

STATEMENT OF CLAIM**COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	

TITLE OF PROCEEDINGS

Plaintiff	Jason Peter Hegemann
First Defendant	Joseph Tannous
Second Defendant	Moussa Tannous
Third Defendant	Charbel Tannous
Fourth Defendant	Kwik Flo Pty Ltd (ACN 131 073 204)

FILING DETAILS

Filed for	Jason Peter Hegemann, the plaintiff
Legal representative	Kathryn Emeny, Maddens Lawyers 219 Koroit street, Warrnambool, Victoria, 3080 DX:28001 Tel: (03)55602000
Legal representative reference	210427
Contact name and telephone	Kathryn Emeny, (03)55602000
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TYPE OF CLAIM

Torts – Negligence – Personal Injury – Nuisance - Property Damage

RELIEF CLAIMED

The plaintiffs claim on their own behalf and on behalf of each of the group members identified in paragraph 2 of this statement of claim:

- 1 Damages.
- 2 Costs.

- 3 Interest on damages and costs pursuant to sections 100 and 101 of the *Civil Procedure Act 2005* (NSW).

PLEADINGS AND PARTICULARS

1. On 4 December 2019, a fire started at 1620 Upper Turon Road, Palmers Oaky, in the State of New South Wales (**Defendants' Property**) and burnt over an area of approximately 17,400 hectares (**Palmers Oaky Fire**).

The Plaintiff and Group Members

2. The plaintiff is and was, at all material times, the owner of personal property situated at 257 New Oliver's Road, Running Stream, NSW, 2850 (**Plaintiff's Property**).
3. The plaintiff brings this proceeding pursuant to section 157 of the *Civil Procedure Act 2005* (NSW) on his own behalf and on behalf of the group members, being:
- (a) all those persons who suffered personal injury (whether physical injury, or psychiatric injury) as a result of the Palmers Oaky Fire;
 - (b) all those persons who suffered loss of or damage to property as a result of the Palmers Oaky Fire; and
 - (c) the legal personal representatives of the estates of any deceased persons who came within paragraphs (a) or (b) at the time of the Palmers Oaky Fire.
4. As at the date of commencement of this proceeding, there are seven or more persons who have claims against the defendants as a result of property damage or personal injury caused by the Palmers Oaky Fire.

The Defendants

5. The first, second and third defendants (together, **Owners**) are and, at all material times since about September 2018, have been:
- (a) the registered proprietors of the Defendants' Property as tenants in common in equal shares;

- (b) in possession and effective control of the Defendants' Property; and
 - (c) the occupiers of the Defendants' Property.
6. At all material times, the fourth defendant (**Kwik Flo**) is and was a corporation incorporated pursuant to the *Corporations Act 2001* (Cth) and capable of being sued.
7. At all material times:
- (a) the first and second defendants were the appointed directors of Kwik Flo; and
 - (b) the third defendant was a director of the first defendant within the meaning of paragraph (b) of the definition of "director" in s 9 of the *Corporations Act 2001* (Cth).

The Palmers Oaky Fire

8. At all material times, the Defendants' Property was in the Central Ranges Fire District defined in Schedule 1 of the *Rural Fires Regulation 2013* (NSW).
9. On 4 December 2019:
- (a) a bushfire danger period as defined by s 81 of the *Rural Fires Act 2013* (NSW) applied to the Central Ranges Fire District;
 - (b) the Fire Danger Rating for the Central Ranges Fire District, in which the Property was located, was assessed by the Rural Fire Service to be "very high"; and
 - (c) the weather and fuel conditions at and in the vicinity of the Defendants' Property were favourable for the ignition and spread of fire.

Particulars

The maximum temperature on 4 December 2019 at Palmers Oaky was 24.1 degrees and wind speed varied from 24-39km/h with gusts between 35-62km/h. Relative humidity was between 15-22% between 10am and 6pm. The Defendants' Property and neighbouring land were rural properties predominately vegetated with dry, fully cured, grass. Fires starting in cured grass under strong winds will spread fast and be

difficult to suppress (Country Fire Authority, *CFA Grassland Curing Guide*).

