Court of Appeal
Supreme Court

New South Wales

Case Name:	Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin & Anor
Medium Neutral Citation:	[2020] NSWCA 358
Hearing Date(s):	19 June 2020; further written submissions 26, 30 June and 14 July 2020
Decision Date:	24 December 2020
Before:	Basten JA at [1]; Macfarlan JA at [2]; White JA at [3]
Decision:	(1) Appeal allowed in part. (2) Set aside the orders entered in the District Court on 20 November 2019. (3) In lieu thereof direct entry of judgment for the respondents against the appellant in the sum of $35,548.58. (4) Order that the respondents repay to the appellant moneys paid by the appellant to the respondents in reduction of the judgment entered in the District Court to the extent moneys paid exceed the judgment to be entered in accordance with order 3, together with interest at the rates prescribed for the purposes of s 100 of the Civil Procedure Act 2005 (NSW). (5) Order that the respondents pay the appellant's costs of the appeal. (6) Order that within 28 days the appellant file and serve written submissions of no more than six pages as to what order should be made as to the costs of the proceedings below and any evidence to be relied upon on that question. (7) Order that within 21 days thereafter the respondents file and serve written submissions and any evidence to be relied upon on that question.

(8) Any submissions in reply be filed and served seven days thereafter.
(9) Reserve the question of costs of the proceedings below, to be dealt with on the papers, subject to any further order.

Catchwords:	BUILDING AND CONSTRUCTION – Contract – Home Building Act 1989 (NSW) – Statutory warranties – whether contract confined to negotiated scope of works or expanded to include other works by virtue of the implied statutory warranties – whether building in breach of statutory warranties CONTRACTS – Remedies – Damages – where loss claimed would have been suffered if contract had been properly performed
Legislation Cited:	Home Building Act 1989 (NSW), s 18B, s 18F Civil Procedure Act 2005 (NSW), s 100
Cases Cited:	Alexander v Cambridge Credit Corp Ltd (1987) 9 NSWLR 310 Bellgrove v Eldridge (1954) 90 CLR 613; [1954] HCA 36 Builders Insurers' Guarantee Corporation v The Owners – Strata Plan 60848 [2012] NSWCA 375 Building Insurers Guarantee Corp v The Owners – Strata Plan No 57504 [2010] NSWCA 23 Heskell v Continental Express Ltd [1950] 1 All ER 1033 Houghton v Immer (No 155) Pty Ltd (1997) 44 NSWLR 46 The Owners – Strata Plan No. 64757 v MJA Group Pty Ltd (2011) 81 NSWLR 426; [2011] NSWCA 236 The Owners – Strata Plan No. 66375 v King [2018] NSWCA 170 Wylie v ANI Corp Ltd [2002] 1 Qd R 320; [2000] QCA 314
Texts Cited:	J D Heydon, Heydon on Contract (Lawbook Co, 2019)
Category:	Principal judgment
Parties:	Ostin Constructions Pty Ltd t/as Lars Fischer Construction (Appellant) Katherine Ostin (First Respondent)

	Craig Shortus (Second Respondent)
Representation:	Counsel: J Doyle with I King (Appellant) P Bambagiotti with A Wilson (Respondents) Solicitors: Kent Attorneys (Appellant) Stanton Legal (Respondents)
File Number(s):	2019/366615
Decision under appeal:	
Court or Tribunal:	District Court of New South Wales
Jurisdiction:	Civil
Citation:	n/a
Date of Decision:	20 November 2019
Before:	Craig ACDJ
File Number(s):	2015/266326

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant appealed from orders of a Judge of the District Court who ordered that the appellant pay damages for breach of certain implied statutory warranties pursuant to
s 18B of the *Home Building Act 1989* (NSW). The breach was said to arise in relation to remedial works intended to address water proofing issues at the respondents' residence arising from defects in its construction by the original owner/builder (Mr Angelo Amodeo).

The respondents' purchased the residence from a Mr and Mrs Simons on 2 August 2011 who in turn had acquired the premises from Mr Amodeo in October 2009. Prior to contracting to purchase the property, the respondents' arranged for a building inspection to take place which revealed problems of water penetration. The Simonses arranged for the appellant to inspect the property who provided by email on 13 May 2011 a list of the likely causes of water penetration and an estimate to rectify those causes. The Simonses contracted with the appellant to undertake remediation works. The scope of those works reflected the 13 May email. That contract was made no later than 10 June 2011. It was a condition of the contract of sale between the Simonses and the respondents that such works were carried out.

The works were carried out by the appellant and were completed on 1 August 2011; however, the issues of water penetration continued. In 2012 the respondents arranged for a Mr Steve Murphy, a building consultant, to inspect the property. In his report he identified various building defects which were causative of the continued water penetration. In September 2013 Consolidated Quality Projects ("CQP") was contracted to carry out further remediation works which were also unsuccessful in preventing water ingress.

In September 2016 a Mr Paul Ratcliff, a Senior Consultant with Building and Waterproofing Reports, provided a report (the "Ratcliff report") which purported to identify the defects in the works performed by Mr Amodeo, the appellant and CQP. That report showed that some of the works performed by the appellant were defective. The report also showed that the appellant's works would have been insufficient to prevent the ingress of water as there were defects requiring remediation beyond those identified in the scope of works.

The primary judge found that the appellant had breached certain statutory warranties in relation to works performed. As the Simonses' immediate successors in title the respondents were entitled to the protection of the statutory warranties. A significant aspect of his Honour's reasoning was his finding that the contract between the Simonses and the appellant was for the purpose of preventing water ingress as opposed to being confined to rectifying the issues identified in the scope of works.

The Court of Appeal (Basten, Macfarlan and White JJA), allowed the appeal in part, holding:

White JA (Basten JA and Macfarlan JA agreeing at [1] and [2] respectively)

Issue (1) - Did the contract and the statutory warranties require the appellant to undertake work beyond its scope of works

The objective purpose of the contract was to address the then identified most likely causes of water penetration, not to address all potential causes of water penetration: [74]. The statutory warranties in s 18B may, depending of the circumstances of the case, expand the scope of work that a builder contracts to do: [78]-[80]. In this case as there was a specifically agreed scope of works and there was no evidence that the Simonses disclosed a particular purpose or result that the works were to satisfy, the warranties did not expand the scope of works beyond what was agreed [81]-[86].

Issue (2) – Did the primary judge err in allowing the respondents to rely on an amended Scott Schedule and amended expert evidence which expanded the case against the appellant to its prejudice

As the primary judge erred in his construction of the contract the matters raised in the amended Scott Schedule lay beyond the works required by the contract [99]. In such circumstances no prejudice could arise from the amendment. Nevertheless, the primary judge was entitled to take the view that the amendment would not prejudice the appellant in circumstances where the dispute between the parties concerned a question of law; namely whether the contract required the works subject of the amendment to be performed. There was no factual dispute as to the existence of the underlying defect: [97]-[99].

Issue (3) – Did the primary judge err in refusing to admit an email of 12 July 2011 and in rejecting the appellants application to amend its defence to rely on s 18F of the Home Building Act

The email sent on 12 July 2011 where the Simonses directed the appellant not to “worry about any extra work” beyond that set out in the scope of works was irrelevant to the construction of the contract which was entered into, at the latest, one month earlier. The primary judge did not err in refusing to admit the letter: [104], [106].

The appellant's application to amend its defence was made late. In the circumstances the primary judge was entitled to refuse the amendment on the respondents' evidence of prejudice and that allowance of the amendment would necessitate an adjournment of the proceedings: [103], [105].

Issues (4) and (5) – Did the primary judge err in his findings of breach of the statutory warranties and in his assessment of quantum

The primary judge erred in findings of breach in relation to some aspects of the claim due to his misconstruction of the contract and his misapprehension as to the effect of some of the evidence: [113], [119], [129]-[130]. However, there was evidence on which the primary was entitled to conclude that the appellant had failed to perform the contract in accordance with the statutory warranties: [123]-[128], [131], [133]-[135].

Aside from three distinct aspects of the respondents' claim below, the primary judge did err in awarding damages for breach of the statutory warranties [144], [153]-[165]. As the scope of work did not cover all of the causes of water penetration, part of the loss sustained by the respondents would have been incurred regardless of whether the contract had been properly performed: [141]-[143], [150]. The inability to determine what precise aspects of the consequential loss were attributable to the appellant was not the fault of the appellant: [145]-[146].

Heskell v Continental Express Ltd [1950] 1 All ER 1033; *Simonius Vischer & Co v Holt* [1979] 2 NSWLR 322; *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310; *Wylie v ANI Corp Ltd* [2002] 1 Qd R 320; [2000] QCA 314; considered.

Issue (6) – Did the primary judge err in not rejecting the claim against the appellant as the statutory warranties had already been enforced and no loss was suffered for which compensation had not been made by Mr Amodeo

The primary did not err in refusing the appellant leave to raise a contention that the statutory warranties had already been enforced through the settlement with Mr Amodeo: [166]-[169]. The settlement agreement with Mr Amodeo included a recital which excluded the work performed by the appellant from the

settlement: [167]. The evidence shows that the amounts recovered from Mr Amodeo and CQP do not exceed the costs incurred by the respondents: [172].

JUDGMENT

1 **BASTEN JA:** I agree with White JA.

2 **MACFARLAN JA:** I agree with White JA.

3 **WHITE JA:** The respondents brought proceedings in the District Court claiming damages for breach of statutory warranties implied by s 18B of the *Home Building Act 1989* (NSW) in respect of residential building work carried out by the first defendant (Mr Angelo Amodeo), and the second defendant, the appellant, Oikos Constructions Pty Ltd ("Oikos" or "LFC").

4 The respondents settled their claim against Mr Amodeo. They succeeded in their claim against Oikos. The primary judge found that Oikos was liable to pay damages of $131,800 plus pre-judgment interest. On 20 November 2019 judgment was entered against Oikos in the sum of $168,885.92.

5 There are numerous grounds of appeal. They can conveniently be grouped as follows:

(a) first, that the primary judge misconstrued the contract pursuant to which Oikos carried out home building work by finding that Oikos was required to carry out building repairs that were beyond its scope of works (grounds 1, 6(a), 9, 11);

(b) secondly, that the primary judge erred in permitting the respondents to rely on an amended Scott Schedule and amended expert evidence that expanded the case against Oikos, when Oikos had made forensic decisions, including not calling evidence from an independent expert, based on the case pleaded against it (grounds 4 and 5);

(c) thirdly, that the primary judge erred in refusing to admit certain evidence, namely an email of 12 July 2011 and refusing to permit Oikos to amend its defence to rely upon s 18F of the *Home Building Act* (ground 3);

(d) fourthly, that the primary judge erred in his findings of breach (grounds 6, 8 and 12).

(e) fifthly, that the primary judge erred in his assessment of quantum (ground 12); and

(f) sixthly, that the primary judge erred in not rejecting the respondents' claim against Oikos, because the warranties had

been enforced against Mr Amodeo (*Home Building Act*, s 18D) and the respondents did not establish that they had suffered loss for which they had not been compensated by Mr Amodeo (ground 7 and proposed grounds 7A and 7B).

6 For the reasons which follow I accept that the primary judge erred in his assessment of the scope of work Oikos was contractually obliged to undertake and that the award of a substantial part of the damages ordered should be set aside.

Statutory provisions

7 Sections 18B(1), 18C and 18D(1) of the *Home Building Act* provide:

> "**18B Warranties as to residential building work**
>
> (1) The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work—
>
> (a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,
>
> (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
>
> (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,
>
> (d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,
>
> (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,
>
> (f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.
>
> …

18C Warranties as to work by others

(1) A person who is the immediate successor in title to an owner-builder, a holder of a contractor licence, a former holder or a developer who has done residential building work on land is entitled to the benefit of the statutory warranties as if the owner-builder, holder, former holder or developer were required to hold a contractor licence and had done the work under a contract with that successor in title to do the work.

(2) For the purposes of this section, residential building work done on behalf of a developer is taken to have been done by the developer.

18D Extension of statutory warranties

(1) A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty."

Background

8 Mr Amodeo was an owner/builder within the meaning of the *Home Building Act*. He constructed a substantial residential property in Greycliffe Street, Queenscliff. On 22 October 2009 he sold the property to a Mr and Mrs Simons. Mr and Mrs Simons were immediate successors in title to Mr Amodeo and by virtue of s 18C of the Act, they were entitled to the benefit of statutory warranties as against Mr Amodeo.

9 The respondents purchased the property from Mr and Mrs Simons by contracts exchanged on 10 June 2011. Completion of the purchase took place on 2 August 2011. The building has been plagued with problems of water penetration.

10 Before contracting to buy the property, the respondents obtained an inspection report from KR Le Compte & Associates. The report is dated 25 March 2011. On 29 March 2011 the first respondent, Ms Katherine Ostin, advised the agent acting on the sale for Mr and Mrs Simons, a Mr Vince Donovan, that the inspection report disclosed items requiring remediation.

