

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

S CI 2016 05027

BETWEEN:

**MICHAEL KARL SCHMID**

Plaintiff

and

**ROGER JAMES SKIMMING** (and others according to the attached Schedule)

Defendants

**ORDER**

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JUDGE: The Honourable Justice Forbes  
DATE MADE: 20 August 2020  
ORIGINATING PROCESS: Writ filed 8 December 2016  
HOW OBTAINED: On the return of the Plaintiff's summonses filed 28 August 2019 and adjourned from 19 November 2019 and Plaintiff's summons filed 6 February 2020  
ATTENDANCE: T Tobin SC and A Fraatz of counsel for the plaintiff  
OTHER MATTERS: A. Consent of the first, third and fourth defendants to the plaintiff filing a fourth amended writ and statement of claim (paragraph 6 of this order) is recorded in the signed Minute of Proposed Orders submitted to the Court by email from Maddens Lawyers on 20 July 2020 at 6:14pm and has been placed on the court file.  
B. This Order is signed by the Judge pursuant to Rule 60.02(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2015*

**THE COURT ORDERS THAT:**

1. Pursuant to section 33ZF of the *Supreme Court Act 1986* (Vic) (**Act**) and until further order of the Court, the following documents be sealed in an envelope marked '*Not to be opened without the leave of the Court or a Judge*', kept confidential and placed on the Court file:
  - (a) Confidential affidavit of Brendan Francis Pendergast sworn 14 October 2019 including confidential exhibit "BFP-1".
  - (b) The confidential exhibits marked "Confidential exhibit BCB-1" and "Confidential exhibit BCB-2" to the Affidavit of Brooke Chelsea Byrne affirmed on 12 February 2020.
  - (c) The confidential exhibits marked "Confidential exhibit KAE-3" to the Affidavit of Kathryn Amy Emeny sworn on 24 March 2020.



- (d) The confidential exhibits marked “Confidential exhibit KAE-1” to the Affidavit of Kathryn Amy Emeny sworn on 16 April 2020.
- (e) Confidential Affidavit of Catherine Mary Dealehr filed on 29 April 2020 including confidential exhibit “CMD-1”.
- (f) Confidential affidavit of Brendan Francis Pendergast sworn 15 June 2020 including confidential exhibit “BFP-3’ excluding pages 107 to 130 inclusive.
- (g) Confidential Affidavit of Catherine Mary Dealehr filed on 16 July 2020 including confidential exhibit “CMD-2”.
- (h) Confidential affidavit of Brendan Francis Pendergast sworn 16 July 2020.
- (i) Confidential Affidavit of Catherine Mary Dealehr sworn on 17 July 2020 including confidential exhibit “CMD-2”.
- (j) Confidential Affidavit of Catherine Mary Dealehr sworn on 20 July 2020 including confidential exhibit “CMD-1”.
- (k) Minute of proposed consent order signed by the plaintiff, first, second and third defendant’s undated, provided to the court by email on 20 July 2020 at 6:14pm.

### Settlement Approval Orders

- 2. Pursuant to section 33ZF of the Act, the Court authorises the plaintiff *nunc pro tunc* on behalf of the group members to enter into and give effect to:
  - (a) the “Deed of settlement and release” between Michael Karl Schmid and Maureen Lynette Johns (**Johns Deed**); and
  - (b) the “Deed of Settlement and Release” between Michael Karl Schmid, Roger Skimming, Auto and General Insurance Company Limited (ACN 111 586 353), EL Mining Solution Pty Ltd (ACN 151 983 603) and QBE Insurance Australia Limited (ACN 003 191 035)(**Deed of Settlement and Release**)

in relation to Supreme Court Proceeding S CI 2016 05027 (collectively the **Deeds**) executed by the parties and reproduced at pages 1 to 11 of exhibit BFP-1 to the affidavit of Brendan Pendergast and pages 133 to 164 of (confidential) exhibit BFP-3 to the affidavit of Brendan Pendergast sworn, and the transactions contemplated by the Deeds, for and on behalf of the group members.

