Supreme Court

New South Wales

Case Name:	Eades v Endeavour Energy
Medium Neutral Citation:	[2018] NSWSC 1524
Hearing Date(s):	9 October 2018
Decision Date:	10 October 2018
Jurisdiction:	Common Law
Before:	Adamson J
Decision:	(1) Grant leave to the plaintiff to amend his pleading in accordance with the draft third amended statement of claim annexed and marked "A" to the affidavit of Kathryn Amy Emeny sworn 8 October 2018. (2) Reserve the costs of the plaintiff's notice of motion filed in Court on 9 October 2018.
Catchwords:	CIVIL PROCEDURE — pleadings — amendment — late application for amendment — whether amendment in the interests of justice — whether the party seeking the amendment is at fault — whether any prejudice to the other parties
Legislation Cited:	Civil Procedure Act 2005 (NSW), ss 56, 58, 59, 64 Uniform Civil Procedure Rules 2005 (NSW), Sch 7
Cases Cited:	Aon Risk Services v Australian National University (2009) 239 CLR 175; [2009] HCA 27
Category:	Procedural and other rulings
Parties:	Laurence Eades (Plaintiff) Endeavour Energy (First Defendant) Asplundh Tree Experts (Australia) Pty Ltd (Second Defendant) Pinnacle Career Development Pty Ltd (Third Defendant)

Representation:	Counsel: T Tobin SC/G Dalton QC/A Fraatz (Plaintiff) Dr A Bell SC/J Hutton/H Pintos-Lopez (1st Defendant) M Windsor SC/T Berberian (2nd Defendant) MT McCulloch SC/T Marskell (3rd Defendant) Solicitors: Maddens Lawyers (Plaintiff) Lander & Rogers (1st Defendant) Colin Biggers & Paisley Lawyers (2nd Defendant) Wotton + Kearney (3rd Defendant)
File Number(s):	2015/310264

JUDGMENT

Introduction

1 Laurence Eades (the plaintiff) brings proceedings for damages in negligence against three defendants: Endeavour Energy (the first defendant), Asplundh Tree Expert (Australia) Pty Ltd (the second defendant) and Pinnacle Career Development Pty Ltd (the third defendant). The plaintiff's claim arises from a bush fire (the Fire) on 17 October 2013 which destroyed the plaintiff's property in Mount Victoria (the Property). The statement of claim was filed on 22 October 2015 but not served until February 2016.

2 On 8 October 2018, the first day of the trial, the plaintiff sought leave to amend his statement of claim, the application having been foreshadowed in late September 2018. The proposed amendments included formal matters, consequential amendments and, of present relevance, sought to add a further ground of negligence. It is the last matter which the defendants oppose and to which these reasons are addressed.

The plaintiff's claim as pleaded

3 The plaintiff alleges that the Fire was caused by a tree falling on a power line which broke, leaving the live power line to fall into the surrounding bush which caught alight and spread, ultimately destroying the Property. The plaintiff alleges that the first defendant owed it a non-delegable duty of care to take reasonable steps to inspect and identify hazardous trees that could impact its

power lines and investigate the trees identified so as to trim or remove them to mitigate the risk of a bushfire being caused by such impact. The first defendant engaged the third defendant to inspect the trees to ascertain whether they had the potential to come into contact with the power lines and, if so, to arrange for trees identified as hazardous to be cut or removed by the second defendant.

4 The plaintiff alleges that the tree which failed (the Tree) exhibited signs which indicated the possibility of internal weakness and that a reasonable person in the position of the defendants would have appreciated what these signs indicated and would have investigated further. Such steps would have led to the Tree being trimmed, in which event, it would not have failed and the Fire would not have occurred. Although there are significant differences between the plaintiff's cases against each of the defendants, it is not necessary for present purposes to address them. Nor is it necessary to set out the detail of the case.

