



Defence to non-use removal application

No. VID 659 of 2024

Federal Court of Australia
District Registry: Victoria
Division: General

Progressive Green Pty Ltd (ACN 130 175 343)

Applicant

Flo Energy Australia Pty Ltd (ACN 664 209 330) and Flow Holding Pte Ltd (UEN 202006024R)

Respondents

In response to the application for removal of trade mark registration 1553374 for FlowSmart (**Trade Mark**) for non-use filed 3 December 2024 and referred to the Court pursuant to Orders of the Honourable Justice Moshinsky dated 12 December 2024, the Respondents say by way of defence:

1. Bruutzak Holding B.V. (**Bruutzak**) was registered as the owner of the Trade Mark with effect from 31 October 2024 to 2 December 2024.
2. On 31 October 2024, Bruutzak granted to the First Respondent an exclusive licence to use the Trade Mark in Australia.

Particulars

- (i) Paragraph [117] of the Affidavit of Matthijs Jan Guichelaar dated 4 December 2024 and pages 391 to 403 of Exhibit MJG-1.
3. The First Respondent used the Trade Mark in good faith in Australia between 31 October 2024 and 3 November 2024 in respect of:

Distribution of energy; Electricity distribution; Fuel distribution services; Electricity storage; Electricity supply services; Supply of electricity; Transmission of electricity; Storage; Storage of gas; Delivery of fuel (**Registered Services**).

Filed on behalf of (name & role of party)	The Respondents		
Prepared by (name of person/lawyer)	Siabon Seet		
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Particulars

- (i) Paragraphs [114] to [120] of the Affidavit of Matthijs Jan Guichelaar dated 4 December 2024 and pages 382, 404 to 421 and 442 to 461 of Exhibit MJG-1.

- 4. The First Respondent's use of the Trade Mark referred to in the above paragraph was controlled and thus authorised by Bruutzak within the meaning of s 8 of the *Trade Marks Act 1995* (the **Act**), such that the First Respondent's use of the Trade Mark is taken to be use by Bruutzak by operation of s 7(3) of the Act.

Particulars

- (i) The First Respondent's use of the Trade Mark was governed by the written agreement reproduced at pages 391 to 403 of Exhibit MJG-1 to the Affidavit of Matthijs Jan Guichelaar dated 4 December 2024.
- (ii) Throughout the time of that use, Matthijs Jan Guichelaar was the sole director and shareholder of Bruutzak and a director and the chief executive officer of the First Respondent.

- 5. By reason of the matters set out in paragraphs 1 to 4 above, Bruutzak used the Trade Mark in good faith in Australia within the **Alleged Non-use Period** (3 November 2021 to 3 November 2024), such that the Applicant's allegation under s 92(4)(b) is rebutted and no ground is made out to remove the Trade Mark.

- 6. In the alternative, if it is found that the First Respondent and Bruutzak have not used the Trade Mark in good faith in Australia during the Alleged Non-use Period, the Court should exercise its discretion not to remove the Trade Mark from the Register on the basis that:

- (a) between 4 November 2024 (after the Alleged Non-use Period) and 2 December 2024, the First Respondent used the Trade Mark in respect of the Registered Services under the control and thus authorisation of the registered owner Bruutzak;

Particulars

- (i) Paragraphs [114] to [120] of the Affidavit of Matthijs Jan Guichelaar dated 4 December 2024 and pages 382, 404 to 421 of Exhibit MJG-1.

- (b) on 2 December 2024, Bruutzak assigned the Trade Mark to the Second Respondent;

Particulars

- (i) Paragraph [121] of the Affidavit of Matthijs Jan Guichelaar dated 4 December 2024 and pages 422-428 of Exhibit MJG-1.
- (c) the Second Respondent has been registered as the owner of the Trade Mark with effect from 2 December 2024 to the present;
- (d) on 2 December 2024, the Second Respondent granted to the First Respondent an exclusive licence to use the Trade Mark in Australia;

Particulars

- (i) Paragraph [122] of the Affidavit of Matthijs Jan Guichelaar dated 4 December 2024 and pages 429 to 441 of Exhibit MJG-1.
- (e) since 2 December 2024:
 - (i) the Second Respondent has used the Trade Mark in respect of the Registered Services; and
 - (ii) the First Respondent has used the Trade Mark in respect of the Registered Services under the control and authorisation of the Second Respondent.

Particulars

- (i) Paragraphs [114] and [123] of the Affidavit of Matthijs Jan Guichelaar dated 4 December 2024 and pages 382, 442 to 461 of Exhibit MJG-1.
- (f) further or alternatively, since 2 December 2024, the First and Second Respondents have used the Trade Mark in relation to services which are similar or closely related to the Registered Services; and
- (g) neither Bruutzak (until 2 December 2024) nor the Second Respondent (since 2 December 2024) has ever abandoned the Trade Mark.

Date: 10 February 2025



Signed by Siabon Seet
Lawyer for the Respondents

This pleading was prepared by Edward Heerey KC and Tim Burn-Francis of counsel.

Certificate of lawyer

I Siabon Seet certify to the Court that, in relation to the defence filed on behalf of the Respondents, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 10 February 2025



Signed by Siabon Seet
Lawyer for the Respondents