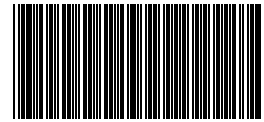




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Commercial List Response

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	Zurich Insurance Company Ltd, Defendant 1 Aspen Insurance UK Limited (Company Number 01184193, ARBN 128 637 650), Defendant 2 Liberty Mutual Insurance Europe SE (Company Number B232280), Defendant 3 Allianz Global Corporate & Specialty SE (Company Number HRB 208312), Defendant 4 American International Group UK Limited (Company Number 10737370), Defendant 5 Arch Managing Agency Limited, for and on behalf of Syndicate 2012 at Lloyd's (Company Number 06948515), Defendant 6 Great Lakes Insurance SE (Company Number HRB 230378), Defendant 7 Swiss Re International SE (Company Number 8134553), Defendant 8 Allied World Managing Age Limited for and on behalf of Syndicate 2232 at Lloyd's (Company Number 07249776), Defendant 9 Chubb Underwriting Agencies Limited for and on behalf of Syndicate 2488 at Lloyd's (formerly Syndicate 1882), Defendant 10 Starr Managing Agents Limited for and on behalf of Syndicate
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Legal representative
Legal representative reference
Telephone

Andrew Stewart Moore

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 (Case no 2021 00224418 Further Amended Commercial List Response.pdf)

[attach.]

Form 1 (version 4)
Practice Note SC Eq 3

FURTHER AMENDED COMMERCIAL LIST RESPONSE

(Filed pursuant to leave granted by Brereton J on 3 September 2025)

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial List
Registry	Sydney
Case number	2021/00224418

TITLE OF PROCEEDINGS

Plaintiff	Dariusz Koper
First defendant	Zurich Insurance Company Limited
Number of defendants (if more than two)	11

FILING DETAILS

Filed for	Zurich Insurance Company Limited first defendant Aspen Insurance UK Limited second defendant Liberty Mutual Insurance Europe SE (Company Number B232280) third defendant Allianz Global Corporate & Specialty SE (Company Number HRB 208312) fourth defendant American International Group UK Limited (Company Number 10737370) fifth defendant Arch Managing Agency Limited, for and on behalf of Syndicate 2012 at Lloyd's (Company Number 06948515) sixth defendant Great Lakes Insurance SE (Company Number HRB 230378) seventh defendant Swiss Re International SE (Company Number 8134553) eighth defendant Allied World Managing Agency Limited for and on behalf of Syndicate 2232 at Lloyd's (Company Number 07249776) ninth defendant Chubb Underwriting Agencies Limited for and on behalf of Syndicate 2488 at Lloyd's (formerly Syndicate 1882) (Company Number 02287773) tenth defendant Starr Managing Agents Limited for and on behalf of Syndicate 1919 at Lloyd's (Company Number 06265337) eleventh defendant
Filed in relation to	Plaintiff's claim
Legal representative	Andrew Moore, Wotton + Kearney
Legal representative reference	ASM 9006607 RJS
Contact name and telephone	Andrew Moore 02 8273 9943
Contact email	andrew.moore@wottonkearney.com.au

A. NATURE OF DISPUTE

- 1 By his Further Amended Commercial List Statement filed on 9 October 2023, the plaintiff, Mr Dariusz Koper (**Koper**), on behalf of himself and other group members, asserts that he is entitled, under s 4 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) (**Claims Act**), to recover, from the defendants, being insurers that issued various policies of professional indemnity insurance under which Brookfield Multiplex Constructions (NZ) Ltd (in liq) (**BMX**) is an insured, sums for which BMX was held liable in the New Zealand High Court proceedings numbered CIV 2012-404-6290 (**Victopia Proceeding**).
- 2 The defendants deny that they are liable to indemnify BMX for the liabilities established or recognised in the judgment of Thomas J in the Victopia Proceeding (**Victopia Judgment**), and so deny that Koper has any entitlement to recover from them under the Claims Act.
- 3 The dispute is as to whether the primary insurance policy and certain excess layer policies respond to the proceedings referred to in paragraph 1 above and whether the defendants are obliged to indemnify BMX in respect of the Victopia Judgment.

B. ISSUES LIKELY TO ARISE

- 4 Whether, and if so, to what extent, the primary insurance policy and certain excess layer policies respond to the Victopia Judgment.

C. DEFENDANTS' RESPONSES TO PLAINTIFF'S CONTENTIONS

The defendants adopt the definitions in the plaintiff's Further Amended Commercial List Statement filed on 9 October 2023 (**FACLS**) except where otherwise stated and respond as follows:

PARTIES

1. The defendants admits paragraph 1 of the FACLS.
2. The defendants admit paragraph 2 of the FACLS.
- 2A. In answer to paragraph 2A of the FACLS, the defendants:
 - (a) say that Aspen Insurance UK Limited (**Aspen**) is a company incorporated under the law of the United Kingdom;
 - (b) say that it has a registered office in Australia; and
 - (c) otherwise admit the paragraph.
- 2B. The defendants admit paragraph 2B of the FACLS.