5 It was common ground that the Tree, as at 17 October 2013, was a eucalyptus with a height of approximately 20m. The trunk of the Tree had a lean to the west/southwest of about 28-35 degrees. Two upright parallel braches extended from the trunk. At the end of the trunk there was a slight elbow. On 17 October 2013 the Tree split into three pieces. The lower part of the trunk and the lower of the two vertical branches (the Base Section) remained in the earth. The portion which comprised a fork between the trunk and the higher vertical branch (the Main Failed Section) split from the Base Section and fell. The balance of the trunk (the Extended Stub) split from the Main Failed Section and fell. On the plaintiff's case, when the Tree split, the Main Failed Section fell onto the power line and caused the Fire. The forked part of the Main Failed Section was severed from the branch which protruded vertically from it and was referred to as the Short Stub. The Short Stub contained a fork created by the trunk and one of the vertical branches.

6 In the current pleading, the amended statement of claim filed on 20 December 2017, the plaintiff relevantly relies on two cavities, #1 and #2, each of which is contained within the Main Failed Section, which he alleges ought to have put the defendants on notice that the Tree had the potential to fail.

The proposed amendment to the current pleading

7 The contentious paragraphs of the proposed pleading relate to the addition of a further cavity, cavity #3, which is located at the fork in the Extended Stub. The plaintiff wishes to put a case, if the amendment is allowed, that the defendants, acting reasonably, would have seen cavity #3 and would have appreciated that it, too, indicated that the Tree was vulnerable and would have investigated further. On the plaintiff's case this further investigation would have led to the Tree being trimmed or removed, thereby averting the Fire.

The relevant history of the matter

8 One of the considerations which is relevant to whether an amendment ought be allowed is the conduct of the parties and the extent to which their conduct has brought about the need for the application: see Part 6 of the *Civil Procedure Act 2005* (NSW), ss 56, 58, 59, 64. Accordingly, it is necessary to set out what led to this application.

9 Following the Fire, the first defendant and others investigated its cause. Various photographs were taken of the site and the Tree, including on 19 and 24 October 2013. David McDonald took photographs on 24 October 2013 which included photographs of the Extended Stub and the Short Stub in relatively close proximity to each other on the ground near the Base Section (the McDonald Photographs).

10 Photographs and other records created before the Fire were also available, including images known as LiDAR images. LiDAR is an imaging system that uses pulses of laser to illuminate objects and then measures the time it takes for the light to be reflected and the wavelength of the reflected light to create the image. One such LiDAR image taken in 2013 (before the Fire) indicated that the Extended Stub was connected to the Short Stub shortly before the Fire.

11 On 14 August 2014 the plaintiff's solicitors wrote to the Coroner's Court to say that they were acting for the plaintiff (and others who had suffered loss as a result of the Fire) and wanted access to various documents concerning the Fire. They asked whether there would be in an inquest. On 22 October 2014, they sent a further request, no answer having been forthcoming to their first

request. On 12 January 2015 Justice Legal, the solicitor assisting the coroner wrote to the plaintiff's solicitors informing them that the brief to the coroner was still being finalised and that there would be a directions hearing on 15 February 2015.

12 At some time in 2015, Justice Legal instructed Adam Tom, an arborist, to prepare a report for the coroner, the objective of which was to identify the tree which caused the Fire, opine as to the cause of the failure of the tree and identify factors which may have contributed to the failure.

13 On 24 April 2015 Toose LCM made a coronial investigation order which was to operate from 6am on 6 May 2015 to 6pm on 8 May 2015. On 6 May 2015, Constable Franklin of the New South Wales Police Force went to the site to execute the order. She was accompanied by the first defendant's solicitors and experts employed or retained by the first defendant. Persons who operated a crane were also present. Various investigations were made and photographs taken. The crane was used to move the Main Failed Section from the Base Section. The branch of the Main Failed Section was sawn off and the forked portion was preserved and later taken to the local police station to be safeguarded. The Short Stub was also preserved. At some stage the Extended Stub may have been moved some 2m from the place where it fell, but it otherwise remained in the vicinity of the Base Section.