- 3. Pursuant to section 33V of the Act, the Court approves:
  - (a) the settlement of the proceeding upon the terms set out in the Deeds;
  - (b) subject to order 4, distribution of the Settlement Sum (as defined in the Deed of Settlement and Release) among the registered group members in accordance with the settlement Distribution Scheme (**Scheme**) being Annexure A.



4. The Administrator will not distribute from Maddens Lawyers' trust account compensation entitlements to a registered group member with insured loss until 7 days after:
  - (a) agreement between a group member and his, her or its insurer in relation to the amount of any Insurance Payment payable to the group member's insurer referred to in sub-paragraph 6.5 of the Scheme; or
  - (b) in the absence of agreement, the decision of the Court on insurance issues in *Lenehan v Powercor Australia Limited* (S CI 2018 01290) referred to in sub-paragraph 6.7(d) of the Scheme.
5. Pursuant to r 25.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (**Rules**) and s 33V of the Act, the plaintiff have leave to discontinue this proceeding as against the second defendant.
6. Pursuant to rr 36.01(1) and 36.04(1)(b) of the Rules and s 33ZF of the Act, the plaintiff have leave to file a fourth amended writ and statement of claim in the form of the document at pages 107 to 130 of (confidential) exhibit BFP-3 to the affidavit of Brendan Francis Pendergast sworn 15 June 2020.
7. Pursuant to sections 33X and 33Y of the Act, the Court approves the content of the 'Notice of Settlement Approval' (**Notice**) being Annexure B.
8. By 4pm on 25 August 2020, notice of approval of the settlement be given to all group members by the plaintiff, by his solicitors causing the Notice:
  - (c) to be sent by ordinary pre-paid post to the postal address for each person recorded on the database of RGMs maintained by Maddens Lawyers, and, where Maddens Lawyers has an email address for the person, to be sent to be sent by email to the person;
  - (d) to be published on Maddens Lawyers website; and
  - (e) to be provided to the Common Law Class Actions Coordinator to be published on the Supreme Court of Victoria's website.
9. The plaintiff by his solicitors file and serve an affidavit as to compliance with Order 8 by 4:00pm on 4 September 2020.

#### **Legal costs**

10. Pursuant to section 33ZF and 33ZJ of the Act, alternatively the inherent jurisdiction of the Court, the amount of \$2,606,974.55 (plus GST on costs to 26/2/2020) (including the reimbursement payment to the lead plaintiff) be approved toward payment in part of the plaintiff's costs and disbursements.




11. The plaintiff's solicitors file further material in support of quantification of legal costs not yet approved as identified in the reasons for approval 2020 VSC 493 by **4.00pm** on **1 September 2020**.
12. Within 14 days of the Administrator distributing from Maddens Lawyers' trust account the final balance of compensation entitlements to registered group members, the plaintiff by his solicitors file and serve an affidavit as to the completion of the claims assessment procedure set out in the Scheme.
13. There be no order as to the costs as between the plaintiff and second defendant.
14. Following approval of the Deeds and upon completion of distributions pursuant to the Scheme, the proceeding be dismissed with no further order as to costs.
15. All *inter partes* costs orders in the proceeding be vacated.

**Liberty to apply**

16. Pursuant to section 33ZF of the Act, the plaintiff and the defendants have leave to apply to the Court for orders in respect of any issue arising in relation to the administration of the Deed.

DATE AUTHENTICATED:      **20 AUGUST 2020**

  
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**THE HONOURABLE JUSTICE FORBES**



**SCHEDULE OF PARTIES**

**BETWEEN:**

MICHAEL KARL SCHMID

Plaintiff

and

ROGER JAMES SKIMMING

First Defendant

MAUREEN LYNETTE JOHNS

Second Defendant

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

Third Defendant

EL MINING SOLUTIONS PTY LTD (ACN 151 983 603)

Fourth Defendant

**AND BETWEEN:**

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

Plaintiff by Counterclaim

MICHAEL KARL SCHMID

Defendant by Counterclaim