- 2C. The defendants admit paragraph 2C of the FACLS.
- 2D. The defendants admit paragraph 2D of the FACLS.
- 2E. The defendants admit paragraph 2E of the FACLS.
- 2F. The defendants admit paragraph 2F of the FACLS.
- 2G. The defendants admit paragraph 2G of the FACLS.
- 2H. In answer to paragraph 2H of the FACLS, the defendants:
 - (a) say that Allied World Managing Agency Limited for and on behalf of Syndicate 2232 at Lloyd's is a private limited company incorporated pursuant to the laws of England and Wales; and
 - (b) otherwise admit the paragraph.
- 2I. In answer to paragraph 2I of the FACLS, the defendants:
 - (a) say that Chubb Underwriting Agencies Limited for and on behalf of Syndicate 2488 at Lloyd's (formerly Syndicate 1882) is a private limited company incorporated pursuant to the laws of England and Wales; and
 - (b) otherwise admit the paragraph.
- 2J. In answer to paragraph 2J of the FACLS, the defendants:
 - (a) say that Starr Managing Agents Limited for and on behalf of Syndicate 1919 at Lloyd's is a private limited company incorporated pursuant to the laws of England and Wales; and
 - (b) otherwise admit the paragraph.
- 3. The defendants admit paragraph 3 of the FACLS.
- 4. The defendants admit paragraph 4 of the FACLS.

CLAIM IN NEGLIGENCE

The Victopia Apartments

- 5. The defendants admit paragraph 5 of the FACLS.
- 6. The defendants admit paragraph 6 of the FACLS.
- 7. The defendants admit paragraph 7 of the FACLS.
- 8. The defendants admit paragraph 8 of the FACLS.
- 9. In answer to paragraph 9 of the FACLS, the defendants:
 - (a) rely on the D&C Contract as if set out here in full; and
 - (b) otherwise, do not admit the paragraph.
- 10. The defendants admit paragraph 10 of the FACLS.

11. The defendants admit paragraph 11 of the FACLS.
12. The defendants admit paragraph 12 of the FACLS.
13. The defendants admit paragraph 13 of the FACLS.
14. The defendants admit paragraph 14 of the FACLS.
15. The defendants admit paragraph 15 of the FACLS.
16. The defendants admit paragraph 16 of the FACLS.
17. The defendants admit paragraph 17 of the FACLS.

Building Code

18. The defendants admit paragraph 18 of the FACLS.
19. In answer to paragraph 19 of the FACLS, the defendants:
 - (a) say that under clause B2.3.1 of the Code, building elements must, with only normal maintenance, continue to satisfy the performance requirements of this code for the lesser of the specified intended life of the building, if stated, or:
 - (i) the life of the building, being not less than 50 years, if:
 - A those building elements (including floors, walls, and fixings) provide structural stability to the building, or
 - B those building elements are difficult to access or replace, or
 - C failure of those building elements to comply with the building code would go undetected during both normal use and maintenance of the building; or
 - (ii) 15 years if:
 - A those building elements (including the building envelope, exposed plumbing in the subfloor space, and in-built chimneys and flues) are moderately difficult to access or replace, or
 - B failure of those building elements to comply with the building code would go undetected during normal use of the building, but would be easily detected during normal maintenance; or
 - (iii) 5 years if:
 - A the building elements (including services, linings, renewable protective coatings, and fixtures) are easy to access and replace, and
 - B failure of those building elements to comply with the building code would be easily detected during normal use of the building;
 - (b) rely on the Code as if set out here in full; and

- (c) otherwise do not admit paragraph 19.

Victopia Apartments – Design Elements

20. In response to paragraph 20 of the FACLS, the defendants:

- (a) say that Thomas J in the Victopia Judgment made findings to the effect that as designed and constructed, the Victopia Apartments have the design elements alleged in paragraph 20;

Particulars

Victopia Judgment at [7], [38], [39] and [48].

- (b) say further that the defendants were not parties to the Victopia Proceeding and therefore are not bound by findings made in the Victopia Judgment;
- (c) admit paragraph 20.2;
- (d) deny paragraph 20.3;
- (e) admit the first sentence of paragraph 20.5; and
- (f) otherwise do not admit paragraph 20.

Victopia Apartments – Defects

Eterpanel Cladding

21. In answer to paragraph 21 of the FACLS, the defendants:

- (a) say that it was found by Thomas J in the Victopia Judgment that the Eterpanel Cladding system did not allow for thermal and moisture movements;

Particulars

Victopia Judgment at [63].

- (b) say further that the defendants were not parties to the Victopia Proceeding and therefore are not bound by findings made in the Victopia Judgment; and
- (c) otherwise do not admit paragraph 21.

22. In answer to paragraph 22 of the FACLS, the defendants:

- (a) say that it was found by Thomas J in the Victopia Judgment that:
 - (i) there has been extensive cracking of the fibre cement sheets on the Eterpanel Cladding system; and
 - (ii) there have been resulting breaches of clauses B1 (Structure) and B2 (Durability) of the Code;

Particulars

Victopia Judgment at [64].

