

IN THE SUPREME COURT OF VICTORIA
COMMON LAW DIVISION
MAJOR TORTS LIST



Case: S CI 2016 05027

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BETWEEN

MICHAEL KARL SCHMID

Plaintiff

and

ROGER JAMES SKIMMING & ORS (according to the attached schedule)

Defendants

and

HARLEY INDUSTRIAL PTY LTD (ACN 115 230 905)

Third Party

DEFENCE TO THIRD PARTY STATEMENT OF CLAIM

Date of Document:

3 May 2019

Filed on Behalf of:

The Third Party

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To the Third Party Statement of Claim (TPSC) filed 29 March 2019 by the Fourth Defendant, EL Mining Solutions Pty Ltd (ACN 151 983 603) (**Agrison**), the Third Party Harley Industrial Pty Ltd (ACN 115 230 905) (**Harley**) by its solicitors says as follows;

The parties

1. Paragraph 1(a) of the TPSC is admitted. Paragraph 1(b) of the TPSC is denied. Under cover of the aforesaid denial, Harley says that prior to 29 February 2016, the Fourth Defendant's name was Agrison Pty Ltd (ACN 151 983 603).
2. Paragraph 2(a) of the TPSC is admitted. Save that Harley admits that it sold chain to various customers in or about 2011, paragraph 2(b) is not admitted.

Group claim against Agrison

3. Save that it is admitted that the Group Claim as more particularly set out in the Third Amended Statement of Claim dated 16 May 2018 has been brought against the Fourth Defendant, paragraph 3 of the TPSC is not admitted.

Negligence

4. Paragraph 4 of the TPSC is denied. Under cover of the aforesaid denial Harley says:

Harley's catalogue

- a. At or about 2011, Harley's catalogue for wholesale sales of chain (**the catalogue**) distinguished between three types of chain:
- i. "Proof coil chain";
 - ii. "Grade 70 chain and components";
 - iii. "Grade 80 lifting chain and components";

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A copy of the catalogue is in the possession of the solicitors for Harley and may be inspected by prior arrangement.

- b. Proof coil chain is grade 30 chain and is the lowest specified strength chain and is not to be used where grade 70 or grade 80 chain is required. Proof coil chain is also known as commercial chain;
- c. Grade 70 chain is transport chain manufactured in heat treated carbon steel and is typically used to tie down loads on trucks;
- d. Grade 80 chain is heat treated steel chain with a high strength to weight ratio and is typically used for lifting and for recovery, safety and towing;
- e. The catalogue, by distinguishing between "proof coil chain", "grade 70 chain and components" and "grade 80 lifting chain and components", made plain that purchasers needed to assess the use the chain was to be put to, and purchase chain fit for that purpose.

First sale of chain

- f. In or about 27 September 2011 Harley sold to a person who paid with a NAB credit card:

- i. One pail of 10 mm chain mild steel medium link self-colour 24 metre/pail at a cost of \$77.27 ex GST;
- ii. Two pails of 10 mm mild steel long link galvanised 50 kg pail at a total cost of \$172.73 ex GST;

(the first sale)

- g. The first sale was a walk-in sale: the person arrived at Harley's then premises in 22-24 Chaffey Street, Thomastown without prior notice and purchased the chain;
- h. The chain sold in the first sale was of chain that was not grade 70 or grade 80 chain but instead proof coil chain;
- i. Harley generated a tax invoice number 00008011 in respect of the first sale at the request of the person, addressed to "Agrison" at both 27 Production Drive Campbellfield and 1583 Hume Highway Campbellfield;
- j. Apart from the invoice and the credit card slip for the first sale (which were first provided by the solicitors for Agrison (Messrs Hall and Wilcox) to the solicitors for Harley (Messrs Goldsmiths) by letter dated 12 February 2019), Harley has no records of the first sale.