14 The plaintiff's solicitors retained an expert arborist, Mr Gatenby, who visited the site three times in the second half of 2015. Although Mr Gatenby had access to the LiDAR image he apparently did not appreciate that it indicated that the Short Stub was connected to the Extended Stub prior to the Fire. Nor did he infer from the McDonald Photographs that the piece of wood depicted in one of them had been part of the Tree before the Fire. He proceeded on the basis that the Short Stub was the outer extremity of the trunk of the Tree and therefore did not locate the Extended Stub on the ground in the vicinity of the Base Section. He therefore did not give any consideration to whether there was any defect or sign in the Extended Stub which would have put the defendants on notice that the Tree had the potential to fail and hit a power line. Indeed, he opined that the Extended Stub had failed and split from the Short Stub in about

2005 and used this as the basis for his opinion that there was a defect in the Tree at that time.

15 On 27 August 2015, Mr Tom finalised his report. It is apparent from his report that he did not identify the Extended Stub on the ground or appreciate that it was attached to the Short Stub prior to the Fire.

16 The case was extensively case-managed by Garling J, although his Honour was not available to be the trial judge. The last directions hearing was on 28 September 2018 (referred to below). Several directions were made for the service of expert reports. Ultimately the report of Mr Gatenby was finalised on 19 June 2018 and served on 22 June 2018, which was within an agreed extended time. On 10 August 2018 the first and second defendants were directed to serve their expert reports by 23 August 2018 and the third defendant was directed to serve its arborist's report by 3 September 2018. The plaintiff was directed to serve any report in reply by 6 September 2018. On 10 September 2018, Garling J extended the time for the defendants' expert reports. Directions were made for various expert conclaves. The arborists' conclave was to take place on Monday 24 September 2018.

17 On 31 August 2018 the first defendant served a report of Mr Lodge, arborist (the Lodge report); on 5 September 2018 the second defendant served a report of Mr Hartley, arborist (the Hartley report); and on 10 September 2018 the third defendant served a report of Mr Fletcher.

18 In the Lodge report, Mr Lodge refuted Mr Gatenby's hypothesis about the stub by referring to two of the McDonald Photographs. Mr Lodge identified in these photographs the Extended Stub and the Short Stub in relatively close proximity to each other. In the Hartley report, Mr Hartley referred to LiDAR image which showed that the Extended Stub was joined to the Short Stub in 2013 before the Fire. Mr Fletcher did not address this question and did not opine about the significance of the cavities identified by Mr Gatenby.

19 When Mr Gatenby read the Lodge and Hartley reports, he realised that he had proceeded on an incorrect basis. On 17 September 2018 he returned to the site to inspect the location and found the Extended Stub in the vicinity of the Base Section. He formed the view that there was a defect in this section which

would have indicated to a reasonable person in the position of the defendants that the Tree was vulnerable and had the potential to fail, namely cavity #3 which he found at the fork of this section. In his report in purported reply, he acknowledged his error and expressed his opinion about cavity #3. He finalised his report on Thursday 20 September 2018.

20 On Friday 21 September 2018 there was a further directions hearing before Garling J at which the plaintiff sought leave to serve a report of Mr Gatenby in reply. He was directed to provide it by Saturday 22 September 2018. A report of Mr Gatenby dated 20 September 2018 (the Second Gatenby Report) was served on Sunday 23 September 2018 at about 7pm.

21 On Monday 24 September 2018, the defendants' solicitors contacted the plaintiff's solicitors and asked that the conclave, which was due to start at 9am, be deferred until 10am to permit them an opportunity to discuss the Second Gatenby Report with their experts. The conclave commenced at 10am and resulted in a joint report by the arborists dated 24 September 2018 (the Joint Arboreal Report). The questions to be answered in the conclave were general in nature and did not refer to particular cavities. For example, in answer to the issue "the state of health, structure and any other relevant characteristics of the Tree", the experts said:

> "All experts agreed that there were a number of cavity openings. There was internal loss of tissue, particularly between the two upright stems or branches shown in photograph A [the LiDAR image taken in 2013 which showed the silhouette of the Tree] and the extent of internal loss was not visible."

