

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No S CI 5296 of 2014

BETWEEN:

STEVEN ELLIOT WILLIAMS

Plaintiff

and

AUSNET ELECTRICITY SERVICES PTY LTD
(ACN 064 651 118) and OTHERS
(in accordance with the Schedule)

Defendants

AND BETWEEN

AUSNET ELECTRICITY SERVICES PTY LTD
(ACN 064 651 118)

Plaintiff by Counterclaim

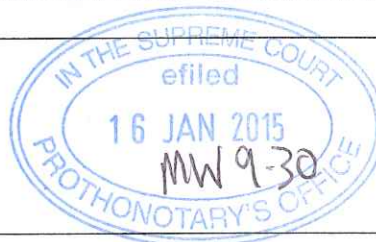
and

STEVEN ELLIOT WILLIAMS and OTHERS
(in accordance with the Schedule)

Defendants by Counterclaim

REPLY AND DEFENCE TO COUNTERCLAIM

Date of Document:
Filed on behalf of:
Prepared by:
Maddens Lawyers
219 Koroit Street
WARRNAMBOOL VIC 3280



15 January 2015
The Plaintiff
Solicitor's code: 102650
DX: 28001 Warrnambool
Tel: 5560 2000
Ref: Brendan Pendergast

To the defence and counterclaim of the first defendant dated 15 December 2014, the plaintiff says as follows:

REPLY

1. He admits paragraph 2(a).
2. As to paragraph 6:
 - (a) he admits paragraph 6(b)(i)
 - (b) he admits paragraph 6(d);
 - (c) he does not admit paragraph 6(e).
3. As to paragraph 16(b):

- (a) the ability or otherwise of the plaintiff and some or all of the group members to effect insurance cover in respect of the losses alleged is not relevant to the existence of the General Duty;
- (b) alternatively to (a), the ability or otherwise of the plaintiff and some or all of the group members to effect insurance cover is not relevant to the existence of the General Duty other than in respect of pure economic loss.

4. As to paragraph 17:

- (a) he admits that the scope of the General Duty and the reasonableness of steps taken by AusNet in discharge of the General Duty are informed by the Technical Regulatory Framework but otherwise denies sub-paragraph 17(b);
- (b) he admits that, at all relevant times, there were large populations of trees in proximity to some network assets within AusNet's distribution network but otherwise denies paragraph 17(c);
- (c) he does not admit paragraph 17(d);
- (d) he admits paragraph 17(e) but says further that, in determining the prices which AusNet was permitted to charge for its services, the Australian Energy Regulator (**AER**) had regard to, among other things, the costs actually incurred by AusNet in complying with its regulatory obligations;
- (e) he admits paragraph 17(f) and will rely upon the Price Determination for its full terms and effect;
- (f) he admits paragraph 17(h) and says further that, in determining the approved revenue allowance in the Price Determination, the Australian Energy Regulator (**AER**) adopted a revealed cost approach which included taking into account:
 - (i) the operating costs which AusNet had in fact incurred in previous years, including the costs incurred in complying with regulatory requirements concerning bushfire risk and vegetation clearance;
 - (ii) allowances for 'scale escalation', 'real cost escalation' and 'step changes' including in relation to complying with regulatory requirements concerning bushfire risk and vegetation clearance;
 - (iii) the costs which AusNet projected that it would incur in complying with the requirements imposed by the Technical Regulatory Framework including costs concerning bushfire risk and vegetation clearance;

- (g) in further answer to paragraph 17(e) to (h), he says that the scheme for the setting of the prices that AusNet may charge for its services under the National Electricity Law is irrelevant to the scope of the General Duty or to the reasonableness of steps taken by AusNet in discharge of the General Duty, including because:
 - (i) the revenue allowance approved by the AER in the Price Determination was calculated by reference to operating costs, which include the cost of insuring or self-insuring against legal liability;
 - (ii) under the Price Determination, the AER approved nominated pass through events, including insurance events, permitting AusNet to pass on costs incurred beyond a relevant insurance policy limit;
 - (h) he admits paragraph 17(i) and (j) and will rely upon the licence, Acts and Regulations comprising the Technical Regulatory Framework for their full force and effect;
 - (i) he admits paragraph 17(k) and will rely upon AusNet's ESMS, bushfire mitigation plans and VM plans for their full force and effect.
5. As to paragraph 37:
- (a) he refers to and repeats paragraph 72 to 75 of the Amended Statement of Claim (**ASOC**);
 - (b) he denies paragraph 37(l) and says further that:
 - (i) AusNet did not discharge the Statutory Duties or the General Duty by the appointment of Active Tree Services under the Services Agreement or by any of the matters alleged in paragraph 37;
 - (ii) Active Tree Services performed the Services under the Services Agreement as agent for AusNet and any failure by Active Tree Services to exercise reasonable care in performing the Services is a breach by AusNet of the duty alleged in paragraph 17(a) of the ASOC;
 - (iii) further, or alternatively, to (ii), by the appointment of Active Tree Services as a contractor to undertake the Services, AusNet came under a duty to ensure that reasonable care was taken by Active Tree Services as alleged in paragraph 17(b) of the ASOC;
 - (c) he otherwise does not admit the positive allegations in paragraph 37.