- (b) say further that the defendants were not parties to the Victopia Proceeding and therefore are not bound by findings made in the Victopia Judgment; and
- (c) otherwise ~~do not admit~~ deny the paragraph.

Balconies

23. In answer to paragraph 23 of the FACLS, the defendants:

- (a) say that it was found by Thomas J in the Victopia Judgment that the Asaphonic tile adhesive and Dampfix 3 waterproofing membranes on the balconies were incompatible;

Particulars

Victopia Judgment at [66].

- ~~(b) if (which is otherwise not admitted) there was an incompatibility as found by her Honour, deny that such incompatibility was a feature or result of the design of the balconies;~~
 - (c) say further that the defendants were not parties to the Victopia Proceeding and therefore are not bound by findings made in the Victopia Judgment; and
 - (d) say further that:
 - (i) ASA Dampfix 3 waterproof membrane and ASA Asaphonic tile adhesive were incompatible with one another and should not have been used for the balconies; and
 - (ii) in so far as ASA Dampfix 3 waterproof membrane and the ASA Asaphonic tile adhesive were used for the balconies, that was a departure from, and inconsistent with, the design for the balconies, and the use of those materials in combination was not an act of neglect or error omission with respect to the design or specification of materials or with respect to advice given in connection with the selection of materials; and
 - (e) otherwise ~~do not admit~~ deny paragraph 23.
24. In answer to paragraph 24 of the FACLS, the defendants:
- (a) repeat paragraph 23 above;

- (b) say that it was found by Thomas J in the Victopia Judgment that the solvents in the Asaphonic (phthalate plasticiser and xylene) were able to migrate into the Dampfix 3 causing it to deteriorate in breach cl B1 of the Code;

Particulars

Victopia Judgment at [66].

- (c) say further that the defendants were not parties to the Victopia Proceeding and therefore are not bound by findings made in the Victopia Judgment; and
- (d) otherwise ~~do not admit~~ deny paragraph 24.

Podium

25. In answer to paragraph 25 of the FACLS, the defendants:

- (a) say that Thomas J in the Victopia Judgment accepted the evidence of Mr Simon Paykel, a building surveyor, as to the defective installation of the waterproofing membrane to the ground floor podium, which allowed moisture to migrate into the carpark causing damage to the plasterboard wall linings and undue dampness in the carparks in breach of clauses E2 and B2 of the Code;

Particulars

Victopia Judgment at [70]-[71].

- (b) say further that the defendants were not parties to the Victopia Proceeding and therefore are not bound by findings made in the Victopia Judgment; and
- (c) otherwise ~~do not admit~~ deny paragraph 25.

26. In answer to paragraph 26 of the FACLS, the defendants:

- (a) repeat paragraph 25 above; and
- (b) otherwise ~~do not admit~~ deny the paragraph.

Fire-Stopping

27. In answer to paragraph 27 of the FACLS, the defendants:

- (a) say that Thomas J in the Victopia Judgment accepted the evidence of Mr Geoffrey Merryweather, a fire engineer, as to widespread passive fire (fire stopping) defects in the building;

Particulars

Victopia Judgment at [73].

- (b) say further that the defendants were not parties to the Victopia Proceeding and therefore are not bound by findings made in the Victopia Judgment; and
- (c) otherwise do not admit paragraph 27.

BMX – Breach of Duty of Care

28. In answer to paragraph 28 of the FACLS, the defendants:

- (a) say that it was held by Thomas J in the Victopia Judgment that BMX owed a non-delegable duty of care in respect of the defects that her Honour found;

Particulars

Victopia Judgment at [89].

- (b) say further that the defendants were not parties to the Victopia Proceeding and therefore are not bound by findings made in the Victopia Judgment; and
- (c) otherwise does not admit paragraph 28.

29. In answer to paragraph 29 of the FACLS, the defendants:

- (a) say that Thomas J in the Victopia Judgment found that BMX breached its duty of care:
 - (i) by applying for building consent for and installing the Eterpanel cladding system;
 - (ii) by either:
 - A failing to identify that the waterproofing products installed on the balconies were not in accordance with the building consent; or
 - B with awareness that the waterproofing products installed on the balconies were not in accordance with the building consent, allowing the Asaphonic and Dampfix 3 to be installed regardless;
 - (iii) by installing the podium waterproofing with the defects identified by Mr Paykel;
 - (iv) by allowing the fire stopping to be undertaken in a defective manner as described by Mr Merryweather in his evidence;

Particulars

Victopia Judgment at [92], [95], [97] and [99].

- (b) say further that the defendants were not parties to the Victopia Proceeding and therefore are not bound by findings made in the Victopia Judgment; and
- (c) otherwise do not admit paragraph 29.

Loss and Damage

30. In answer to paragraph 30 of the FACLS, the defendants:
- (a) say that Thomas J made various findings as to loss and damage in Schedule 1 to the Victopia Judgment;
 - (b) say further that the defendants were not parties to the Victopia Proceeding and therefore are not bound by findings made in the Victopia Judgment; and
 - (c) otherwise do not admit paragraph 30.