11 Mr Donovan contacted a builder, Mr Lars Fischer, who is the director of Oikos. It trades as Lars Fischer Construction. Mr Fischer was asked to inspect the property on behalf of Mr Donovan's clients (that is, Mr and Mrs Simons) who were the prospective vendors.

12 Mr Fischer inspected the property. On 28 April 2011 he reported to Mr Donovan that the cupping and swelling of a timber floor was a strong indicator

of moisture problems along a certain wall and referred to other then identified problems with water penetration. He observed that further investigation was required to achieve a "certain conclusion". On 5 May 2011 Mr Fischer again inspected the property with Mr Le Compte of KR Le Compte & Associates who had been engaged by the respondents to discuss what further investigation should be undertaken and to agree on a scope of works.

13 On 6 May 2011 Mr Fischer advised Mr Simons that he and Mr Le Compte had agreed upon the following investigations, all of which were directed to ascertaining the likely cause of water ingress to the property. Mr Fischer said:

> "We had a meeting with Keith Le Compte on the 5th of May at the above address to discuss further investigation proceedings and agreed on the following scope of works:
>
> ● Remove bricks in key locations to enable inspection of the cavity and flashing/weephole details along the bottom of the wall. This might involve the removal of some skirting tiles.
>
> ● Remove bricks in key locations from the sills of all windows to enable inspection of sill flashings and weepholes and possible water penetration.
>
> ● Remove tiles and associated materials in key locations along the sill of the western sliding door to inspect water drainage details. This procedure might have to be done at the eastern door as well but is not confirmed yet and we will try to avoid this.
>
> ● Removal of skirtings and the first two rows of flooring to inspect internal waterproofing measures, slab levels, expansion joints, fixing methods and moisture content.
>
> We will try to limit the impact of these works, however these works will result in remedial works.
>
> Once these works are completed we will arrange an inspection and meeting with Keith Le Compte to discuss further proceedings."

14 Mr Fischer deposed that he carried out what he described as "minor intrusive testing works" on the property on 12 May 2011 in the presence of Mr Le Compte and received verbal instructions from Mr Le Compte on 12 May 2011 to prepare a specification for building repair work.

15 Mr Fischer sent an email on 13 May 2011 to Mr Simons that was copied to Mr Donovan and to Mr Le Compte. The email read in full as follows:

> "Dear Jim
>
> We finished the works outlined in our scope of works and had a meeting/inspection with Keith Le Compte on site yesterday (12.05.11). We

determined the most likely causes for the defects and necessary rectification works. The scope of these works is:

Two sliding doors first floor and sliding door bedroom second floor:

The flashings/waterproofing details to these doors are defective/non compliant and allow water to penetrate which causes the timber to rot, the floor to expand and fungi and mould to grow underneath the carpet.

The sills will have to get removed and new flashings have to be installed. This involves demolition of external tiled sills, removal of render 200mm up the sides of the doors, waterproofing, flashings and remedial works.

Five windows:

The flashings/waterproofing details to all windows are defective/non compliant and allow water to penetrate.

We are trying to limit the extend [sic] of the works and try to keep the doors and windows in place during these works. If this is not possible we will notify Keith to discuss further proceedings.

Weepholes and flashings.

There are not enough weepholes and some are a course above the flashing and have no function. Invert levels of others are blocked and the cavity is full of rubble which creates a breach of the cavity.

Some bricks have to get removed, the cavity cleaned and new weepholes installed.

Parts of the flooring first floor and second floor have to get removed and reinstalled, allowing for expansion joints. Both levels have get [sic] sanded and coated.

If you have any questions please contact me or Keith.

I estimate that the works will cost around 25-30 K. (including, painting, floor sanding, patchwork etc.)

If you want to proceed I will prepare a 'small [works] contract' and arrange for 'home owners warranty'.

Kind Regards

Lars Fischer

Director"

16 Oikos emphasises that the outline scope of works addressed what were then perceived to be the most likely causes for the ingress of water in the locations specified, not to rectify all possible causes of water penetration.

17 Mr Fischer prepared a form of Home Building Contract which he signed for Oikos and which is dated 15 May 2011. A counterpart contract was signed by Mrs Simons. Under the heading of "Description of works/materials" Mr Fischer inserted "Works as described in our email dated 13.5.11 (repair to doors,

windows and flooring)". Under the heading "Payment schedule" Mr Fischer wrote "'cost plus' as per SOR every 15th of months". The completion period for the work was described as "t.s.a (2-3 weeks).". The contract was later completed by Mrs Simons who inserted her own name as owner and signed it.

18 Mr Shortus deposed that on 24 May 2011 Mr and Mrs Simons provided him with a building contract they proposed to enter into with Oikos Constructions.

19 On 25 May 2011 Mr Shipton forwarded an email to the vendors' conveyancer attaching a proposed draft special condition 61 for the contract "subject to the scope of works being finalised". That clause is referred to below.

20 Ms Ostin identified the fact that the proposed scope of rectification works contained in Mr Fischer's email of 13 May 2011 did not address a matter that had been identified earlier by Mr Le Compte, being rust marks to balcony soffits. She wrote an email to Mr Donovan on 24 May 2011 saying that she thought this would be covered by Mr Fischer's work. Mr Fischer prepared a document, one copy of which bears a date 26 May 2011 which amended the scope of work to address rust stains under the balcony ceilings.

21 Contracts for the sale of the property were exchanged on 10 June 2011. Special condition 61 provided:

> "The vendors shall carry out in a good and workmanlike manner at their expense the building works detailed in the annexed document 'Scope of rectification works at 5 Greycliffe street, Queenscliff' on the following terms and conditions:
>
> a) The vendors shall enter into a contract with Lars Fischer in the terms of the contract annexed hereto;
>
> b) The vendors shall obtain and provide evidence to the purchasers of warranty insurance under the Home Building Act in relation to such works;
>
> c) The works shall be completed within 42 days from the date of this Contract for the sale of land;
>
> d) In the event that the works are not completed in their entirety and in a good and workmanlike manner and approved by a consultant engaged by the purchasers, Keith LeCompte, who may approve or disapprove in his absolute and unfettered discretion without being required to give reasons for his decision, within 42 days from the date of this Contract for the sale of land then:
>
> i. The purchase price will be reduced by $60,000.00;
>
> ii. Other than the reduction in purchase price the purchasers will have no further rights and shall not in any other manner be entitled to make any

> objections, requisition or claim for compensation in respect of such non completion;
>
> iii. The purchasers will thereafter accept responsibility for completion of the works at the Purchasers[’] costs.”

22 The document described as the annexed document “Scope of rectification works at 5 Greycliffe street, Queenscliff” was on the letterhead of Lars Fischer Construction and is quoted at [27] below.

23 The primary judge said (at [19]) that despite the reference in the “‘cost plus’ contract dated 15 May 2011 (the HB Contract)” to the email of 13 May 2011:

> “... It was accepted by the second defendant that the relevant scope of works is that expressed in the document on the Lars Fischer construction letterhead annexed to the contract for sale.”

24 If the primary judge intended by that reference to exclude from the contractual terms between Mrs Simons and the appellant the terms of the email of 13 May 2011, that was not accepted. In any event, later in his judgment the primary judge referred to the terms of the “HB Contract” which he had defined not by reference to the document on the Lars Fischer Construction letterhead quoted at para [27] below, but by reference to the “‘cost plus’ contract dated 15 May 2011 (the HB Contract)”.

25 The significance of whether the email of 13 May 2011 formed part of the contract between Oikos and Mrs Simons is the effect of the statement in the email of 13 May 2011 of the purpose of the works to be undertaken. This is relevant to the application of the statutory warranties under s 18B(1).

26 The respondents, being successors in title to Mr and Mrs Simons, who were themselves the immediate successor in title to an owner-builder, were entitled to the benefit of the statutory warranty under s 18B and were entitled to the same rights as the Simons had in respect of the statutory warranty (s 18D(1)).

27 The respondents pleaded and Oikos admitted that Oikos entered into a contract with “... the Simons or another party or other parties under which the second defendant was required to carry out residential building work at the property” (Further Amended Statement of Claim, para 23). The respondents pleaded that the work to be carried out by Oikos was work set out in a

nominated document or similar work. The document nominated was on the letterhead of Lars Fischer Construction and stated as follows:

> "Scope of rectification works at ... Greycliffe street, Queenscliff
>
> **Two sliding doors first floor and sliding door bedroom second floor:**
>
> The flashings/waterproofing details to these doors are defective/non compliant and allow water to penetrate which causes the timber to rot, the floor to expand and fungi and mould to grow underneath the carpet.
>
> The sills will have to get removed and new flashings have to be installed. This involves demolition of external tiled sills, removal of render 200mm up the sides of the doors, waterproofing, flashings and remedial works.
>
> **Five windows:**
>
> The flashings/waterproofing details to all windows are defective/non compliant and allow water to penetrate.
>
> The sills have to get removed and new flashings including new weepholes have to get installed. This involves removal of render and bricks.
>
> We are trying to limit the extend [sic] of the works and try to keep the doors and windows in place during these works. If this is not possible we will notify Keith to discuss further proceedings.
>
> **Weepholes and flashings:**
>
> There are not enough weepholes and some are a course above the flashing and have no function. Invert levels of others are blocked and the cavity is full of rubble which creates a breach of the cavity. Some bricks have to get removed, the cavity cleaned and new weepholes installed.
>
> **Flooring:**
>
> Parts of the flooring first floor and second floor have to get removed and reinstalled, allowing for expansion joints. Both levels have get [sic] sanded and coated.
>
> **Rust marks to balcony soffits:**
>
> All rust marks have to get cut out and metal has to be removed to at leat20mm [sic] below surface. The hole has to get patched with waterproof epoxy based filler and the soffits need to get repainted."

28 The respondents pleaded that:

> "The work carried out under the Oikos Contract did not comply with the statutory warranties as particularised in the Ratcliff Report."

29 This was the only pleading of breach. The reference to the "Ratcliff Report" was to an expert's report of a Mr Paul Ratcliff, a Senior Consultant with Building and Waterproofing Reports Australia dated 22 September 2016.

30 Oikos Construction commenced its work on 4 July 2011 and completed the works on 1 August 2011.

31 On 11 July 2011 Mr Fischer sent an email to Mr Le Compte with a copy to Mr Simons and Mr Donovan as follows:

> "Further to our discussions on site on the 5th of July I had meetings with two individual water proofing contractors. Both contractors immediately suggested that the proper rectification method of the waterproofing would be the replacement of the whole membranes over all balconies. This would involve the removal of all screed and tiles. However both also said that the waterproofing can be joined onto the existing, which would involve the removal of only a few tiles, but both Contractors are not able to warrant any work in this case.
>
> At this stage I believe the second option is a lot more feasible and should have the desired outcome. We intend to remove the doors, build temporary dry walls around the openings, remove the tiles and screed, re waterproof, re tile and reinstall the doors. Additionally we will replace the flashings and provide more weepholes in the door sill.
>
> Both waterproofing contractors also mentioned that another major problem is apparent; the multiple water and rust marks throughout the whole building are a result of wet brickwork. In some areas the brickwork behind the waterproofing is so wet that it formed water bubbles. The suspected cause for this is insufficient capping of parapet walls, bad roof flashings, a large amount of cracks in walls which are the result of lack of expansion joints, defective head and sill flashings, lack of and defective weepholes, breaches of the cavity, wrongly positioned step downs and wrongly installed water proofing.
>
> The only suggested corrective measure for this would be to replace the roof flashings, cut in expansion joints and paint the whole house in membrane paint (eg dulux elastomer) and hope that it works.
>
> At this stage we will only do the works as outlined in the scope of works but we want everyone to be aware that this is just a partial rectification of the overall problem and the outcome might be jeopardised by the remaining defects. Because of this we cannot guarantee the rectification of the problems."

32 Mr Simons replied on 12 July 2011 to Mr Fischer:

> "The agreed scope of work needs to be finalised prior to settlement which is next Friday – don't worry about any extra work."

33 At the trial Oikos sought leave to amend its defence to rely upon s 18F of the *Home Building Act*. Section 18F provides that:

> "... it is a defence for the defendant to prove that the deficiencies of which the plaintiff complains arise from instructions given by the person for whom the work was done contrary to the advice in writing of the defendant or person who did the work."

34 The primary judge rejected the proposed amendment and rejected the email of 12 July. Oikos' challenge to those rulings is addressed at [101]-[106] below.

35 On 20 July 2011 Mr Le Compte provided a report on the appellant's work with regard to the repair works carried out by Lars Fischer Construction "as per the

rectification document supplied". He reported on an inspection conducted on 5 July 2011 (before the commencement of rectification works) where Mr Fischer had removed part of the flooring on the first floor and upper level which revealed that moisture had been allowed to enter the building at floor level adjacent to sliding door units where some of the timber battens had rotted. He reported that the inspection also revealed that the "alcore flashings" under the sliding doors were poorly installed and would need to be removed and replaced with a new flashing.

