

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No. 8547 of 2009

BETWEEN

ENVIRONMENT EAST GIPPSLAND INC

Plaintiff

and

VICFORESTS

Defendant

AFFIDAVIT OF REBECCA VERONICA HOWE

Date Sworn: 19 February 2010

Filed on behalf of the Defendant

**HWL Ebsworth Lawyers as agent for Komesaroff Legal
Pty Ltd**

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Ref: JAK:RVH:182227

I, **REBECCA VERONICA HOWE**, of Level 21, 570 Bourke Street, Melbourne in the State of Victoria, Solicitor,
make oath and say as follows:

1. I am a solicitor in the employ of HWL Ebsworth Lawyers and subject to the supervision of my principal I have the care and conduct of this Proceeding on behalf of the Defendant. I am authorised to swear this affidavit on behalf of the Defendant. I make this affidavit from my own knowledge, except where otherwise stated.
2. On 23 October 2009, his Honour Justice Osborn made orders that the Plaintiff file and serve any expert reports on which it intends to rely at trial on or before 21 December 2010. Now produced and shown to me and marked "**RVH-1**" is a true copy of the authenticated orders of Justice Osborn made on 23 October 2009.
3. Now produced and shown to me and marked "**RVH-2**" is a true copy of a letter dated 21 December 2009 from Vanessa Bleyer, solicitor for the Plaintiff, addressed to Jonathan Kramersh, who is the partner who has the care and conduct of this proceeding on behalf of the Defendant. I was provided with a copy of this letter. For convenience I note that the letter provides:

"We enclose expert reports of Dr Chris Belcher, Rohan Bilney and Robert McCormack, by way of service.



We are awaiting four further expert reports. We expect to receive one of them later today or tomorrow morning, at which time it will be filed and served. We expect to receive the remaining three expert reports in January 2010, at which time they will be filed and served."

4. The Plaintiff did not serve HWL Ebsworth with a further report in December 2009.
5. On 6 January 2009, at about 5.32 pm, I was carbon copied into an email from Jonathan Kramersh to Vanessa Bleyer. For convenience I note that the email provides:

"We refer to the orders of his Honour Justice Osborn of 23 October 2009 requiring the provision of any expert reports that your client intends to rely at trial to be served and filed by 21 December 2009.

On 21 December 2009 you served expert reports of Dr Chris Belcher, Rohan Bilney and Robert McCormack under cover of your letter of the same date. In your letter you stated that you expected to receive a further report within two days of the letter, and a further three reports in January 2010.

We have not yet received the three further reports you referred in your letter dated 21 December 2009.

Your clients [sic] delays are hampering our client's preparation of this matter for trial, and if it does intend to rely on further expert reports, could you please serve those reports without further delay.

In the interim our client reserves all of its rights in relation to your clients [sic] late service and filing of its expert reports."

Now produced and shown to me and marked "RVH-3" is a true copy of the email sent at approximately 5.32 pm on 6 January 2010 from Jonathan Kramersh to Vanessa Bleyer.

6. Now produced and shown to me and marked "RVH-4" is a true copy of a letter I sent by email to Vanessa Bleyer at approximately 3.22 pm on 21 January 2010. For convenience I note that the letter provides:

"We refer to the orders of Justice Osborn dated 23 October 2009 (Orders).

The Orders provided that the Plaintiff was to file and serve any expert reports on which it intends to rely at trial on or before 21 December 2009. On 21 December 2009 you served expert reports of Dr Chris Belcher, Rohan Bilney and Robert McCormack under cover of letter of the same date. In your letter you stated that you expected to receive a further report within two days of the letter, and a further three reports in January 2010.

We have not received any further reports from you, notwithstanding your letter of 21 December 2009. By email dated 6 January 2010, we wrote to you to the following effect:




"Your client's delays are hampering our client's preparation of this matter for trial, and if it does intend to rely on further expert reports, could you please serve those reports without further delay.

In the interim our client reserves all of its rights in relation to your clients late service and filing of its expert reports."

You have not responded to that email nor served the further reports.

Your delay in filing the further reports continues to prejudice our client's ability to prepare and present its case in this proceeding. Given there is only 5 weeks until commencement of the trial, there is now insufficient time for the Defendant's experts to consider your client's expert reports and prepare supplementary reports.

The Defendant and the experts retained by the Defendant are left with no other alternative but to finalise the preparation of expert reports on the basis of the evidence filed by the Plaintiff to date (including the affidavits of Andrew Lincoln and Shelly McLaren).

It follows that the delay in the filing of any further expert evidence by your client will not leave our client with adequate time prior to trial to consider the further material and prepare a response by the experts retained by the Defendant prior to the hearing.

