

Part 2

Background/uncontroversial matters

Preliminary

3. On 11 January 2021, a bushfire (**the Lucindale bushfire**) started on land commonly known as 593 Carrachers Road, Blackford, South Australia, being the land more particularly described in Certificate of Title Volume 5630 Folio 238 (**the Property**).
4. The Property is located in the Lower South East Fire Ban District of South Australia.
5. The Lucindale bushfire burned over the area highlighted on the map in Annexure A to this Statement of Claim (**Lucindale bushfire area**).

The Applicant and group members

6A. The applicant is a natural person capable of suing in his own name.

6. On 11 January 2021, the applicant was the registered proprietor of land commonly known as 187 Washpool Road, Avenue Ranges, South Australia, being the land more particularly described in Certificate of Title Volume 6007 Folios 227, 228 and 229 (**the land**) and real and personal property on the land.
7. The applicant brings this proceeding on his own behalf and on behalf of the group members.
8. The group members to whom this proceeding relates are:
 - (a) all those persons who suffered loss of or damage to property as a result of the Lucindale bushfire (including, without limitation, consequential losses including economic losses and loss or damage resulting from emergency action taken by any person in response to the Lucindale bushfire);
 - (b) all those persons who suffered personal injury (whether physical injury, or psychiatric injury as defined below) as a result of the Lucindale bushfire (including without limitation, any injury suffered as a result of burns, inhalation of smoke, attempts to escape the Lucindale bushfire or other emergency action taken by the person in response to the Lucindale bushfire):

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 by a medical practitioner prior to 11 January 2022; and
 - (c) all those persons who suffered loss of or damage to property, or economic loss, in connection with the Lucindale bushfire’s interference in their use or enjoyment of interests in land; and
 - (d) the legal personal representatives of the estates of any deceased persons who came within subparagraphs (a) - (c) above at the time of the Lucindale bushfire (**group members**).
9. As at the time of the commencement of this proceeding there are two or more group members.

The Proprietors

- 10.
- (a) As at June and July 2020 the registered proprietors of the Property were Thomas Keith Brinkworth and Patricia Ann Brinkworth (**the proprietors**);
 - (b) Thomas Keith Brinkworth died on 20 August 2020;
 - (c) A grant of probate was issued on 18 May 2021¹⁰ to Benjamin Ronald John Brinkworth, Angas Thomas Kenneth Brinkworth and John Charles Finnis as executors of the estate of Thomas Keith Brinkworth.
 - (d) ~~The current registered proprietors~~ At the time of the Lucindale bushfire, the registered proprietors of the Property are were Benjamin Ronald John Brinkworth, Angas Thomas Kenneth Brinkworth and John Charles Finnis as executors of the estate of Thomas Kenneth Brinkworth together with Patricia Ann Brinkworth (**the respondents**).
 - (e) Insofar as they relate to Mr Thomas Brinkworth, the causes of action pleaded against the proprietors survive as against Mr Brinkworth's estate. ~~The current registered proprietors of the Property are the respondents to this proceeding being legally liable in respect of matters pertaining to the ownership of the Property in 2020 and thereafter.~~

Part 3

Other facts forming the basis of the claim

11. At all material times up to 20 August 2020, the proprietors and thereafter the respondents:
- (a) were the occupiers of the Property;
 - (b) had practical control over the Property.
12. Prior to, or in about June or July 2020, piles of vegetation were created and/or maintained on the Property by:
- (a) the proprietors;
 - (b) alternatively, a person or persons:
 - (i) employed by the proprietors;
 - (ii) acting on instructions from the proprietors; or
 - (iii) authorised by the proprietors to access and use the Property.
13. In about June or July 2020:
- (a) the proprietors; or
 - (b) alternatively, a person or persons:
 - (i) employed by the proprietors;
 - (ii) acting on instructions from the proprietors; or

(iii) who accessed the Property under an authority granted by the proprietors, carried out burning off activity on the Property.

Particulars

The burning off activity included igniting a fire or fires in one or more vegetation piles on the Property.

13A. The burning off activity in or about June or July 2020 included ignition of a vegetation pile located on the Property which pile has subsequently been referred to as Pile 1.

Particulars

Pile 1 is referred to as Pile 1 in the reports of Mr Richard Woods dated 24 May 2022 and 9 February 2023.