36 Mr Le Compte also reported:

> "Also, some discussions between myself and the builder had taken place on to what was the best method to inspect the leaking windows and dirty cavities at floor level. These discussions involved the removal of some of the brickwork at weep hole height at floor level which revealed that some of the cavities had brick droppings and would need to be cleaned out and were located too high above the inside floor level and would need to be lowered further on the outside level.
>
> Also at the time of this inspection it was discussed that the first row of tiles outside the sliding door units on both levels should be removed to investigate the flashings and whether a proper membrane had been provided, and if not, this may involve the removal of the sliding door units and a new membrane being provided and new flashings.
>
> Also at the time of this inspection it was discussed that the first row of tiles outside the sliding door units on both levels should be removed to investigate the flashings and whether a proper membrane had been provided, and if not, this may involve the removal of the sliding door units and a new membrane being provided and new flashings.
>
> On the 14th July 2011 I had a further meeting with the builder, Lars [Fischer], and on inspecting the property this revealed that a course of bricks had been removed under the windows on the inside wall on both levels and the raking out of render and a new flashing having been provided to properly waterproof these window units.
>
> At the time of this inspection I took some photos and relate to Photo 0901 with the bricklayer relaying some of the new bricks.
>
> In Photo 0902, this revealed that new timber battens have been laid at floor level and a completion of the removal of the floor boards in a straight line where the new control joint will be situated. This photo also shows some of the window and part of the sliding door unit having a new flashing provided."

37 Mr Le Compte's report then continued:

> "Photo 0903 reveals that the original alcore flashing on the sliding door unit to the outside balcony areas shows that the flashing had been cut, possibly by the tiler when laying. This shows that one row of tiles has been removed and that there was a membrane provided where it is planned that the new

> membrane will be joined to the original membrane and up and under sliding door units will be completed shortly.
>
> Photo 0904 shows a new flashing provided to the large aluminium window units which are now ready for the final brick course and re-rendering.
>
> Photo 0905 shows a further sliding door unit also ready to be reflashed and remembraned.
>
> Photo 0906 shows the opening door unit on the southern end of the building on Level 1 having not been correctly flashed and will need to be reflashed, remembraned and tiled.
>
> Photo 0907 shows further new flashings provided under the window units on the upper level.
>
> Photo 0908 shows the sliding door unit to the master bedroom, where a similar new flashing and tiling will also need to be completed."

38 It is clear from Mr Le Compte's report that photo 0903 was a photo of the "original alcore flashing on the sliding door unit" and not Oikos' rectification work. Photo 0905 also refers to the unit "ready to be reflashed and remembraned" and not the work done by Oikos, as do photos 0906, 0908 and 0909.

39 Mr Le Compte reported:

> "During my inspection on 20th July 2011 with the builder, Lars [Fischer], to give you an update on the progress at present. Firstly, the sliding door units had been removed and new flashings and membrane had been applied and had all just been replaced today. This appeared to be successful as no water has entered the building since the doors have been reinstated. Also, 85% to 90% of the flooring has been relaid with no water ingress visible at the time of this inspection, so I am happy to say that all of the works so far seem to be successful in preventing water ingressing the building."

40 Photos 0903, 0905, 0906, 0908 and 0909 are reproduced as annexure C.

41 The respondents' purchase of the property was completed on 2 August 2011. They moved in on the following day with their four children.

42 The work done by Oikos did not prevent the entry of water either generally or at the locations at which it carried out the work. Mr Ratcliff, in oral evidence, said that major causes of the cupping of the floors that had been identified in Mr Le Compte's pre-purchase report were defective cavity flashings and defective flashings of the doors.

43 From November or December 2011 the respondents noticed continuing waterproofing issues. They engaged a building consultant, Mr Steven Murphy

of Steven Murphy & Associates, to inspect the property. In a report dated June 2012, Mr Murphy identified defects that included water penetration into various living areas, inadequate wall flashings, waterproofing membrane failures, cracked cement render and paint, and water damaged timber flooring. He estimated the cost of remedial work would approximate $180,000.

44 The primary judge summarised Mr Murphy's report as follows:

> 27 ... It is sufficient for present purposes to record that Mr Murphy identified a number of 'specific issues regarding the integrity of the waterproofing' as well as extrinsic defects that were identified. He conducted a number of moisture readings in the walls of the dwelling and concluded from those moisture readings that the external walls are close to saturation level and that the moisture suspended in the masonry material is transferring to the internal walls of the house.' He also examined cavity flashing and the balcony floors covered by a waterproofing membrane, each of which, according to the report, were inadequate in addressing the entry of water into the dwelling. The moisture content of timber flooring was measured, resulting in 'high to extreme readings'. He observed a section of timber flooring in a living area which had 'heaved and buckled'. He concluded that there was 'patent water ingress as a consequence of water migrating from the external balconies due to a combination of failed wall flashings, paint coatings and waterproofing membranes.'
>
> 28 On the basis of the information provided to him that previous attempts had been made to rectify window and door flashings, he concluded that those attempts 'had not mitigated the water penetration into the house" and therefore had no effect. Reference to the attempts at rectification was perceived to be a reference to the work undertaken by the second defendant.'"

45 In September 2013 the respondents entered into a contract with Consolidated Quality Projects Pty Ltd ("CQP") to carry out extensive remedial works. The quoted costs of the works was $222,640 (J [31]). After variations, the total contract price for the CQP contract was $283,990. That work was also unsuccessful. The respondents received an insurance payout in respect of CQP's work. CQP carried out new repairs on windows and doors on the top floor of the building that covered over or replaced work done by Oikos, which in turn had done work on the same areas upon which the original building work was done at that level. Work done described as "LFC door or window repair" on the ground floor level was not redone by CQP.

46 Mr Ratcliff's report, which provided the basis for the respondents' pleaded claim, was dated 22 September 2016. Mr Murphy's investigation report of June 2012 included an assessment of cavity flashing in a section of wall. The

inspection involved the removal of bricks from the wall to reveal the wall flashing. He stated that the:

> "... flashing was short of the horizontal level and did not extend to and beyond the outside face of the cement rendered brick wall. This means that water dripping off the cavity flashing can migrate behind the turn-up of the waterproof membrane on the balcony.
>
> This situation is exacerbated by the use of bricks under the flashing laid side by side without mortar which allows the water dropping off the cavity to find the base of the wall and migrate back into the internal walls of the house."

47 Mr Murphy's report was not read as evidence of facts asserted, but was relied upon by the respondents for the fact of the report.

48 Mr Ratcliff stated that improperly installed cavity flashing was "one of the major causes of continued water penetration after LFC completed its work". He opined that the LFC scope of rectification works as set out at [27] above did not address the defective flashings at the base of the external walls, but only addressed blocked cavities and omitted weepholes. He said that the cavity flashings at the base of the cavity walls were not rectified as part of the LFC repair. This was common ground. In a sentence that was not read at trial, but which nonetheless informed the case pleaded against Oikos, Mr Ratcliff stated that:

> "On the basis the LFC scope of rectification works ... it is reasonable to assume that the cavity flashings at the junction of the balconies were not replaced by LFC as it was not part of their contracted works."

49 Oikos submitted that the primary judge erred in allowing the respondents to maintain a case at trial that Oikos breached its contract by failing to rectify defective cavity flashings and erred in finding that such work was within its scope of works.

50 The remedial works carried out by CQP were also defective. In August 2017, the respondents made a claim against the Home Building Compensation Fund and obtained a payment to the maximum indemnity available of $339,750. The payment reflected the insurer's approval of a new tender amount of $420,561.90 to address the problems with water penetration.

51 The house is located on the northern headland of Queenscliff Beach and occupies three levels. The lower floor level includes three bedrooms, a study, and rumpus room. Mr Le Compte noted that on the rumpus room there was

some “slight cupping and raising of polished flooring boards visible at the time of inspection” (p 9 of report). He stated there was noticeable staining on carpet visible in bedroom 3 on the lower level. Later remedial work was carried out by CPQ on this level. Oikos did not do work on this level.

52 The middle level, called the ground floor level, included a lounge room, dining room, kitchen and family room. Work done on this area was depicted in a plan prepared by Mr Ratcliff which is reproduced (in colour) as annexure A to these reasons. The plan shows the locality in which Oikos (LFC) carried out doors or window repairs, namely, to sliding doors marked D1 and D2 in the family room and lounge room respectively and to windows W1 and W2 at the dining room. Later cavity flashing repairs carried out by CPQ are designated in yellow and balcony repairs carried out by CPQ are shown in green. CPQ did not remove and replace the works done by Oikos on this level as can be seen from the plan.

53 Mr Le Compte noted that in the dining room the flooring boards were badly cupping between the dining room and the living room and that these appeared to be slightly water damaged, and possibly sun damaged. There was a high or very high reading on the moisture meter on the front wall from the floor to the underside of the window sill in front of the dining room table area. Mr Le Compte stated that in the family room there was noticeable cupping to floorboards and that these were possibly water damaged, although it was possible that the floor might have been cramped up too tight and needed a control joint. Mr Le Compte had noted that floorboards in the living room were noticeably cupping.

54 The top floor included a parents retreat and bedroom. Annexure B to these reasons is a plan included in Mr Ratcliff’s 2016 report showing “LFC door or window repair” at D3, W3, W4 and W5 and the later work done by CPQ on that level, both in re-doing door or window flashing repairs and in carrying out cavity flashing repairs and balcony repairs. Mr Le Compte’s 25 March 2011 report stated that there was noticeable cupping visible towards the front wall in the parents retreat.

55 In his report of 22 September 2016, Mr Ratcliff provided a then current assessment of issues of water penetration. One issue he identified was balcony waterproofing and tiling. The primary judge found that this was an issue that Oikos was required to address. The primary judge's assessment of damages included a sum of $39,317 in respect of the cost of repairs under that heading (J [157]). The primary judge accepted the evidence of Mr Ratcliff that because inappropriate materials had been used, the only means by which rectification could later be effected was to provide a new membrane for the entire area (J [159]). The primary judge found that one of the defects for which Oikos was (at [133]):

> "... the use of a waterproofing membrane to carry out remedial work that was incompatible with the original membrane installed on the balconies at each of first floor and ground floor levels attached to the southern facade of the building."

56 The appellant complains that this was not within its scope of work, that Mr Ratcliff specifically acknowledged this, and that the primary judge erred in allowing the respondents to maintain the claim and, in any event, wrongly concluded that Oikos had a responsibility to address that defect. Oikos noted that as late as the service of an amended Scott schedule on 24 October 2017 the respondents claimed against the first defendant only (not against it) a proportion of the sums paid to CQP referable to addressing water penetration to the sitting room's south balcony (and the living room balcony).

57 The primary judge found that the work done by Oikos was in breach of paras 18B(1)(a), (b), (e) and (f) (Judgment [136]).

58 Oikos did not dispute that the document on its letterhead quoted at [27] above set out the scope of the rectification works it undertook to carry out. It did not agree (and it was not alleged) that the terms of that document contained the whole of the terms of the contract.

59 The respondents pleaded that by reason of s 18B the statutory warranties were implied into the "Oikos contract". They alleged that by s 18D(1A) of the Act the Simonses were entitled to the benefit of the statutory warranties as against the appellant in relation to the work carried out, and that by operation of s 18D(1) they were entitled as against the appellant to the same rights as Mr and Mrs

Simons in respect of the statutory warranties under the Oikos contract (para 27). Although these allegations were either not admitted or denied, there was no dispute about them at the trial or on appeal.

60 As noted above, the alleged breaches of the statutory warranties were pleaded only by reference to what appeared in Mr Ratcliff's report.

61 In para 20 of the amended statement of claim the respondents alleged that:

> "The nature and causes of the 2011/2012 defects and the 2015 defects are further particularised in the expert report of Paul Ratcliff dated 22 September 2016".

62 The "2011/2012 defects" were identified as building work defects identified by the plaintiffs in or around December 2011. The particulars of those defects were identified by reference to a report of Steven Murphy & Associates dated June 2012 ("the SMA 2012 report"). The "2015 defects" were pleaded as defects observed by the respondents in early 2015. The particulars of those defects were identified only by reference to a supplementary report on building defects of Steven Murphy & Associates dated 7 July 2015 ("the SMA 2015 report").

63 Both the SMA 2012 and 2015 reports were tendered, but were not tendered as evidence of the truth of the facts asserted in them, as distinct from evidence of the fact that the reports had been made (presumably in order to identify the defects that were the subject of the allegations). The primary judge said (J [75]) that as Mr Murphy was not called, his reports were tendered:

> "only for the purpose of establishing the fact that he had attended the premises at the request of the plaintiffs and recorded what he saw. Those documents were not tendered for a hearsay purpose and I do not place any reliance upon them for that purpose. To the extent that there are photographs of areas within the building relevant to the works carried out by the second defendant prior to any work being undertaken by CQP, I do not understand any submission from the second defendant to contend that they cannot be used, as they have been by Mr Ratcliff, to inform some of the evidence that he gives."

