claim.

Knowledge of the respective parties

18. In answer to paragraph 18 of the Claim, the Defendant:

- (a) refers to and repeats paragraph 9 herein;
- (b) denies paragraph 18 of the Claim;
- (c) says further that:
 - (i) self-propelled sprayers such as the Unit are:
 - (A) sold and purchased exclusively for commercial use;
 - (B) large and sophisticated pieces of machinery which require skilled use and ongoing maintenance;

(C) able to be customised to order in numerous respects;

(D) used in a broad range of:

(I) primary industry businesses;

(II) terrains;

(III) environmental and climactic conditions;

which are not in the ordinary course of business disclosed to the Defendant prior to sale;

- (ii) potential purchasers of self-propelled sprayers such as the Unit, including the Plaintiff, are reasonably expected by the Defendant to be sufficiently sophisticated, experienced and knowledgeable to reach their own conclusion as to whether or not the Presidio is suitable for the specific purpose for which they wish to use it, having regard (inter alia) to the matters pleaded in subparagraph 18(c)(i) herein;
- (iii) the Warranty Terms expressly identified the extent to which the Defendant would be liable for any claim in respect of the Units.

Acquisition

19. In response to paragraph 19 of the Claim, the Defendant:

- (a) admits that members of the Dealer Network placed orders for Units by completing and submitting to the Defendant an online form hosted on the Defendant's extranet, which:
- (i) was, from time to time, entitled either *PRESIDIO 2700* or *PRESIDIO Special limited offer*;
- (ii) required dealers to specify the intending purchaser's name and the specific options that the intending purchaser had selected;
- (iii) permitted dealers to generate a price for the Unit based on the specific options selected;
- (b) says further that:

- (i) the specific configuration selected by each purchaser, and notified to the Defendant by the dealer on behalf of the purchaser, was relied upon by the Defendant to assemble and customise that purchaser's Unit;
- (ii) the Defendant dealt primarily with its dealer network and did not in the ordinary course of its business communicate with intending purchasers prior to delivery of a Unit.

20. In answer to paragraph 20 of the Claim, the Defendant says:

- (a) the paragraph as pleaded is vague and embarrassing and the Defendant is unable properly to respond to it;
- (b) says further, in respect of the Plaintiff, that:
 - (i) Carruthers Machinery Co, one of its dealer groups (**Carruthers**), provided the Plaintiff with:
 - (A) a document titled "Proposal" dated 15 December 2016;
 - (B) tax invoice no. 1464 in the sum of \$275,000 dated 18 January 2016 (sic);
 - (ii) the Defendant delivered a Unit to the Plaintiff at its nominated property on or about 18 January 2017;
 - (iii) the Defendant supplied the Unit to the Plaintiff pursuant to a supply agreement reached with Carruthers, comprised of:
 - (A) an order for the Plaintiff's Unit on the *PRESIDIO Special limited offer* form, submitted to the Defendant by Carruthers in or about mid-December 2016;
 - (B) an invoice issued to Carruthers by the Defendant for the wholesale cost of the Unit on 16 January 2017;
 - (C) Warranty Terms executed by Bruce McGregor on behalf of Carruthers, and Steve Hicks on behalf of the Plaintiff, on 1 February 2017;
 - (iv) the Defendant received payment from Carruthers for the Plaintiff's Unit;

- (c) otherwise denies paragraph 20 of the Claim.

Alleged Duty

- 21. In answer to paragraph 21 of the Claim, the Defendant:
 - (a) refers to and repeats subparagraphs 10(a) and 18(b) herein;
 - (b) says that, by reason of the matters referred to in subparagraph (a) above:
 - (i) it did not owe the plaintiff or Group Members a duty in the terms pleaded in paragraph 21 of the Claim;
 - (c) further, any duty it did owe to the plaintiff and any Group Member was satisfied; otherwise denies paragraph 21 of the Claim.
- 22. In answer to paragraph 22 of the Claim, the Defendant:
 - (a) refers to and repeats paragraph 21 herein;
 - (b) denies paragraph 22 of the Claim.
- 23. In answer to paragraph 23 of the Claim, the Defendant:
 - (a) refers to and repeats paragraphs 21 and 22 herein;
 - (b) denies paragraph 23 of the Claim.

