



Filed: 1 December 2023 2:38 PM



D0001V7LKC

## Commercial List Response

### COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Commercial
Registry	Supreme Court Sydney
Case number	2021/00224418

### TITLE OF PROCEEDINGS

First Plaintiff	Dariusz Koper
First Defendant	Zurich Insurance Company Ltd
Second Defendant	Aspen Insurance UK Limited (Company Number 01184193, ARBN 128 637 650)
Number of Defendants	11

### FILING DETAILS

Filed for	Dariusz Koper, Plaintiff 1
Legal representative	Martin Del Gallego
Legal representative reference	
Telephone	(02) 9253 9999
Your reference	MDG.JY.425121

### ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Commercial List Response (231201 Reply to Amended Commercial List Response (dated).pdf)

[attach.]

Form 8 (version 5)  
UCPR 14.4

## REPLY TO AMENDED COMMERCIAL LIST RESPONSE

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial
Registry	Sydney
Case number	2021/224418

### TITLE OF PROCEEDINGS

Plaintiff	<b>Dariusz Koper</b>
First defendant	<b>Zurich Insurance Company Limited</b>
Second defendant	<b>Aspen Insurance UK Limited</b>
Number of defendants	<b>11</b>

### FILING DETAILS

Filed for	<b>Plaintiff</b>
Legal representative	Martin del Gallego, Piper Alderman
Legal representative reference	MDG.JY.425121
Contact name and telephone	Martin del Gallego Tel: +61 2 9253 9999
Contact email	mdelgallego@piperalderman.com.au

### PLEADINGS AND PARTICULARS

This Commercial List Reply responds to the Amended Commercial List Response (**CLR**) of the Defendants dated 26 October 2023. This Reply adopts the headings used in the CLR. Where a paragraph is not pleaded to in Reply the Plaintiff joins issue with the whole of the CLR, save for any admissions therein. Unless otherwise indicated, defined terms are as they appear in the Amended Commercial List Statement (**CLS**).

#### C. Plaintiff's Reply to Contentions

##### Victopia Apartments – Design Elements

- 1 As to paragraphs C.20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 60 of the CLR, the Plaintiff:
- (a) says that, on its proper construction, the Defendants had a right under the Primary Policy to take over the conduct of the defence of the New Zealand Proceedings, but elected not to do so;

- (b) says that the failure to undertake the defence of BMX amounted to an election by the Defendants to be bound by the findings of the New Zealand Judgment;
- (c) says that, on its proper construction, the Policy responds to a legal liability to pay in respect of any Claim or Claims first made against the Insured;
- (d) says that the legal liability to pay crystallised by the Decision of Thomas J such that the indemnity applies to that legal liability and the subject matter of the New Zealand Judgment;
- (e) says further that the insurers are estopped, by reason of an issue estoppel, from denying the findings of fact or law in the New Zealand Judgment;
- (f) says that, on 9 November 2023 the Defendants filed a notice of motion and accompanying affidavit of Andrew Moore affirmed on 9 November 2023, the solicitor on record for the Defendants (**Moore Affidavit**). At paragraph 45(c) the Moore Affidavit deposes that: "it is not disputed that there were defects at both properties. The crucial question, as noted above, is whether the nature of the defects arose by reason of defective design or defective workmanship";
- (g) in the premises of the above, the Plaintiff says that each and every non-admission as to the defects present at the Victopia Apartments is embarrassing and, is contrary to the overriding purpose; and
- (h) otherwise joins issue with the paragraphs.

#### **Prior Known Circumstances**

2 As to paragraphs C. 36, 82, 83 and 84 the Plaintiff:

- (a) denies that the Relevant Facts, or any of them, fall within the ambit of the exclusion pleaded at paragraph C. 36;
- (b) says that if the Relevant Facts, or any of them, are held to fall within the ambit of the exclusion pleaded at paragraph C. 36 then the Plaintiff denies that the knowledge of the Relevant Facts, or any of them, can (or is) imputed to BMX or any Insured under the Policy through Messrs Savage, Smith or Feltham (or any of them);
- (c) says that it does not know whether notice has been given of the Relevant Facts or facts which may give rise to a claim under any earlier policy of insurance as it does not have access to the books and records of BMX or any Insured under the Primary Policy, nor does it have access to notifications made to the Defendants during the Primary Policy (including any bordereaux) or under any earlier policy of insurance, and so does not admit those matters;

- (d) says that it has asked the solicitors for the Defendants for correspondence relating to facts which may give rise to a claim under the Policy or any earlier policy of insurance, but such request has been refused by the Defendants;
- (e) says that it does not have all of the correspondence relating to the Relevant Facts referred to in paragraph 83 of the CLS;
- (f) will rely on the "prior known circumstances" exclusion for its full force and effect; and
- (g) otherwise deny the allegations in the paragraph.

#### **Defective Workmanship Exclusion**

3 As to paragraphs C. 38 and 85 the Plaintiff:

- (a) denies that the exclusion at paragraph C.38 operates as pleaded in the CLR;
- (b) says that the proviso to the exclusion operates to restore cover where such liability is otherwise indemnifiable under the Primary Policy and arises from:
  - i. an act of neglect or error or omission with respect to the design or specification of materials; or
  - ii. an act of neglect or error or omission with respect to advice given in connection with the selection of materials
 undertaken by professionally qualified persons or personnel as per item a) of [the] Definition of Professional Activities and Duties.
- (c) says that, if the defective workmanship aspect of the exclusion applies in this case (which is denied) then the legal liability arises from matters falling within the ambit of the writeback such that the exclusion does not apply; and
- (d) otherwise denies the allegations in the paragraph.

#### **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 this reply has reasonable prospects of success.

Signature



Capacity

Martin del Gallego

Date of signature

1.12.23

**AFFIDAVIT VERIFYING**

Name	Dariusz Koper
Address	Unit 5, 2A Gilbert Street, Manly NSW 2095
Occupation	Project Director
Date	1.12.23

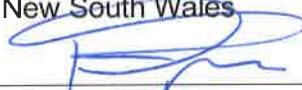
I affirm:

- 1 I am the plaintiff.
- 2 I believe that the allegations of fact contained in the reply are true.
- 3 I believe that the allegations of fact that are denied in the reply are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the reply are true.

AFFIRMED at

Sydney, New South Wales

Signature of deponent



Name of witness

JORDANA OLIVIA YENCKEN-NISSENBAUM

Address of witness

Level 23, Governor Macquarie Tower, 1 Farrer Place,  
Sydney NSW 2000

Capacity of witness

Solicitor

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.  
~~#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.\*~~
- 2 #I have known the deponent for at least 12 months.  
#I have confirmed the deponent's identity using the following identification document:

New Zealand Passport

Identification document relied on (may be original or certified copy)†

Signature of witness

Jencken-Nissenbaum

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.]