INSURANCE POLICIES

The Primary Policy

31. The defendants admit paragraph 31 of the FACLS and say the following insurers subscribed to the Primary Policy:
- (a) the First Defendant, as to 38.8888%;
 - (b) the Third Defendant, Liberty Mutual Insurance Europe SE, as to 30.0000%;
 - (c) the Fourth Defendant, Allianz Global Corporate & Specialty SE, as to 15.5556%;
 - (d) the Second Defendant, as to 7.7778%; and
 - (e) the Fifth Defendant, American International Group (UK) Limited, as to 7.7778%.
32. In answer to paragraph 32 of the FACLS, the defendants:
- (a) say that BMPL, together with its subsidiaries and associated companies, is an "Insured" under the Primary Policy subject to the terms, conditions and exclusions applicable to that policy; and
 - (b) otherwise admit paragraph 32 of the FACLS.
33. In answer to paragraph 33 of the FACLS, the defendants:
- (a) say that BMX is an "Insured" under the Primary Policy subject to the terms, conditions and exclusions applicable to that policy; and
 - (b) otherwise admit paragraph 33 of the FACLS.
34. The defendants admit paragraph 34 of the FACLS.
35. The defendants admit paragraph 35 of the FACLS.
36. In answer to paragraph 36 of the FACLS, the defendants say:

- (a) that the Policy contains a 'Prior Circumstances Exclusion' to the effect that the Defendants shall not be liable under the Policy to indemnify BMX in respect of any claim arising out of any fact or circumstance of which:
 - (i) notice has been given, or ought reasonably to have been given, under any previous policy as a fact or circumstance likely to give rise to a claim; or
 - (ii) BMX first became aware prior to the inception of the Policy and which BMX knew or, ought reasonably to have known was likely to give rise to a Claim under this Policy;

(Prior Circumstances Exclusion)

- (b) they refer to and rely upon the Policy in its totality for its full meaning, terms and effect including all applicable terms, conditions and exclusions pursuant to the contract of insurance; and
- (c) otherwise admit paragraph 36 of the FACLS.

Particulars

Primary Policy (including but not limited to Exclusion 14, page 7).

- 37. The defendants admit paragraph 37 of the FACLS.
- 38. The Defendants admit paragraph 38 of the FACLS and further:
 - (a) repeat paragraph 36(a) and (b) above; and
 - (b) say that the Policy contains an exclusion to the effect that the Defendants shall not be liable under the Policy to indemnify BMX in respect of any claim arising out of defective workmanship by or on behalf of BMX, defective materials, manual labour operations or any defective materials, workmanship or production techniques used in the actual manufacture of any product.

Particulars

Primary Policy Exclusion 9, page 6

- 39. The defendants admit paragraph 39 of the FACLS.
- 40. The defendants admit paragraph 40 of the FACLS.
- 41. The defendants admit paragraph 41 of the FACLS.
- 42. The defendants admit paragraph 42 of the FACLS.

The Excess Policies

43. The defendants deny paragraph 43 of the FACLS and say the following insurers subscribed to the First Excess Policy:
- (a) the Sixth Defendant, Arch Managing Agency Limited, for and on behalf of the Corporate Members of Lloyd's Syndicate 2012 for the 2012 Year of Account, as to 19.0839%;
 - (b) the Seventh Defendant, Great Lakes Insurance SE, as to 15.2671%;
 - (c) the Third Defendant, Liberty Mutual Insurance Europe SE, as to 19.0840%;
 - (d) the Eighth Defendant, Swiss Re Insurance Company Limited, as to 19.0840%;
 - (e) the Ninth Defendant, Allied World Managing Agency Limited for and on behalf of Syndicate 2232 at Lloyd's, as to 7.6336%;
 - (f) the Fourth Defendant, Allianz Global Corporate & Specialty SE, as to 7.6336%;
 - (g) the Tenth Defendant, Chubb Underwriting Agencies Limited for and on behalf of Syndicate 2488 (formerly Syndicate 1882), as to 7.6336%; and
 - (h) the Fifth Defendant, American International Group (UK) Limited, as to 4.5802%.
44. In answer to paragraph 44 of the FACLS, the defendants:
- (a) say that BMPL, together with its subsidiaries and associated companies is an "Insured" under the First Excess Policy subject to the terms, conditions and exclusions applicable to that policy; and
 - (b) otherwise admit paragraph 44 of the FACLS.
45. In answer to paragraph 45 of the FACLS, the defendants:
- (a) say that BMX is an "Insured" under the First Excess Policy subject to the terms, conditions and exclusions applicable to that policy; and
 - (b) otherwise admit paragraph 45 of the FACLS.
46. The defendants admit paragraph 46 of the FACLS.
47. The defendants admit paragraph 47 of the FACLS and repeat and rely on paragraphs 36 and 38 above.

