



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

Case: S CI 2016 05027

Filed on: 02/09/2019 02:30 PM  
SCI 2016 05027

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

**AMENDED DEFENCE AND COUNTERCLAIM TO AMENDED THIRD PARTY**  
**STATEMENT OF CLAIM\***

(Filed pursuant to paragraph 2 of the Order made by Judicial Registrar Clayton dated 29 August 2019)

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Date of Document:

4 July 2019

Filed on Behalf of:

The Third Party

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To the Amended Third Party Statement of Claim (ATPSC) filed ~~29 March~~ 5 June 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 ATPSC is admitted. Paragraph 1(b) of the ATPSC 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 ATPSC 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 ATPSC is not admitted.

**Negligence – duty owed to Agrison**

4. Paragraph 4 of the ATPSC 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"

**PARTICULARS**

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 Yangtou Foreign Trading Co Ltd (NYFT) of 208 Huarong Road, Yangtou 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.

Agrison assembled the Slasher

pa Agrison assembled the Slasher;

**PARTICULARS**

Paragraph 34I(e) of Agrison's Amended Defence and Counterclaim

pb Agrison knew that the Slasher was to be used for agricultural purposes, in particular to slash grass in rural areas.

**PARTICULARS**

Agrison sells slashers for agricultural purposes. The Agrison Slasher Operation Manual refers to its use for mowing. A copy of the Manual has been discovered by the solicitors for Agrison.

pc To assemble the Slasher, Agrison required a stabilising chain;

pd Agrison knew, or ought reasonably to have known, that the stabilising chain had to be of sufficient strength and quality for use on the Slasher;

**PARTICULARS**

Agrison is in the business of selling agricultural machinery (including slashers) that it purchases from overseas and assembles in Australia for sale, further or alternatively Agrison manufactures. Paragraphs 34I and 47(b) of Agrison's Amended Defence and Counterclaim.

pe If, which is denied:

- i. the stabilising chain that was on the Slasher on 19 December 2015 was the same as the chain sold by Harley in the first sale or the second sale; and

- ii. the chain that Harley sold in those sales was defective as alleged in the Third Amended Statement of Claim, further or alternatively as alleged in the ATPSC,

Agrison:

- iii. knew, or ought reasonably to have known on an inspection of the chain that it had misaligned or inadequate joint welds;
- iv. did not implement any or any adequate testing or inspection procedures for the chain so as to detect defective chain links;
- v. further or alternatively neglected or failed to verify the chain was of sufficient quality so as to not fail during the operation of the slasher;
- vi. despite those matters, used the chain as stabilising chain when assembling the Slasher.

*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;
- va. By reason of the matters aforesaid, Harley denies that the chain it sold in the first sale and the second sale was the same as the stabilising chain on the Slasher on 19 December 2015.

*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:

### PARTICULARS

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.
- cca By reason of the matters aforesaid, Harley denies that the failed link and the recovered chain are the same as the chain it sold in the first sale and the second sale.

#### *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 Amended Defence of the Fourth Defendant dated 10 October 2018 5 June 2019;
- 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 or part thereof 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;

#### **PARTICULARS**

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.

#### **PARTICULARS**

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 ATPSC is denied. Under cover of the aforesaid denial Harley repeats and adopts paragraph 4 hereof.
- 6. Paragraph 6 of the ATPSC is denied.
- 7. Paragraph 7 of the ATPSC 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 ATPSC is denied. Under cover of the aforesaid denial, Harley repeats paragraphs 4 to 7 hereof and ~~8 to 12 above.~~

### **Proportionate liability**

14. Paragraph 14 of the ATPSC is denied. Under cover of the aforesaid denial Harley says that:
- a. 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*;
  - b. further or alternatively, the claims made by the Plaintiff and group members against Agrison pursuant to the *Australian Consumer Law (ACL)* are not apportionable claims within the meaning of sections 24AE and 24AF of the *Wrongs Act 1958* as they do not arise from a failure to take reasonable care: section 24AF(1) of the *Wrongs Act 1958*;
  - c. further or alternatively, insofar as Agrison "repeats against Harley the matters set out in paragraph 47 of [Agrison's] Amended Defence and Counterclaim", Harley repeats and adopts paragraphs 2 and 4 hereof.

**Contributory negligence**

15. Further or in the alternative, Harley says that the Scotsburn Bushfire was caused, further or alternatively contributed to, by the negligence of Agrison:

**PARTICULARS**

- a. Harley repeats and adopts paragraphs 34A – 34J and 34M – 34O of the Third Amended Statement of Claim;  
b. Harley also repeats and adopts paragraphs 4(pa) – (pe) hereof.

**COUNTERCLAIM**

16. Harley repeats against Agrison the matters set out in paragraph 4 hereof and says, by reason of those matters and if Harley is found liable to the Plaintiff and the group members, Harley is entitled to a contribution from Agrison pursuant to sections 23B and 24 of the *Wrongs Act 1958* in an amount the Court considers just and reasonable.

**WHEREFORE:**

- A. Harley claims from Agrison contribution in an amount the Court considers just and reasonable;  
B. Interest;  
C. Costs;  
D. Such further or other relief as this Honourable Court deems just.

DATED: 4 July 2019

**G.R.McCormick**



**GOLDSMITHS LAWYERS**  
Solicitors for the Third Party