



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**

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 MITHCELL ON 28 OCTOBER 2019)

Third Respondents

and

NOREEN MERLE CAMPBELL

Fourth Respondent

and

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

Fifth Respondent

FOURTH RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

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

PART II: OUTLINE OF PROPOSITIONS

Western Power's appeal

2. *Issue before this Court (fourth respondent's submissions (4RS) [2]-[3]):* The issue before the Court is whether, as the Court of Appeal (CA) held, the appellant (WP) owed a duty to *inter alia* the first to third respondents to take reasonable care to avoid or minimise the risk of injury to those persons, and loss or damage to their property, from the ignition and spread of fire in connection with the delivery of electricity through its distribution system. The matters raised on WP's appeal are: (1) whether WP exercised sufficient control over point of attachment poles to owe the duty; and (2) whether that duty is inconsistent with the statutory scheme under which WP operated.
3. *Propositions which inform the issue (4RS [14]):* Five propositions inform the analysis: (1) WP attached its service cable to the point of attachment pole owned by Mrs Campbell (the **PA Pole**); (2) that service cable was critical in creating the relevant risk of harm; (3) WP's argument in respect of both grounds of appeal misconstrues s 25 of the *Electricity Act 1945* (WA); (4) WP's argument is inconsistent with the duties of care which WP accepted it owed (see J[152] (CAB 441)); and (5) the true point WP seeks to agitate is whether it breached the duty it owed, whether as the Court of Appeal identified or as it conceded.
4. *The statutory scheme (4RS [15]-[20]):* The functions of WP (particularly ss 41(a), (e) and (i); ss 42(d), (e) and (f) of the *Electricity Corporations Act 2005* (WA)) as well as its powers (particularly ss 59 of the 61 of the *Electricity Corporations Act*; ss 28(3)(c), 43(1), 46, 48, 49(c), (d) and (f) and 58 of the *Energy Operators (Powers) Act 1979* (WA)) give WP sufficient control over the relevant risk of harm. They provide the foundation for the duty found by the CA to be owing, as do the express statutory obligations of WP, including s 25 of the *Electricity Act*.
5. *Ground 2(a): control (4RS [22]-[31]):* Control (in the sense of ownership) over the PA Pole is not determinant of the existence of the duty of care. The evaluation of whether a relationship between WP and a class of persons imports a common law duty of care is a multifaceted inquiry which focuses on the relevant legislation and the positions occupied by the parties. That inquiry reveals that the CA was correct to hold that WP owed the duty as framed. In particular: (1) the

risk of harm was reasonably foreseeable and not insignificant (J[157] (CAB 442), [164] (CAB 445)); (2) WP had statutory powers to protect the specified class of persons from that foreseeable risk of harm; (3) WP knew the risk of harm (J[19]-[21] (CAB 408-409)); (4) property owners in the vicinity of the South West Interconnected System were vulnerable as they had no power to arrange WP's network, or to enter upon Mrs Campbell's land and inspect or ensure the PA Pole was in a safe condition, in contrast to WP which had the express statutory powers to do so; and (5) the duty is consistent with the statutory scheme under which WP operated.

6. It was the attachment of the service cable to the PA Pole and the use of that cable in supplying the electricity distribution service that created the relevant risk of harm. WP's conceded duty illustrates that the issue is more aptly dealt with at the breach stage and raises only a question of whether the duty extended to exercising reasonable care in relation how the outer parts of WP's network were made reasonably safe and fit for the purpose of conveying electricity. No fine question of the application of s 5B of the *Civil Liability Act 2002* (WA) arises. In not taking any reasonable steps in relation to the pole which held aloft its apparatus, WP was in breach of duty (J[166]-[168] (CAB 445-46)).
7. *Ground 2(b): statutory inconsistency (4RS [32]-[46]):* Section 25 of the *Electricity Act*, and the statutory scheme more generally, do not negative a common law duty. Subsection 25(1)(a) required WP to keep or preserve its service apparatus (which included the service cable) in a safe and fit condition for supplying electricity. The service cable would not be in a safe and fit condition for supplying electricity unless the PA Pole to which the service cable was attached was also kept in a safe condition (see J[143] (CAB 439)). Section 25(1)(b) is directed to the supply of electricity but, having a physical element directed to the point at which electricity passes beyond WP's equipment, necessarily contemplates that the required care be directed to those things necessary for or connected with the supply to that point. Here, as electricity passed beyond WP's equipment part way up the PA Pole, the required precautions necessarily included a safe pole holding up WP's equipment. No negative implication to exclude a common law duty is evinced by the broader statutory context. The functions and powers of WP under that scheme are facilitative of the common law duty.

Mrs Campbell's application for special leave to cross-appeal

8. *Duty (4RS [48]-[54]):* The duty framed by the trial judge and adopted by the Court of Appeal is too specific, directed to breach (J[266] CAB 473; J[290] CAB 480). Correctly framed the

duty is directed to the risk of harm from fire, or fire caused by electrical discharge; so framed, the duty is not correctly analysed by reference to obtaining skilled inspections of the PA Pole.

9. *Breach (4RS [55]-[62])*: Mrs Campbell did not breach the duty she owed. The risk of harm is the harm caused by fire starting on her property following a discharge of electricity, or discharge of electricity following a failure of the PA Pole. As the PA Pole showed no specific risk of failure, the duty and the analysis required by s 5B(2) of the *Civil Liability Act* did not require Mrs Campbell to obtain “regular” inspections of the pole by a skilled person. Further, as the fifth respondent (**Thiess**) had inspected the pole in July 2013, performance of the duty Mrs Campbell owed did not require Mrs Campbell to undertake any other act prior to 12 January 2014.
10. *Causation (4RS [63]-[66])*: causation in the scope of liability sense (section 5C(1)(b) of the *Civil Liability Act*) was not established. That is because (a) Thiess inspected the PA Pole six months prior to it failing; and (b) the plaintiffs established Thiess breached a duty owed to the plaintiffs. In those circumstances, it is not “appropriate” to attribute liability to Mrs Campbell.

Response to Herridge Parties’ application for special leave to cross-appeal (nuisance)

11. A claim for loss caused by a fire which starts on a defendant’s property and spreads to damage a plaintiff’s property: (a) if properly framed in nuisance, requires that the defendant has failed to act with reasonable care (*Hargrave v Goldman* (1963) 110 CLR 40 at 51-2); or (b) is properly framed in negligence (*Hargrave v Goldman* at 61; *Goldman v Hargrave* [1967] AC 645). The requirement of a lack of reasonable care is consistent with *Burnie Port Authority v General Jones Pty Limited* (1994) 179 CLR 520 at 556-7. The claim is an action arising from a failure to take reasonable care and is apportionable: s 5AK of the *Civil Liability Act* (CA [325]-[329] CAB 489-491) (4R X-AS [9] and [11]).
12. In any event, the pleaded case relied on a failure to take reasonable care and as pleaded the nuisance liability (if any) is apportionable (CA [329] CAB 490-491) (4R X-AS [7], [9]-[10]).

Dated: 5 September 2022



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