48. The defendants deny paragraph 48 of the FACLS and say the following insurers subscribed to the Second Excess Policy:
- (a) the Eleventh Defendant, Starr Managing Agents Limited for and on behalf of Syndicate CVS 1919, as to 16.6667%;
 - (b) the Seventh Defendant, Great Lakes Insurance SE, as to 16.6667%;
 - (c) the Second Defendant, as to 16.6667%;
 - (d) the Eighth Defendant, Swiss Re Insurance Company Limited, as to 20.8333%;
 - (e) the Tenth Defendant, Chubb Underwriting Agencies Limited for and on behalf of Syndicate 2488 (formerly Syndicate 1882) , as to 8.333%;
 - (f) the Fourth Defendant, Allianz Global Corporate & Specialty SE, as to 8.3333%; and
 - (g) the Ninth Defendant, Allied World Managing Agency Limited for and on behalf of Syndicate 2232 at Lloyd's, as to 12.5000%.
49. In answer to paragraph 49 of the FACLS, the defendants:
- (a) say that BMPL, together with its subsidiaries and associated companies is an "Insured" under the Second Excess Policy subject to the terms, conditions and exclusions applicable to that policy; and
 - (b) otherwise admit paragraph 49 of the FACLS.
50. In answer to paragraph 50 of the FACLS, the defendants:
- (a) say that BMX is an "Insured" under the Second Excess Policy subject to the terms, conditions and exclusions applicable to that policy; and
 - (b) otherwise admit paragraph 50 of the FACLS.
51. The defendants admit paragraph 51 of the FACLS.
52. The defendants admit paragraph 52 of the FACLS and repeat and rely on paragraphs 36 and 38 above.
53. The defendants deny paragraph 53 of the FACLS and say the following insurers subscribed to the Third Excess Policy:
- (a) the Sixth Defendant, Arch Managing Agency Limited, for and on behalf of the Corporate Members of Lloyd's Syndicate 2012 for the 2012 Year of Account, as to 22.0653%;

- (b) the Third Defendant, Liberty Mutual Insurance Europe SE, as to 29.3910%;
- (c) the second defendant, as to 17.6523%;
- (d) the Eleventh Defendant, Starr Managing Agents Limited for and on behalf of Syndicate CVS 1919, as to 13.2392%;
- (e) the Fourth Defendant, Allianz Global Corporate & Specialty SE, as to 8.8261%; and
- (f) the Fifth Defendant, American International Group (UK) Limited, as to 8.8261%.

54. In answer to paragraph 54 of the FACLS, the defendants:

- (a) say that BMPL, together with its subsidiaries and associated companies is an “Insured” under the Third Excess Policy subject to the terms, conditions and exclusions applicable to that policy; and
- (b) otherwise admit paragraph 54 of the FACLS.

55. In answer to paragraph 55 of the FACLS, the defendants:

- (a) say that BMX is an “Insured” under the Third Excess Policy subject to the terms, conditions and exclusions applicable to that policy; and
- (b) otherwise admit paragraph 55 of the FACLS.

56. The defendants admit paragraph 56 of the FACLS.

57. The defendants admit paragraph 57 of the FACLS and repeat and rely on paragraphs 36 and 38 above.

58. The defendants admit paragraph 58 of the FACLS.

NEW ZEALAND PROCEEDINGS

Judgment in New Zealand Proceedings

59. The defendants admit paragraph 59 of the FACLS and repeats and relies on paragraphs 21 to 30 above.

60. In answer to paragraph 60 of the FACLS, the defendants:

- (a) admit that Thomas J determined BMX’s liability in the paragraphs sub-joined to the particulars of paragraph 60 of the FACLS;

- (b) refer to the Victopia Judgment in its totality for its full meaning; and
- (c) say further that the defendants were not parties to the Victopia Proceeding and therefore are not bound by findings made in the Victopia Judgment.

61. The defendants admit paragraph 61.

APPLICATION OF THE INSURANCE POLICIES

Application of the Primary Policy

62. The defendants admit paragraph 62 of the FACLS.

63. In answer to paragraph 63, the defendants say:

- (a) BMX undertook to design, construct, complete, deliver and remedy defects in the works described in the D&C Contract;
- (b) rely on the D&C Contract as if set out in full here; and

Particulars

Contract Agreement dated 1 November 2003 between KNZ and BMX.

- (c) otherwise do not admit paragraph 63.

64. The defendants do not admit paragraph 64 of the FACLS.

Particulars

~~Further particulars will be provided following discovery / exchange of expert reports.~~

- 65. The defendants do not admit paragraph 65 of the FACLS and repeat paragraphs 28 to 30 above.
- 66. The defendants do not admit paragraph 66 of the FACLS.
- 67. The defendants admit paragraph 67 of the FACLS.
- 68. The defendants admit paragraph 68 of the FACLS.
- 69. The defendants admit paragraph 69 of the FACLS.
- 70. The defendants admit paragraph 70 of the FACLS.

71. The defendants admit paragraph 71 of the FACLS and repeat the matters set out in paragraphs 31 to 42 and 62 to 69 above.
72. In answer to paragraph 72, the defendants:
 - (a) admit that the originating process for the Victoria Proceeding is a “Claim” as defined in the Primary Policy;
 - (b) repeat and rely on paragraphs 36 and 38 above;
 - (c) refer to paragraphs 82 to 85 below; and
 - (d) deny that the Policies respond to the Claim.
73. The defendants deny paragraph 73 of the FACLS and repeat and rely on paragraphs 36, 38 and 72 above.