Pile 1 is referred to as 'the Active Heap' in the reports of Dr Jon Marsden-Smedley dated 26 May 2022 and 6 February 2023.

Pile 1 is referred to as the 'hot pile' in contemporaneous Country Fire Service (CFS) notes taken in the immediate aftermath of the Lucindale fire.

Pile 1 is referred to as Pile 1 in contemporaneous South Australian Police (SAPOL) notes taken in the immediate aftermath of the Lucindale fire.

13B. For a period between the ignition of Pile 1 and 11 January 2021, Pile 1 continued to smoulder (the smouldering period).

Particulars

Report of Mr Richard Woods dated 24 May 2022.

Report of Dr Jon Marsden-Smedley dated 26 May 2022.

13C. During the smouldering period the remnants of Pile 1 would have exhibited external signs of smouldering which signs would have included:

- (a) radiant heat;
- (b) smoke;
- (c) steam;
- (d) a distinctive smell;
- (e) significant amounts of residual ash; and
- (f) the appearance of vents (fumaroles) within the accumulated ash.

Particulars

Report of Richard Woods dated 24 May 2022;

Report of Dr Jon Marsden-Smedley dated 26 May 2022; and

Joint expert report at response A.1(1)(d).

Weather conditions

14. The South Australian Country Fire Service (**CFS**) declared that 11 January 2021 was a day of Total Fire Ban for the Lower South East Fire Ban District, South Australia, with a forecast Extreme Fire Rating.

Particulars

The declaration was made at 3.45pm on 10 January 2021.

15. At 12.00pm on 11 January 2021:

- (a) the temperature near the Property was about 37.6°C;
- (b) winds were travelling in a north to north-westerly direction at about 35km/h.

Particulars

The applicant relies on historical data from Keith Weather Station, Keith, South Australia.

- 15A. The weather conditions on the Property on 11 January 2021 caused the smouldering fire within Pile 1 to escape into the surrounding vegetation.

Particulars

Report of Mr Richard Woods dated 24 May 2022.

Report of Dr Jon Marsden-Smedley dated 26 May 2022.

Negligence

Duty of care

16. At all material times between the ignition of Pile 1 in or about June or July 2020 and 11 January 2021, it was reasonably foreseeable to the proprietors up to 20 August 2020 and to the respondents thereafter that:

- (a) the Lucindale bushfire area, within which the Property was located, was an area of high bushfire risk when weather conditions were hot, dry and windy;
- (b) a vegetation pile that has been ignited can burn and/or smoulder, including underground, after the day of ignition;
- (c) in hot, dry and windy conditions a fire in a vegetation pile or a fire underground resulting from a fire in a vegetation pile is at risk of spreading and causing a bushfire;

- (d) the risk of spreading is increased if the area surrounding the vegetation pile contains flammable material such as cured grass, trees, tree branches, or tree stumps;
- (e) such fire could cause death or injury to persons and loss of or damage to property within the area over which the fire spread (**fire area**) and consequential losses including economic losses;
- (f) such fire could cause damage to property and consequential losses including economic losses within areas:
 - (i) affected by the physical consequence of fire, such as smoke or debris; or
 - (ii) the subject of emergency activity to prevent the spread of fire, including without limitation the clearing of firebreaks

(affected areas);
- (g) such fire or its consequences could:
 - (i) disrupt or impair the income-earning activities of persons residing or carrying on business in the fire area or affected areas;
 - (ii) impede the use or amenity of property located in the fire area or affected areas; or
 - (iii) reduce the value of property or businesses located in the fire area or affected areas and thereby cause economic loss to those persons, or the owners of those properties or businesses;
- (h) the risks referred to in (a)-(g) above inclusive were:
 - (i) not insignificant as to their likelihood of occurring;
 - (ii) not insignificant as to the potential consequences if they did occur.

17. At all material times members of the public who:

- (a) owned or had an interest in real or personal property;
- (b) carried on business; or
- (c) were from time to time;

in the Lucindale bushfire area or affected areas (**Lucindale class**):

- (i) had no ability, or no practical and effective ability, to prevent or minimize the risk of a fire escaping from the Property;
- (ii) were vulnerable to the impact of a fire escaping from the Property; and
- (iii) consequently, were dependent on the proprietors up to 20 August 2020 and the respondents thereafter ensuring that any burning off activity conducted on the Property was conducted safely in the conditions applying from time to time.

