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PROCESSED

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

S CI 2017 02779

BETWEEN:

CASTOR MURILLO

Plaintiff

-and-

**SKM INDUSTRIES PTY LTD**

**(ABN 15 130 864 621)**

**SKM SERVICES PTY LTD**

**(ABN 55 130 867 220)**

Defendant

AMENDED WRIT

(Filed pursuant to the Orders of the Honourable Justice John Dixon

made on 4 August 2017)

Date of document: <del>21 July 2017</del> 9 August 2017		Solicitor's Code: 102650
Filed on behalf of: The Plaintiff		DX: 28001
Prepared by:		Tel: (03) 5560 2000
Maddens Lawyers		Fax: (03) 5560 2099
219 Koroit Street		Ref: B. Pendergast: 171006
Warrnambool VIC 3280		Email: bfp@maddenslawyers.com.au

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: 21 July 2017

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

*Pursuant to Regulation 5.04 of the Supreme Court (General Civil Procedure) Rules 2015.*

#### A. PRELIMINARY

##### The Plaintiff

1. At all material times, the plaintiff was a tenant of 20 King Street, Dallas and the owner of personal property kept at that address.
2. The plaintiff brings this proceeding pursuant to section 33C of the *Supreme Court Act 1986* (Vic) on his own behalf and on behalf of group members.

##### The Fire

3. At approximately 9.00am on 13 July 2017, a fire started at the Coolaroo Recycling Plant (**the Plant**), at 94 Maffra Street, Coolaroo, Victoria, 3048 (**the Fire**).
4. The Fire emitted smoke, soot, dust, ash, debris, and toxins (**the Emissions**) which spread across the suburbs of Coolaroo and Dallas (**the Affected Area**).

##### Group Members

5. The group members to whom this proceeding relates are:
  - (a) all those persons who suffered personal injury (whether physical injury, or psychiatric injury as defined below) as a result of the Emissions (including, without limitation, an injury suffered as a result of attempts to escape the Emissions or other emergency action taken by any person in response to the Emissions);

where “psychiatric injury” in this group means nervous shock or another psychiatric or psychological injury, disturbance, disorder or condition which has been diagnosed as such in a diagnosis given to the person by a medical practitioner prior to 31 December 2017; and

- (b) all those persons who suffered loss or damage to property as a result of the Emissions (including, without limitation, loss or damage resulting from emergency action taken by any person in response to the Emissions); and
- (c) all those persons who at the time of the Fire resided in, or had real or personal property in, the Affected Area and who suffered economic loss, which loss was not consequent upon injury to that person or loss or damage to their property as a result of the Emissions;
- (d) the legal personal representatives of the estates of any deceased persons who came within paragraphs (a), (b) and/or (c) at the time of the Fire.

**(Group Members)**

- 6. As at the commencement of this proceeding there are seven or more Group Members.

**The Defendant**

- 7. At all material times, the defendant (**SKM**) was a corporation capable of suing and being sued.
- 8. At all material times, SKM carried on a business of collection, storage, sorting, and processing of recycled waste (**the Recycling Services**), trading under the name of SKM Recycling (**the Business**).
- 9. In the course of, and for the purpose of, the Business, SKM:
  - (a) carried on the Recycling Services at the Plant;

- (b) was the sole operator of the Plant; and
- (c) was the sole occupier of the land on which the Plant was located.

## B. NEGLIGENCE

### Duty

10. At all material times, SKM:
  - (a) collected waste from residential and commercial recycling bins;
  - (b) stored such waste at the Plant;
  - (c) sorted and processed such waste at the Plant in order to make it available for sale to end-users for re-manufacture into new products;
  - (d) had sole responsibility for all activities associated with planning, design, construction, operation, and maintenance of the Plant;
  - (e) had the right, to the exclusion of other private persons, to:
    - (i) operate and maintain the Plant; or
    - (ii) give directions as to the operation and maintenance of the Plant.
  - (f) exercised the right referred to subparagraph (e) above;
  - (g) in the premises, had practical control over the Plant.
11. At all relevant times, it was reasonably foreseeable to, and was foreseen by, SKM, that:
  - (a) processed and unprocessed waste at the Plant could ignite and sustain a fire;
  - (b) if such a fire commenced, the risk that it might develop into a fire of the severity of the Fire and cause the spread of the Emissions was not insignificant;
  - (c) if a fire occurred, there was a not insignificant risk that the plaintiff and Group Members would suffer:

- (i) loss or damage to property within the Affected Area and consequential loss, including economic loss;
- (ii) economic loss, including by reason of:
  - (1) disruption or impairment of the income earning activities of persons residing in or carrying on business within the Affected Area;
  - (2) impeding the use or amenity of property in the Affected Area;
  - (3) reducing the value of property or businesses located in the Affected Area;
- (iii) personal injury.