Application of the Excess Policies

74. The defendants deny paragraph 74 of the FACLS and repeat paragraph 72 above.
75. The defendants deny paragraph 75 of the FACLS.

THIRD PARTY CLAIMS ACT

76. The defendants admit paragraph 76 of the FACLS.
77. The defendants admit paragraph 77 of the FACLS.
78. In answer to paragraph 78 of the FACLS, the defendants:
 - (a) repeat paragraphs 72 and 73 above; and
 - (b) otherwise deny paragraph 78.
79. The defendants admit paragraph 79 of the FACLS.
80. In answer to paragraph 80 of the FACLS, the defendants:
 - (a) repeat paragraphs 72, 73 and 78 above; and
 - (b) otherwise deny paragraph 80.
81. In answer to paragraph 81 of the FACLS, the defendants:
 - (a) repeat paragraphs 30, 72, 73 and 78 above; and
 - (b) otherwise deny paragraph 81.

IN ANSWER TO THE WHOLE OF THE FACLS

82. Further, and in the alternative, in answer to the whole of the FACLS, the defendants make the allegations in paragraphs 823 to 85 below.

Prior known circumstances

83. The defendants further say that:

- (a) from about May 2002, Ian Savage was a Site Manager within the Construction & Development team at BMX;
- (b) from at least August 2010, Steve Smith was a Maintenance Manager within the Construction & Development team at BMX;
- (c) from about 2001, Paul Feltham was a Project Manager at BMX;
- (d) at all material times, Ian Savage, Steve Smith, Paul Feltham and/or BMX had actual knowledge of the facts or circumstances that are recorded in the following correspondence:
 - (i) On 29 October 2010, the Body Corporate of the Victopia Apartments (**Body Corporate**) issued a letter to BMX attention to Ian Savage informing BMX that the *“tile grouting and bedding compound have broken down completely”* in a number of apartments.
 - (ii) On 25 November 2011, Ian Savage informed the Body Corporate that:
 - A. *“the tiles have been laid fit for purpose in accordance with the specification and the suppliers technical data”* including membranes, tile sealants and adhesives;
 - B. *“the installation has been laid and warranted in accordance with the contract documents”*; and
 - C. *“this is the first that we have heard about any grout failure”*;
 - (iii) On 18 January 2011, Ed Stubenitsky, Design Assistant of BMX emailed Ian Savage copying in Steve Smith, Grant Pemberton and Paul Feltham of BMX noting that:
 - A. the *“Eterpan Sheet which are ‘cracking’ on the corners”*;
 - B. that *“there was some consistency with the crack occurring through the 2 corner fixing locations”*;

- C. that the damage was not *“from Abseil/maintenance works”* but rather was due to *“thermal expansion of the backing aluminium extrusion”*;

Photographs were taken by BMX personnel during a site inspection of the cracks to the cladding panels.

- (iv) On 28 April 2011, the Body Corporate responded to BMX’s email providing letters issued by owners to BMX regarding (amongst other things), *“grout failure”*.
- (v) On 21 September 2011, Ian Savage sent an email to Steve Smith and Paul Feltham requesting PBS Contracting Limited (in liquidation) (**PBS**) to inspect and formally comment on the cladding defect. The email recorded the following:
 - A. *“Bob knows that it is an expansion issue that is due to lack of allowance within their design for thermal movement”*; and
 - B. *“before forwarding any PBS report to the Body Corp, we need to make sure our legal team has reviewed it first”*;
- (vi) On 7 October 2011 Paul Read of PBS emailed Steve Smith of BMX regarding the regarding fractures in cladding indicating:

“We have viewed the cladding from the same locations as others present, it would appear from this distance that there has been excessive expansion in the Cladding Systems aluminium extrusions as established elsewhere, causing fractures where countersunk mechanical fixings penetrate the rain shield, a solution maybe to repair the fractures and replace the mechanical fixings with an adhesive fix detail to prevent a continuation of this process.”

- (vii) On 11 October 2011, Steve Smith of BMX emailed Paul Read of PBS regarding start date for cladding rectification works and querying whether PBS’s insurers have been notified;
- (viii) On 13 October 2011, Ian Savage of BMX emailed Paul Read of PBS regarding the exterior cladding issue stating:

“The issue at Victopia is a clear warranty issue as there is a failure of the cladding system. We have previously held discussions on this topic with Bob in February this year and to date have let things run their course. Please provide your proposed method of repair to the entire panelised system, which must include a peer review by a recognised Facade design consultant. We see this as a PBS cost. Please also confirm that you have notified your insurer of this potential PI claim.”

