Supreme Court

New South Wales

Case Name:	The Owners – Strata Plan No 89005 v Stromer
Medium Neutral Citation:	[2021] NSWSC 853
Hearing Date(s):	13 July 2021
Date of Orders:	14 July 2021
Decision Date:	14 July 2021
Jurisdiction:	Equity - Commercial List
Before:	Williams J
Decision:	See paragraph [70]
Catchwords:	BUILDING AND CONSTRUCTION – civil procedure – application to amend Technology and Construction List Response – proposed amendment to limitation defence based on construction of Home Building Act 1989 (NSW), ss 18C and 18E and schedule 4, clause 109 – defendants had previously withdrawn limitation defence – prejudice to the plaintiff if limitation defence now re-introduced – whether consistent with overriding purpose and dictates of justice to grant leave to amend – leave refused CIVIL PROCEDURE – application for leave to file a cross-summons and list cross-claim statement against sub-contractors of the defendant builder – where no material facts pleaded or alleged defects particularised in support of the allegations – application dismissed
Legislation Cited:	Building Products (Safety) Act 2017 No 69 (NSW), sch 2.6 cl 1 Civil Procedure Act 2005 (NSW), ss 56, 58, 64 Corporations Act 2001 (Cth), s 471B Home Building Act 1989 (NSW), pt 2C, ss 18A, 18B, 18C, 18D, 18E, sch 4, pt 19 cl 109 Home Building Amendment Act 2011 (NSW), sch 1 cl

	13 Home Building Amendment Act 2014 No 24 (NSW), sch 1 cl 28-29 Law Reform (Miscenalleous Provisions) Act 1946 (NSW), s 5 Strata Schemes Management Act 2015 (NSW), s 8, sch 4.12 cl 2 Uniform Civil Procedure Rules 2005 (NSW), r 9.11
Cases Cited:	Kelly v Mina [2014] NSWCA 9 Lucantonio v Benscrape Pty Ltd [2020] NSWSC 579 Price v Spoor [2021] HCA 20
Category:	Procedural rulings
Parties:	The Owners – Strata Plan No 89005 (Plaintiff) Mr Thomas Stromer (First Defendant) Mr Simone Stromer (Second Defendant) Mr Nathan Stromer (Third Defendant) Farad Electric Co Pty Ltd (Fourth Defendant)
Representation:	Counsel: Mr B Stanton (Solicitor) (Plaintiffs) Mr J O'Sullivan (Defendants) Solicitors: Stanton Legal (Plaintiff) Darian Iancono & Legal (Defendants)
File Number(s):	2019/294941
Publication Restriction:	N/A

JUDGMENT

1 These proceedings were commenced on 20 September 2019.

2 The plaintiff is a body corporate constituted under s 8 of the *Strata Schemes Management Act 2015* (NSW) and has been the registered proprietor of the common property in strata plan number 89005 since registration of that strata plan on 11 November 2013.

3 The first to third defendants were the registered proprietors of that land at all relevant times prior to 11 November 2013. The fourth defendant (a builder)

undertook the construction of the apartment building on that land, which is now the subject of strata plan 89005 (the **building**).

4 Where it is necessary to distinguish between them, I will adopt the terminology used by the parties and refer to the first to third defendants as **the developers** and the fourth defendant as **the builder**. Otherwise, I will refer to them collectively as the defendants.

5 It is common ground between the plaintiff and the defendants that the work done by the builder was "*residential building work*" within the meaning of the *Home Building Act 1989* (NSW) (the **HB Act**) that was carried out under a contract between the developers (or some of them) and the builder. The plaintiff alleges that the work contains defects in breach of warranties implied pursuant to Part 2C of the HB Act.

6 The plaintiff claims damages for the cost of identifying and rectifying the alleged breaches of statutory warranties and other losses said to have been incurred by reason of the presence and rectification of those alleged defects.

7 These reasons for judgment relate to the defendants' application made by notice of motion filed on 22 June 2021 seeking:

(1) leave to file a proposed Further Amended List Response, including amendments that would raise a limitation defence that I will refer to in more detail below; and

(2) leave to file a Cross-Summons and List Cross-Claim Statement claiming contribution or indemnity pursuant to s 5 of the *Law Reform (Miscenalleous Provisions) Act 1946* (NSW) (**LRMP 1946 Act**) against five sub-contractors of the builder.

8 The plaintiff opposes the defendants' application for leave to amend to raise the limitation defence, being the amendments set out in paragraphs B3, C9 and C24 of the proposed Further Amended List Response. The plaintiff does not oppose the other proposed amendments set out in that document.