22 In answer to the issue "the probable cause of the Tree falling onto the powerlines on 17 October 2013", the experts gave relatively non-specific answers as follows:

> "The experts agreed that there was force applied to the stem which was greater than the load-bearing capacity of the stem.
>
> Mr Tom is of the view that the more likely cause was rotational failure caused by wind.
>
> Mr Gatenby agrees that the most likely cause was wind together with the amount of decay in the tree and termite damage in the tree.
>
> The other experts are unable to say with any certainty what was the cause of the force upon the stem."

23 There was a further directions hearing before Garling J on 28 September 2018 at which the plaintiff obtained an extension of time to serve the Second Gatenby Report (it having been served a day late) and also foreshadowed that he would apply for leave to amend the statement of claim, having circulated a draft to the other parties. It was agreed that this application would be heard by the trial judge. At the directions hearing, the first defendant's counsel informed the Court that the first defendant was not in a position to know what prejudice the amendment would cause, if it were allowed. His Honour urged the parties to take steps to deal with the proposed amendment so that, if it were allowed, the trial would not be disrupted.

The amendment application

24 Mr Tobin SC, who appeared with Mr Dalton QC and Mr Fraatz for the plaintiff, relied on the chronology which I have summarised above, by way of explanation for the delay in the application. He submitted that there was no fault on the part of Mr Gatenby or the plaintiff's legal advisers or the plaintiff himself. He said that, of all parties, the first defendant was in the best position to know of the configuration of the Tree before the Fire because it had created the LiDAR images and had also been present when the coronial investigation order was executed and, therefore, knew of the movement of the various parts of the Tree after the Fire. He also relied on a passage from Mr Gatenby's report to the effect that the Extended Stub had been moved a distance of about 2m from where it would have fallen. Mr Tobin submitted that no adverse view of Mr Gatenby could be formed from the circumstance that he did not appreciate that the Extended Stub was part of the Tree in circumstances where Mr Tom had also failed to appreciate it.

25 Mr Tobin submitted that when Mr Gatenby read the Hartley and Lodge Reports, he fulfilled his obligations under cl 4 of the Expert Witness Code of Conduct (Uniform Civil Procedure Rules 2005 (NSW), Sch 7) which requires an expert who has changed his mind on a material matter to provide a supplementary report. Mr Tobin submitted that Mr Gatenby went to the site to locate and inspect the Extended Stub and wrote his second report, correcting his earlier misapprehension and setting out his change of opinion (that there

was a further cavity which ought to have been seen and investigated by the defendants).

26 Mr Tobin contended that, in light of the generality of the Joint Arboreal Report, the materiality of cavities #1 and #2 would, in any event, need to be explored in a further conclave or in the concurrent evidence given by the arboreal experts. Although Mr Tobin accepted that it would be necessary for Mr Hartley and Mr Lodge to consider cavity #3 and respond to Mr Gatenby's opinion, he submitted that there was no reason why that task would be particularly onerous and could be accommodated during the course of the trial. He also relied on the circumstance that the defendants' solicitors had appreciated the importance of the Second Gatenby Report before the conclave, as evidenced by their request that the conclave be deferred for an hour to permit them to discuss it with the experts.

27 In summary, Mr Tobin submitted that the Second Gatenby Report was a responsible, responsive report which included a further matter which had been absent from the First Gatenby Report, through no fault of Mr Gatenby or the plaintiff. He contended that it was proper for Mr Gatenby's opinion about cavity #3 to be allowed to be included in the plaintiff's case and that there was no evidence of prejudice, particularly in circumstances where the Joint Arboreal Report left open significant matters which would need to be further explored.