64 Mr Bambagiotti who appeared for the respondents below, said that he did not read Mr Murphy's report:

> "as evidence of the representations it contains. I only seek to rely upon that report as the fact of that report. It was an earlier exploration."

65 After further discussion it was confirmed that Mr Murphy's report was not to be used to prove the correctness of what it stated.

66 However, the primary judge was right to say that to the extent Mr Ratcliff informed himself and gave evidence based upon the truth of photographic representations contained in Mr Murphy's report, then there was no objection to that course. Mr Murphy's 2012 report, although it contained photographs, did not identify the locations at which the photographs were taken. Those locations were identified in Mr Ratcliff's report.

First issue: Construction of the contract

67 The primary judge found that there were two inter-related sources to which recourse was to be had to determine the nature and extent of the work Oikos was bound to carry out in fulfilment of its obligations under the "HB contract". The first was what appeared under the heading in the contract "Description of work/materials", that is, the works described in the email of 13 May 2011. His Honour added "the second or related source is the impact upon the extent of the work so described by operation of the warranties imposed ... by ... the provisions of s 18B of the HB Act" (J [50]). The primary judge correctly said that the scope of the works was formulated in the knowledge that water entry to the dwelling was the cause of damage to the timber flooring that had been fixed to the concrete slab floors of the building and that the likely vectors of water entry had been identified (J [52]).

68 The primary judge concluded that the contract required Oikos to carry out items of work described in the email of 13 May 2011 within the areas or parts of the building there identified:

> "... together with such further work as was reasonably necessary to prevent the entry of water into the building from those areas or parts of the building there identified by reason of existing building defects then discovered or discoverable. The second defendant was obliged to undertake that work such that upon completion it satisfied the warranties expressed in s 18B of the HB Act" (J [61]).

69 The primary judge's reasoning in support of that conclusion was as follows:

> "56 No doubt because of the implicit qualification in the phrase 'most likely causes', the work to be undertaken by the second defendant is not specified with any precision. Rather, the intent or purpose of rectification work in nominated areas of the building is stated together with an outline of likely work

to achieve that purpose. Under each heading in the email, the likely defects allowing water entry in each area are identified, followed by work believed to be necessary to rectify the defect. In each case, the description of work is imprecise. In the case of work directed to doors, the final sentence under that heading concludes with the words 'waterproofing, flashings and **remedial works'** (emphasis added). In the case of the windows, the uncertainty of all work required emerges from the final paragraph under that heading, expressing uncertainty as to whether the work could be undertaken with 'the doors and windows in place', thereby acknowledging that their removal, so as to permit work achieving its purpose, was a possibility.

57 As for the work under the 'weep holes' heading in the email, works are not specified as to the number of bricks to be removed or the number of weep holes to be installed. In respect of flooring, apart from nominating the location of the flooring to be removed, the extent of removal and reinstallation remains unstated. Those observations make apparent the 'rectification work' was that work necessary to address water entry into the building at nominated locations consequent upon the defective work so far as it was able to be identified on 13 May 2011. The prevention of water entry by the identified mechanisms was the purpose for which the second defendant agreed to undertake the work. Further, the work necessary to achieve that purpose was that which also fulfilled the building warranties both expressed in the contract and implied in the same terms by s 18B of the HB Act.

58 The imprecision with which the work is described is consistent with its description as a 'scope' of works, the 'scope' or 'range' of work being that which was necessary to fulfil the purpose that I have identified. Achievement of that objective or purpose is implicit in the broad statement of indicative works under each heading, that statement of works in each case being immediately preceded by a paragraph identifying the potential for water entry as a consequence of defective building work on the part of the original builder.

59 The need to replace flooring to an unspecified extent is the identification of damage sustained as a result of water entry. That fact is important to the proper construction of the HB Contract. If business efficacy is a tool used for the purpose of construing the contract, it would be a nonsense to assume that the second defendant would agree to perform particular work without assessment by him as to whether that work, competently undertaken, would achieve the purpose or objective of abating internal water entry occasioning damage to timber flooring. The fact that the contract into which the parties entered is a cost plus contract is not without present significance in determining the work required to be undertaken to address the purpose engendering the need for that work. More work than was initially thought likely was in prospect. Thus, the cost plus contract.

60 The performance of work by the second defendant under the HB Contract is consistent with the uncertainty identifying precise works in order to fulfil the purpose of the contract. It will be recalled that the pre-contract cost estimates had ranged from a figure in excess of $50,000.00 to a 'cost around 25 – 30K' stated in the email of 13 May 2011. When asked in cross examination about the increase from the latter estimate to the sum ultimately charged of nearly $65,000.00, the Mr Fischer accepted that there was more work involved 'in doing and performing' the scope of works than he had originally expected. (T364:13-15). In so indicating, he accepted that the unanticipated work fell within the 'scope' identified in the HB Contract (T364:27-31)."

70 The fact that the description of work was imprecise and that this led to an increase in the cost and price of doing the works from the original estimate of around $25,000 to $30,000 to a price of nearly $65,000 did not mean that the scope of works Oikos contracted to perform was as wide as the respondents ultimately contended. More work was required to be done than was initially anticipated in order to address what was then perceived to be the likely causes of water penetration. For example, the email of 13 May 2011 contemplated that Oikos would try to keep the doors and windows in place during the works, but the doors had to be removed during the works. The fact that the number of bricks to be removed, the number of weepholes to be installed and the extent of removal and reinstallation of flooring were undetermined, did not mean that work of a different kind, such as the investigation and rectification of the cavity flashing which was later identified as a major cause of water penetration, was within Oikos' scope of works.

71 The email of 13 May 2011 identified problems with weepholes that had no function, the blocking of others, and the presence of rubble in the cavity requiring the removal of bricks, the cleaning of the cavity and the installation of new weepholes. Defective installation of the cavity flashing was not one of the "identified mechanisms" for the ingress of water for the prevention of which Oikos agreed to undertake the work (J [57]). The primary judge's contrary conclusion was based upon the purpose of a builder's fulfilling the warranties in s 18B.

72 Each of the warranties in s 18B is a warranty as to the quality or timeliness or fitness for purpose of "the work", that is, the residential building work, that the holder of a contractor licence, or a person who should hold a contractor licence, contracts to undertake.

73 The respondents did not identify in their pleading or particulars the particular warranties they alleged had been breached. But the primary judge identified the warranties in s 18B(e) and (f) as informing the scope of the work required to be carried out in order for the warranties to be fulfilled. The primary judge said:

> "63 ...

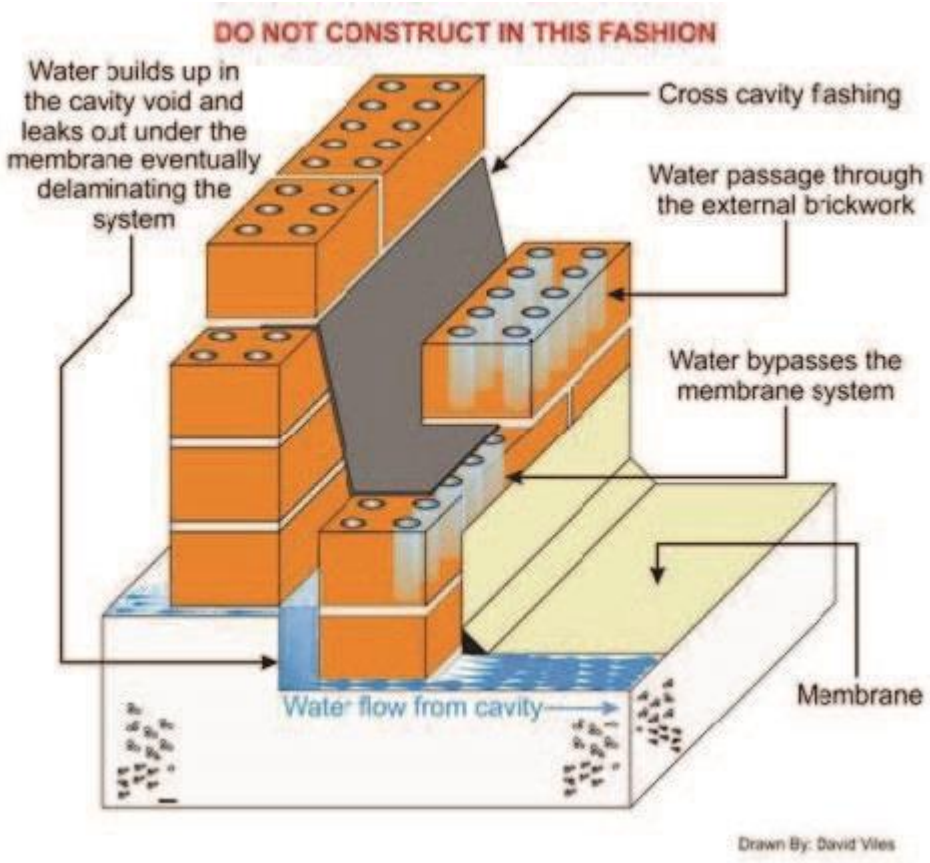
> The objective discerned from the contract is important. If such detail as was provided in the contract did not address the rectification that the second defendant aspired to achieve, as reflected in his email of 13 May, other works to which I have referred when construing the contract were required to be undertaken so as to make good the warranties expressly given and implied by law (*Building Insurers' Guarantee Corporation v The Owners - Strata Plan 60848* [2012] NSWCA 375 at [46] and [51]).
>
> 64 That observation is important because one area of conjecture between the plaintiff and the second defendant is the extent of work required to the wall cavity in the areas identified. The second defendant's email of 13 May recorded the fact that there were deficiencies associated with the wall cavity that were a cause of water entry occasioning damage to timber floors. One of the reasons that his email identified for that deficiency was the misplacement of flashing in the construction of the cavity wall. Having identified the inadequacy of the existing wall flashing to achieve the purpose of addressing water entry, the obligation to address that inadequacy is implicit in the work the second defendant contracted to undertake. That must be so by considering the purpose of work he agreed to undertake together with the warrantees incorporated into the HB Contract, particularly those warranties expressed in paragraphs (e) and (f). At least, that is so in respect of those areas of the building that the second defendant identified as requiring remedial work."

74 But the "objective discerned from the contract" was to address the then identified most likely causes of water penetration, not to address all potential causes of water penetration in the specified areas. The investigation preceding the email of 13 May 2011 provided for "the removal of bricks to enable inspection of the cavity and flashing/weephole details along the bottom of the wall". That led to an identification of then perceived likely causes of water penetration.

75 Whether acting with reasonable care Mr Fischer ought to have perceived that the cavity flashing had been wrongly installed because it did not overlap the membrane was not an issue. Oikos was not sued in negligence.

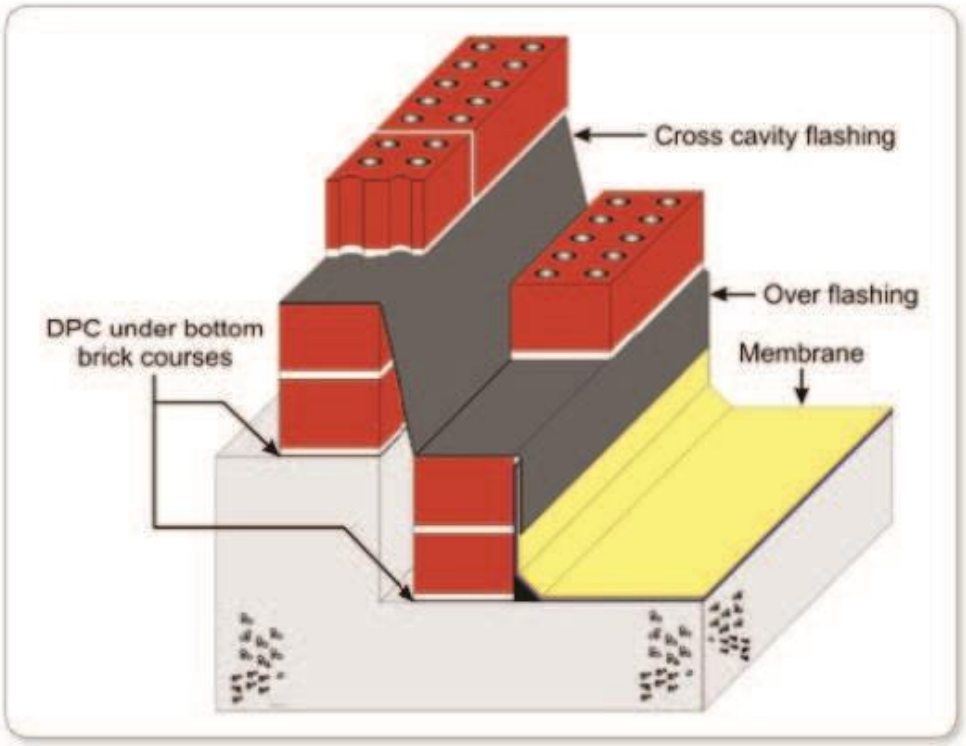
76 The defect in the cavity flashing was described by Mr Ratcliff as follows:

> "83. Below paragraph 28 in the SMA report dated June 2012 Mr Murhpy has two photographs of the cavity flashings. On page 9 Mr Murphy has photographs of the membrane vertical termination. There is no cavity flashing projecting out the face of the wall to overflash the membrane. This leads me to the conclusion that the method of installing the original cavity flashings was defective by allowing water to migrate behind the vertical termination causing the waterproofing on the balcony to delaminate.
>
> 84. The consequence of not installing the cavity flashing so that they overflash the membrane is depicted in the sectional detail below. Water leaks under the membrane and causes it to delaminate. This occurred as a result of a defect in the original construction of the building.