Second sale of chain

- k. In or about 8 December 2011 Harley sold to a person who paid with a NAB credit card:
 - i. One bucket of 8 mm long link commercial chain 50KG bucket, and
 - ii. One bucket of 10 mm long link commercial chain 50KG bucket, at a total cost of \$181.82 ex GST;

(the second sale)

- l. The second sale was also a walk-in sale: the person arrived at Harley's then premises in 22-24 Chaffey Street, Thomastown without prior notice and purchased the chain;
- m. The chain sold in the second sale was of chain that was not grade 70 or grade 80 chain but instead proof coil chain;
- n. Harley generated a tax invoice number 00008221 in respect of the second sale at the request of the person, addressed to "Agrison" at both 27 Production Drive Campbellfield and 1583 Hume Highway Campbellfield;
- o. The tax invoice expressly described the chain as "commercial chain";

- p. Apart from the invoice and the credit card slip for the second sale (which were also first provided by the solicitors for Agrison (Messrs Hall and Wilcox) to the solicitors for Harley (Messrs Goldsmiths) by letter dated 12 February 2019), Harley has no records of the second sale.

Source of the chain

- f. At all material times Harley's primary business was manufacture, supply and installation of warehouse storage racking and shelving;
- g. However, Harley also sold hardware (including chain);
- h. Harley had purchased chain in or about 2006/07 from Nantong Yangtong Foreign Trading Co Ltd (NYFT) of 208 Huarong Road, Yangtong Town, Rudong, Nantong, Jiangsu, Peoples Republic of China;
- i. In 2009 Harley decided to exit the sale of hardware and to focus on its primary business of the manufacture, supply and installation of warehouse storage racking and shelving;
- j. By 2011, Harley was disposing of the chain purchased from NYFT and was selling it at the 2006/07 wholesale benchmark price;
- k. The 2006/07 wholesale benchmark price was cheaper than the 2011 prevailing price for chain;
- l. The chain sold as part of the first sale and the second sale came from the chain purchased from NYFT and was sold at the 2006/07 wholesale benchmark price;
- m. Harley sold the last of the chain purchased from NYFT in 2013/14 and now has no more of the chain.

Harley had at the material time no particular knowledge of Agrison or of the purpose to which the chain was to be put

- n. Harley has no records of any dealings with Agrison prior to the first sale;
- o. Harley had at the time of the first sale and the second sale no knowledge of Agrison or its business beyond a general knowledge common to many members of the public that Agrison sold farm tractors and other farm machinery;

- p. Harley had no knowledge at the time of the first sale or the second sale or thereafter, and was not told by the person who purchased the chain or by Agrison, for what purpose the chain was to be used.

Provenance of stabilising chain that was on the Slasher on 19 December 2015 is unknown

- q. The Tractor and Slasher was first sold on 24 January 2012 by Agrison to Cesil Nominees (**Cesil**);
- r. Whether the stabilising chain on the Slasher as at the date of the sale to Cesil was the same as the chain sold by Harley to Agrison is unknown to Harley;
- s. Between 24 January 2012 and 19 December 2015, the Tractor and Slasher was owned and used by Cesil;
- t. On or about 19 December 2015, the Tractor and Slasher were sold by Cesil to the First Defendant;
- u. The stabilising chain that was on the Slasher on 19 December 2015 has not been recovered or analysed;
- v. Whether the stabilising chain on the Slasher on 19 December 2015 is the same as the chain that Harley sold in the first sale and the second sale is unknown.

The failed link and the recovered chain

- w. A broken link of chain was recovered at the premises of the First Defendant on or about 20 December 2015 shortly after the fire (**failed link**);
- x. A length of chain was recovered at the premises of the First Defendant on 21 November 2018 (**recovered chain**);
- y. Whether the failed link was part of the stabilising chain that was on the Slasher on 19 December 2015 is unknown;
- z. Whether the recovered chain was the stabilising chain, or part thereof, that was on the Slasher on 19 December 2015 is unknown;
- aa. Both the failed link and the recovered chain are 8 mm chain and the only 8 mm chain that Harley sold Agrison was the 8 mm proof coil chain sold in the second sale;
- bb. 8 mm proof coil chain was more than adequate in terms of supporting the load of the Slasher in its raised position:

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Expert report of UQ Materials Performance dated 8 April 2019.