28 Dr Bell SC, who appeared with Mr Hutton and Mr Pintos-Lopez for the first defendant, submitted that the only reason Mr Hartley and Mr Lodge referred to the Extended Stub was to refute Mr Gatenby's hypothesis that a piece had broken off the Short Stub in 2005. He said that if Mr Lodge could identify the Extended Stub there was no reason why Mr Gatenby ought not to have been able to, as he, too, had access to the LiDAR image and the McDonald Photographs. He also pointed to a photograph Mr Gatenby had taken of a piece of wood on the ground which he said showed that he appreciated the relevance of the Extended Stub. He said that this photograph was relied upon for the case based on cavity #4, which has since been abandoned. Dr Bell contended that I could not be satisfied of the explanation for the delay when Mr Gatenby was not called as a witness in support of the amendment application

and the evidence was given by Ms Emeny, the plaintiff's solicitor, on information and belief. He submitted that, had Mr Gatenby been called, he would have been able to cross-examine him to test the veracity of the explanation, which the first defendant did not accept. Indeed, Dr Bell, in his written submissions, relied on Mr Gatenby's "apparent lack of credibility" in respect of cavity #4.

29 Dr Bell relied on the affidavit of Mr Hunt, the first defendant's solicitor, in which he deposed that the first defendant, by reason of the plaintiff's delay, has lost the opportunity to document cavity #3 in the Extended Stub because it was not part of the plaintiff's case. Mr Hunt referred to the degradation of wood left out in the open and that said that he had been advised by Mr Lodge it is possible that an animal has made its nest in cavity #3 since February 2016 (when the statement of claim was served). Mr Hunt said that, if the amendment were granted, Mr Lodge and Mr de Mar (a vegetation management expert retained by the first defendant) would have to give further evidence. Mr Hunt also deposed that an ecologist might have to be retained to address the possibility of an animal having made its nest in the Extended Stub after the Fire. Mr Hunt deposed that a further conclave would be required to consider cavity #3, which would be difficult as Mr Lodge lives in South Australia and Mr Tom lives in Queensland. Mr Hunt referred to the circumstance that an adjournment would cause significant prejudice as the plaintiff would not be able to meet an adverse costs order to pay the costs thrown away. Further, Dr Bell is apparently unavailable until September 2019 apart from the time presently allocated for this trial.

30 Dr Bell informed me that he could not tell me how long it would take the first defendant to deal with the amendment, which was a substantial change at a critical point in the trial which was already disrupting preparation. He referred to the concept of "assumed prejudice" and referred to *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 at [102] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). Dr Bell also took me to the Second Gatenby Report and said that it was largely inadmissible. He submitted that the Court was being asked to proceed on a weak evidentiary foundation. Dr Bell also relied on the circumstance that "all sorts of forensic

commercial decisions have been made in the interim in respect of this case on the basis of the way it was put" and submitted that it would cause prejudice to the defendants to allow the plaintiff to add cavity #3 to a case which was founded on cavities #1 and #2.

31 Mr Windsor SC, who appeared with Ms Berberian on behalf of the second defendant, adopted the submissions of Dr Bell. He referred to the stress of litigation and the added stress of amendments or adjournments, not only to individuals but also to corporations, who necessarily acted through human agents.

32 Mr McCulloch SC, who appeared with Mr Marskell for the third defendant, adopted Dr Bell's and Mr Windsor's submissions. He said that Mr Gatenby's correction ought not be used as a stalking horse for a new case by the plaintiff. He submitted that the question whether a reasonable person in the position of the third defendant could have, or ought to have, seen the Extended Stub (when it was still part of the Tree) has not been considered at all and would need to be investigated. He submitted that it was "intolerable and grossly unfair" to require such an investigation to be carried out on the run. Further, he submitted that it would be difficult to work out whether cavity #3 could, or should, have been seen by a scoper (a role performed by his client) in circumstances where the best evidence comprised photographs, which should, in any event, be used with caution. Mr McCulloch also referred to the "usual flurry of activity" which precedes a long civil trial, including settling the court book, preparing openings and cross-examination and conferring with witnesses. He said that although he has spoken to Mr Wyper (who is the third defendant's director and an arborist and vegetation management expert), he would need to go to the site with Mr Wyper to assist in the investigation of cavity #3 if the amendment were allowed and this would constitute an unjustifiable disruption of the trial process.