We reserve the right to produce the email to you dated 6 January 2010 and this letter to the Court at the appropriate stage on the question of prejudice to our client."

7. On 29 January 2010, the Defendant filed and served the expert report of Professor Ian Ferguson.
8. On 29 January 2010, at approximately 11.37 am, I was carbon copied into an email from Vanessa Bleyer to Jonathan Kramersh. For convenience I note the email provides:

"Please find attached expert report by way of service which has been filed today.

We intend to write to you regarding the delay in the filing of expert reports on Monday, 1 February 2010."

Now produced and shown to me and marked "RVH-5" is a true copy of the email from Vanessa Bleyer to Jonathan Kramersh sent on 29 January 2010 at approximately 11.37 am.

9. On 1 February 2010, at approximately 11.23 am, I received a letter by email from Vanessa Bleyer to Jonathan Kramersh. For convenience I note the letter provides:

1. We confirm that:

- (a) on 21 December 2009, we filed and served expert reports of Dr Chris Belcher, Rohan Bilney and Robert McCormack;




(b) on 22 December 2009, we filed and served the expert report of Dr Graeme Gillespie; and

(c) on 29 January 2010, we filed and served the expert report of Dr Andrew Smith.

2. We also confirm that we were served with an expert report of Ian Ferguson on 29 January 2010. Please let us know whether this is the only expert material that your client intends to file and serve including in respect of the species the subject of the reports at paragraphs 1(a) and (b) above.
3. We expect to receive two further expert reports from one expert tomorrow, 2 February 2010, at which time they will be filed and served. These are the last expert reports that we are instructed to file for the Plaintiff. They delay in the provision of these expert reports arises from the time available to the author to produce the reports. In addition, it is due to another expert previously retained to report on the Long-footed Potoroo advising of his inability to do so in December 2009. As a result, we had to engage an alternative expert, being the expert referred to in this paragraph, in December 2009.
4. The delay in provision of Dr Smith's report arose from the matters set out in paragraphs 24(a) to (c) of the affidavit of Vanessa Elizabeth Bleyer sworn 22 October 2009. Dr Smith did not have the capacity to conduct a site visit and prepare his report before 29 January 2010.
5. Our client accepts your client may choose to file expert material in respect of the reports referred to in paragraphs 1(c) and 3 above. Please let us know at your earliest convenience (following receipt of the para 3 reports in respect of those reports) whether your client intends to do so and, if so, when we can expect to be served with them."

Now produced and shown to me and marked "RVH-6" is a true copy of the letter from Vanessa Bleyer to Jonathan Kramers sent by email at approximately 11.23 am on 1 February 2010.

10. Now produced and shown to me and marked "RVH-7" is a true copy of an email I sent Vanessa Bleyer at approximately 11.29 am on 1 February 2010. For convenience I note the email provides:

"We have not received the report of Mr Gillespie referred to in your letter sent at 11.23 today.

Please sent [sic] it to us be [sic] return email as a matter of urgency."

11. Now produced and shown to me and marked "RVH-8" is a true copy of a letter I sent by email to Vanessa Bleyer at approximately 12.56 pm on 1 February 2010. For convenience I note the letter provides:




"We refer to your letter sent at approximately 11.23 am today. We respond as follows:

- 1. We confirm we have received the reports of Dr Chris Belcher, Rohan Bilney and Robert McCormack which were served under cover of letter dated 21 December 2009.*
- 2. We have not received a copy of the report of Dr Graeme Gillespie that you assert served by you on 22 December 2009; and*
- 3. We have received a copy of the report of Dr Andrew Smith which was served on us on 29 January 2010.*

On 6 January 2010 and 21 January 2010 we wrote to you about your failure to comply with the orders of Justice Osborn made on 23 October 2009. Both of those letters made it clear that the defendant was in receipt only of the reports served under cover of letter dated 21 December 2009. For the sake of convenience, our letter of 21 January 2010 provided in part:

"In your letter [of 21 December 2009] you stated that you expected to receive a further report within two days of the letter, and a further three reports in January 2010. We have not received any further reports from you, notwithstanding your letter of 21 December 2009."

At no stage after receiving our letters of 6 January 2010 and 21 January 2010 did you write to us regarding Dr Gillespie's report or that you had already served a copy of this report on our office. We had retained a suitably qualified brown tree frog expert who had set aside time over the festive season to respond to your client's expert but in the absence of receipt of your client's report he was unable to respond to your client's expert evidence and as such, we were unable to file his expert report on 29 January 2010. We have and continue to be hampered by your client's failure to serve its expert evidence.

As requested in our email sent to you earlier today, would you please provide us as a matter of urgency with Dr Gillespie's report together with proof that Dr Gillespie's report was served on our office on 22 December 2009.

