



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

Case: S CI 2016 05027

No S CI 05027 of 2016 Filed on: 26/11/2018 11:13 AM

B E T W E E N:

MICHAEL KARL SCHMID

Plaintiff

-and-

**ROGER JAMES SKIMMING and OTHERS
(in accordance with the attached Schedule)**

Defendants

**AMENDED REPLY AND DEFENCE TO DEFENCE AND COUNTERCLAIM
OF THE THIRD DEFENDANT**

(filed pursuant to the order of Judicial Registrar Clayton of 22 November 2018)

Date of document:	26 November 2018	Solicitor's Code:	102650
Filed on behalf of:	The Plaintiff	DX:	28001
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To the third defendant's (**Auto & General**) Defence and Counterclaim to the Third Amended Statement of Claim dated 24 July 2018, the plaintiff says as follows:

REPLY

1. In answer to paragraph 37A, he:
 - (a) admits he owes a duty of disclosure to Auto & General pursuant to section 21(1) of the *Insurance Contracts Act 1984 (ICA)*;
 - (b) says that the duty of disclosure pursuant to section 21(1) of the ICA by its terms is subject to the ICA;
 - (c) says that the duty of disclosure pursuant to section 21(1) of the ICA does not require the disclosure of a matter that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know.

Particulars

The plaintiff refers to sub-section 21(2) of the ICA.

but otherwise does not admit paragraph 37A.

2. In answer to paragraph 37F, he:

- (a) denies paragraph 37F;
- (b) says that the first defendant (**Skimming**) disclosed the insured address to Auto & General;
- (c) says further and/or in the alternative that if ~~(which is denied)~~ Skimming ~~breached~~ the duty of disclosure imposed by section 21 of the ICA did not require disclosure that the insured address included the Johns' land because Auto & General knew or in the ordinary course of its business as an insurer ought to have known that the insured address included the Johns land;

Particulars

The plaintiff relies upon sub-sections 21(2) of the ICA.

Auto & General ought to have known that the insured address included the Johns land because that information was publicly available through Landata.

- (d) says further that, by operation of sub-section 21A(6) of the ICA, Skimming is taken to have complied with any duty of disclosure in relation to the policy because:
 - (i) before the policy was entered into, Auto & General requested Skimming to answer specific questions relevant to its decision whether to accept the risk and, if so, on what terms;
 - (ii) in answer to each question, Skimming disclosed each matter that was:
 - (A) known to him; and
 - (B) a reasonable person in the circumstances could be expected to have disclosed.

Particulars

The questions and matters disclosed by Skimming are set out in the document entitled Your Declarations which forms part of the policy.

2A. He denies paragraph 37H and says further that Auto & General is not entitled to reduce its liability in respect of the claim under ss 28(3) of the Act because:

- (a) before the policy was entered into, Auto & General did not clearly inform Mr Skimming in writing of:
 - (i) the general nature and effect of the duty of disclosure; or

- (ii) the general nature and effect of section 21A of the ICA;
 - (b) as a result, Auto & General did not comply with ss. 22(1) of the ICA;
 - (c) by operation of ss. 22(3), Auto & General may not exercise a right in respect of a failure to comply with the duty of disclosure, including ss. 28(3) of the ICA.
3. In answer to paragraphs 42C, 42E, 42G (first appearing), 42H and 42L:
- (d) he says that the exclusion clauses referred to in these paragraphs are identified by page numbers which do not correspond to the page numbers of policy number 115513169 02 (the **policy** as defined in paragraph 36 of the Amended Statement of Claim), a copy of which is produced at pages 8 to 47 of exhibit SMM-1 to the affidavit of Sophie Maree Maraldo sworn 27 April 2017 and filed in this proceeding (**exhibit SMM-1**);
 - (e) subject to production of the policy documents and reference to their full terms, conditions, and exclusions, he admits the terms of the policy;
 - (f) he otherwise does not admit the allegations.
4. In answer to paragraph 42F, he:
- (a) does not admit the allegations;
 - (b) says further that if the exclusion clause in paragraph 42E applies, which is not admitted, the slasher:
 - (i) was not a motor vehicle;
 - (ii) did not require registration or compulsory insurance cover;
 - (iii) was purchased by the first defendant to cut grass;
 - (iv) at all relevant times was used to cut grass in a domestic setting at 260 Finns Road, Scotsburn;
 - (v) was not used by the first defendant for agricultural or commercial purposes;
 - (vi) in the premises, was a domestic garden appliance within the meaning of the policy.

Particulars

The plaintiff relies upon page 21 of the policy under the heading "Transport": refer page 34 of exhibit SMM-1.

5. In answer to paragraph 42G (second appearing), he:
- (a) denies the allegations;
 - (b) says that the exclusion clause on page 29 of the policy under the heading “Mechanical or Electrical Breakdown” applies to loss and damage of the insured, not legal liability of the insured.

DEFENCE TO COUNTERCLAIM

6. He denies the allegations in paragraphs 37I and 37J.

G D Dalton

A Fraatz

Dated: 26 November 2018


Maddens
Maddens Lawyers
Solicitors for the plaintiff

SCHEDULE OF PARTIES

MICHAEL KARL SCHMID

Plaintiff

ROGER JAMES SKIMMING

First Defendant

MAUREEN LYNETTE JOHNS

Second Defendant

AUTO & GENERAL INSURANCE COMPANY LIMITED
(ACN 111 586 353)

Third Defendant

EL MINING SOLUTIONS PTY LTD
(ACN 151 983 603)

Fourth Defendant