85. The correct method of flashing the external wall at the junction of the flashing is depicted in Figure 7P from the Master Builders NSW Waterproofing Council Technical Committee Waterproofing Guide Book 2, refer below.

Figure 7.P - CROSS-CAVITY FLASHING



”

77 The defect was no doubt discoverable. Mr Murphy reported that he removed several bricks from the wall to reveal the wall flashing, but this was not admitted as evidence of the facts stated.

78 In *Builders Insurers Guarantee Corporation v The Owners – Strata Plan 60848* [2012] NSWCA 375, Bergin CJ in Eq said (at [46]-[47]):

> “46 Owners made a submission that there are aspects of building work that would be necessarily incidental to the work a builder is contracted to conduct. For instance it was submitted that if a builder is contracted to construct windows in a building and fails to install appropriate flashings thereby allowing water ingress, the failure to install the flashings would fall within the expression “to the extent of the work conducted” in s 18B of the HB Act, notwithstanding that it was work that was not done. I agree with that submission. If a builder in a do and charge contract is instructed to install windows and fails to install flashings, liability under s 18B(e) of the HB Act would be triggered. ...
>
> 47 The Tribunal decided that there was no provision in the do and charge contract that the builder was to do (or conduct) the waterproofing work. That does not amount to a provision in a do and charge contract that the builder was to omit from the scope of work for which he was contracted, work that was necessarily incidental to that work.”

79 The work of rectifying faulty cavity flashings was not necessarily incidental to the work Oikos agreed to perform. There was a fundamental difference between contracting to do work such as the installation of windows which imports the doing of things necessarily incidental to the proper performance of that work, and doing specified remedial work designed to address a problem whose causes are not known.

80 The warranties in s 18B are implied in every contract to do residential building work. The reference to "the work" in paras (a)-(f) of s 18B is to the residential building work the subject of the contract. Residential building work is defined to include any work involved in the construction of a dwelling, the making of alterations or additions to a dwelling, or the repairing, renovation or protective treatment of a dwelling (s 3). Oikos submitted that the warranties stipulated by s 18B apply to the work contracted to be done and cannot expand the scope of the work contracted to be done. I do not accept the submission in so absolute a form.

81 In some circumstances the operation of the warranties may expand the scope of work that a builder contracts to do. Thus, a builder cannot avoid the operation of the warranty under s 18B(b) that the materials supplied be good and suitable by specifying sub-standard materials. A builder cannot avoid the warranty in s 18B(c) that the work comply with the law by relying on the fact that the plans and specifications do not include the provision of sprinklers required by law (*The Owners – Strata Plan No 66375 v King* [2018] NSWCA 170 at [332], [399]-[409]).

82 The present case is different. The warranties on which the respondents rely to expand the scope of the work from that stated in the email of 13 May 2011 are those in s 18B(e) and (f). Neither the warranty that the work the subject of the email of 13 May 2011 would be performed with due care and skill, nor that the materials supplied by Oikos would be new and good and suitable for the purpose for which they were used (s 18B(a) and (b)) could expand the scope of the work required to be carried out.

83 Section 18B(e) provides for a warranty where the work consists of the making of alterations to the dwelling or the repairing, renovation or protective treatment

of a dwelling, that the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling. The underlined words show that the warranty is not so wide as to require that once the work contracted to be done has been done the dwelling will be reasonably fit for occupation. The warranty is given only "to the extent of the work conducted". I assume, without deciding, that that expression will extend to the work contracted to be done as well as the work actually done. (In any event, the builder would be liable for damages resulting from failure to do work agreed to be done but not done.) But those emphasised words negative any idea that the scope of works expressly agreed on is impliedly expanded by the warranty of reasonable fitness for occupation under s 18B(e). That is, if the dwelling, or parts of the dwelling, are not reasonably fit for occupation by reason of defects that are outside "the extent of the work conducted", the warranty in s 18B would not be breached. Therefore, that warranty cannot extend the expressly agreed scope of works.

84 The warranty in s 18B(f) could potentially expand the required scope of work if the person for whom the work was done, in this case Mrs Simons, expressly made known to Mr Fischer the particular purpose for which the work was required, or the result she desired the work to achieve, so as to show that she relied upon Mr Fischer's skill and judgment.

85 There was no evidence that Mrs Simons (or Mr Simons) made any such specified purpose or result known. To the contrary, the purpose as specified in the contract was to address the then perceived likely causes of water penetration, not to achieve a dwelling free of water penetration. The latter was the respondents' purpose, but they did not contract with Oikos.

86 The respondents did not sue Oikos in tort. They did not allege that Oikos owed them a duty of care to identify the sources or likely sources of water penetration and failed to act reasonably in identifying the likely causes of water penetration. The primary judge's finding that the contract required Oikos to do work that was reasonably necessary to prevent the entry of water by reason of existing building defects that were discoverable, wrongly equated Oikos' contractual obligations under the contract with the Simons, including the

implied statutory warranties, with a duty (going beyond a mere duty of care) to the respondents as likely purchasers.

87 Accordingly, the grounds of appeal on what I have identified as the first substantive issue should be allowed.

Second issue: Departure from the pleaded case

88 As noted above, the respondents' further amended statement of claim identified Oikos' alleged breaches of contract simply by unspecified reference to Mr Ratcliff's report of 22 September 2016.

89 On 15 March 2017 the respondents served a "schedule of plaintiffs' claim without costings" which identified three areas of claim against Oikos, namely, a claim for water penetration to parents retreat, water penetration to the family and dining room, and water penetration to south windows in the dining room. A Scott Schedule was prepared, but was not included in the appeal books. An amended Scott Schedule was served on 24 October 2017. Again, it identified the claims against Oikos as being limited to "water penetration to parents retreat" as a result of inadequate repairs by Oikos, and by reference to pages 12-19 and 23 of Mr Ratcliff's report.

90 A second claim was described as "water penetration to family and dining room" and referenced pages 12-19 of the report. A third claim was for "water penetration to south windows in dining room" and referenced pages 41-42 of the Mr Ratcliff's report, in addition to pages 12-19.

91 The same claims for damages, and additional claims, were made against the first defendant, Mr Amodeo.

92 On 30 January 2018 the respondents' solicitors served a "supplementary report" of Mr Ratcliff and a "further amended Scott Schedule". At a preliminary hearing before his Honour Judge Letherbarrow SC, on the Wednesday before the commencement of the hearing, his Honour refused the respondents' application to rely upon Mr Ratcliff's supplementary report. Letherbarrow SC DCJ directed that the respondents serve a statement of particulars.

93 The first day of the hearing before the primary judge was mostly concerned with objections taken by Oikos to the statement of particulars (which the primary judge calls an amended Scott Schedule).

94 The primary judge allowed the respondents to rely upon the document entitled "Particulars of Defects per para 28 of the amended statement of claim".

95 The particulars identified two types of defect. "Defect Type 1" was called "inadequate repair work to rectify water ingress to the underside of the flooring at the southern side of the parents retreat level and the southern side of the family, dining and lounge rooms in the level below". The respondents had been directed by Letherbarrow DCJ to provide particulars of the relevant work said to have been carried out by Oikos. Those particulars were not provided. Under the heading "Defect Type 1" the works Oikos carried out were said to be defective for the following reasons:

> "(a) The bitumen on the underside of the Alcor flashings installed by the Second Defendant at the door/window openings was incompatible with the acrylic membrane not allowing a long-term seal and would allow water to wick under the flashing and enter the building;
>
> (b) Flashings under the doors/window openings were not installed properly;
>
> (c) The sides of the door/window sill flashings where they meet the brick reveals were not sealed or not sealed properly to prevent water bypassing the flashings;
>
> (d) The sides of the door/window sill flashings where the cavity flashings meet the door/window frames were not sealed to prevent cavity flashing water dropping of the ends of the flashing and migrating into the building;
>
> (e) The vertical step under the door/window frames was not adjusted by removing any concrete projecting past the face of the doors/window or by building out the concrete that was under the door/window;
>
> (f) The cavity flashings were too high and did not extend to the outside face of the external brickwork but were not repositioned which allowed water to migrate under the flashings onto the side by side bricks and into the inside of the house
>
> (g) Not addressing external bricks in the cavity walls laid side by side which bridged the slab step and allowed water to enter the building at same level as the internal floor at the door/window openings and throughout the length of the walls
>
> (h) Use of an unsuitable membrane for a localised waterproofing approach to waterproofing the door/window openings;
>
> (i) The Second Defendant did not address the defective flashings at the base of the external walls which were too high and did not extend past the external face of the brickwork or overflash the membrane."

96 Paragraphs (f) and (i) quoted above were objected to by counsel for Oikos.

97 Oikos submitted that the primary judge erred by permitting the respondents to rely upon the amended Scott Schedule and "particulars" that raised new and materially different allegations from and which contradicted the respondents' "pleaded case". The respondents' pleaded case was that the breaches alleged were those identified in Mr Ratcliff's report. Mr Ratcliff stated that the rectification of cavity flashings was not part of Oikos' scope of works. Oikos had not served its own expert's report in response to that of Mr Ratcliff.

98 In his affidavit of 24 April 2017 Mr Fischer said that he agreed with the opinions set out in paras 81-85 of Mr Ratcliff's report which he said recorded deficiencies in the original construction method undertaken by Mr Amodeo. Paragraphs 81-85 of Mr Ratcliff's report deal with the water penetration after Oikos completed its work due to defective cavity flashings.

99 Because I have concluded that Oikos is not responsible for the rectification of the defective cavity flashings it is strictly not necessary to decide whether the primary judge erred in allowing the respondents to maintain that part of their claim. The primary judge was in a difficult position. It is apparent that he had not had the opportunity to read the evidence that was to be relied upon. The very late amendment to the respondents' claim put Oikos in a difficult position. But the terms of the HB contract were not in dispute. The evidence of the objective matrix of facts in which the contract was entered into was complete and was not in dispute. Mr Fischer agreed with Mr Ratcliff's criticism of the defective cavity flashings. It could not be expected that Oikos would seek to lead evidence that the cavity flashings were not defective, or that if the scope of Oikos' contract required rectification of the cavity flashings, it had carried out that work. The primary judge was entitled to consider that Oikos would not be prejudiced by the expansion of the case against it.

100 I would not accept Oikos' complaint on the second issue.

Third issue: Rejection of email of 12 July 2011 and Oikos' application to rely upon s 18F

101 The correspondence of 11 and 12 July 2011 is set out at [31] and [32] above.

102 The email of 12 July 2011 was attached to an affidavit of Mr Fischer dated 19 January 2018. The appellant's solicitor, Mr Robert Gorczyca, deposed on 20 February 2018 that when Mr Fischer swore his affidavit of 24 April 2017 which attached the letter of 11 July 2011 addressed to "Dear Keith" he was instructed and believed that Mr Fischer was not aware of the 11 and 12 July 2011 emails. He said that those emails were "rediscovered" while answering a notice to produce from the first defendant. They were included in a bundle of material produced by the second defendant to the first defendant in answer to a notice to produce served by the first defendant on 10 July 2017. The significance of the emails and the fact that they had not been attached to the earlier affidavit was not appreciated by Mr Gorczyca or his employed solicitors.

103 Mr Fischer's affidavit of 19 January 2018 was served on 24 January 2018. The respondents' solicitor, Mr Stanton, deposed that if he had been earlier aware that the appellant would be relying upon s 18F he would have provided advice to the plaintiffs that they should consider commencing proceedings against Mr Le Compte, but it was now too late to do so.

104 As noted above, the primary judge rejected the proposed amendment and rejected the emails of 12 July 2011. He dealt with the letter of 11 July 2011 only. His Honour said in substance that the letter could not be used to construe the contract between the appellant and Mr and Mrs Simon that had been made either on 15 May 2011 or at least at about 10 June 2011 when the contract for sale was entered into. There was no pleading that the contract had been varied (nor that the appellant had been discharged from further performance) which would have raised a question as to whether such a plea was available if a defence under s 18F was not available (Judgment [128]-[132]).

105 The primary judge did not err in refusing the application for leave to amend. There is no doubt that the application was late. His Honour was entitled to be satisfied that to allow the amendment would necessitate an adjournment and the possible joinder of an additional party. The fact that his Honour allowed the respondents to expand their claim did not mean that he was bound to allow Oikos to raise a new defence.