- cc. However, whether the failed link and/or the recovered chain are the same as the chain that Harley sold Agrison in the second sale is unknown.

Failure of stabilising chain not causative of the Scotsburn Bushfire

- dd. If the operation of the Tractor and Slasher caused a spark, flame or discharge of other heat source (which is not admitted) it was caused by the operation by the First Defendant of the Tractor and Slasher contrary to the Tractor Operation Manual and/or the Slasher Operation Manual and Harley here repeats and adopts paragraphs 16(c), 34D(b) and 34M of the Defence of the Fourth Defendant dated 10 October 2018;
- ee. Further or alternatively, if the operation of the Tractor and Slasher caused a spark, flame or discharge of other heat source (which is not admitted):
 - i. The First Defendant raised the Slasher to its full height with the PTO engaged;
 - ii. Because the PTO was engaged, the drive shaft to the Slasher was rotating;
 - iii. The rotating drive shaft came into contact with the front of the Slasher platform thereby generating heat, further or alternatively sparks;

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Expert report of Professor Simon Barter dated 30 August 2018.

- iv. If (which is not admitted) the reason why the drive shaft came into contact with the front of the Slasher platform was the stabilising chain breaking, then if the PTO had not been engaged the drive shaft would not have been rotating and there would not have been the generation of heat, further or alternatively sparks;
- v. The cause of the heat and/or sparks was the First Defendant raising the Slasher to its full height with the PTO engaged.
- ff. Further or alternatively, the First Defendant operated, on or about 19 December 2015, the Tractor without having the Tractor Operation Manual.

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The First Defendant purchased the 50 hp Operator and Parts Manual from MSS Pty Ltd Spare Parts on 4 March 2016. A copy of the Invoice for the purchase has been discovered by the solicitors for Agrison.

5. Paragraph 5 of the TPSC is denied. Under cover of the aforesaid denial Harley repeats and adopts paragraph 4 hereof.
6. Paragraph 6 of the TPSC is denied.
7. Paragraph 7 of the TPSC is denied. Under cover of the aforesaid denial, Harley repeats and adopts paragraph 4(bb) hereof

Breach of contract

8. Paragraph 8 of the TPSC is denied. Under cover of the aforesaid denial, Harley repeats and adopts paragraph 4 hereof.
9. Paragraph 9 of the TPSC is denied. Under cover of the aforesaid denial, Harley repeats and adopts paragraph 4 hereof.
10. Paragraph 10 of the TPSC is denied. Under cover of the aforesaid denial, Harley repeats and adopts paragraph 4 hereof.
11. Paragraph 11 of the TPSC is denied.
12. Paragraph 12 of the TPSC is denied. Under cover of the aforesaid denial Harley further says that more than 6 years have passed since the first sale and the second sale and delivery of the chain sold pursuant to those two sales whereby Agrison's claim for breach of contract is statute barred pursuant to section 5(1)(a) of the *Limitation of Actions Act* 1958.

Claim for Contribution

13. Paragraph 13 of the TPSC is denied. Under cover of the aforesaid denial, Harley repeats paragraphs 4 to 7 and 8 to 12 above.

Proportionate liability

14. Paragraph 14 of the TPSC is denied. Under cover of the aforesaid denial Harley says that it is not a Defendant to the proceeding whereby Part IVAA of the *Wrongs Act* 1958 does not apply to it: section 24AI(3) of the *Wrongs Act* 1958.

DATED: 3 May 2019

G.R.McCormick

Goldsmiths lawyers
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GOLDSMITHS LAWYERS
Solicitors for the Third Party