#### **Particulars**

Fires occurred at the Plant on 28 February 2017 and 4 June 2017. As a result of the fire on 28 February 2017, the Metropolitan Fire Brigade issued a warning to the community about smoke in the area. As a result of the fire on 4 June 2017, Victoria Police issued a warning to local residents to stay indoors with windows and doors closed.

12. At all material times, Group Members:
- (a) had no, or no practical ability, to prevent or minimise the risk of a fire starting at the Plant;
  - (b) had no, or no practical ability, to prevent, control or minimise the development, growth or spread of a fire which started at the Plant;
  - (c) were vulnerable to the impact or effects of such fire; and
  - (d) consequently, were dependent, for the protection of their persons, property and interests, upon SKM ensuring that:

- (i) no fire would start at the Plant;
- (ii) any fire that did start at the Plant was controlled and managed so as to avoid the Emissions; and
- (iii) further and alternatively, the Emissions from any such fire were contained or minimised.

13. In the premises, SKM owed the Group Members a duty to take reasonable care to prevent:

- (a) a fire starting at the Plant; and
  - (b) the Emissions from any such fire spreading to the Affected Area
- (the Duty).**

#### **Standard of Care**

##### *Foreseeable risks of harm*

14. At all material times, it was reasonably foreseeable that:

- (a) a fire could ignite waste stored at the Plant;
- (b) a fire ignited within the Plant could emit smoke, soot, dust, ash, debris, and toxins;
- (c) the smoke, soot, dust, ash, debris, and toxins emitted by a fire could spread to the Affected Area;
- (d) the matters referred to in subparagraphs (a)-(c) presented risks to human life and property **(Risks of Harm).**

##### *Probability and seriousness of Risk of Harm occurring*

15. At all material times, SKM knew, or ought to have known that:

- (a) the immediate surrounding of the Plant was a high density industrial park; and

- (b) the major uses by the public of the suburb in which the Plant was located and the surrounding suburbs were residential, education, recreational, and commercial.

16. At all material times, SKM:

- (a) stored highly flammable waste at the Plant;
- (b) was aware that such waste could ignite and cause a fire; and
- (c) was aware that there had been two previous fires caused by ignition of such waste in the previous five months.

17. By reason of the matters set out at paragraphs 15-16 above:

- (a) the probability of the Risks of Harm occurring if care were not taken was not insignificant; and
- (b) the likely seriousness of the harm occurring in the event that the Risks of Harm eventuated was severe.

#### *Precautions*

18. As a result of the matters pleaded in paragraphs 15-17 above, a reasonable person in the position of SKM would have taken the following precautions against the Risks of Harm:

- (a) prepared and implemented a fire management plan to minimise the incidence and impact of a fire igniting at the Plant;
- (b) installing an appropriate fire suppression system;
- (c) ensuring that different kinds of waste were not and did not remain mixed together, including by:
  - (i) sorting waste as soon as practical after it was deposited at the Plant;



- (ii) ensuring the different types of sorted waste were stored separately from each other and from unsorted and unprocessed waste and in appropriate receptacles while awaiting processing;
  - (iii) ensuring processed waste was stored separately from unprocessed waste;
  - (iv) ensuring there were appropriate clearances between each waste storage area;
- (d) ensuring fuel levels are adequately managed and minimised, including by:
- (i) sorting waste as soon as practical after it was deposited at the Plant;
  - (ii) limiting the volume of waste in each storage area;
- (e) ensuring flammable waste was managed and minimised, including by:
- (i) ensuring that all flammable materials are stored in appropriate areas or receptacles; and
  - (ii) dividing flammable waste of any particular kind into small separate piles so as to keep a pile of material that might ignite separate from other flammable materials.
- (f) ensuring waste that could emit toxic fumes when ignited was managed and minimised, including by:
- (i) ensuring such waste was kept to a minimum at the plant; and
  - (ii) ensuring such waste was stored away from other flammable waste.

#### **Breaches of the Duty**

19. SKM failed to take reasonable care by reason of:

- (a) having no, or no adequate, fire management plan to minimise the incidence and impact of fire;

- (b) alternatively, not implementing its fire management plan;
- (c) not having in place an appropriate fire suppression system;

**Particulars**

Insofar as the plaintiff is able to say prior to discovery the absence can be inferred from the failures identified below.

- (d) taking no, or no adequate, steps to reduce or control the emission of smoke, soot, dust, ash, debris and toxins from any such fire by reason of:
  - (i) failing to, or to adequately, manage different types of waste materials so that they were not and did not remain mixed together;

**Particulars**

Insofar as the plaintiff is able to say prior to discovery, SKM did not ensure that different types of waste were stored separately with appropriate clearances between each type waste.