106 The primary judge was also correct in observing that the correspondence of 11 and 12 July 2011 was not relevant to the construction of the contract and there was no pleading that the contract had been varied. I would reject these grounds of appeal.

Fourth issue: Other findings of breach

107 Having identified what work Oikos was required to carry out under the "HB contract", the primary judge moved to the issue as to whether and to what extent any of that work was defective. His Honour noted that a result of the work undertaken by CQP in 2013 was that most of the work undertaken by Oikos was no longer available for inspection (J [72]). That was the position when Mr Ratcliff undertook his inspections on 7 June, 5 August, 18 August and 19 August 2016.

108 Mr Ratcliff dealt first with "LFC flashing repairs to doors". These were to the sliding doors at D3 to the bedroom on the top floor and to the doors at D1 and D2 adjacent to the family room and lounge room on the ground floor level. All of the doors opened onto balconies as shown on the attached plans.

109 In his report Mr Ratcliff said that if Mr Murphy were correct, that the original membrane (installed by Mr Amodeo) was an acrylic-based membrane, then it was not possible to achieve a long-term seal between the bitumen on the underside of the Alcor flashing (which he then assumed was installed by Oikos as subcontractor) and the acrylic membrane as the two systems were not compatible. He said that this would allow water to wick under the flashing and enter the building.

110 In oral evidence Mr Ratcliff amended his opinion to state that the original membrane was not an acrylic-based membrane, but a polyurethane membrane.

111 Mr Murphy had stated in his report of June 2012 (at [36]) that he had identified the applied waterproofing membrane as a polyurethane-style membrane.

112 Mr Ratcliff also reported that although Mr Le Compte identified that the cavity flashings were located too high above the inside floor level and would need to be lowered on the outside level, the photographs attached to his report (being

photographs 0903-0908) did not show that the adjacent cavity flashings had been lowered. Failure to lower the flashings would mean that water could migrate under the flashings onto the bricks laid side-by-side and enter into the inside of the house. The cavity flashings could not be sealed to the adjacent door flashings (Ratcliff para 68(f)).

113 Only photographs 0903, 0905, 0906 and 0908 in Mr Le Compte's report showed flashings at the door. Those photographs were all taken before Oikos carried out its work. The photographs did not support Mr Ratcliff's opinion.

114 Mr Ratcliff also said that it appeared from photograph 0905 in the Le Compte investigative property inspection report of 20 July 2011 that the bricks in the external cavity walls were laid side by side which bridged the slab step and allowed water to enter the building at the same level as the internal floor, and that this was also shown in the photograph taken by Mr Murphy in his report of June 2012 (para 68(g)).

115 Mr Ratcliff opined that the door flashing repair carried out by Oikos had little chance of achieving an effective result.

116 The work carried out by Oikos included installing a new "localised" waterproofing to the balconies adjacent to the doors by the insertion of a new membrane (Ratcliff [70]). Mr Ratcliff assumed, and there is no reason to doubt his assumption, that Oikos removed one row of tiles in front of each door opening and applied new waterproofing in that area. He said that the membrane applied did not successfully lap onto the old membrane (Report [73]). Mr Ratcliff said that the new membrane installed by Oikos did not achieve an effective seal between the new and the old membranes and this was likely to have been a cause or contribution to the failure of Oikos' repair to prevent continued water penetration. He said that a waterproof seal would not have been created between the new and old membrane (Report [75]).

117 The primary judge accepted these opinions that were not the subject of any contrary expert evidence. The primary judge found (at [95]):

> "However, I accept the evidence of Mr Ratcliff as to the incompatibility of the material used by the second defendant in carrying out its remedial work. Specifically, I find than an acrylic membrane was sought to seal over the area where tiles had been removed from the original polyurethane membrane and

> that fact, coupled with the cementitious material that remained on the surface of the polyurethane membrane, resulted in a mechanism whereby water could be retained and move into the building. Further, I find that the use of Alcor flashing over the newly installed acrylic membrane was inappropriate because a water seal between the two was unlikely to be achieved thereby affording a further mechanism for water to enter the building."

118 The primary judge made the following findings in relation to Mr Ratcliff's examination of the sliding door area on the ground level adjacent to the family room (D1):

> "105 Buckling of the timber floor at the eastern end of the sliding door to the balcony from the family room was evident to Mr Ratcliff by what he described as peaking of the floor boards" approximately 1200mm in from the door. For the purpose of inspection he removed the aluminium trim on the inside of the sliding door as well as balcony skirting tiles adjacent to the eastern end of that door. On the inside he observed Alcor flashing that turned up behind the back of the door sub sill. Upon removing the balcony skirting tiles he observed an acrylic based membrane that had been applied to the vertical face of the wall 'over the top of an original membrane system'. He also observed that Alcor flashing had been used as a cavity flashing. He observed delamination of the coating on the back of that flashing.
>
> 106 He also removed trim in front of the sliding door to investigate the method of flashing and draining. He observed that a polyurethane joint sealant had been used along the underside of the door onto the Alcor flashing. That sealant he described as being incompatible with the Alcor flashing as it prevented drainage from the flashing. In addition, he observed that the skirting tile in front of the Alcor flashing in the front of the door was approximately 8mm above the top of the flashing. The height of the tile prevented the flashing from draining with the consequence that water would re-enter beneath the door. As well, the incompatibility between the two kinds of membrane there used and to which I have earlier referred is also a basis upon which Mr Ratcliff seeks to explain water entry and therefore why the work undertaken did not achieve a seal such that water entry beneath the family room door, causing internal floor deformation, was prevented."

119 When asked to identify the evidence to which the primary judge referred, the respondents referred to paras 193 and 194 of Mr Ratcliff's report. What Mr Ratcliff there described was defective flashings installed by CQP in 2013. The prior work done by Oikos had been removed by CQP.

120 The evidence on this topic was confused, not least because Mr Ratcliff amended (or as it was put, corrected) his report in giving oral evidence, both as to the colours of the membranes he observed and as to whether the membranes he assumed were applied by Oikos were acrylic or polyurethane.

121 Oikos called its subcontractor, a Mr Zenobi, but he had no recollection of the kind of original membrane installed by Mr Amodeo, nor the type of membrane that he installed to overlap with the original membrane.

122 Mr Ratcliff said that "Alcor flashing is a thin piece of aluminium that is protected by a coating of bitumen" (Report [95]).

123 The reports of Mr Le Compte, Mr Murphy and Mr Ratcliff leave in doubt the question of whether the original membrane installed by Mr Amodeo was an acrylic-based coating system or a polyurethane system. But whether the one or the other, Mr Ratcliff's opinion that the membrane installed by Oikos' subcontractor to overlap with the existing membrane, did not achieve a waterproof seal was not successfully challenged. Whether that was through the mechanism identified by the primary judge quoted above (at [117]), or otherwise, his Honour's conclusion that a waterproof seal between the two membranes was unlikely to be achieved should not be disturbed. In examination-in-chief Mr Ratcliff said:

> "A. Yes, your Honour, the type of membrane that was used by the second defendant in repairing the door openings is critical to the likely success of that repair. A photograph in my report identified it as an acrylic based membrane system and in the SMA report and in my report in other locations I observed and it is confirmed by SMA that the original membrane was a polyurethane membrane. Now the critical difference between those two membrane systems when you're doing a repair is that an acrylic based membrane is water based. It's basically house paint that's got some more filler in it. Polyurethane based membrane systems are an oil based system so if you're trying to do a repair between an acrylic and a polyurethane, the overlap between the two won't stick. So they'll delaminate and in the LFC affidavit it's confirmed that the second defendant used an acrylic so throughout my report and a lot of the changes that I seek to clarify is clarifying whether or not there was an acrylic or a polyurethane membrane system in my observations."

124 Mr Ratcliff did not resile from that evidence in cross-examination. He acknowledged that it was a practice in the industry to apply an epoxy primer to a polyurethane membrane and then bond an acrylic waterproofing membrane to the epoxy primer, but said that that was a risky practice that he would not recommend. Oikos submitted that this demonstrated that an appropriately experienced waterproofer, which Mr Zenobi was, could have used an acrylic membrane and achieved a successful result, and therefore the underlying premise that the membranes were simply incompatible should not be accepted. Because Mr Ratcliff did not inspect the works until they had later been worked

on by CPQ, Oikos submitted that there was no evidence that a successful result had not been achieved. In his report Mr Ratcliff said (para [87]) that:

> "I could not determine the condition of the existing waterproof membrane, or how successful the contractors had been at achieving a lap between the new and old waterproofing membranes."

125 However, Mr Ratcliff went on to say that the fact that water continued to enter into the building after Oikos' work had been done suggested that its method of repair had failed ([88]). The logic of that conclusion can be doubted where there were concurrent defects that also would have led to water ingress at those locations.

126 Nevertheless, Mr Ratcliff's evidence was not based solely on his interpretation of other reports. He gave oral evidence that CQP had failed to remove the previous membrane system. He said that, as a result of his own observations, he could determine the membrane installed by Mr Amodeo and the membrane applied by LFC. The CQP membrane was a "cementitious-faced membrane". Mr Amodeo's membrane was yellow and was a polyurethane-based coating system. The membrane installed by Oikos was a white water-based acrylic membrane.

127 The primary judge did not err in accepting Mr Ratcliff's opinion, notwithstanding the mistake at J [106] referred to at [118] above.

128 This was not the only defect identified by Mr Ratcliff in the work done by Oikos at the sliding doors. The primary judge said (at [106]):

> "… In addition, [Mr Ratcliff] observed that the skirting tile in front of the Alcor flashing in the front of the door was approximately 8mm above the top of the flashing. The height of the tile prevented the flashing from draining with the consequence that water would re-enter beneath the door. …"

129 Another issue in relation to water penetration of the doors was the laying of bricks on edge above the step. The primary judge addressed this question as follows:

> "115 A prevailing response of the second defendant to criticism directed to its work is the absence of any obligation on its part, having regard to 'the scope of works', to address flashing placement in the cavity walls in the construction of the building. One area relevant to that response relates to the doors that the plaintiffs contend continued to be a source of water entry.

116 Above the step in the structural slab, bricks have been laid on edge above that step. The type of brick was one with a series of holes through it. A consequence of the bricks being laid on edge was that the holes permitted the lateral movement of water through those bricks. Those bricks in turn, bridged the cavity between the two walls and thus provided a vector for water entry beneath the internal flooring.

117 Mr Ratcliff's evidence is that the use of a liquid membrane in those circumstances would not address the lateral movement of water through those bricks on edge beneath the slab step (T126:43-127:3). However, use of a sheet membrane, properly installed and lapped would have addressed that problem in the vicinity of the doors in question. If water entry beneath the doors at level one and those on the ground level were to be addressed, the installation of the appropriate membrane was required.

118 I do not understand the second defendant to dispute that contention. Its response is only to assert that necessary work to achieve the appropriate seal involved cavity flashing that was not within the scope of works. The difficulty with that response, apart from the terms of the email of 13 May 2011, as earlier discussed, read in the context of the HB Contract as a whole, is that there are two sources of water entry that resulted in damage to the flooring. Neither could be causally distinguished one from the other. They were a combination of water entry beneath the doors coupled with the inadequacy of the cross cavity flashing (T135:42-136:46).

119 Mr Ratcliff accepted that because there were two sources of water entry affecting the timber flooring, if the assumption was made that waterproofing around the doors in question was successful, contrary to the evidence earlier given as a result of his investigation, nonetheless the potential for damage to the flooring would remain as a result of water collecting in the wall cavity, thereby seeping through the inner wall beneath the flooring. In order address that occurrence, it was necessary to repair the flashing across the cavity in the manner illustrated in the diagram attached to para 85 of his report. He described the work necessary to repair that flashing. It required the removal of up to three courses of brickwork at the base of the wall, propping the southern wall while this was done, installing new flashing, replacing the courses of brickwork removed to install that flashing and then repairing the render on the wall (T190:41-191:17).

120 As I have said, the second defendant does not challenge the opinion of Mr Ratcliff in this regard, submitting only that it was not part of the work it agreed to undertake. I do not accept that submission, essentially for reasons earlier given. The second defendant recognised a problem with water entry into the building occasioning damage to internal flooring and floor covering. It identified, through Mr Fischer, the inadequacy of weep holes and defective flashing as a cause of that water entry. It would make no commercial sense to address one cause, leaving another identified cause unaddressed, rendering the work of no value in addressing the very issue the work was intended to address. As the plaintiffs submit, if there was no point to the work undertaken by the second defendant because it was not going to address the very 'defect' it had identified by undertaking what is described as 'necessary rectification works' in its 'scope of works', inevitably such work as was going to be carried out would be in breach of the statutory warranties."

130 For the reasons given earlier, the primary judge erred in saying that it would make no commercial sense to address one cause, leaving another identified

cause unaddressed where the other cause had not been identified and what was addressed was the perceived most likely causes of water penetration. The email of 13 May 2011 included in the scope of work the removal of "some bricks" ([15] above). Mr Le Compte's report of 20 July 2011 stated that "some of the cavities had brick droppings and would need to be cleaned out". This work would not include the removal and re-laying of bricks which had been laid on edge. The primary judge's conclusion that Oikos failed to address the issue of water penetration through the bricks being laid on edge so as to bridge the cavity between the two walls and provide a vector for water entering beneath the internal flooring was flawed because this was not part of Oikos' contracted scope of work.