10. On 4 December 2019, Jamie Edwards (**Edwards**) was undertaking fencing works (**Works**) at the Defendants' Property.
 - (a) as a contractor of the Owners; or alternatively
 - (b) as a sub-contractor of Kwik Flo, which itself was a contractor of the Owners.
11. On 4 December 2019:
 - (a) while undertaking the Works, Edwards and a subcontractor engaged by him were using equipment to weld metal fencing components together;
 - (b) the welding caused the discharge of molten metal particles (**sparks**);
 - (c) a spark or sparks so discharged landed in and ignited a dry fuel; and
 - (d) the ignition started the Palmers Oaky Fire.

Kwik Flo's and Owners' Duty

12. At all material times, the Owners, had the right as the occupiers of the Defendants' Property, to the exclusion of other private persons, to control and direct activities carried out on their land.
13. At all material times:
 - (a) the Owners; or, alternatively,
 - (b) Kwik Flo,

had the right, to the exclusion of other private persons, to control and direct their contractors (including Edwards) in the carrying out of the Works at the Property.
14. At all relevant times, Edwards, the Owners and Kwik Flo knew or ought to have known that welding causes the discharge of sparks which have the potential to ignite a fire if they contact combustible material, including dry grass.

15. At all relevant times, the following risks (**Risks**) were reasonably foreseeable to a reasonable person in the position of Edwards, the Owners, and/or Kwik Flo:
- (a) the welding of metal at the Defendants' Property could cause the discharge of sparks;
 - (b) one or more of such sparks might ignite nearby vegetation, including dry grass, and result in a fire;
 - (c) such a fire could:
 - (i) spread over a wide geographic area;
 - (ii) cause death or injury to persons;
 - (iii) cause loss or damage to property within the area affected by the fire;
 - (iv) cause consequential economic loss, including by:
 - (A) disrupting or impairing their incoming earning activities;
 - (B) impeding the use or amenity of their properties; and
 - (C) reducing the value of real property or businesses located within the area affected by the fire.
16. 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 a fire, caused by the discharge of sparks from the use of plant, at the Defendants' Property, might spread (**Class**):
- (a) had no ability, or no practical or effective ability, to prevent or minimise the Risks materialising;
 - (b) were vulnerable to the Risks materialising; and
 - (c) for the purposes of protecting themselves and their property against the Risks, dependent on Edwards and/or the Owners or, alternatively, Kwik Flo

exercising reasonable care in relation to the Works, including the welding of metal, at the Property.

17. As at 4 December 2019, the plaintiff and group members were members of the Class.
18. In the circumstances, at all relevant times, the Owners owed to the plaintiff and group members:
 - (a) a non-delegable duty to ensure that reasonable care was taken by its contractors, Edwards and/or Kwik Flo, to avoid the ignition and escape of fire from the Defendants' Property; and, or alternatively
 - (b) a duty to exercise reasonable care to eliminate or reduce the eventuation of the Risks.
19. Further, if Kwik Flo (rather than the Owners) contracted Edwards to perform the Works, then Kwik Flo also owed to the plaintiff and the group members a duty to exercise reasonable care to eliminate or reduce the eventuation of the Risks.

Breach of Duty

Owners – Breach of Non-Delegable Duty

20. On 4 December 2019:
 - (a) the probability of the Risks materialising was not insignificant by reason that:
 - (i) the welding of metal at the Defendants' Property would create sparks;
 - (ii) there was dry vegetation, including long, fine, cured grass in the vicinity of the Works at the Defendants' Property;
 - (iii) the low humidity and strong, dry winds would assist in the sparks igniting a fire and in the propagation and spread of the fire;
 - (b) the probability that the harm referred to in paragraph 15(c) above would occur if Edwards, the Owners and/or Kwik Flo failed to take reasonable care to avoid the materialisation of the Risks was not insignificant;

- (c) in the event that the Risks materialised, the harm was potentially catastrophic; and
- (d) any burden on Edwards, the Owners and/or Kwik Flo in taking precautions to avoid the Risks was slight and not unreasonable having regard to the probability of the Risks materialising and the seriousness of the harm.

21. In the circumstances pleaded at paragraph 20, a reasonable person in the position of Edwards would have taken the following precautions to avoid the materialisation of the Risks:

- (a) refrained from using any plant or equipment, including any welding equipment, that would, or had the potential to, discharge sparks, embers or flames in conditions of high bushfire risk;
- (b) designed and implemented a system for performing the Works at the Property so as to ensure that the emission or discharge of any sparks, embers or flames from the use of plant or equipment was controlled so as to prevent the ignition of a fire; and
- (c) had in place adequate fire suppression systems and equipment to control and suppress any fire that was ignited by the operation of plant or equipment.

