

**IN THE SUPREME COURT OF VICTORIA  
AT BALLARAT  
COMMON LAW DIVISION  
CIVIL CIRCUIT LIST**

S CI 2016

**B E T W E E N:**

**MICHAEL KARL SCHMID**

Plaintiff

-and-

**ROGER JAMES SKIMMING**

Defendant

**WRIT**

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Date of document: 8 December 2016	Solicitor's Code:102650
Filed on behalf of: The Plaintiff	DX: 28001
Prepared by: Maddens Lawyers 219 Koroit Street Warrnambool VIC 3280	Tel: (03) 5560 2000 Fax: (03) 5560 2099 Ref: B Pendergast/S Maraldo: 161346 Email: <a href="mailto:smm@maddenslawyers.com.au">smm@maddenslawyers.com.au</a>

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**TO THE DEFENDANT**

**TAKE NOTICE** that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

**IF YOU INTEND TO DEFEND** the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, **YOU MUST GIVE NOTICE** of your intention by filing an appearance within the proper time for appearances 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 plaintiff's address for service, which is set out at the end of this writ.

**IF YOU FAIL** to file an appearance within the proper time, the plaintiff may **OBTAIN JUDGMENT AGAINST YOU** on the claim without further notice.

**THE PROPER TIME TO FILE AN APPEARANCE** is as follows—

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ 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 writ.

FILED: 8 December 2016

Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

**Indorsement of Claim**  
(Order 18A)

1. The plaintiff brings this proceeding on his own behalf and on behalf of all other persons ("**group members**") who suffered personal injury, and/or loss of or damage to property as a result of the fire which commenced at approximately 2:50pm on 19 December 2015 at 260 Finns Road, Scotsburn ("**Scotsburn bushfire**").
2. The plaintiff is and was at all material times the owner of 140 Fischers Road, Scotsburn, and the owner of real and personal property destroyed in the Scotsburn bushfire.
3. As at the date of the commencement of this proceeding there are seven or more persons who have claims against the defendant.
4. On 19 December 2015, the defendant ("**Skimming**") at all relevant times:
  - (a) was the owner of a 2012 Ardison Tractor and grass slasher ("**tractor and slasher**");
  - (b) carried out slashing on a neighbour's property at 260 Finns Road, Scotsburn ("**property**") involving the use of the tractor and slasher ("**works**") at the request of and/or on behalf of the neighbour.

**Duty**

5. At all relevant times, it was reasonably foreseeable to Skimming that:
  - (a) operating a tractor and slasher could create and discharge sparks, embers or other molten hot material ("**sparks**");
  - (b) such sparks could cause ignition of dry vegetation in the vicinity of the works;
  - (c) any ignition as set out in "b" could produce a fire which might spread over a wide geographic area; and
  - (d) the risk that any such ignition could produce a fire that might spread over a wide geographic area was greater on days which had been declared as days of Total Fire Ban;

- (e) the risk that a spark might start a fire in the vicinity of the works was higher on a day which had been declared as a Total Fire Ban day;
  - (f) such fire could cause injury to persons, and loss of or damage to property, within the area over which the fire spread, and consequential losses including economic losses.
6. At all relevant times members of the public who might be, or who owned or had an interest in property that might be, within the area across which might spread a fire caused by the discharge of sparks, embers or hot molten material created by plant including a tractor and slasher ("**class**") had no ability, or no practical and effective ability, to prevent or minimize the risk of such discharge occurring.
7. In the premises set out in paragraphs 5 and 6, at all relevant times Skimming owed to the class a duty to take reasonable care to ensure that:
- (a) any plant and equipment necessary to facilitate the works was safe and operated safely in the operating conditions that were foreseeable;
  - (b) any slashing works at the property did not cause a fire; and/or
  - (c) any outbreak of fire caused by the works was suppressed ("**Duty**").
8. The plaintiff and group members were persons within the class.

### **The Incident**

9. 19 December 2015 was a declared day of Total Fire Ban in respect of the property.
10. At approximately 2:50pm on 19 December 2015, Skimming's operation of the tractor and slasher at 260 Finns Road, Scotsburn, during the works caused a spark, ember or other hot molten material to discharge ("**the Incident**").
11. As a result of the Incident:
- (a) a spark, ember or other hot molten material landed in and ignited dry grass adjacent to the works; and

- (b) there started a fire which spread over a wide geographic area, being the Scotsburn bushfire.