131 The complaint of inadequate preparation of the existing membrane to afford an effective seal with the new membrane was also made in respect of the window W5 on the top floor and the same comments apply as apply in relation to the doors D1, D2 and D3.

132 There was no complaint in respect of the work done at the windows W3 and W4 on the top floor.

133 A separate complaint was made in what was called "Defect type 2" described as inadequate waterproofing of south facing windows in the dining room on the ground level (windows W1 and W2). As to these Mr Ratcliff said that on inspection the moisture content below the window sills range between 28-30 per cent. He concluded that the moisture levels indicated that the sill flashing was defective. The moisture readings correlated with the readings documented by Mr Murphy in June 2012. The primary judge found that defects were due to the wall coating behind the skirting tiles not overlapping the vertical termination of the ceiling membrane, the fact that the original membrane had not been removed and an incompatible acrylic membrane was applied over the polyurethane membrane, and the flashing was blocked with mortar (J [107]-[110]).

134 This was not an area in which CQP carried out work.

135 The primary judge's findings were based upon the evidence of Mr Ratcliff and the primary judge did not err in accepting that evidence.

Fifth issue: Quantum

136 The primary judge found (at J [118]) that there were two sources of water entry that resulted in damage to the flooring and that neither could be causally distinguished one from the other. His Honour said that they were a combination of water entry beneath the doors coupled with the inadequacy of the cross-cavity flashing. This finding was not in issue. Mr Ratcliff said:

> "... the moisture that caused the timber to cup was a combination of moisture from the cavity flashings and moisture from the door openings after Oikos did their work. ... There were no other variables that could cause the cupping of the timber floors. ... It's clear to me that there was a contributory issue in relation to the waterproofing at the doors being turned up on the ends of the cavities on the reveals, and ... there was a contributory factor in relation to the cross-cavity flashings.".

137 Mr Ratcliff was asked:

> "If LSC's scope of works was merely to attend to the doors, and it was not part of its scope of work to attend to the detail of the cavity flashing; then the problem of water ingress into the property would have happened anyway. Is that right?"

138 After a non-responsive answer, the question was asked again:

> "... If you took away the issue of the flashing to the doors, the remaining issue would still have been of sufficient substance, to cause water ingress into the building and under the floorboards. ... is that right?
>
> A. Yes. So in other words, if I can interpret what you're asking me. In other words, if the flashing across the doors was done correctly, and it was done correctly, would the damage to the floorboards have been manifest after that point? Yes."

139 He said that given there was a serious problem with the cavity flashing, it was impossible to predict how much water would find its way through the bricks. He said that it was, at best, a guess as to whether the floorboard cupping that was the main observable symptom of the water issues was caused by the cavity flashing or by the door membranes.

140 Because the primary judge considered that Oikos was responsible for not repairing the defective cavity flashing, he did not need to consider how the existence of concurrent causes of water penetration, for one of which Oikos was responsible and for one of which it was not, affected the assessment of damages.

141 The respondents submitted that if it were found that Oikos was not responsible for the repair of defective cavity flashing, the award of damages would be adjusted by deletion of the allowance made for the cost of repair and replacement of cavity wall flashings, but other elements of the primary judge's assessment of damages would remain because water ingress by the doorways at least contributed to the need for re-waterproofing and re-tiling a balcony and patio and carrying out repairs to the timber floors. The assumption in the respondents' submission is that the applicable principle is that if damage is suffered by concurrent causes, one of which is a breach of contract, damages for the loss sustained are recoverable if the contractual breach materially contributed to the loss (*Simonius Vischer & Co v Holt* [1979] 2 NSWLR 322 at 346 per Samuels JA; *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310 at 315; *Wylie v ANI Corp Ltd* [2002] 1 Qd R 320; [2000] QCA 314 at [27] and [50]; applying *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1047 per Devlin J).

142 This principle is well settled, but it applies where the causes are concurrent in the sense that they are "equally operative causes in that if either had ceased the damage would have ceased" (*Heskell v Continental Express Ltd*; J D Heydon, *Heydon on Contract* (Lawbook Co, 2019) at [26.520]). That is not this case. Rather, repair of timber floorboards and waterproofing to the balcony and patio would probably have been required by reason of the defective cavity flashings, even if Oikos' contracted work had been carried out properly. Mr Ratcliff opined that the defective cavities were a major cause of continued water penetration and caused the waterproofing on the balcony to delaminate (Report [81] and [82]).

143 The object of an award of damages for breach of contract is to put the innocent party in the same position as that in which it would have been had the contract been performed. Had Oikos' contract been performed, repairs would still have had to have been carried out to the timber flooring and the patio or balconies by reason of the defective cavity flashings for which it was not responsible.

144 The respondents would be entitled to damages for the cost of rectifying the defective work for which Oikos was responsible and other work required to

achieve conformity with its contract (*Bellgrove v Eldridge* (1954) 90 CLR 613 at 617-8; [1954] HCA 36; *Building Insurers' Guarantee Corp v The Owners – Strata Plan No 57504* [2010] NSWCA 23 at [64]-[65]).

145 In *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 Handley JA said (at 59):

> "… the Court should assess the compensation in a robust manner, relying on the presumption against wrongdoers, the onus of proof, and resolving doubtful questions against the party 'whose actions have made an accurate determination so problematic'".

146 This principle is not applicable in the present case where an accurate determination of the loss consequential upon Oikos' breach of contract is not made problematic by anything done by Oikos, but by the fact that Oikos' scope of work did not cover all of the causes of water penetration.

147 The primary judge explained (J [153]-[154]) that the respondents' case for the assessment of damages proceeded on two alternative bases. Both were supported by the evidence of a quantity surveyor, a Mr David Madden. On the first basis, Mr Madden took as his starting point the quotation given to the respondents by CQP for the work CQP contracted to do. Mr Madden then apportioned so much of the contract sum in CQP's quotation as was considered necessary to address defects in Oikos' work (J [153]). The alternative approach was that Mr Madden applied his own assessment to relevant items of work to determine what would be a reasonable cost of rectification works. Mr Madden compared the lineal extent of the work undertaken by CQP compared with the work undertaken by Oikos. For this purpose, Mr Madden used plans that showed the cavity work being "LFC cavity work" (J [156]). Mr Madden's calculation assumed that not only was Oikos required to carry out cavity flashing repairs, but it was also required to carry out repairs called "balcony and patio waterproofing/tiling". Mr Madden considered that CQP's quotation for cavity wall flashing and balcony and patio waterproofing/tiling was high. He also considered that CQP's quotation for façade render repair and coating was high, but its quotation for timber floor repair was insufficient.

148 The respondents' claim for damages was separated between damages for type 1 defects and for type 2 defects. In relation to the first part of the claim for type 1 defects, the primary judge determined that the respondents were entitled to damages in respect of the breach identified as "Defect Type 1 of $99,085 inclusive of GST" made up of six items as follows:

(1) Preliminaries $8,165.00

(2) Façade render repair and coating $5,472.00

(3) Cavity wall flashings $36,854.47

(4) Balcony and patio waterproofing/tiling $32,342.52

(5) Timber floor repairs $5,310.00

(6) Internal render repair/painting $1,941.00

(7) Total (excluding GST) $90,085.00 (to nearest dollar)

(8) Total (including GST) $99,093.00 (to nearest dollar)

(miscalculated by the judge as $99,085) (J [168]).

149 The cost for façade rendering repair and coating, cavity wall flashings and timber floor repairs would have been necessitated by the need to repair the defective cavity flashings irrespective of Oikos' breach. The position in relation to balcony and patio waterproofing/tiling is less clear. The primary judge found:

> "158 The complaint of the second defendant in relation to this Item is that the waterproofing of the balcony extended to the entire balcony areas rather than a restricted portion immediately adjacent to the southern wall. The submission is that the proportion calculated does not reflect the reality.
>
> 159 The response of the plaintiffs is to rely upon the evidence of Mr Ratcliff in that regard. He accepted that, had the initial repair been properly undertaken, in particular by using the appropriate membrane material, correctly preparing the original membrane and providing for the appropriate overlapping between the two membranes, a local or patch job would have worked. However, because inappropriate materials have been used the only means by which rectification could later be effected was to provide a new membrane for the entire area. Mr Ratcliff's evidence in that regard was persuasive. No contrary evidence was given. Accordingly, I accept his evidence in that regard."

150 But Mr Ratcliff explained in paras 83 and 84 of his report (quoted above at [76]) that the defects in the installation of the cavity flashing caused delamination of the membrane on the balcony. The replacement of the membrane and re-tiling would have been required by reason of the defective cavity flashings, even if there had been no breach by Oikos in its selection of appropriate membrane

material that did not provide an appropriate overlapping between the two membranes.

151 It is unnecessary to consider Oikos' further complaint that the amount allowed by Mr Madden under this item was allowed in respect of issue 9 identified by Mr Ratcliff, which did not relate to repairs to the balcony on the ground level, but to the balcony on the lower level where Oikos did not do any work. The respondents submit that Mr Madden's reference to an issue 9 calculation was a mistake. Because he made his calculations based on a proportion of what he assumed to be areas where both Oikos and CQP carried out work, his calculation should be understood to relate not to the balcony on the lower level, but to the balcony adjacent to the lounge room on the ground floor level. They noted that Mr Madden was not challenged on this issue.

152 If it were necessary to decide, I would agree with the respondents' submission on this issue, but it is not necessary to decide.

153 The item of $1,730 allowed for internal render repairs/painting should also be disallowed because those works would in any event have been required due to the defective cavity wall flashings. The amount allowed for preliminaries was assessed as a proportion of the other required works. The disallowance of the other items should also lead to the disallowance of the sum claimed for preliminaries.

154 The amount claimed and allowed for Defect Type 2 works was $26,015. These works related to the inadequate waterproofing of the south-facing windows in the dining room, windows W1 and W2.

155 The primary judge said (at [169]):

> "In his report (Exhibit C), Mr Ratcliff identified the work necessary to address the defective work carried out in respect of windows W1 and W2, being the Type 2 defects. Mr Madden identified the reasonable cost of carrying out that work to be the sum of $26,015. His evidence in that regard was not challenged. As I have found the second defendant in breach of the warranties relating to that work, the plaintiffs are entitled to recover the cost of that work. The manner in which Mr Madden assessed the cost of that work is set out in detail in his report."

156 That finding was not specifically challenged on appeal, save in Oikos' written submissions in reply where it was said (at para 19):

> "If one deducts the amounts allowed for the cavity flashing issue, Issue 9, and waterproofing the balcony, which were outside the Appellant's Scope, there is nothing left, other than the claim for damage caused by water ingress to the south facing windows which is addressed separately at $26,015. If one appropriately reapportions the flooring repair and re-rendering costs, and associated preliminaries, the amount remaining is nominal."

157 I assume that the explanation for this submission is that Mr Madden calculated the cost of repairs to address water penetration to the south windows in the dining room (issue 3 in Mr Ratcliff's report) at $12,755.90. This was exclusive of GST. This did not include on-costs of $10,894 (exclusive of GST). The calculation of on-costs and its relationship to the estimated trade costs of carrying out the whole of the rectification work was explained as follows:

> "7.1 In respect of Rectification Work Issues 3, 4, 6, 7, 10 and 11 which have not been carried out, I have provided an independent estimate $135,865.
>
> 7.2 I have assumed the work programme 7 weeks based on the extent and nature of Rectification Works and referenced to Issue 1, 2, 5, 8, 9 in which Rectification Works had been completed. The preliminaries cost for Issues 3, 4, 6, 7, 10 and 11 would be $40,480 (excl GST) (**Annexure 1**).
>
> 7.3 The allowance of 15% margin would be $26,452 (excl GST).
>
> 7.4 The Design and Professional Fees would be $26,452 (excl GST).
>
> 7.5 The contingency would be $22,900 (excl GST).
>
> 7.6 On Cost total would be $116,031 (excl GST).
>
> 7.7 The total cost for Rectification Works in respect of Issues 3, 4, 6, 7, 10 and 11 would be $251,896 (Excl GST).

Description	Total
Trade Costs	$135,865
Preliminaries	$40,480
Contractors Margin (15%)	$26,452
Design and Professional Fees	$26,200
Contingency and Risk (10%)	$22,900
TOTAL DEFECTS (excl GST)	$251,896

158

Sixth issue: Recovery from Mr AmodeoMr Madden's report addressed the reasonable market cost to carry out the rectification works set out in Mr Ratcliff's report upon which the respondents relied, both in their claims against Oikos and their claims against Mr Amodeo. Oikos advanced no submission as to why the allowance for on-costs would have been lower if the only rectification work in question were the repairs to address water penetration in the south windows in the dining room. There is no reason to interfere with the primary judge's finding that the reasonable cost of carrying out the work to address defective work carried out by Oikos in respect of windows W1 and W2 was $26,015.