9 The plaintiff neither consents to nor opposes the application for leave to file the Cross-Summons and List Cross-Claim Statement.

10 For the reasons that follow, leave is refused in relation to both the contentious amendments to the List Response and the proposed Cross-Summons and List Cross-Claim Statement.

The proposed limitation defence amendments

11 It is convenient to describe the legislative provisions relevant to the proposed limitation defence, the history of the pleadings in this matter and the current state of preparation of the matter for hearing, before setting out my reasons for refusing leave to amend.

Relevant legislative provisions

12 As I have referred to above, the plaintiff alleges that the work undertaken by the builder in constructing the apartment building contains defects in breach of warranties implied pursuant to Part 2C of the HB Act.

13 Sections 18A and 18B in Part 2C of the HB Act imply certain warranties into every contract to perform residential building work made after the commencement of s 18A. The implied warranties are by the person who holds or is required to hold a contractor licence.

14 In this case, there is no dispute that the work done by the builder was *"residential building work"* within the meaning of the HB Act, that the work was done under a contract between one or more of the developers and the builder, and that the contract was entered into after the commencement of s 18A and before 1 February 2012. Thus, the warranties implied by Part 2C are warranties by the builder for the benefit of the developers who were parties to the contract. It is common ground that any of the developers who were not parties to the contract were *"non-contracting owners"*, with the result that the benefit of the implied statutory warranties extends to those developers by reason of s 18D(1A) of the Act. The relevance of the 1 February 2012 date will become apparent below.

15 Section 18C of the HB Act provides (my emphasis):

> "(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**."

16 Section 18D of the HB Act relevantly provides:

> "(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."

17 Sections 18C and 18D(1) of the HB Act have been in the same terms at all times potentially relevant to these proceedings.

18 As I have referred to above, the plaintiff claims damages for the cost of identifying and rectifying the alleged breaches of Part 2C warranties and other losses said to have been incurred by reason of the presence and rectification of those alleged breaches.

19 It is not in dispute that the plaintiff is the immediate successor in title to the developers.

20 Insofar as the plaintiff's claim is made against the developers, it relies on s 18C of the HB Act on the basis that the work done by the builder was done on behalf of the developers.

21 Insofar as the plaintiff's claim is made against the builder, it relies on s 18D(1) of the HB Act on the basis that the developers (either as parties to the contract with the builder or as non-contracting owners) are entitled to the benefit of the statutory warranties by the builder that are implied by Part 2C of the HB Act.

22 At all relevant times prior to 1 February 2012, s 18E of the HB Act relevantly provided that proceedings for breach of a statutory warranty must be commenced within seven years after the completion of the work to which it relates.

23 Section 18E was amended by clause 13 of Schedule 1 of the *Home Building Amendment Act 2011* (NSW) with effect from 1 February 2012 (the **2011 Amendment Act**). The amended s 18E relevantly provided that proceedings for a breach of statutory warranty must be commenced before the end of the warranty period for the breach, being six years for a breach that results in a structural defect (as defined in the regulations) or two years in any other case, with the period commencing in both instances from the completion of the work to which the alleged breach of statutory warranty relates.

24 Part 19 of Schedule 4 of the HB Act contains transitional provisions concerning the enactment of the 2011 Amendment Act. Relevantly, clause 109 of Part 19 of Schedule 4 provides that:

> "The amendment made to section 18E by the amending Act does not apply in respect of a contract for residential building work entered into before the commencement of the amendment".

25 It is common ground that the work that is the subject of these proceedings was completed in November 2013. At that time, s 18E applied as amended by the 2011 Amendment Act (subject to clause 109 set out immediately above).

26 Section 18E was further amended by clause 28-29 of Schedule 1 of the *Home Building Amendment Act 2014 No 24* (NSW). Those further amendments commenced on 15 January 2015, but also extended to residential building work commenced or completed and contracts entered into prior to that date. Thus, the effect of the 2015 amendments is that, in cases where the limitation periods introduced into s 18E by the 2011 amendments apply, the test for the application of the six year period (as opposed to the two year period) is now whether the breach of statutory warranty results in a *"major defect in residential building work"* (as opposed to a structural defect as defined in the regulations). The 2015 amendments also introduced a definition of *"major defect"* in s 18E(3) and (4) of the HB Act.