Particulars

~~The Applicant refers to and relies on:~~

~~(A) *Environment Protection Act 1993 (SA), section 28.*~~

~~(B) *Environment Protection (Air Quality) Policy 2016 (SA), clause 5.*~~

~~(C) *Vegetation Pile Burning Code of Practice (April 2015).*~~

~~Further particulars may be provided.~~

18. At all material times, the applicant and group members were:

- (a) persons within the Lucindale class; or
- (b) dependents of persons within the Lucindale class; or
- (c) persons likely to suffer mental injury, psychiatric injury or nervous shock as a result of the death of or injury to persons within the Lucindale class.

19. In the premises, at all material times, the proprietors up to 20 August 2020 and the respondents thereafter owed to persons within the Lucindale class a duty to exercise reasonable care to avoid the risk of fire escaping the Property and starting a bushfire (**Duty**).

Precautions

20. At all material times, the proprietors up to 20 August 2020 and the respondents thereafter knew or ought reasonably to have known that the risk of a fire from burning off activity escaping the Property could be eliminated by:

- (a) ensuring there was a fire break of at least four metres from vegetation piles, which had been cleared of flammable material, including grass, logs, trees, and tree stumps;
- (b) keeping vegetation piles to less than 0.5 metres high and two metres long;
- (c) not placing logs larger than 150mm in diameter in a vegetation pile;
- (d) ensuring the fire or fires in a vegetation pile had been completely extinguished by doing the following on the day of the burning off activity and the following weeks until such time as the remnants of the burning off activity and burned area were completely cold to touch and no longer emitted smoke or any steam:
 - (i) turning over remnants in the pile;
 - (ii) applying a large amount of water to the pile, and
- (e) monitoring piles which had been ignited for signs of smouldering.

(together and severally, the **precautions**).

Particulars

Environment Protection Act 1993 (SA), section 28.

Environment Protection (Air Quality) Policy 2016 (SA), clause 5.

CFS Vegetation Pile Burning Code of Practice (April 2015).

The Applicant refers to and relies on the particulars joined to paragraph 17 above.

Further particulars may be provided.

21. The burden of taking any of the precautions in paragraph 20 above was not disproportionate having regard to their efficacy in eliminating the risk and the potential gravity of the harm that might be caused by a fire ignited in a vegetation pile escaping the Property during a period of extreme bushfire danger.

Breach of Duty

22. The proprietors up to 20 August 2020 and the respondents thereafter:

- (a) failed to take one or more of the precautions as described in paragraph 20 above; and
- (b) breached the Duty.

Particulars

- (i) After a fire was lit in a vegetation pile or piles in or about June or July 2020 In constructing Pile 1 the proprietors failed to:
 - (A) create or maintain a fire break of at least four metres around Pile 1 which was from vegetation piles free from flammable material, including grass, logs, trees, and tree stumps;
 - (B) keep the height of the vegetation pile or piles Pile 1 to less than 0.5 metres;
 - (C) keep the length of the vegetation pile or piles Pile 1 to less than 2 metres;
 - (D) ensure logs larger than 150mm in diameter were not placed in the vegetation pile or piles Pile 1.
- (ii) After ignition of Pile 1, the proprietors up to 20 August 2020 and the respondents thereafter failed to ensure the fire or fires in the vegetation piles were Pile 1 was extinguished by not, or not sufficiently, turning over remnants in or applying large amounts of water to Pile 1 the vegetation pile or piles.
- (iii) After ignition of Pile 1, the proprietors up to 20 August 2020 and the respondents thereafter failed to monitor Pile 1 for signs of ongoing smouldering combustion.
- (iv) Alternatively, the proprietors up to 20 August 2020 and the respondents thereafter failed to ensure the person or persons who constructed or ignited Pile 1 lit a fire in a vegetation pile or piles in or about June or July 2020 did the things in (i) to (iii) (A) to (E) above.