(collectively, the **Relevant Facts**):-

Particulars

Letter from Body Corporate to BMX dated 29 October 2010

Email from Ian Savage to Body Corporate dated 25 November 2010

Email from Ed Stubenitsky to Ian Savage dated 18 January 2011

Letter from Body Corporate to BMX dated 28 April 2011

Email from Ian Savage to Steve Smith and Paul Feltham dated 21 September 2011

Email from Paul Read to Steve Smith dated 7 October 2011

Email from Steve Smith to Paul Read dated 11 October 2011

Email from Ian Savage to Paul Read dated 13 October 2011

- (e) at all material times, including during the period from 11 October 2011 until 31 March 2012, Matthew (Matt) Andrews held the position of “Group Manager – Insurance & Risk” for the corporate group of which BMPL was the ultimate holding company;
- (f) in the course of the role referred to in paragraph 83(e), Mr Andrews had authority from BMX to receive and communicate information about BMX’s insurance and/or about the disclosure to insurers of claims against BMX or facts or circumstances that might give rise to claims against BMX;
- (g) in the premises, the knowledge of Mr Andrews about such matters was the knowledge of, or otherwise is imputed to, BMX;
- (h) at all material times, Mr Andrews and/or BMX had knowledge of the facts or circumstances that are recorded in the following correspondence:

- (i) on 11 October 2011, Paul Feltham of BMX emailed Mr Andrews concerning “attached info regarding PBS and Victopia Cladding” which forwarded a chain of email including the emails referred to in paragraphs 83(d)(vi) and (vii) above;
- (ii) on 13 October 2011, Paul Feltham of BMX emailed Mr Andrews concerning “attached correspondence to PBS” which forwarded a chain of email including the email referred to in paragraphs 83(d)(viii) above;
- (iii) on 13 December 2011, Paul Feltham of BMX emailed Mr Savage and copied other individuals including Mr Andrews, which refer to “the defects handover documents you are preparing” and asked Mr Savage to “ensure the following is included Victopia, wall cladding panels, with PBS”;
- (i) consequently, at the time of inception of the Primary Policy, BMX (through Mr Andrews) was aware of all of the following matters (the **Andrews Relevant Facts**):
 - (i) There was an issue with the cladding at the Victopia building.
 - (ii) PBS had the view that there had been excessive expansion in the cladding system aluminium extrusions, causing fractures.
 - (iii) PBS had suggested that a solution may be to repair the fractures and replace the mechanical fixings with an adhesive fix detail.
 - (iv) Mr Smith had sent an email to PBS asking if PBS had notified its professional indemnity insurer
 - (v) Mr Stubenitsky had sent an email to PBS making it clear that he considered that PBS should provide a remedial solution.
 - (vi) Mr Stubenitsky characterised this defect as a ‘big issue’ for the Victopia body corporate.
 - (vii) Mr Feltham held the view that BMX was legally liable for the damage caused by the defect, and that the burden of the costs may fall upon BMX.
 - (viii) PBS had not offered to do the proposed remedial works and, by suggesting that any work it was to do on the remedial works would need to be preceded by a quote, had indicated that it expected to be paid for those remedial works.
 - (ix) Mr Savage had sent another email to PBS making it clear that he considered that the costs of rectifying the cladding defect was PBS’s

responsibility as it resulted from a breach of PBS' warranty, and indicated that PBS should notify its professional indemnity insurer.

84. The defendants refer to and rely on paragraph 36 above and further say for the purposes of the Prior Circumstances Exclusion:

- (a) the Relevant Facts and the Andrews Relevant Facts (or any one or part of them) were facts or circumstances of which BMX first became aware existing prior to the inception of the Primary Policy and which BMX knew or ought reasonably to have known was likely to ~~might~~ give rise to a Claim under the Primary Policy;
- (b) the Claim constituted by the originating process in the Victoria Proceeding arose out of the Relevant Facts and the Andrews Relevant Facts (or any one or part of them); and
- (c) in the premises, the defendants are not liable under the Primary Policy (and therefore not liable under any of the Excess Policies) in respect of such Claim, or alternatively, in respect of so much of the Claim as is concerned with cladding defects, ~~is excluded from cover under the Primary Policy.~~

Workmanship Exclusion

85. Further or alternatively, the defendants rely on paragraph 38 above and further say for the purposes of the Workmanship Exclusion, the defects the subject of the Claim giving rise to the Victoria Judgment arose out of defective workmanship by BMX, with the result that the Defendants are not liable to indemnify BMX in respect of the Claim constituted by the bringing of the Victoria Proceeding, or alternatively, so much of that Claim that is concerned with defects that arose out of defective workmanship.

Particulars

Eterpanel Cladding defect

1. _____ In so far as there was a defect in the Eterpanel Cladding ~~as found in the Victoria Judgment (which is otherwise not admitted)~~, it was the result of a failure to install the cladding sheets in accordance with:

- (a) _____ the manufacturer's recommendations in the Eterpan Technical Manual, which required:

- (i) _____ the sheets to be fixed with 40mm stainless screws, where the fixing holes were to be pre-drilled 6mm to accommodate the 4.5mm screw head; and
- (ii) _____ the edges of the sheets to be fixed 50mm from the horizontal edge and 25mm from the vertical edge; and
- (iii) _____ a maximum of 200mm between screw fixings.

(b) _____ the PBS specification and good trade practice which required continuous sealing to be completed to the external Eterpanel sheets before fixing.