We note that we requested Dr Gillespie's report by email sent at approximately 11.29 am this morning but have not received the report at the time of writing this letter."

- 12. At approximately 1.06 pm on 1 February 2010, I received an email from Vanessa Bleyer. For convenience I note that the email provides:*

"Dr Gillespie's report is attached. We also attach our letter to him dated 26 October 2009".

Now produced and shown to me and marked "RVH-9" is a true copy of the email I received from Vanessa Bleyer at approximately 1.06 pm on 1 February 2010.



13. At approximately 3.05 pm on 2 February 2010, I was carbon copied into an email from Vanessa Bleyer to Jonathan Kramersh. The email attached two reports prepared by Dr Charles Meredith (**Meredith Reports**) respectively dated 1 February 2010 and 2 February 2010. For convenience I note that the email provides:

"We enclose reports of Dr Meredith by way of service which have been filed with the Supreme Court today."

Now produced and shown to me and marked "RVH-10" is a true copy of the email I received from Vanessa Bleyer at approximately 3.05 pm on 2 February 2010.

14. At about 4.10 pm on 3 February 2010, I telephoned Professor Ferguson who is the forestry science expert retained by the Defendant. I said: *"I would like to send you the Meredith Reports so that you can prepare a supplementary expert report."* Professor Ferguson said: *"I have a lot on my plate at the moment. I have a consultancy report due and I am aiming to have the draft out by Sunday, 7 February. I am then travelling to Western Australia for holidays and I will have limited access to email and computers. I am also appearing as a witness in the Bushfires Royal Commission in late February so any supplementary report won't be prepared until after 22 February."*

15. Now produced and shown to me and marked "RVH-11" is a true copy of a letter I received by email from Vanessa Bleyer at approximately 5.03 pm on 3 February 2010. For convenience I note the letter provides:

" ...

1. We refer to your letter sent to us by email at about 1.11 pm on 1 February 2010 (**your 1 February letter**) in relation to Dr Graeme Gillespie's report.
2. We emailed a copy of Dr Gillespie's report to Rebecca Howe of your office at about 1.06 pm on 1 February 2010 before receiving your 1 February letter. You were copied in on our email. Our email was sent in response to an email received from Ms Howe at about 12.03 pm on 1 February 2010. Your 1 February letter states that you still have not received the report. It appears that our emails may have crossed. Please confirm that you have now received and been served with Dr Gillespie's report.
3. After receiving Ms Howe's 1 February email and your 1 February letter, we reviewed our file to ascertain whether you had been served with Dr Gillespie's report on 22 December 2009. Regrettably, it appears that while a member of this law practice was directed to file and serve the report that day, it was filed with the Supreme Court but, in error, it was not served on your firm.
4. We refer to our letter sent to you by email at about 11.22 am on 1 February 2010. At the time of sending, Vanessa Bleyer of our office who was the author of that letter genuinely believed




that Dr Gillespie's report had been served on your firm. This is for various reasons, including those set out at paragraphs 5 and 6 below.

5. *On 21 December 2009, we sent you a letter which said that we expected to receive a further expert report within 2 days and a further 3 reports in January 2010. On 6 January 2010, you sent an email to Ms Bleyer which referred to that part of our 21 December letter and then said "[w]e have not yet received the 3 further reports you referred in your letter dated 21 December 2009". Any reference to not having received the one report 'within 2 days' was omitted.*
6. *On 24 December 2009, you sent us a letter requesting a copy of instruction letters to 2 experts (not all 3 which we now know you had, nor 4 which we believed you had). On 28 December 2009, we provided the 2 letters of instruction to you. In your 24 December email, you set out reasons for asking for those 2 instruction letters. We had assumed that those reasons did not apply to the other 2 reports. On 29 December 2009, you sent an email to Ms Bleyer requesting the instructions letter for 1 other report. We assumed that you requested that 1 other instruction letter after deciding that you needed it for the same reasons as the first 2 provided to you. The 1 other instruction letter was emailed to you on 30 December 2009.*
7. *The delay in service of the report was clearly inadvertent. We apologise for the delay in service of it."*

16. Now produced and shown to me and marked "RVH-12" is a true copy of a letter I received by email from Vanessa Bleyer at approximately 9.35 am on 9 February 2010. For convenience I note the letter provides:

"It was recently been [sic] brought to our attention that one of the experts retained for our client identified a Square-tailed Kite at Brown Mountain.

As a result, we are instructed to retain an expert in that species to prepare a report to be filed in this proceeding. We expect to receive the report later this week at which time it will be filed and served.

We are of course prepared to accommodate whatever time your client needs to respond to this extra report and we apologise for its lateness, however it was not something we were able to anticipate."

