

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



S CI 05027

Case: S CI 2016 05027

Filed on: 29/03/2019 12:47 PM

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

THIRD PARTY NOTICE

Date of document: 28 March 2019

Filed on behalf of: The Fourth Defendant

Prepared by:

Hall & Wilcox

Lawyers

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Attention: Kate Lawford

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KALM PM 142042

TO HARLEY INDUSTRIAL PTY LTD (ACN 115 230 905)

TAKE NOTICE that the plaintiff has brought this proceeding against the defendants for the claim set out in the writ and statement of claim served herewith.

AND TAKE NOTICE that the fourth defendant disputes the plaintiff's claim on the grounds set out in the fourth defendant's defence served herewith, and claims to be entitled to relief against you on the grounds set out in the statement of claim indorsed on this notice.

IF YOU INTEND TO DISPUTE the plaintiff's claim against the fourth defendant, or the fourth defendant's claim against you, **YOU MUST GIVE NOTICE** of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by—

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the fourth defendant's address for service, which is set out at the end of this notice.

IF YOU FAIL to file an appearance within the proper time you will be taken to admit the validity of any judgment against the fourth defendant and your own liability to the fourth defendant to the extent

claimed in the statement of claim indorsed on this notice, and the fourth defendant may OBTAIN JUDGMENT AGAINST YOU without further notice.

THE PROPER TIME TO FILE AN APPEARANCE is as follows—

- (a) where you are served with the notice in Victoria, within 10 days after service;
- (b) where you are served with the notice out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the notice in Papua New Guinea, within 28 days after service;
- (d) where you are served with the notice in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the notice.

FILED:

Prothonotary

THIRD PARTY STATEMENT OF CLAIM

The parties

1. The fourth defendant (**Agrison**) is and was at all material times:
 - a) a corporation incorporated under the *Corporations Act 2001* (Cth); and
 - b) carrying on a business of supplying products, including tractors and slashers, to customers under the trade mark, Agrison.
2. The third party (**Harley**):
 - a) is and was at all material times a corporation incorporated under the *Corporations Act 2001* (Cth);
 - b) in or around 2011, in the business of supplying commercial grade steel chain to customers, including Agrison.

Group claim against Agrison

3. In the third amended statement of claim dated 16 May 2018 (**3SOC**), the Plaintiff alleges that Agrison is liable to the Plaintiff and group members in respect of loss arising from the Scotsburn Bushfire (as defined in paragraph 1 of the 3SOC) because (inter alia):
 - a) on or about 24 January 2012, Agrison supplied an Agrison Gen II 50 horsepower tractor (**Tractor**) and an Agrison branded 6ft slasher (**Slasher**) to Cesil Nominees Pty Ltd (**Cesil Nominees**) (paragraph 34A of the 3SOC);
 - b) Agrison owed a duty of care to the Plaintiff and group members when supplying the Tractor and Slasher to Cesil Nominees (paragraph 34G of the 3SOC);
 - c) Agrison breached its duty of care by failing to take the precautions identified in paragraph 34I, including by failing to:
 - i) supply the Tractor and Slasher without a defective stabilising chain;
 - ii) supply a stabilising chain adequate to support the weight of the Slasher deck during operation and use of the Tractor and Slasher;
 - iii) implement adequate quality control, inspection and testing procedures to:
 - iv) detect the presence of defective chain links in stabilising chains used in the supply of its products; and
 - v) ensure stabilising chains supplied with the Tractor and Slasher were adequately manufactured and/or of sufficient quality so as not to fail during operation of the Tractor and Slasher;(paragraph 34J of the 3SOC)
 - d) the Tractor and Slasher contained safety defects within the meaning of s 9 of the *Australian*

Consumer Law (paragraph 34L of the 3SOC); and

- e) the Scotsburn Bushfire was caused by Agrison's negligence and/or the safety defects in the stabilising chain (paragraph 34N of the 3SOC).

Negligence by Harley

- 4. Between about 27 September 2011 and 8 December 2011, Harley supplied Agrison with 10mm and 8mm commercial chain (**the Chain**).

Particulars

The particulars of the chain supplied by Harley Industrial are set out in invoices 00008011 and 00008221 from Harley to Agrison dated 27 September 2011 and 8 December 2011. Copies of those invoices have been provided to Harley by Agrison's solicitors.