2. _____ In a departure from these requirements:,

- (a) _____ the screw holes for the sheets in the building had no clearance; the screws were installed between 10mm and ~~20~~ 15mm from the sheet edges; and the screw spaces were generally between 200mm and 220mm; and
- (b) _____ there was an absence of sealing to the rear of some of the external Eterpanel sheets.

3. _____ The defendants rely upon paragraphs [23] to [83] of the report of Mark Bullen dated 23 September 2024.

Balcony defects

~~In so far as there was a defect in the balconies: as found in the Victoria Judgment (which is otherwise not admitted), the liquid applied membrane failed because it was applied poorly, including in the sense that the screed was applied to a wet concrete substrate, and the membrane was applied over a wet screed, using the incorrect trowel and allowing insufficient curing time.~~

4. _____ The balcony defects were the result a failure to install the balcony waterproofing membranes in accordance with:

- (a) _____ the consented specifications, which called for the combination of ASA Dampfix 3, ASA Impactamat and ASA tile adhesive;
- (b) _____ the consented acoustic report of Norman Disney & Young dated 5 December 2003 which provided three options for impact protection, being:

- (i) Option 1: 5mm thick Impactamat (Impactamat is a preformed sheet material) in combination with ASA adhesive and waterproofing membranes (Dampfix 3 as used for internal tiles areas).
 - (ii) Option 2: Mapephonic underlay with Dampfix 3 (as used for internal tiles areas); or
 - (iii) Option 3: Dampfix PU and Asaphonic; and
 - (c) the manufacturer's recommendations in the ASA Asaphonic data sheet, which stated that 'Asaphonic must not be used over water-based membranes or paint'.
5. In a departure from these requirements, ASA Dampfix 3 and ASA Asaphonic tile adhesive were used on the balconies.
- 5A Repeats paragraphs 23(d)(i) and (d)(ii) above.
6. The defendants rely upon paragraphs 58 to 119 of the report of Andrew Gray dated 24 September 2024 and paragraphs 84 to 107 of the report of Mark Bullen dated 24 September 2024.

Podium defects

7. In so far as there were podium defects as found in the Victoria Judgment (which is otherwise not admitted), the defendants say the following:
- (a) to the extent there was no adequate upstand at the junction with the wall, this was the result of a failure by the upstand as built to meet the requirement in the architectural plans for an upstand at 150mm above the finished asphalt;
 - (b) to the extent that a protective flashing should have been installed to provide compression and protect the top edge of the membrane, such flashing was detailed in the consented drawings, such that an omission to install it involved defective workmanship;
 - (c) to the extent that a transitional fillet should have been installed at the junction where the membrane changes from horizontal to vertical, the wall connection specified an angle fillet, such that any omission to include a transitional fillet resulted from the subcontractor's failure to follow the technical literature;
 - (d) to the extent that there was poor detailing at the junctions between the podium entry threshold membrane and the balcony and front

entrance tiled areas, a stainless-steel angle was installed as specified in the consented plans, but the flashing was not installed correctly, resulting in moisture ingress; and

- (e) to the extent that there was a defect in the flashing at the lower level balconies, flashings were specified in the plans, notwithstanding that no flashing was installed and the junction has lost adhesion.

8. The defendants rely upon paragraphs 120 to 140 of the report of Andrew Gray dated 24 September 2024 and paragraphs 108 to 122 of the report of Mark Bullen dated 24 September 2024.

Fire-stopping defects

9. In so far as there were fire-stopping defects as found in the Victopia Judgment (which is otherwise not admitted), the defendants say that:

- (a) the findings of Thomas J in the Victopia Judgment at [73] and [98]-[99] are expressed at such a high level of generality that it is impossible to identify any design deficiency said to have caused the defects;
- (b) the plaintiff has pleaded the fire-stopping defects in terms that do not properly identify what they are; and
- (c) the plaintiff has failed to allege or particularise any material facts pointing to a design deficiency that is said to have caused the fire-stopping defects
- (d) the plaintiff has failed to serve any expert evidence which suggests that a design deficiency caused the fire-stopping defects; and
- (e) the entirety of the fire-stopping defects were the result of poor workmanship.

~~, such that a reasonable inference to be drawn is that the defects were the result, not of any design deficiency, but instead of defective workmanship.~~

~~Further particulars in respect of all the defects addressed above will be provided following service of the defendants' expert evidence.~~

10. The defendants rely upon paragraphs 123 to 159 of the report of Mark Bullen dated 23 September 2024 and paragraphs 51 to 89 of the report of Bob Nelligan dated 11 October 2024.

D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

- 1 Nil.

E. STATEMENT AS TO WHETHER PARTIES HAVE ATTEMPTED MEDIATION; WHETHER A PARTY IS WILLING TO PROCEED TO MEDIATION AT THE APPROPRIATE TIME

- 1 The parties have ~~not~~ attempted mediation.
- 2 The defendants are willing to proceed to mediation at an appropriate time.

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 defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature of legal representative

AS Moore

Capacity

Solicitor on record

Date of signature

~~26 October 2023~~ 5 September 2025