33 In reply Mr Tobin submitted that the expert conclave had, in part, considered cavity #3 as they had the Gatenby Second Report and Mr Gatenby took part in the conclave on 24 September 2018. He submitted that it was not unusual for conclaves to reconvene on the morning of concurrent evidence so that experts

could discuss further points. He also submitted that the plaintiff (and the other group members who are in a similar position) ought not be prevented from putting a case available to him which was not disclosed earlier through no fault of his own, or his experts, or legal advisers.

Consideration

34 I am persuaded, largely for the reasons submitted by Mr Tobin, that the amendments ought be allowed.

35 I do not accept, on the basis of the material before me on the amendment application, Dr Bell's submission that Mr Gatenby was incompetent in failing to appreciate that the Extended Stub was part of the Tree immediately before the Fire. I do not regard it as significant that Mr Gatenby was not called as a witness in support of the amendment application, it being the usual practice for solicitors to give such evidence on information and belief. Moreover, much of the narrative set out above is apparent from the experts' reports and other evidence to be adduced at the trial which is contained in the court book. An interlocutory application such as the present is rarely an appropriate occasion to test the credibility of a witness, whether expert or otherwise, who is to give evidence in the trial.

36 While the LiDAR image depicted a longer trunk than Mr Gatenby understood to be the case, it is telling that Mr Tom, who was appointed by the coroner to provide an opinion, did not appreciate that it was part of the Tree either. While they may both have overlooked a matter which, in hindsight, they might appreciate they could have seen at the time, I am not satisfied that this indicated either incompetence or default.

37 It follows that I accept Mr Tobin's submission that there was no relevant fault on the part of Mr Gatenby or anyone on behalf of the plaintiff in failing to appreciate the true configuration of the Tree before the Hartley and Lodge Reports were served in September 2018. Mr Gatenby responded quickly to the new information and prepared another report. Although the Second Gatenby Report was dated 20 September 2018 and not served until 23 September 2018, I infer that the reason for the delay was that the plaintiff's legal advisers, understandably, wished to read it before it was served. Thus, although the

amendment application has been made at a late stage, I accept that it has been made at the earliest reasonable opportunity.

38 There is no indication in the Joint Arboreal Report that the experts had difficulties in considering the questions by reason of the late service of the Second Gatenby Report or the matters raised in it. This may be partly because the experts did not address or distinguish between cavities #1 and #2 and, indeed, did not refer to them specifically. Plainly, the questions arising in relation to cavities #1 and #2 will have to be addressed further in the concurrent evidence. There is no reason why cavity #3 cannot be added to the list. I accept that this will impose a burden on the defendants and that these matters are difficult in the context of a trial which is running and I have taken it into account.

39 As to Dr Bell's submission that the plaintiff's case on cavity #3 was weak and insufficiently substantiated by the evidence and that therefore the amendment ought be refused, I do not consider this to be a matter which I am in a position to assess at this early stage. It may be that the plaintiff's case on cavity #3 is weaker than on cavities #1 and #2 and that there is, in the end, no forensic advantage to be gained by the addition of cavity #3 to the plaintiff's case. However, the plaintiff is entitled to fortify its case by cross-examining the defendants' witnesses. Thus, when there has been no evidence adduced at the trial so far, the plaintiff's opening having been concluded before the amendment application (because I asked for this to be done so that I could better understand the plaintiff's case), it is, in my view, too early to make a judgment about the relative prospects of success of the plaintiff's case on cavity #3.