- 5. At all material times, Harley knew or ought reasonably to have known that:
 - a) the Chain supplied to Agrison was likely to be used as stabilising chain on tractors and slashers sold by Agrison to its customers;
 - b) defects in the Chain (and in particular defective welds in links in the Chain):
 - i) were difficult to detect and not something that purchasers of chain, like Agrison, were likely to be able reliably to detect;
 - ii) could impair the capacity of the Chain to bear the loads associated with use as a stabilising chain on equipment like tractors and slashers;
 - iii) could lead to a failure of the Chain while in use, including use while bearing the loads associated with use as a stabilising chain on equipment like Tractors and Slashers.

Particulars

The knowledge on the part of Harley is to be inferred from the nature of Harley's and Agrison's respective businesses and Harley's dealings with Agrison.

- 6. In the premises set out in the preceding paragraph, in supplying the Chain to Agrison as alleged in above:
 - a) Harley owed Agrison a duty of care to take reasonable care; and
 - b) the said duty include to take reasonable steps to ensure that the welding joints on links in the Chain were free of defects likely to impair the capacity of the Chain to bear the loads associated with use as a stabilising chain on equipment like tractors and slashers.
- 7. If, which is denied, the Tractor and Slasher caused or contributed to the causing of the Scotsburn Bushfire as alleged in the 3SOC (which is denied), then:
 - a) the Chain caused or contributed to the Scotsburn Bushfire because it failed during the

ordinary course of use as a stabilising chain between the Tractor and the Slasher;

Particulars

Agrison relies upon the expert report of Professor Simon Barter filed on behalf of the Plaintiffs in the proceeding. Further particulars may be provided following discovery and receipt of expert reports.

- b) the failure in 'a' was caused by Harley's breach of its duty of care to Agrison; and

Particulars

Harley breached its duty of care by failing to have or implement any or any adequate manufacturing, testing and inspection procedures to:

- i) prevent misaligned welding joints on links used in its chains;
- ii) detect the presence of defective chain links;
- iii) test its chains to verify they were of sufficient quality so as not to fail during the operation of tractor and slashers of the type supplied by Agrison to its customers.

Further particulars will be provided following discovery and receipt of expert reports.

- c) in the premises in 'a' and 'b', Agrison has suffered loss and damage by reason of Harley's breach of its duty of care.

Breach of contract

8. By contract made between Agrison and Harley on or around 27 September 2011, Agrison agreed to buy and Harley agreed to sell a quantity of 10mm commercial chain (**First Contract**).

Particulars

The First Contract is partly written and partly to be implied. To the extent it is in writing, it is recorded in invoice no. 00008011 from Harley Industrial to Agrison dated 27 September 2011. To the extent that it is implied, it is to be implied from the parties' conduct.

9. By contract made between Agrison and Harley on or around 8 December 2011, Agrison agreed to buy and Harley agreed to sell a quantity of 8mm and 10mm long link commercial chain (**Second Contract**).

Particulars

The Second Contract is partly written and partly to be implied. To the extent it is in writing, it is recorded in invoice no. 00008221 from Harley Industrial to Agrison dated 8 December 2011. To the extent that it is implied, it is to be implied from the parties' conduct.

10. At the time of making each of the First and Second Contracts, Agrison:
- a) expressly or by implication made known to Harley the particular purpose for which it required the chain, namely for the purpose of use as a stabilising chain on tractors and slashers sold to its customers;
 - b) relied upon Harley skill or judgment; further or alternatively

- c) purchased the Chain by description, being "10mm commercial chain" or "8mm" or "10mm" "long link commercial chain".

Particulars

Agrison refers to and repeats the particulars to paragraph 5 above.

- 11. By reason of the matters pleaded in paragraph 10 above, it was an implied condition the First and Second Contracts that the chain supplied by Harley would be:
 - a) reasonably fit for purpose; further or alternatively
 - b) of merchantable quality.

Particulars

Section 19 of the *Sale of Goods Act 1958 (Vic)*.