Proportionate Liability – Wrongs Act, Part IVAA

6. As to paragraph 50:

- (a) in relation to Hume, he refers to and repeats paragraphs 49 to 69 of the ASOC;
- (b) in relation to Active Tree Services, he refers to and repeats paragraphs 70 to 87 of the ASOC;
- (c) as to subparagraph 50(c), he says that:

- (i) the claims of the plaintiff and group members based:

- (A) on AusNet's breach of the Statutory Duties; and

- (B) in nuisance

do not arise from a failure to take reasonable care and are therefore not apportionable claims under s 24AF of the *Wrongs Act*;

- (ii) the claims of the plaintiff and group members for damages for economic loss and/or damage to property based on Ausnet's breach of the General Duty are apportionable claims under s 24AF of the *Wrongs Act*;

- (iii) by reason of subparagraphs (i) and (ii) above, this proceeding involves both an apportionable claim and a claim that is not an apportionable claim;

- (iv) accordingly, pursuant to s 24AI(2) of the *Wrongs Act*:

- (A) liability for the claim for economic loss and/or damage to property based upon breach of the General Duty is to be determined in accordance with Part IVAA of the *Wrongs Act*; and

- (B) all other claims in the proceeding are to be determined in accordance with the relevant legal rules apart from Part IVAA;

- (v) in so far as the claims of the plaintiff and group members are claims for economic loss and/or damage to property based upon breach of the General Duty, pursuant to section 24AP(b) of the *Wrongs Act* nothing in Part IVAA prevents AusNet from being held jointly and severally liable for the damages awarded against Active Tree Services for its failure to exercise reasonable care as agent of AusNet;

- (vi) if (which is denied) the claims of the plaintiff and sub-group members for economic loss and/or damage to property based on breach of the Statutory Duties are apportionable claims, pursuant to section 24AP(e) of the *Wrongs Act*, nothing in Part IVAA affects AusNet's liability in respect of such claims because several liability is imposed pursuant to the *ES Act*;
- (d) he otherwise denies paragraph 50.

SAVE AS AFORESAID and save as to the admissions contained therein, the plaintiff joins issue with the whole of AusNet's Defence.

DEFENCE TO COUNTERCLAIM

[There are no paragraphs 7 to 50 and hereafter the numbering and headings conform to the numbering and headings in the Counterclaim]

Introduction

51. He does not plead to paragraph 51.

Hume City Council

52. He refers to and repeats paragraphs 49 to 69 of the ASOC and otherwise does not admit paragraphs 52 to 69.

Active Tree Services

70. He refers to and repeats paragraphs 70 to 87 of the ASOC and otherwise does not admit paragraphs 70 to 81.

Contractual Claims by AusNet against Active Tree Services

82. He does not plead to paragraphs 82 to 85 as they raise no allegations against him or any of the group members.

Contribution – Wrongs Act Part IV

86. He does not plead to paragraph 86 as it raises no allegation against him or any of the group members.

G Dalton


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Maddens Lawyers
Solicitors for the plaintiff

Dated: 15 January 2015

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No S CI 5296 of 2014

SCHEDULE OF PARTIES

BETWEEN

STEVEN ELLIOT WILLIAMS

Plaintiff

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118)

First Defendant

HUME CITY COUNCIL

Second Defendant

ACTIVE TREE SERVICES PTY LTD (ACN 002 919 299)

Third Defendant

AND BETWEEN

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118)

Plaintiff by Counterclaim

STEVEN ELLIOT WILLIAMS

First Defendant by Counterclaim

HUME CITY COUNCIL

Second Defendant by Counterclaim

ACTIVE TREE SERVICES PTY LTD (ACN 002 919 299)

Third Defendant by Counterclaim