History of the pleadings

27 In their List Response filed on 23 December 2019, the defendants:

(1) admitted that the work done by the builder in relation to the building was done under a contract to do "*residential building work*" within the meaning of the HB Act that was entered into prior to 1 February 2012 (defined as *"the Contract"*) (paragraph C9);

(2) admitted that the work was completed for the purpose of the HB Act on 6 November 2013 (paragraph C10);

(3) admitted that each of the developers were either a party to *"the Contract"* or a non-contracting owner in relation to *"the Contract"* for the purpose of s 18D(1A) of the HB Act (paragraph C11);

(4) admitted that, by reason of those matters and by operation of s 18B of the HB Act, the warranties established by Part 2C of the HB Act were implied in *"the Contract"* (paragraph C12);

(5) admitted that, by reason of those matters and by operation of s 18D of the HB Act, the plaintiff, as a successor in title to the developers, is

entitled to the same rights as against the builder that the developers have against the builder in respect those statutory warranties (paragraph C13);

(6) admitted that, by reason of those matters, the work was done on behalf of the developers within the meaning of s 3A of the HB Act (paragraph C14);

(7) admitted that, by reason of those matters and by operation of s 18C of the HB Act, the plaintiff is entitled to the benefit of the statutory warranties against the developers as if the developers were required to hold a contractor licence and had done the work under a contract with the plaintiff (referred to as *"the Notional Contract"*) (paragraph C15); and

(8) admitted that, by reason of the above matters and by operation of s 18B of the HB Act, the statutory warranties in Part 2C are implied into *"the Notional Contract"* (paragraph C16).

28 The defendants then admitted that the building contained the defects identified in the defendants' expert report, but otherwise denied the alleged defects and denied the plaintiff's claimed loss and damage (paragraphs C17-C21).

29 The defendants then pleaded certain additional defences in answer to the whole of the plaintiff's claim, including the following limitation defence in paragraph C24 of the List Response:

> "… the Alleged Defects were not 'major defects' as defined by section 18E(4) of the Act, so that the statutory warranty period was 2 years from completion of the works pursuant to section 18E(1)(b) of the Act and the Plaintiff's claim is statute barred for being out of time."

30 This was the only limitation issue identified in Section B of the List Response as likely to arise. As will be apparent from [26] above, by pleading this limitation issue, the defendants contended that s 18E applied as amended by the 2011 Amendment Act and as subsequently amended in 2015.

31 On 3 February 2020, the plaintiff's solicitor wrote to the defendants' solicitor in the following terms (my emphasis):

> "It is apparent from paragraphs B3 and C24 of your clients' List Response that they consider that the current warranty periods of 6 years for '*major defects*' and 2 years for other defects apply in respect of these proceedings.
>
> That is incorrect. My client is entitled to the benefit of a 7 year warranty period for all types of defects as the work was carried out under a contract or contracts entered into prior to 1 February 2012. **My client notes clause 109 of schedule 4 to the Act in relation to that issue**."

32 I have set out clause 109 of Schedule 4 of the HB Act at [24] above.

33 On 28 February 2020, the Court ordered the defendants to serve on the plaintiff any proposed Amended List Response to address the issues raised in the correspondence immediately above.

34 That led to the defendants filing the Amended List Response on 20 March 2020, in which the defendants withdrew the limitation defence referred to at [29] above and did not introduce any additional limitation issue. Plainly, after taking time to consider the construction of the relevant legislative provisions advanced by the plaintiff's solicitor in the letter dated 3 February 2020, the defendants were conceding that they could not take advantage of the amendments made to s 18E by the 2011 Amendment Act because the work had been done under a contract for residential building work entered into before 1 February 2012, namely the contract between the developers (or some of them) and the builder and not the under s 18C *"Notional Contract"*.

Current state of preparation for hearing

35 The alleged defects that are the subject of these proceedings were identified in the particulars to paragraph 18 of the List Statement filed on 20 September 2019 by reference to an expert report of Mr Paul Ratcliff together with an associated photographic report, both dated 19 September 2019. The plaintiff's Amended List Response filed on 25 June 2020 added to these particulars a document entitled *"Amended Plaintiff's Further Air Conditioning Allegations"* served on the defendants on 18 May 2020. The plaintiff's solicitor informed the Court that Mr Ratcliff's reports are 477 pages and 118 pages in length, and provide a detailed description of the alleged defects.