40 The only evidence of actual prejudice was that adduced by Mr Hunt, who referred to the loss of opportunity of investigating the Extended Stub in the period from February 2016 to September 2018 when the amendment was first foreshadowed. That the Extended Stub may have degraded either through the weather or by the activities of animals, birds or insects, affects all parties. Indeed, this factor may be more prejudicial to the plaintiff than to the

defendants since it is the plaintiff who bears the onus of proof as to the condition of the Extended Stub at the time of the Fire.

41 Although Dr Bell and Mr McCulloch spoke in general terms about the difficulties of meeting new matters on the run, there was no evidence as to what had been done by the experts since the amendment was foreshadowed or why investigation of cavity #3 could not take place during the trial itself, given that there are many other witnesses to be called on unrelated topics. In the absence of such evidence, I am not prepared to infer that it could not be done or that there would be undue difficulty in doing so, although I assume that there will be some burden imposed on the parties and their experts. It is of significance that Dr Bell submitted that he could not tell how long it would take, in circumstances where it must have been open to the first defendant to obtain such an estimate from its experts and provide it to the court.

42 Ultimately the question whether an amendment ought be allowed is to be resolved by the interests and dictates of justice: see Part 6 of the *Civil Procedure Act*. I have considered the matters in Part 6, including s 58(2). Relevant matters include: whether the party seeking the amendment is at fault in any way; the stage at which the amendment is sought to be made; any prejudice to the other parties if the amendment were allowed; any prejudice to the applicant if the amendment were refused. Having regard to the matters raised by the parties in submissions which are referred to and addressed above, I consider that the interests and dictates of justice favour allowing the amendment to permit the plaintiff to put his case, including his case on cavity #3. It is also significant that s 64 of the *Civil Procedure Act* provides that, subject to s 58, “all necessary amendments are to be made for the purpose of determining the real questions raised by . . . the proceedings”. The proposed amendment raises a real question which, in the circumstances, set out above, the plaintiff is entitled to have determined in these proceedings.

43 The dictates of justice require that the defendants be given an opportunity to meet the case on cavity #3. What will be involved in providing that opportunity cannot presently be determined.

Detail of the amendments

44 I understand that only the following amendments are objected to:

> <u>Paragraph 51.5</u>
>
> **Particulars of the tree**
>
> - "The closest vegetation of the Tree was approximately 3.5 metres from the northern conductor."
> - The words "both within and" in the following sentence.
> - "Branches over 75mm in diameter were in close proximity to the power lines and above a 45 degree line of clearance from the power lines."
>
> The whole of (f), (g) and (h) and subparagraph (i) in so far as it refers to cavity #3.

45 For the reasons given above, I allow the subparagraphs objected to. As far as the balance of the matters (concerning the dimensions of the Tree) are concerned, it was submitted by Dr Bell that he could not find evidence to the effect of these paragraphs and invited Mr Tobin to identify it. Mr Tobin did not, in the course of oral submissions, identify any such evidence. Nonetheless, the dimensions of the Tree and its proximity to the power lines are plainly highly relevant to the plaintiff's case. It is important that the defendants and the Court know what the plaintiff says in respect of these matters. If there is, at the end of the trial, no evidence to the effect of these descriptive particulars, they will fall away. In these circumstances, I am persuaded that these amendments ought be allowed as well.

Costs

46 I have not heard the parties on costs. In the normal course the amending party would have to pay the costs of the amendment. Rather than address this question now, I would prefer to reserve costs and determine the question, if required, before the end of the trial.

Orders

47 For the reasons given above, I make the following orders:

(1) Grant leave to the plaintiff to amend his pleading in accordance with the draft third amended statement of claim annexed and marked "A" to the affidavit of Kathryn Amy Emeny sworn 8 October 2018.

(2) Reserve the costs of the plaintiff's notice of motion filed in Court on 9 October 2018.

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