17. Now produced and shown to me and marked "RVH-13" is a true copy of a letter I received by email from Vanessa Bleyer at approximately 9.00 pm on 10 February 2010. For convenience I note the letter provides:

"It was recently been [sic] brought to our attention that one of the experts retained for our client considers the Giant Burrowing Frog relevant to Brown Mountain.




As a result, we are instructed to retain an expert in that species to prepare a report to be filed in this proceeding. We expect to receive the report early next week at which time it will be filed and served.

We are of course prepared to accommodate whatever time your client needs to respond to this extra report and we apologise for its lateness, however it was not something we were able to anticipate."

18. At approximately 3.18 pm on 15 February 2010, I sent an email to Vanessa Bleyer. For convenience I note the email provides:

"We refer to your letter of 9 February 2010 wherein you indicated you would be in a position to file and serve expert material in relation to the square-tailed kite by the end of last week.

We have not received any such material from you. Please serve that expert material as a matter of urgency."

Now produced and shown to me and marked "RVH-14" is a true copy of the email I sent Vanessa Bleyer at approximately 3.18 pm on 15 February 2010.

19. Now produced and shown to me and marked "RVH-15" is a true copy of an email I received from Vanessa Bleyer at approximately 8.23 pm on 17 February 2010. For convenience I note that email provides:

"We attached [sic] report of Dr Stephen Debus with attachments which we intend to file tomorrow."

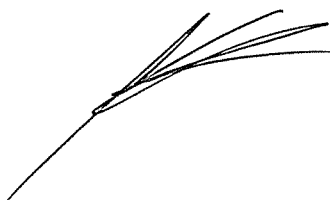
20. For convenience I note that the report of Dr Stephen Debus concerns the Square-tailed Kite.

21. At approximately 6.12 pm on 18 February 2010 I sent a letter by email to Vanessa Bleyer. For convenience I note that letter provides in part:

"In the meantime, and as expressed in our correspondence to you on 6 January 2010 and 21 January 2010, our client reserves all of its rights in relation to your client's late serve and filing of its expert reports. This reservation extends to the filing of expert material in relation to the Square-tailed Kite and Giant Burrowing Frog."

Now produced and shown to me and marked "RVH-16" is a true copy of the letter I sent Vanessa Bleyer at approximately 6.12 pm on 18 February 2010.

22. Now produced and shown to me and marked "RVH-17" is a true copy of a letter I received by email at approximately 6.29 pm on 18 February 2010 from Vanessa Bleyer. That email attached a letter. For convenience I note the letter provides:




"We enclose proposed amended statement of claim. Please let us know preferably by 4pm tomorrow, 19 February 2010, whether your client consents to the filing of it."

23. At approximately 11.17 am on 19 February 2010 I was carbon copied into an email from Vanessa Bleyer. For convenience I note that email provides:

"We enclose:

- Affidavit of Barbara Triggs with exhibits by way of service, which has been filed; and

-Affidavit of Jill Redwood with exhibits, which has not yet been filed. We received the attached document by fax. We are instructed to expect the original by post on Tuesday, 23 February 2010, at which time we will file the document and formally serve it on you."

Now produced and shown to me and marked "RVH-18" is a true copy of the email I received from Vanessa Bleyer at approximately 11.17 am on 19 February.

24. At approximately 2.46 pm on 19 February 2010, I sent an email to Vanessa Bleyer which attached a letter. For convenience I note that letter provides in part:

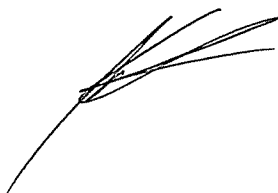
"We are instructed that our client does not consent to the filing of the proposed amended statement of claim.

Should your client instruct you to seek leave of the Court to amend its statement of claim 9 days prior to the commencement of trial, then we request that it makes a formal application to the Court.

Our client will resist your application for leave to amend its statement of claim at this late stage as the amendments raise new allegations and species (unsupported in part by any evidence) and will necessary cause significant delay and prejudice to our client who are at an advanced stage of preparation for trial. Your client has had a significant opportunity since August 2009 to plead its case.

The extent of the proposed amendments, the delay and costs renders it too late for a further and substantial amendment to your client's statement of claim on the eve of trial."

Now produced and shown to me and marked "RVH-19" is a true copy of the email I sent Vanessa Bleyer at approximately 2.46 pm on 19 February 2010.




25. At the time of deposing this affidavit, HWL Ebsworth has not been served with any expert material with respect to the Giant Burrowing Frog.

SWORN at

Melbourne

on

19 February 2010

Before me:

[Signature]

[Signature]
Rebecca Veronica Howe

Jonathan Alan Kramersh
Level 21, 570 Bourke Street Melbourne
An Australian Legal Practitioner
(within the meaning of the
Legal Profession Act 2004)