22. On 4 December 2019, Mr Edwards failed to take any of the precautions in the previous paragraph.

23. In the circumstances, the Owners breached their non-delegable duty alleged in paragraph 18(a) by failing to ensure that reasonable care was taken by their contractor, Edwards.

Owners – Breach of Duty

24. Further, in the circumstances pleaded at paragraph 20, a reasonable person in the position the Owners would have taken the following precautions to avoid the materialisation of the Risks:

- (a) exercised reasonable skill and care in the selection of contractors, in arranging the terms of engagement of contractors, or in confirming that contractors would take or had taken appropriate steps to discharge the duties with which they were charged in relation to the risk of fire;
- (b) refrained from requiring or permitting to be used any plant or equipment, including any welding equipment, that would, or had the potential to, discharge sparks, embers or flames in conditions of high bushfire risk;
- (c) designed and implemented a system for performing the Works at the Property so as to ensure that sparks, embers or flames were not emitted or discharged by the operation of plant or equipment;
- (d) designed and implemented a system for performing the Works at the Property so as to ensure that the emission or discharge of any sparks, embers or flames from the use of plant or equipment was controlled so as to prevent the ignition of a fire;
- (e) had in place adequate fire suppression systems and equipment to control and suppress any fire that was ignited by the operation of plant or equipment.

25. In breach of the duty of care pleaded at paragraph 18(b), the Owners:

- (a) instructed Mr Edwards to undertake the Works by welding metal fence components together, rather than bolting them;
- (b) alternatively, failed to prevent Mr Edwards from welding metal fencing components at the Defendants' Property in conditions of high bushfire risk;
- (c) failed to design or implement a system for performing the Works at the Defendants' Property so as to ensure that sparks, embers or flames were not emitted or discharged by the use of the welding equipment;
- (d) failed to design or implement a system for performing the Works at the Defendants' Property so as to ensure that the emission or discharge of sparks from the operation of the welding equipment was controlled so as to prevent the ignition of a fire; and

- (e) failed to have in place any adequate fire suppression systems and equipment to control and suppress the fire ignited by Mr Edwards using welding equipment.

Kwik Flo – Breach of Duty

- 26. Further or in the alternative to paragraphs 0 and 25, if Kwik Flo (rather than the Owners) engaged Mr Edwards to undertake the Works, a reasonable person in the position of Kwik Flo would have taken the precautions set out in paragraph 0.
- 27. In breach of its duty of care pleaded at paragraph 19, Kwik Flo:
 - (a) instructed Mr Edwards to undertake the Works by welding metal fence components together, rather than bolting them;
 - (b) alternatively, failed to prevent Mr Edwards from welding metal fencing components at the Defendants' Property in conditions of high bushfire risk;
 - (c) failed to design or implement a system for performing the Works at the Defendants' Property so as to ensure that sparks, embers or flames were not emitted or discharged by the use of the welding equipment;
 - (d) failed to design or implement a system for performing the Works at the Defendants' Property so as to ensure that the emission or discharge of sparks from the operation of the welding equipment was controlled so as to prevent the ignition of a fire; and
 - (e) failed to have in place any adequate fire suppression systems and equipment to control and suppress the fire ignited by Mr Edwards using welding equipment.

Breaches Caused the Palmers Oaky Fire

- 28. Had the Owners and/or Kwik Flo not breached their duty or duties of care, the Palmers Oaky Fire would not have occurred because:
 - (a) sparks capable of igniting fuel and starting a fire would not have been emitted or discharged from the use of the welding equipment;

- (b) any sparks emitted or discharged from the use of the welding equipment would not have ignited a fire; or
 - (c) any fire resulting from sparks emitted from the welding equipment would have been suppressed before it spread from the Property.
29. In the premises of paragraph 28, the Palmers Oaky Fire was caused by the breaches of the Owners and/or Kwik Flo as alleged in paragraphs 23, 25 and/or 27.
30. The Palmers Oaky Fire was a natural and foreseeable consequence of the negligence of the Owners and/or Kwik Flo.

Loss and Damage

31. By reason of the negligence of the Owners and/or Kwik Flo, the plaintiff and each of the group members suffered loss and damage.

