



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P5 of 2022

BETWEEN:

**ELECTRICITY NETWORKS CORPORATION
T/AS WESTERN POWER (ABN 18 540 492 861)**

Appellant

and

**HERRIDGE PARTIES (PER ORDER MADE BY
JUSTICE MITCHELL ON 28 OCTOBER 2019)**

First Respondents

and

**IAG/ALLIANZ PARTIES (PER ORDER MADE BY
JUSTICE MITCHELL ON 28 OCTOBER 2019)**

Second Respondents

and

**RAC PARTIES (PER ORDER MADE BY
JUSTICE MITCHELL ON 28 OCTOBER 2019)**

Third Respondents

and

NOREEN MERLE CAMPBELL

Fourth Respondent

and

**VENTIA UTILITY SERVICES PTY LTD (ACN 010 725 247)
(FORMERLY KNOWN AS THIESS SERVICES LTD)**

Fifth Respondent

SECOND RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

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PART I: CERTIFICATION FOR INTERNET PUBLICATION

1. This outline is in a form suitable for publication on the internet.

PART II: OUTLINE OF PROPOSITIONS

2. The Second Respondents rely on their written submissions and the submissions of the other respondents in response to WP's appeal, save for any questions arising.

Second Respondent's Cross-Appeal: Non-delegable nature of works duty

3. *The issue:* The trial judge held that WP had a duty to take reasonable care to inspect the PA pole before and when undertaking works, to ascertain whether it was in a safe and fit condition for use in the supply of electricity (TJ [297]) and that it was discharged by delegating the works and associated inspection to Thiess: TJ [359]. The Second Respondents appealed the finding that it was a non-delegable duty. The CA dismissed that appeal CA [225]-[235].
4. **The issue in the proposed cross-appeal:** The works duty was of the second kind identified by Gleeson CJ in *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 29, [9]-[10]: the performance could be delegated but the responsibility remained with the authority, a characterisation determined by the statutory scheme. The indicative statutory features are informed by the unifying principle underlying non-delegable duties: a relationship involving the "central element of control" (here of WP) and the special vulnerability or dependence of the affected person (here the public in the vicinity of WP's electricity distribution system): *Kondis v State Transport Authority* at 687; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 550-551.
5. **The CA's three errors: First**, the CA focussed too narrowly on WP not being in physical control or occupation of Mrs C's land (J [226] to [227]). **Second**, it erred in construing the legislative scheme as excluding an intention that WP remain liable for acts done in the exercise of the functions relevant to the works duty (J [229]). **Third**, it failed to have regard to the plaintiffs' special vulnerability and dependence if reasonable care was not exercised in the works duty.
6. **WP's control:** The relevant control is control of the risk of harm (eg *Stuart v Kirkland-Veenstra* at [114]): here the July 2013 works and pre work inspection. The CA erred in focussing WP'S lack of control over the *land* on which Thiess performed the works (CA [225], [226],[227]). WP gives this finding determinative significance (WP Reply [41]). The central element of control does not turn on occupier status or physical control; *Burnie* acknowledges the control involved in allowing another to enter land to undertake a dangerous activity: 551, **JBA vol 3, p 897**.