Alleged Misleading and Deceptive Conduct

- 24. In answer to paragraph 24 of the Claim, the Defendant:
 - (a) says that paragraph 24 of the Claim is embarrassing;
 - (b) repeats paragraphs 10, 15 through 15F (inclusive) and 21 above;
 - (c) further says that the Plaintiffs' Presidio:
 - (i) had a traction control valve on the front and rear wheels;
 - (ii) had electronic control of the hydrostatic transmission;
 - (iii) had all four wheels equipped with a Rexroth axial piston motor; and

(d) for the avoidance of doubt, denies paragraph 24 of the Claim.

25. In answer to paragraph 25 of the Claim, the Defendant:

(a) says that paragraph 25 of the Claim is embarrassing;

(b) for the avoidance of doubt, denies paragraph 25 of the Claim;

(c) says that if, which is denied, the Plaintiff and/or any Group Member purchased a Unit in reliance upon, or induced by, the pleaded representations or silence of the Defendant:

(i) they had and continue to have the benefit and use of the Unit from the date of delivery with the exception of brief stand-down periods associated with routine maintenance and repairs;

(ii) the Units had, at all material times, and continue to have, substantial resale or trade-in value (allowing for the usual depreciation that applies to a used vehicle);

(iii) they are not entitled to recover from the Defendant any damage for loss of time, inconvenience, loss of machine use or other consequential damage by reason of the Warranty Terms.

AND THE DEFENDANT FURTHER SAYS

Reduction in respect of failures to take reasonable care

26. At all material times, members of the Dealer Network were ready, willing and able to provide maintenance services as required from time to time in respect of the Units.

27. At all material times, the Defendant was ready, willing and able to assist the plaintiff and any Group Member in respect of issues associated with the Units that could be remedied by way of the provision by the Dealers Network of maintenance services.

28. At all material times, the Plaintiff and each Group Member was aware of the matters referred to at paragraphs 26 and 27 herein.

29. If, which is denied, the Plaintiff or any Group Member has suffered loss or damage in respect of their Unit:

- (a) that loss or damage could have been avoided, reduced or mitigated by the Plaintiff or Group Member, as the case may be, utilising the maintenance services referred to at paragraphs 26 and 27 herein;
 - (b) the Defendant did not intend to cause any such loss or damage and did not fraudulently cause any such loss or damage.
30. In the premises if, which is denied, the Plaintiff or any Group Member has suffered loss or damage in respect of a Unit, such loss or damage has occurred as a result of the Plaintiff's or Group Member's failure to take reasonable care such that any loss or damage ought to be reduced pursuant to s 137B of the *Competition and Consumer Act (2010)* (Cth).

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



Capacity

Solicitor for the Defendant

Date of signature

14/2/20

AFFIDAVIT VERIFYING

Name William Edward Franklin
 Address 538 Cross Keys Rd Cavan South Australia
 Occupation Chief Executive Officer
 Date ~~5 June 2019~~ 14 FEBRUARY 2020

I do solemnly, sincerely and truly affirm and declare:

1. I am the Chief Executive Officer of Hardi Australia Pty Ltd ACN 076 150 617 and am authorised to verify this defence on its behalf.
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.

AFFIRMED at

Adelaide

Signature of deponent

Name of witness

Address of witness

Capacity of witness

DAINA LAURA MARSHALL

25 GRENFELL ST MAR ADELAIDE 5000

SOLICITOR

And as a witness, I certify the following matters concerning the making of this affidavit by the person who made this affidavit (**deponent**):

1. I saw the face of the deponent.
2. I ~~have known the deponent for at least 12 months.~~ OR I have confirmed the deponent's identity using an identification document:

NSW DRIVERS LICENCE

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.

DAINA LAURA MARSHALL
 A Commissioner for taking affidavits in
 the Supreme Court of South Australia

* '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 or JP Ruling 003 - Confirming identity for NSW statutory declarations and affidavits, footnote 3.

FURTHER DETAILS ABOUT FILING PARTY**Filing party**

Name Hardi Australia Pty Ltd ACN 076 150 617
Address Level 10, 25 Grenfell Street, Adelaide SA 5000
Frequent user identifier 84

Legal representative for filing party

Name James Kearney
Practising certificate number P11452
Firm MinterEllison
Contact solicitor James Kearney
Address Level 10, 25 Grenfell Street, Adelaide SA 5000
DX address DX 131 Adelaide
Telephone 08 8233 5685
Fax 08 8233 5556
Email james.kearney@minterellison.com
Electronic service address james.kearney@minterellison.com