## **Breaches of the Duty**

12. The Incident was caused by breaches by Skimming of the Duty.

### **Particulars of breaches of Duty**

#### Skimming:

- (i) failed to take reasonable care to implement a safe system for the use of plant including the tractor and slasher;
- (ii) used plant including the tractor and slasher in conditions of high bushfire risk;
- (iii) failed to take reasonable care to operate the tractor and slasher safely and in particular failed to terminate use of the tractor and slasher in conditions of high bushfire risk;
- (iv) failed to take reasonable care to design a safe system for use of plant including the tractor and slasher and in particular:
  - (1) failed to design a system of work that did not result in discharge of sparks, embers or hot molten material;
  - (2) failed to control the discharge of sparks, embers or hot molten material from the tractor and slasher so as to prevent ignition of dry vegetation in the vicinity of that plant;
  - (3) failed to have any or any adequate fire suppression systems, extinguishers or other means to control fires started from use of the tractor and slasher;
  - (4) failed to have adequate systems for carrying out adequate inspection of the tractor and slasher;
  - (5) failed to have any or any adequate training and supervision in the safe use of the tractor and slasher;
- (v) failed to take reasonable care to implement and / or maintain a safe system for the works;
- (vi) failed to identify the hazard of bushfires associated with the use of the tractor and slasher on 19 December 2015;
- (vii) failed to ensure that an assessment was made to determine whether there was any risk of a fire affecting the plaintiff occurring as a result of use of the tractor and slasher;
- (viii) failed to ensure that any measure to control risk of a fire from the use of the tractor and slasher was properly installed, used and maintained;
- (ix) failed to extinguish the fire in its early stages so as to prevent it escaping from the property;
- (x) failed to ensure that the risk of a fire from the use of the tractor and slasher was eliminated or, if it was not practicable to eliminate the risk, was reduced so far as practicable.

13. The Scotsburn bushfire was a natural and foreseeable consequence of the breaches of duty alleged in the preceding paragraph.

### **Subgroup claims**

14. Further to paragraph 1 above, the plaintiff brings this proceeding on behalf of those group members (“**subgroup members**”) who suffered loss of or damage to property, further or alternatively economic loss, in connection with the Scotsburn bushfire’s interference in their use or enjoyment of interests in land.

### **Particulars**

The plaintiff was the registered proprietor of land over which the bushfire burned.

Particulars relating to individual subgroup members will be provided following the trial of common questions or otherwise as the Court may direct.

15. At all relevant times each of:
  - (a) the risks referred to in paragraph 6 above; and
  - (b) the risk that a bushfire ignited by a discharge of sparks from the operation of a tractor and slasher would unreasonably interfere with the use or enjoyment of interests in land over which the fire passed, by the persons entitled to the said use or enjoyment,were reasonably foreseeable to Skimming.
16. By operating the tractor and slasher in the course of the works, Skimming:
  - (a) caused sparks to be ejected from the tractor and slasher onto flammable material adjacent to the works; and thereby
  - (b) caused a fire, being the Scotsburn bushfire, which spread to the lands in which the plaintiff or subgroup members had interests.
17. The Scotsburn bushfire unreasonably interfered with the use or enjoyment by the plaintiff and subgroup members of their interests in the lands over which the fire passed.
18. In the premises, the plaintiff and each of the subgroup members suffered nuisance created by Skimming.

## **Loss and damage**

19. By reason of:

- (a) the breaches of the Duty, further or alternatively
- (b) the nuisance;

alleged herein the plaintiff, and each of the group members or subgroup members as the case may be, suffered loss and damage of the kinds referred to in paragraph 5(f) above.

### **Particulars of loss and damage**

The plaintiff suffered loss and damage including:

- i. destruction of property including home, gardens, boundary and subdivisional fencing and outbuildings;
- ii. destruction of motor vehicles;
- iii. destruction of trees including an orchard;
- iv. loss of business income and equipment.

Full particulars of the plaintiff's loss and damage will be provided prior to trial.

Particulars relating to individual group members will be provided following the trial of common questions or otherwise as the Court may direct.

## **Common questions of law or fact**

20. The questions of law or fact common to the claims of the plaintiff and each of the group members are:

- (a) whether the Duty was owed by Skimming to the plaintiff and group members, and if so the content of the duty;
- (b) how the Scotsburn bushfire started;

- (c) whether the Scotsburn bushfire was caused by a breach by Skimming of the Duty;
- (d) whether the plaintiff and subgroup members suffered nuisance created by Skimming;
- (e) what kinds of loss caused by the Scotsburn bushfire and suffered by the plaintiff and group members are recoverable from Skimming, and the principles for assessing those losses.

**AND THE PLAINTIFF CLAIMS on his own behalf and on behalf of the group**

**members:**

- A. Damages.
- B. Interest.
- C. Costs.



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Maddens Lawyers  
Solicitors for the plaintiff



1. Place of trial - Ballarat
2. Mode of trial - Judge alone
3. This writ was filed for the Plaintiff by Mr Brendan Pendergast of Maddens Lawyers, Warrnambool
4. The address of the Plaintiff is 140 Fischers Road, Scotsburn VIC 3352
5. The address for service of the Plaintiff is:  
Maddens Lawyers,  
219 Koroit Street  
WARRNAMBOOL 3280  
Ref: BFP/SMM
6. The address of the Defendant is 260 Finns Road, Scotsburn.