159 The primary judge also allowed $1,700 for a proportion of the costs incurred by the respondents in obtaining Mr Murphy's 2012 report (J [178]). His Honour observed that this sum was claimed by the respondents "… as reflecting a reasonable proportion of that cost relevant to Defect Type 1 issues".

160 There is no reason to interfere with that finding, which in any event was not specifically challenged on appeal. The fact that the respondents are not entitled to damages for the costs of repair of the Defect Type 1 issues because the repairs would have been required in any event as the result of defective work for which Oikos is not responsible does not mean that the expense of investigating Oikos' work was not an expense reasonably incurred as a result of its breach.

161 The primary judge also allowed a sum of $5,000 for 50 per cent of moneys paid to Sherrard & Associates Pty Ltd as project supervisor for the remedial work carried out by CQP. Oikos made no submissions in relation to this element of the damages claimed. Although I am doubtful as to its recoverability, in the absence of any submissions on the question or any ground of appeal specifically directed to it, there is no reason to interfere with that finding.

162 The primary judge awarded damages of $99,085 in respect of "Defect Type 1" plus pre-judgment interest on that amount from 29 November 2013 (J [178], [192]). That finding should be set aside.

163 The primary judge awarded damages of $26,015 in respect of "Defect Type 2". His Honour noted that the plaintiffs had not sought and he did not order any pre-judgment interest in respect of that sum (J [195]). There was no cross-appeal from his Honour's not ordering pre-judgment interest on that sum.

164 The primary judge ordered damages of $1,700 in respect of Mr Murphy's report and $5,000 in respect of "Sherrard & Associates contract supervision". His Honour awarded pre-judgment interest from 27 June 2012 on the damages awarded in respect of Mr Murphy's report and awarded pre-judgment interest from 23 December 2013 on the award of $5,000 in respect of that element of the award. There is no challenge to those items.

165 Subject to the next issue dealt with below concerning recoveries made by the respondents, the judgment entered for the respondents should be set aside and in its place there should be entered judgment in favour of the respondents for the sum of $26,015, $1,700 and $5,000, plus pre-judgment interest on the latter two amounts from 27 June 2012 and 23 December 2013 respectively. This totals $35,548.58.

166 Before the primary judge Oikos sought leave to amend its defence to plead that the respondents had no right to enforce the statutory warranties under s 18B of the *Home Building Act* because those warranties had already been enforced in relation to the claimed deficiencies against the first defendant, Mr Amodeo. The primary judge refused the application. His Honour said:

> "182 The first of the amendments sought is said to arise from the circumstance that the claim by the plaintiffs against the first defendant was resolved with a payment having been received by the plaintiffs. That payment was made under an insurance claim. The plaintiffs submitted that the claim could not succeed by reason of the "principle of invisibility of insurance to claims against a wrongdoer" as articulated in a number of cases including *Le v Williams* [2004] NSWSC 645 and *BestCare Foods v Origin Energy* [2012] NSWSC 670. In any event, so the plaintiffs submitted, the addition of that defence would involve the calling of additional evidence and change the way in which the case would be presented.
>
> …
>
> 185 There is substance in the submission on behalf of the plaintiffs that to allow the amendments sought by the second defendant would create prejudice in the presentation of their case. Understandably, with the hearing having been fixed for some time, they had prepared for hearing on the basis of the defences filed. …

> 186 Importantly, no explanation has been advanced in support of the defendant's motion that seeks to explain the delay in raising the matters that it now seeks to plead. The amendments it seeks to make have long since been available to it.
>
> 187 There can be no doubt that if the amendments are allowed, the hearing will need to be vacated. …"

167 On Oikos' notice of motion to amend its defence, it adduced evidence of a settlement deed made between the respondents and Mr Amodeo under which Mr Amodeo agreed that he was indebted to the respondents for the amount of $450,000 and the respondents agreed to accept the sum of $140,000 to be paid by instalments between 21 December 2017 and 1 July 2018 in discharge of that debt. The settlement deed included a recital that:

> "The Owners now accept that Amodeo is not liable to the Owners in relation to the construction of the Oikos work locations but maintain that he is liable to the Owners in relation to the other matters claimed against Amodeo in the proceedings."

168 The settlement deed was provided to Oikos' solicitors on 22 December 2017. The notice of motion for leave to amend the defence was filed on 8 February 2018. Oikos submits that the primary judge also rejected a tender of the settlement deed and limited its use to the notice of motion for leave to amend.

169 However, after the primary judge rejected the application for leave to amend and an application for the production of documents in relation to the settlement agreement, Oikos did not seek to tender the settlement agreement as evidence in the case, although it had earlier foreshadowed that it would seek to do so.

170 Contrary to Oikos' submission, the primary judge did not make an order limiting the use to which the settlement agreement could be put to the application for leave to amend.

171 The respondents would not be entitled to recover double compensation. It can be inferred that the respondents received a settlement payment of $140,000 from the first defendant (or his insurer). It also received a settlement of $339,750 from the Home Building Compensation Fund. It did not pay for the work done by Oikos.

172 But the tender amount for the further repairs that would have to be conducted following the failure of CQP's repairs was $420,561.90. The cost of the CQP contract after variations was $283,990. *Prima facie*, Mr Amodeo would have

been responsible for the whole extent to which the respondents were out of pocket. There are no prospects of Oikos' establishing that the respondents had already been compensated for the damages in question. Leave to appeal to raise this ground should be refused.

Proposed orders

173 For these reasons, I propose that the appeal be allowed in part, that the judgment entered on 20 November 2019 in the sum of $168,885.92 be set aside and in lieu thereof judgment be entered for the respondents against the appellant in a sum to be determined in accordance with para [165] of these reasons.

174 Execution of the judgment entered below was stayed on condition that Oikos make monthly payments of $5,000 in reduction of the judgment debt. To the extent Oikos has paid more than the judgment to be entered in accordance with para [165] the orders should provide for the repayment of such moneys with interest at the rates of interest prescribed for the purposes of s 100 of the *Civil Procedure Act 2005* (NSW).

175 The order for costs against the appellant in the court below should also be set aside. The appellant has been substantially successful on the appeal and should have its costs of the appeal. The parties should be directed to provide written submissions on the appropriate order to be made as to the costs of the proceedings below in accordance with these reasons.

176 For these reasons I propose the following orders:

(1) Appeal allowed in part.

(2) Set aside the orders entered in the District Court on 20 November 2019.

(3) In lieu thereof direct entry of judgment for the respondents against the appellant in the sum of $35,548.58.

(4) Order that the respondents repay to the appellant moneys paid by the appellant to the respondents in reduction of the judgment entered in the District Court to the extent moneys paid exceed the judgment to be entered in accordance with order 3, together with interest at the rates prescribed for the purposes of s 100 of the *Civil Procedure Act 2005* (NSW).

(5) Order that the respondents pay the appellant's costs of the appeal.

(6) Order that within 28 days the appellant file and serve written submissions of no more than six pages as to what order should be made as to the costs of the proceedings below and any evidence to be relied upon on that question.

(7) Order that within 21 days thereafter the respondents file and serve written submissions and any evidence to be relied upon on that question.

(8) Any submissions in reply be filed and served seven days thereafter.

(9) Reserve the question of costs of the proceedings below, to be dealt with on the papers, subject to any further order.

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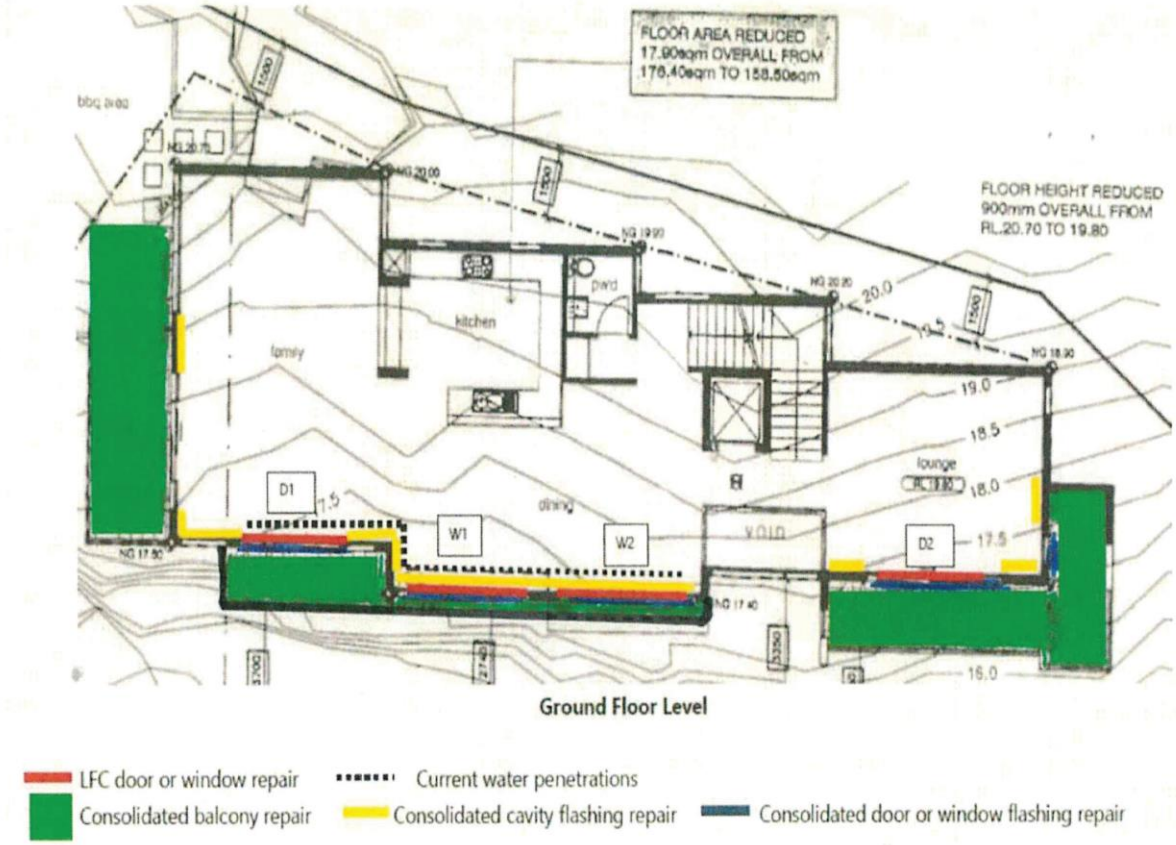
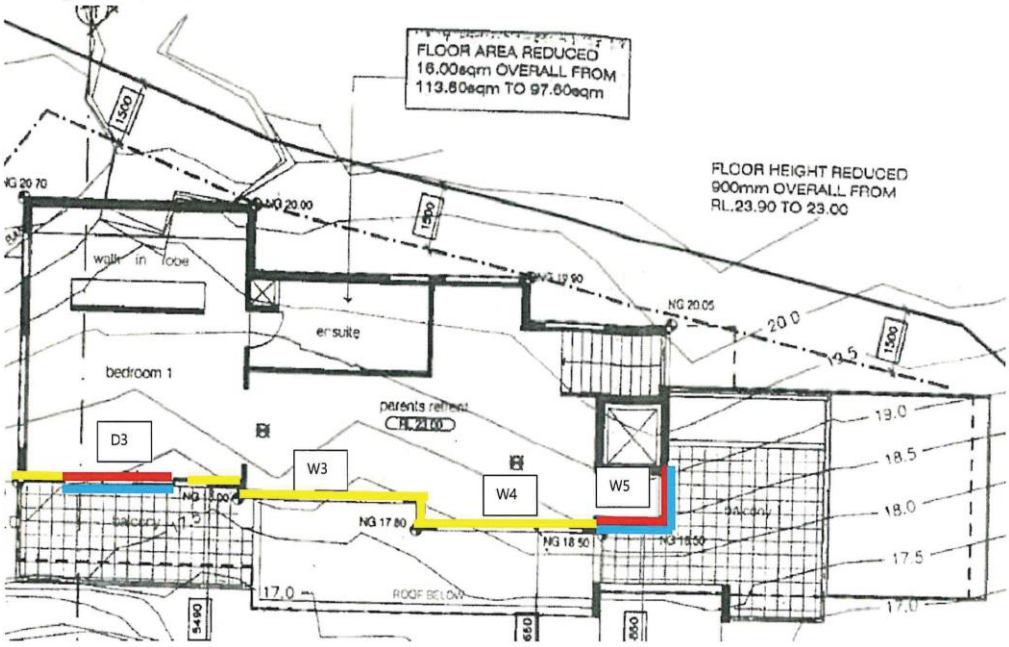
Annexure "A"



Annexure "B"

Revised Plan locating LFC's Work



Top Floor – Parents Floor

LFC door re-flashing repair

LFC cavity work

LFC localised waterproofing repair (assuming lap can be achieved in repair)

Annexure "C"

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