- (ii) failing to ensure fuel levels were adequately managed and monitored;

**Particulars**

Insofar as the plaintiff is able to say prior to discovery, SKM stock piled processed and unprocessed waste.

- (iii) failing to, or to adequately, manage flammable waste so as to minimise the risk of ignition

**Particulars**

Insofar as the plaintiff is presently able to say, SKM did not or did not adequately:

- (a) ensure that all flammable materials were stored in appropriate areas or receptacles; or
  - (b) divide flammable waste of any particular kind into small separate piles so as to keep a pile of material that might ignite separate from other flammable materials.
- (iv) failing to, or to adequately manage waste that could emit toxic fumes when ignited, including by:
- (1) stockpiling such waste at the Plant; and
  - (2) not keeping such waste separate from other flammable waste.

**(the Plant Management Failures)**

20. By reason of one or more of the Plant Management Failures, SKM breached the Duty.

**(the Plant Management Breaches).**

**Causation**

21. The Emissions were caused by the Plant Management Breaches.

**Loss and Damage**

22. By reason of the Plant Management Breaches the plaintiff and Group Members have suffered loss and damage.

**Particulars**

The Emissions caused the plaintiff to be evacuated from his home for 5 nights.

The plaintiff incurred the following costs:

- (a) purchasing sustenance and ancillary items whilst displaced from his home (approximately \$500);

- (b) own labour (8 hours) associated with the cleaning and rectification of his home;
- (c) hiring an ozone machine to assist in cleaning the smoke and toxins from his home (\$61.00);

The Emissions caused the plaintiff to require medical treatment and incur the following expenses:

- (a) obtaining medication (\$30.00); and
- (b) undertaking chest x-rays; and

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

Particulars of the Group Members' loss and damage will be provided after determination of common questions or otherwise as the Court may direct.

### **C. NUISANCE – SUB GROUP CLAIM**

#### **Creation of Nuisance**

23. The Emissions were caused by the Plant Management Breaches.

#### **Foreseeability of loss and damage**

24. At all material times:

- (a) the matters in paragraphs 11 and 14 above; and
- (b) the risk that the Emissions would unreasonably interfere with the use or enjoyment of interests in land in the Affected Area by the plaintiff and the sub-group members,

were reasonably foreseeable to, and were foreseen by, SKM.

**Interference with interests in land**

25. The Emissions substantially and unreasonably interfered with the use or enjoyment of the interests in land in the Affected Area held by the plaintiff and sub-group members.

**Particulars**

The plaintiff was the tenant of 20 King Street, Dallas, being residential property in the Affected Area.

The plaintiff was evacuated from his home for 5 nights.

Particulars of interference suffered by subgroup members will be provided after determination of common questions or otherwise as the Court may direct.

26. In the premises, the plaintiff and subgroup members suffered nuisance created by SKM (the Nuisance).

**Loss and damage**

27. As a result of the Nuisance, the plaintiff and subgroup members have suffered loss and damage.

**Particulars**

The plaintiff refers to and relies on the particulars at paragraph 22 above.

Particulars relating to sub-group members will be provided after determination of common questions or otherwise as the Court may direct.

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

- A. Damages.

B. Interest.

C. Costs.

**D. Common questions of law or fact**

The questions of law or fact common to the claims of the plaintiff and each of the Group

Members are:

1. Whether SKM owed the Duty to the plaintiff and Group Members?
2. The scope and content of the Duty.
3. Whether SKM committed the Plant Management Failures?
4. Whether the Plant Management Failures were breaches of the Duty?
5. Whether the Plant Management Breaches caused the Emissions?
6. Whether the plaintiff and sub-group members suffered a Nuisance created by SKM?



.....  
Maddens Lawyers  
Solicitors for the plaintiff

1. Place of trial - Melbourne
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 20 King Street, Dallas, Victoria, 3047.
5. The address for service of the Plaintiff is:  
Maddens Lawyers,  
219 Koroit Street  
WARRNAMBOOL 3280  
Ref: BFP/171006
6. The address of the Defendant is 32 Gilbertson Road, Laverton North Victoria, 3026.



FORM 28A

FILING CONFIRMATION NOTICE

IN THE SUPREME COURT  
OF VICTORIA  
AT Melbourne

To Maddens Lawyers

An electronic copy of document now described –

Amended Writ

is taken to be filed in the Supreme Court in this proceeding under Part 2 of Order 28 on 09-08-2017 at 10:14.

	CASE DETAILS
Case Number:	S CI 2017 02779
Case Description:	MURILLO –V– SKM INDUSTRIES PTY LTD
List Type:	Major Torts List
Your Reference:	171006

Copies of this filing confirmation notice are permitted to be made for service and proof of service— refer to Rule 28.12

This filing confirmation notice must be retained as proof of filing of the document described above— refer to Rules 28.14 and 40.08



PROTHONOTARY

DATED:09-08-2017 10:14