~~Further particulars may be provided~~

Causation and loss

23. As a result of the proprietors' and the respondents' breach of the Duty, on 11 January 2021:
- (a) the fire ~~or fires in one or more vegetation piles~~ in Pile 1 had not been extinguished (**Continuing Fire**);
 - (b) the Continuing Fire escaped from the Property;
 - (c) the Continuing Fire became the Lucindale bushfire.
24. By reason of the proprietors' and the respondents' breach of the Duty, the applicant and each of the group members suffered loss and damage.

Particulars of loss and damage

The applicant suffered the following loss and damage:

- (i) Real property destroyed:
 - (A) a four bedroom house;
 - (B) outbuildings – five sheds, laundry and toilet;
 - (C) approximately 2 kilometres of fencing;
 - (D) gates;
- (ii) Personal property destroyed:
 - (A) home contents;
 - (B) plant and equipment;
- (iii) Consequential loss:
 - (A) costs incurred in hiring equipment to rehabilitate the land after the fire;
 - (B) the costs of labour implemented in rehabilitating the land after the fire;
- (iv) Physical inconvenience.
- (v) Personal injury.

Further particulars will be provided following the trial of common questions or otherwise as the Court may direct.

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

Nuisance

25. Further and in the alternative, ~~from June or July 2020~~, the proprietors up to 20 August 2020 and the respondents thereafter knew or ought reasonably to have known that:
- (a) ~~a fire from~~ burning off activity that ~~escaped~~ on the Property might result in an uncontrolled fire; and
 - (b) an uncontrolled fire on the Property might escape the Property and:
 - (i) spread in directions and to an extent that would depend on wind direction, fuel loads and the efficacy of firefighting efforts; and
 - (ii) unreasonably interfere with the use or enjoyment by owners or occupiers of interests in land in the fire area within affected areas (the landholder subgroup).
26. In the context of the matters set out in the particulars to paragraph 22(b) above, ~~The~~ proprietors up to 20 August 2020 and the respondents thereafter ~~unnecessarily and without lawful excuse~~ in fact caused such interference by ~~themselves or permitting another person or persons:~~
- (a) ~~prior to, or in or about June or July 2020,~~ creating or maintaining Pile 1 ~~the vegetation piles on the Property;~~
 - (b) ~~in about June or July 2020,~~ igniting Pile 1 ~~one or more of the vegetation piles;~~
 - (c) failing to ensure the fire ~~or fires in~~ Pile 1 ~~one or more vegetation piles were~~ was extinguished; and
 - (d) ~~failing to prevent the fire or fires in one or more vegetation piles escaping from the Property;~~
 - (e) thereby creating, on the Property, the fire ~~or fires~~ which developed and spread to become the Lucindale bushfire.
27. The Lucindale bushfire unreasonably interfered with the use or enjoyment of the interests in land held by the ~~applicant and by those group members who owned or occupied land within the fire area or the affected areas (landholder subgroup).~~

Particulars

The Lucindale bushfire burned over and destroyed property which the applicant occupied or otherwise had an interest in and which was situated at 187 Washpool Road, Avenue Ranges, South Australia.

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

28. In the premises of paragraphs 25 to 27 above, the applicant and each of the landholder subgroup members suffered loss and damage by nuisance created by the proprietors and the respondents.

Particulars

The applicant refers to the particulars sub-joined to paragraph 24 above

COMMON QUESTIONS OF LAW OR FACT

29. The questions of law or fact common to the claims of the applicant and each of the group members are:
- (a) how the Lucindale bushfire started;
 - (b) whether the proprietors and/or the respondents owed the Duty to the applicant and group members, and if so the content of the duty;
 - (c) whether the Lucindale bushfire was caused by a breach by the proprietors and/or the respondents of the Duty;
 - (d) whether the applicant and subgroup members suffered actionable nuisance created by the proprietors and/or the respondents;
 - (e) identification of the principles for identifying and measuring compensable losses suffered by the claimants resulting from the breach of duty or nuisance alleged.


**Part 4
Orders sought**

- 1. Damages.
- 2. Interest.
- 3. Costs.

Certification

Mark appropriate section below with an 'x'

[X] As the filing lawyer, I certify that this pleading is filed in accordance with the instructions of the party/parties for whom I act. There is a proper basis for each allegation of fact in the pleading and it complies with the Rules of Court.


.....
Signature

Kathryn Emery
.....
Name printed

11 September 2023
.....
Date

ANNEXURE A

