

BETWEEN

MICHAEL KARL SCHMID

Plaintiff

and

ROGER JAMES SKIMMING

First Defendant

(and others according to the schedule)

DEFENCE AND COUNTERCLAIM OF THE THIRD DEFENDANT

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Filed on behalf of: The Third Defendant
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In answer to the plaintiff's amended statement of claim indorsed on the further amended writ dated 29 May 2017, the third defendant says as follows:

1. It admits the allegations in paragraph 1.
2. As to paragraph 2:
 - (a) subject to production of the relevant certificate of title, it admits that the plaintiff is and was at all material times the owner of land at 140 Fischers Road, Scotsburn and that this was within the Scotsburn bushfire area; and
 - (b) it does not admit that the land at 140 Fishers Road, Scotsburn was damaged by the Scotsburn bushfire.
3. It admits the allegations in paragraph 3.
4. It admits the allegations in paragraph 4.
5. As to paragraph 5:
 - (a) for the purposes only of responding to the allegation that the requirements of s 33C of the *Supreme Court Act 1986* (Vic) are satisfied, it admits that there are seven or more persons who are asserting claims against the defendants; and
 - (b) it otherwise denies the allegations therein.
6. It admits the allegations in paragraph 6.

7. It admits the allegations in paragraph 7.
8. It admits the allegations in paragraph 8.
- 8A. It admits the allegations in paragraph 8A.
9. As to paragraph 9:
 - (a) it admits that Mr Skimming, with his wife Jennifer Skimming, lived on, had control, and was occupier of the Skimming land; and
 - (b) it otherwise does not admit the allegations therein.
10. It does not admit the allegations in paragraph 10.
11. It does not admit the allegations in paragraph 11.
12. It does not admit the allegations in paragraph 12.
13. It does not admit the allegations in paragraph 13.
14. It does not admit the allegations in paragraph 14.
15. As to paragraph 15:
 - (a) it does not admit the allegations in paragraphs (a) and (b);
 - (b) it admits the allegations in paragraph (c).
16. It does not admit the allegations in paragraph 16.
17. It does not admit the allegations in paragraph 17.
18. As to paragraph 18:
 - (a) it admits that the tractor and slasher did not have in place fire suppression systems or equipment to control fire;
 - (b) it otherwise does not admit the allegations therein.
19. It does not admit the allegations in paragraph 19.
20. It does not admit the allegations in paragraph 20.
21. It does not admit the allegations in paragraph 21.
22. It does not admit the allegations in paragraph 22.
23. It does not plead to paragraph 23 as it does not raise any allegations of fact or law against it.
24. It does not plead to paragraph 24 as it does not raise any allegations of fact or law against it.

25. It does not plead to paragraph 25 as it does not raise any allegations of fact or law against it.
26. It does not plead to paragraph 26 as it does not raise any allegations of fact or law against it.
27. It does not plead to paragraph 27 as it does not raise any allegations of fact or law against it.
28. It does not plead to paragraph 28 as it does not raise any allegations of fact or law against it.
29. It does not plead to paragraph 29 as it does not raise any allegations of fact or law against it.
30. It does not plead to paragraph 30 as it does not raise any allegations of fact or law against it.
31. It does not plead to paragraph 31 as it does not raise any allegations of fact or law against it.
32. It does not plead to paragraph 32 as it does not raise any allegations of fact or law against it.
33. It does not plead to paragraph 33 as it does not raise any allegations of fact or law against it.
34. It does not plead to paragraph 34 as it does not raise any allegations of fact or law against it.
35. It does not admit the allegations in paragraph 35.
36. Subject to production of the policy documents and reference to their full terms, conditions, and exclusions, it admits the allegations in paragraph 36.
37. As to paragraph 37:
 - (a) it admits the allegations in paragraph 37(a);
 - (b) to paragraph 37(b) it says that the insured address was the Skimming land and not otherwise;
 - (c) it otherwise denies the allegations contained in paragraph 37.
- 37A. Further, by section 21(1) of the *Insurance Contracts Act 1984* (ICA) Mr Skimming had a duty to disclose to the third defendant before the policy was entered into every matter that was known to him being a matter that:

- (a) he knew to be a matter relevant to the decision of the third defendant whether to accept risk and, if so, on what terms; or
 - (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.
- 37B. At all relevant times before the policy was entered into Mr Skimming knew that the insured address included the Johns land.
- 37C. Mr Skimming also knew that that fact was a matter relevant to the decision of the third defendant whether to accept the risk under the policy and, if so, on what terms.
- 37D. Further, or in the alternative a reasonable person in the circumstances could be expected to know that fact to be so relevant.
- 37E. Mr Skimming failed to disclose to the third defendant at any time that the insured land included the Johns land.
- 37F. Mr Skimming therefore breached his duty of disclosure imposed by s 21 of the ICA.
- 37G. If Mr Skimming had disclosed to the third defendant that the insured address included the Johns land, the third defendant would not have issued a policy to Mr Skimming for any cover in respect of the Johns land.
- 37H. Pursuant to s 28(3) of the ICA, the third defendant is therefore entitled to reduce its liability in respect of the claim to nil.
- 37I. Further, and in the alternative to paragraph 37(b) hereto it was at all material times from no later than 13 November 2015 the common intention of Mr Skimming and the third defendant that the policy would provide home insurance and legal liability insurance to Mr Skimming in relation to the Skimming land as the insured address, being the land on which the home he owned and occupied was situated.
- 37J. If, which is denied, the policy did include the Johns land as part of the insured address, by reason of the facts pleaded in of paragraph 37I hereof the third defendant is entitled to rectification of the wording of the policy to confirm that the insured address is the Skimming land and does not include the John's land.
38. As to paragraph 38:
- (a) as to paragraph (a), it admits that the Scotsburn bushfire occurred during the policy period;
 - (b) as to paragraph (b), it denies that the ignition of the Scotsburn bushfire occurred at the insured address and says that the accident occurred on the Johns land; and

- (c) it otherwise denies the allegations in paragraph 38.
39. As to paragraph 39:
- (a) it refers to and repeats paragraphs 37H and 37J above; and
 - (b) it denies the allegations in paragraph 39.
40. It denies the allegations in paragraph 40.
41. It admits the allegations in paragraph 41.
42. As to the allegations in paragraph 42:
- (a) it denies the allegations therein;
 - (b) it refers to and repeats paragraphs 37H and 37J above; and
 - (c) it says further that if, as is alleged by the plaintiff, the accident occurred at the insured address (which is expressly denied), then Mr Skimming is not entitled to indemnity by reason of the matters pleaded in paragraphs 42A and 42B hereof.
- 42A. The insuring clause of the policy did not respond to any liability arising from the events alleged in the Amended Statement of Claim because:
- (a) the policy covered Mr Skimming's legal liability as owner-occupier of his home, for death or bodily injury to other people, or for loss or damage to other people's property caused by an accident which occurred during the date of the policy and at the insured address; and
 - (b) if, which is not admitted, Mr Skimming had any legal liability for the accident, it did not arise as owner-occupier of his home as defined in the policy.
- 42B. Further, if which is denied, the insuring clause of the policy responds to a liability arising from the events alleged in the Amended Statement of Claim, the policy will not respond by reason of the application of one or more of the exclusion clauses and conditions referred to in paragraphs 42C to 42E hereof.
- 42C. By the exclusion clause entitled "Deliberate acts or omissions" contained on page 21 of the policy it was a term thereof that the third defendant would not cover Mr Skimming for any legal liability caused by or in connection with an act or omission by him in a way which demonstrated a reckless disregard for the consequences of that act or omission.
- 42D. If the fire commenced as alleged by the plaintiff in the Amended Statement of Claim, then any legal liability of Mr Skimming to the plaintiff and group members was caused by or in connection with an act or omission by Mr Skimming which demonstrated a reckless disregard for the consequences of that act or omission and is therefore excluded.

42E. Further, by the exclusion clause entitled "Transport" on page 22 of the policy it was a term thereof that the third defendant would not cover Mr Skimming for any legal liability caused by or in connection with the use, ownership or control of motor vehicles.

42F. If, as alleged by the plaintiff in paragraph 16 of the Amended Statement of Claim:

- (a) Mr Skimming used the tractor and slasher to slash the grass on the pleaded paddock;
- (b) the operation of the tractor and slasher caused a spark, flame or other heat source to discharge;
- (c) the spark, flame or other heat source so discharged contacted and ignited the dry grass or other fuel in the paddock; and
- (d) the ignition started the fire

then any legal liability of Mr Skimming to the plaintiff and group members was caused by the use and control of a motor vehicle, being the tractor and slasher, and is therefore excluded.