7. WP authorised the access to Mrs C’s land and exercised relevant control: Thiess, using statutory powers conferred on WP, and at its request and on its behalf (*Electricity Operators (Powers) Act* reg 4(2)), had physical control over the pole. WP’s powers authoring the conduct of the 13 July works were **(i)** the broad functions and powers in ss 41 and 59 of the *Electricity Corporations Act 2005* (**ECA**) and as distribution licensee under the *Electricity Industry Act 2004* (**EIA**), and including to operate the system s 4(1)(c) (defined as including to “maintain the works or system”); **(ii)** powers to enter private land and carry out works including on consumer apparatus: EOP Act s 28(3)(c); s 43(1); s 46; s 49 (powers to “maintain” and “inspect” any “supply system”); **(iii)** powers to interrupt electricity supply for the works: s31(1) EIA and s 63(1) ECA. The trial judge found that when WP exercised its power to undertake such works, or to inspect the PA Pole, it had requisite control over the source of the risk of harm (**TJ [303]**).
8. **Error in construing the legislative scheme:** The CA erred in holding (**J [229]**) that there was nothing in the legislative scheme to suggest that Parliament intended to impose a duty on WP to ensure that reasonable care was taken in the exercise of the works duty functions. In addition to the strong element of control the statutory scheme evinced an intention that WP remain liable not only for the conduct of its officers, servants and agents but also contractors where they act at its request and on its behalf: EOP Act, s 4(2); s 121.
9. **Failure to give due regard to special vulnerability and dependence** The CA did not engage, in the context of non-delegability with the vulnerability of neighbouring landowners, and their reliance on WP maintaining the distribution system. The plaintiffs had no powers to control the risk and depended on WP to do so. The CA recognised the foreseeable potential for failure of a structure supporting live electrical apparatus to result in gravely hazardous consequences of death or injury including through spread of fire (**CA [157]; [27]**) but did not recognise that this combined effect of the magnitude of the foreseeable risk of the accident and magnitude of foreseeable injury (*McLean v Meech* (2005) 13 VR 241, [22]) called for special care, instead focussing only on “ultra-hazardous” activity (**CA [208]-[223]**).

Mrs Campbell’s cross-appeal

10. The Second Respondents contend that Mrs Campbell should not be granted special leave to make her cross appeal, because she has not sought to appeal against the finding that she was liable in nuisance (**TJ [528]-[533]**, upheld **J[303]** to **[308]**) in any part of her cross appeal.
11. If special leave be granted, the appeal should be dismissed:

12. Ground 1, duty: There was no error in the CA formulation of a duty to take reasonable care to avoid a fire starting on and escaping from her property causing physical injury or physical damage to property **J[294]**, and Mrs C concedes a duty to the same effect (at 4RS [49]). Even if formulated by reference to her property as whole (4[RS]) the wooden pole, which she knew to hold up an electrified service cable, remained a significant potential source of risk on her land.

13. Grounds 2 and 3, breach: The evidence amply supported the finding (**J[295]**) that a person in Mrs C's position knowing what she knew or ought to have known (s 5B *Civil Liability Act 2002*) breached the duty by failing to have the pole inspected.

- 10 a. Mrs C owned the PA pole, and owned and occupied the land on which it was situated, which was in a high fire-risk area: **CA [291]**, and by the time of the fire, the PA pole had been in the ground for at least 30 years (**TJ [102]**).
- b. The specific history of damage to wooden structures on Mrs Campbell's property, of which she was aware (**TJ [494]**), including the infestation by termites of the jarrah stumps of her house requiring them to be replaced **TJ [78]**, **J[298]** and serious termite damage to a pergola on her property in the late 1990s or early 2000s: **CA [298]**; **TJ [78]**. The termite damage was not only at her house, at a distance from the pole (cf **[4R Reply]**) but also to an orchard of fruit trees on Mrs C's property that had to be removed because of termite damage: **TJ[509]**.
- 20 c. Mrs C knew her husband had arranged for inspections for termites in the house approximately every year: **TJ [78]**. A reasonable person with the above knowledge would have arranged for the pole to be inspected also.

14. Ground 4: Causation The inspection by Thiess on 13 July 2013 did not relieve Mrs C of her own breach: her failure to have the pole inspected at *any* time "*materially contributed*" to the loss, and is to be regarded as a cause of the loss and damage, despite Thiess' later negligent inspection: *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [45]-[47]. The s 5C(1)(b) CLA normative consideration cannot absolve Mrs C of any liability. Her ownership of the pole and the fact that a reasonable person would have appreciated the risk of its failure makes it appropriate that she bear some responsibility for the damage for her failure to have it inspected. Her more limited responsibility compared with WP and Thiess is appropriately reflected in the CA's significantly reduced apportionment in her favour: **CA [356]**.

30 Dated: 7 September 2022



C M HARRIS



PAUL MENDELOW