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

PROCESSED

No. S CI 2016 05027

B E T W E E N:

MICHAEL KARL SCHMID

Plaintiff

- and -

ROGER JAMES SKIMMING & ORS

Defendants

DEFENCE OF THE SECOND DEFENDANT

Date of Document: 13 July 2017
Filed on behalf of: The Second Defendant

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To the Amended Statement of Claim dated 29 May 2017, the Second Defendant says as follows:

1. She admits paragraph 1.
2. She admits paragraph 2.
3. She does not plead to paragraph 3 as it raises no allegation of material fact against her.
4. She does not plead to paragraph 4 as it raises no allegation of material fact against her.
5. She does not plead to paragraph 5 as it raises no allegation of material fact against her.
6. She admits paragraph 6.
7. She admits paragraph 7.

8. She admits paragraph 8.
- 8A. She does not plead to paragraph 8A as it raises no allegation of material fact against her.
9. She admits paragraph 9.
10. She admits paragraph 10 and says that the authority was given in the circumstances, and on the terms, described at paragraph 23A below.
11. Insofar as it raises allegations of material fact against her, she does not admit paragraph 11.
12. Insofar as it raises allegations of material fact against her, she does not admit paragraph 12.
13. Insofar as it raises allegations of material fact against her, she admits paragraph 13.
14. Insofar as it raises allegations of material fact against her, she does not admit paragraph 14.
15. Insofar as it raises allegations of material fact against her, she admits paragraph 15.
16. Insofar as it raises allegations of material fact against her, she admits paragraph 16.
17. Insofar as it raises allegations of material fact against her, she does not admit paragraph 17.
18. Insofar as it raises allegations of material fact against her, she does not admit paragraph 18.
19. Insofar as it raises allegations of material fact against her, save that she admits that, on 19 December 2015, the First Defendant:
 - (a) used the tractor and slasher to slash grass in the paddock; and
 - (b) failed to have in place any fire suppression systems or equipment to control and suppress the said fire,otherwise, she does not admit paragraph 19.
20. Insofar as it raises allegations of material fact against her, she does not admit paragraph 20.

21. Insofar as it raises allegations of material fact against her, she does not admit paragraph 21.
22. Insofar as it raises allegations of material fact against her, she does not admit paragraph 22.
23. She denies each and every allegation in paragraph 23.
- 23A. Further thereto, she says as follows:
- (a) for many years prior to 2013, the Second Defendant and her husband owned approximately 40 acres of rural bushland property at Scotsburn;
 - (b) in or about 2013, the Second Defendant and her husband sold approximately 20 acres of that land to the First Defendant, on the north side of the 40 acre parcel of land;
 - (c) at about the same time, the Second Defendant and her husband reached an understanding, or accommodation, with the First Defendant in relation to the remaining 20 acres of land (the **remaining south parcel**). That understanding was as follows:
 - (i) the Second Defendant and her husband sold a tractor and slasher to the First Defendant;
 - (ii) the Second Defendant and her husband permitted the First Defendant to thereafter use the whole 40 acre property for his own purposes, without charge, so long as he maintained the remaining south parcel;
 - (d) the Second Defendant's husband died in November 2013;
 - (e) shortly thereafter (the Second Defendant cannot be more precise as to the date), the First Defendant represented to the Second Defendant that he would continue to maintain the remaining south parcel.
- 23B. In these premises, at material times prior to 19 December 2015:
- (a) the First Defendant had the sole use and occupation of the remaining south parcel;

- (b) the Second Defendant did not use and did not occupy the remaining south parcel.
24. As to paragraph 24, she says as follows:
- (a) she refers to and repeats paragraph 23A, above;
 - (b) she admits that, in the time alleged, she knew or ought to have known that:
 - (i) it was likely that the First Defendant would use plant or equipment, such as a tractor and slasher, to slash the paddock;
 - (ii) there was a risk of the discharge of sparks, flame or other heat source from the operation of a tractor and slasher;
 - (c) she otherwise denies each and every allegation in paragraph 24.
25. She denies each and every allegation in paragraph 25.
26. She denies each and every allegation in paragraph 26.
27. As to the allegations in paragraph 27, she says as follows:
- (a) she knew that the First Defendant, at all material times prior to 19 December 2015, slashed the grass and maintained the fire breaks on the remaining south parcel;
 - (b) she apprehended that, at all material times prior to 19 December 2015, the First Defendant undertook those tasks using a functioning tractor (which was fairly new), and a functioning slasher;
 - (c) she otherwise denies each and every allegation in paragraph 27.
28. She denies each and every allegation in paragraph 28.
29. She denies each and every allegation in paragraph 29.
30. She denies each and every allegation in paragraph 30.
- 30A. Further thereto, she says that, in circumstances where she did not know, and had no reason to believe that:
- (a) the First Defendant was not a capable and competent operator of the equipment used in the slashing works (be that the case); and

(b) that the First Defendant would carry out the slashing work on a day of high fire risk, and without adequate fire suppression systems in breach of the law, she was under no duty to take the precautions as alleged, or otherwise.

31. Save that admits that she took neither precautions on 19 December 2015, and says that she was under no obligation to do so, otherwise she denies each and every allegation in paragraph 31.
32. She denies each and every allegation in paragraph 32.
33. She denies each and every allegation in paragraph 33.
34. She denies each and every allegation in paragraph 34.
35. Insofar as it raises allegations of material fact against her, she denies each and every allegation in paragraph 35.
36. She does not plead to paragraph 36 as it raises no allegation of material fact against her.
37. She does not plead to paragraph 37 as it raises no allegation of material fact against her.
38. She does not plead to paragraph 38 as it raises no allegation of material fact against her.
39. She does not plead to paragraph 39 as it raises no allegation of material fact against her.
40. She does not plead to paragraph 40 as it raises no allegation of material fact against her.
41. She does not plead to paragraph 41 as it raises no allegation of material fact against her.
42. She does not plead to paragraph 42 as it raises no allegation of material fact against her.
43. She does not plead to paragraph 43 as it raises no allegation of material fact against her.

44. She does not plead to paragraph 44 as it raises no allegation of material fact against her.
45. She does not plead to paragraph 45 as it raises no allegation of material fact against her.

Proportionate Liability

46. Further to the above, the Second Defendant says that the claims made against it in the proceeding include claims for damage to property made in an action for damages arising from alleged failures to take reasonable care (the **Damage to Property Claims**).
47. The Damage to Property Claims are apportionable claims (within the meaning of ss.24AE and 24AF(1) of the *Wrongs Act*), to which Part IVAA of the *Wrongs Act* applies.
48. If (which is denied) any alleged act or omission by the Second Defendant caused any of the alleged loss or damage claimed in relation to the Damage to Property Claims, then the First Defendant is a person whose acts or omissions caused, independently of those of the Second Defendant or jointly, the loss or damage that is the subject of the Damage to Property Claims.
49. Accordingly, the First Defendant is a concurrent wrongdoer in relation to the Damage to Property Claims (within the meaning of s.24AH(1) of the *Wrongs Act*).
50. By reason of the matters alleged, if (which is denied) the Second Defendant is liable in respect of the Damage to Property Claims, her liability is limited to an amount reflecting that proportion of the loss that the Court considers just having regard to the extent of her responsibility for the said loss.

BY COUNTERCLAIM, THE SECOND DEFENDANT CLAIMS AS FOLLOWS:

1. In respect of the Damage to Property Claims, a declaration that the First Defendant is a concurrent wrongdoer (within the meaning of s.24AH of the *Wrongs Act*).

Dated: 13 July 2017

Philip Solomon

T R Messer