42G. Further, by the exclusion clause entitled "Mechanical or Electrical Breakdown" contained on page 31 of the policy it was a term thereof that the third defendant would not cover Mr Skimming for loss or damage caused by mechanical or electrical breakdown or failure of equipment to operate properly.

42G. If the fire occurred as a result of the power take off shaft between the tractor and slasher breaking, then the loss or damage resulting from the fire was caused by mechanical breakdown and/or the failure of the equipment to operate properly and is therefore excluded.

42H. Further, by the exclusion clause entitled "Breaking the Law" contained in page 29 of the policy it was a term thereof that the third defendant would not cover Mr Skimming for loss or damage or the incurring of legal liability caused by any criminal or legal act or omission.

42I. In breach of section 50(2)(c) of the *Country Fire Authority Act 1958* ("section 50(2)(c)"), Mr Skimming failed to have in his possession any fire suppression equipment when he drove and operated the tractor and slasher on 19 December 2015.

PARTICULARS

On 13 October 2016, Mr Skimming plead guilty to one charge of contravening section 50(2)(c).

42J. If, as alleged by the plaintiff in the Amended Statement of Claim:

- (a) the fire resulted from the emission of the sparks, flame or other heat source from the use of the tractor and slasher;
- (b) but the fire would have been suppressed before it spread to the paddock if Mr Skimming had had in place adequate fire suppression systems and equipment;

any legal liability of Mr Skimming, was caused by his contravention of section 50(2)(c) and is therefore excluded under the policy.

42L. Further, by the second condition contained under the heading "Conditions of Cover" on page 34 of the policy it was a condition thereof that Mr Skimming had to ensure that all reasonable steps were taken to prevent loss, damage or legal liability.

42M. If the fire occurred in the manner alleged by the plaintiffs in the Amended Statement of Claim, this was because Mr Skimming failed to take all reasonable steps to prevent loss, damage or legal liability, and is therefore not entitled to be indemnified.

43. It does not admit the allegations in paragraph 43.

44. It denies the allegations in paragraph 44.

45. As to paragraph 45:

- (a) it admits that the questions in paragraphs (1) and (2) are common questions; and
- (b) it does not admit that the questions in paragraphs 3 to 10 are common questions.

46. In further answer to the Amended Statement of Claim it says:

- (a) the plaintiff's allegations against the first defendant are claims for economic loss and/or damage to property arising from alleged failures of the first defendant to take reasonable care (which claims are not admitted);
- (b) the claims against the first defendant are apportionable claims within the meaning of section 24AE and 24AF of the *Wrongs Act 1958* (**Wrongs Act**);
- (c) if, which is denied, the first defendant is liable to the plaintiff and any group member in respect of economic loss and property damage, the acts or omissions of the second defendant alleged at paragraphs 23-34 of the Amended Statement of Claim also caused that loss and damage, and the second defendant is a concurrent wrongdoer within the meaning of s 24H of the *Wrongs Act*;
- (d) accordingly, pursuant to s 24AI(1) of the *Wrongs Act*, any liability of the first defendant is limited to an amount reflecting the proportion of the economic loss or property damage claimed that the Court considers just having regard to the

first defendant's responsibility for the loss or damage, and judgment must not be given against the first defendant for more than that amount.

COUNTERCLAIM

47. The third defendant refers to and repeats paragraphs 37I to 37J in the Defence above.

AND THE THIRD DEFENDANT COUNTERCLAIMS FOR:

A declaration that the insurance certificate for policy number 111551316902 issued by the third defendant should be rectified to state that the Risk Address, which is the insured address, is the land in certificate of title Volume 05995 Folio 803.

Date: 7 July 2017

MICHAEL THOMPSON

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Moray & Agnew
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MORAY & AGNEW
Lawyers for the third defendant

SCHEDULE OF PARTIES

Between

MICHAEL KARL SCHMID

Plaintiff

and

ROGER JAMES SKIMMING

First Defendant

MAUREEN LYNETTE JOHNS

Second Defendant

AUTO & GENERAL INSURANCE COMPANY LIMITED

Third Defendant