Particulars of loss and damage

The plaintiff suffered loss and damage by the destruction of:

- (i) Tools and equipment including lawn mowers, a rotary hoe, a lathe, grinders, chainsaws, metal detector, saws and a toolbox containing various handheld tools;
- (ii) Household chattels including a 42 inch TV, DVD player, computer, Bluetooth speaker, ultrasonic cleaner, dining table and chairs, couches, white goods, kitchen crockery and utensils, bed and bedside tables;
- (iii) Solar panels and batteries; and
- (iv) Personal chattels including motorbike and horse gear and clothing.

Further 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

32. The questions of law or fact common to the claims of the plaintiff and each of the group members are:
- (1) What was the cause of ignition of the Palmers Oaky Fire?

- (2) What areas were damaged by the Palmers Oaky Fire?
- (3) Did the Owners owe a non-delegable duty to the plaintiff and group members to ensure that reasonable care was taken by Mr Edwards in relation to the Works to avoid:
 - (a) personal injury; and/or
 - (b) physical damage to property;
 - (c) economic loss resulting from damage to propertybeing caused by the materialisation of the Risks?
- (4) Did the Owners owe a common law duty to the plaintiff and group members to exercise reasonable care in relation to the Works to avoid:
 - (a) personal injury; and/or
 - (b) physical damage to property;
 - (c) economic loss resulting from damage to propertybeing caused by the materialisation of the Risks?
- (5) Did Kwik Flo or the Owners engage Mr Edwards as a contractor to undertake the Works at the Defendants' Property?
- (6) If Kwik Flo engaged Mr Edwards as a contractor to undertake the Works at the Defendants' Property, did it owe a common law duty to the plaintiff and group members to exercise reasonable care in relation to the Works to avoid:
 - (a) personal injury; and/or
 - (b) physical damage to property;
 - (c) economic loss resulting from damage to propertybeing caused by the materialisation of the Risks?

- (7) Did the Owners and/or Kwik Flo breach their common law duty of care?
- (8) If the Owners and/or Kwik Flo breached their common law duty of care, was such breach a cause of any of the losses suffered by the plaintiff?

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Date of signature 17.12.21

KATHRYN AMY EMENY
of Maddens Lawyers 219 Koroit Street
Warrambool An Australian legal practitioner
within the meaning of the Legal Profession
Uniform Law (Victoria)

NOTICE TO DEFENDANTS

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed**, by:
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed**, by:
 - Paying the plaintiff that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.lawlink.nsw.gov.au/ucpr or at any NSW court registry.

REGISTRY ADDRESS


Street address	Supreme Court of New South Wales Law Courts Building, Queens Square 184 Phillip Street, Sydney NSW 2000 Australia
Postal address	Supreme Court of New South Wales GPO Box 3 Sydney NSW 2001 Australia DX: 829 Sydney
Telephone	(02) 9230 8111

AFFIDAVIT VERIFYING

Name	Kathryn Amy Emeny
Address	219 Koroit Street, Warrnambool Victoria, 3280
Occupation	Lawyer
Date	17 December 2021

I, **Kathryn Amy Emeny**, of 219 Koroit Street, Warrnambool, Victoria, Solicitor, make oath and say as follows:

- 1 I am a Principal of Maddens Lawyers of 219 Koroit Street, Warrnambool and have the carriage of this matter for and on behalf of the Plaintiff.
- 2 The Plaintiff is the owner of personal property located at 257 New Oliver's Road, Running Stream, NSW, 2850 which was damaged in the Palmers Oaky Fire described in the Statement of Claim.
- 3 The Plaintiff's knowledge of the allegations of fact in the pleading are limited by reason of the representative nature of these proceedings and accordingly I have been authorised to make this Affidavit on behalf of the Plaintiff
- 4 I have undertaken investigations into the cause and circumstances of the Palmers Oaky Fire including, conferring with witnesses and reviewing relevant documentation. A representative of my firm has also attended at the scene of the fire.
- 5 I have received instructions from in excess of seven owners of property damaged in the fire, including the Plaintiff to pursue a claim against the defendants seeking damages for losses suffered as a result of the fire.
- 6 As to any allegations of fact in the pleading, I believe that the allegations are true.

SWORN at Warrnambool, Victoria
Signature of deponent 
Name of witness _____
Address of witness 219 Koroit Street, Warrnambool, Victoria, 3280.
Capacity of witness _____

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness  .

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

JESSICA LEE WALKER
of Maddens Lawyers 219 Koroit Street
Warrnambool An Australian legal practitioner
within the meaning of the Legal Profession
Uniform Law (Victoria)