- 12. If, which is denied, the Tractor and Slasher caused or contributed to the causing of the Scotsburn Bushfire as alleged in the 3SOC (which is denied), then:
 - a) the Tractor and Slasher only caused or contributed as aforesaid because the Chain:
 - i) was not reasonably fit for its purpose;
 - ii) was not of merchantable quality; and
 - iii) by reason of 'i' and/or 'ii', failed in the ordinary course of use, leading to the collapse of the Slasher and the sparks that ignited the Scotsburn Bushfire;
 - b) in the premises in 'a', Harley breached the implied condition of the First Contract and/or Second Contract by supplying Agrison with chain that was:
 - i) not reasonably fit for purpose; and
 - ii) not of merchantable quality.

Particulars

The chain supplied pursuant to the First and/or Second Contract was not fit for purpose and/or not of merchantable quality because:

- i) the links in the Chain were inadequately welded; and
- ii) the chain was unable to support the weight of the Slasher deck during operation and use of the Tractor and Slasher.

Further particulars may be provided after the provision of expert reports.

- c) in the premises in 'a' and 'b', Agrison has suffered loss and damage.

Claim for contribution

- 13. If, which is denied, Agrison is liable to the Plaintiff and group members in respect of any loss arising from the Scotsburn Bushfire:

- a) by reason of the matters pleaded in paragraphs 4 to 7 and 8 to 12 above, Harley is liable in respect of the same damage; and
- b) pursuant to ss 23B and 24 of the *Wrongs Act 1958 (Vic)* (***Wrongs Act***), Agrison is entitled to contribution from Harley in an amount that the Court considers just and equitable having regard to Harley's responsibility for the damage.

Proportionate liability

14. Further or alternatively, if (which is denied) Agrison is liable to the Plaintiff and group members in respect of any loss arising from the Scotsburn Bushfire:
- a) the Plaintiff's claims against Agrison include claims for economic loss or damage to property arising from alleged failures to take reasonable care;
 - b) the said claims against Agrison are apportionable claims within the meaning of s 24AE and 24AF of the *Wrongs Act*;
 - c) the acts and omissions of Harley alleged above also caused the loss arising from the Scotsburn Bushfire;
 - d) Harley and Agrison are concurrent wrongdoers within the meaning of s 24AH of the *Wrongs Act*; and
 - e) accordingly, pursuant to s 24AI(1) of the *Wrongs Act*, any liability to the Plaintiff and group members on the part of Agrison is limited to an amount that the Court considers just, having regard to Agrison's responsibility for the loss or damage, and judgment must not be given against it for more than that amount.

IF AGRISON IS LIABLE TO THE PLAINTIFF AND GROUP MEMBERS, AGRISON CLAIMS AGAINST HARLEY:

- A. Contribution.
- B. A declaration that Harley is a concurrent wrongdoer within the meaning of s 24AH of the *Wrongs Act*.
- C. Costs.
- D. Such further or other orders as the Court deems appropriate.

L ARMSTRONG

E BATROUNEY

DATED: 29 March 2019

Hall & Wilcox

Hall & Wilcox
Solicitors for Agrison

1. This notice was filed for the fourth defendant by Matt McDonald, solicitor, of Hall & Wilcox, Level 11 Rialto South Tower, 525 Collins St, Melbourne, VIC 3000.
2. The address of the fourth defendant is Suite 2, Building 2, 270 Ferntree Gully Road, Notting Hill, VIC 3168.
3. The address for service of the fourth defendant is c/- Level 11, Rialto South Tower, 525 Collins Street, Melbourne, VIC 3000.
4. The email address for service of the fourth defendant is matt.mcdonald@hallandwilcox.com.au.
5. The address of the third party is 13 Lara Way, Campbellfield, VIC 3061.

SCHEDULE OF PARTIES

BETWEEN:

MICHAEL KARL SCHMID

Plaintiff

And

ROGER JAMES SKIMMING

First Defendant

MAUREEN LYNETTE JOHNS

Second Defendant

AUTO AND GENERAL INSURANCE COMPANY
LIMITED
(ACN 111 586 353)

Third Defendant

EL MINING SOLUTIONS PTY LTD
(ACN 151 983 603)

Fourth Defendant

AUTO AND GENERAL INSURANCE COMPANY
LIMITED
(ACN 111 586 353)

Plaintiff by Counterclaim

MICHAEL KARL SCHMID

Defendant by Counterclaim

HARLEY INDUSTRIAL PTY LTD
(ACN 115 230 905)

Third Party