36 The following further expert reports have been prepared subsequently to the commencement of the proceedings:

(1) an expert report of Mr Carl Le Breton dated 6 December 2019 in response to Mr Ratcliff's report;

(2) a joint report prepared by Mr Ratcliff and Mr Le Breton dated 16 July 2020 following several conferences and joint site inspections conducted during the period from 28 April to 16 July 2020, in which the experts identify the extent of agreement and disagreement between them concerning the alleged defects relating to building and waterproofing issues;

(3) two expert reports of Mr Ross Warner, a mechanical engineer appointed jointly by the parties, dated 15 and 31 July 2020;

(4) an expert report of Mr Leigh Appleyard, a structural engineer appointed jointly by the parties, dated 10 September 2020;

(5) an expert report of Mr David Wood, a hydraulic engineer appointed jointly by the parties, dated 15 September 2020; and

(6) an expert report of Mr Scott Leighton Smith, a quantity surveyor appointed jointly by the parties, dated 22 December 2020.

37 The proceedings were not resolved at a mediation conducted on 11 May 2021.

38 The plaintiff has foreshadowed serving lay evidence and further expert evidence relating to the actual extent of work required and the actual cost incurred by the plaintiff in rectifying some of the alleged defects to date. The plaintiff's solicitor informed the Court that the actual work and actual cost were greater than the work and cost estimated in the relevant parts of the expert reports referred to above.

39 The matter has not yet been listed for hearing.

Substance of the issues raised by the proposed defence limitation amendments

40 In their proposed Further Amended List Response, the defendants:

(1) plead that their admission that the builder's work was done under a contract to do residential building work entered into prior to 1 February 2012 was limited to "*any actual rather than notional contract*";

(2) plead that *"any notional contract between the Plaintiff and the Defendants arising pursuant to section 18C of the [HB Act] was entered into on 11 November 2013 when the Plaintiff first came into existence upon registration of strata plan 89005 or in the alternative, 19 November 2013 when the work was complete"* (paragraph C9(b));

(3) plead that *"on its proper construction, the reference to 'a contract for residential building work' in clause 109 of schedule 4 of the [HB Act] is a reference to an actual contract and not any notional contract"* (paragraph C9(c));

(4) pleads in answer to the whole of the plaintiff's claim that (paragraph C24):

> "… if on the proper construction of the [HB Act] the version of the Act that was in force as at 11 or 19 November 2013 applies, then the Alleged Defects were not 'structural defects' within the meaning of section 18E(1)(b) of the Act, so that the statutory warranty period was 2 years from completion of the works on 19 November 2013 and the Plaintiff's claim is statute barred for being out of time."

41 Paragraph B3 of the proposed Further Amended List Response identifies the limitation issue referred to immediately above as likely to arise.

42 If leave to amend is granted, and if the defendants succeed in their contention that the words *"a contract for residential building work entered into before the commencement of the amendment"* in clause 109 of Schedule 4 of the HB Act refers to the s 18C *"notional contract"* rather than the contract entered into by the developers (or some of them) and the builder, then:

(1) s 18E as amended by the 2011 Amendment Act and as further amened in 2015 will apply;

(2) these proceedings, having been commenced on 20 September 2019 (just under 6 years since the completion of the work in November 2013), will have been commenced within the limitation period to the extent that they relate to major defects but will otherwise be time-barred; and

(3) it will therefore be necessary for the Court to determine whether each defect found to exist is a major defects as defined in s 18E(3) and (4).

Leave to amend refused

43 Contrary to the plaintiff's submissions, the proposed amendments do not require leave to withdraw any admission made by the defendants.

44 Paragraph C9 of the List Response filed on 23 December 2019 and Amended List Response filed on 20 March 2020 admitted the plaintiff's allegation that was pleaded in the following terms (my emphasis):

> "The Work **was done under** a contract to do 'residential building work' within the meaning of the HBA (**Contract**) which was **entered into** prior to 1 February 2012."

45 In my opinion, the emphasised words make it clear that the plaintiff's pleaded allegation, and the defendants' admission, refer to the contract between the developers (or some of them) and the builder. Work cannot meaningfully have been *"done under a contract"* other than one that existed at the time the work was done, although it may later be treated pursuant to s 18C of the HB Act "*as if*" it had been done under a contract that did not exist at that time.

46 I therefore do not consider that the defendants' paragraph C9 admitted anything more than that the contract between the developers (or some of them) and the builder under which the work was actually carried out was entered into

prior to 1 February 2012. The defendants' paragraph C9 said nothing about when the s 18C *"notional contract"* came into existence.

47 The discretion to grant leave to amend under s 64 of the *Civil Procedure Act 2005* (NSW) falls to be exercised in manner that gives effect to the overriding purpose in s 56 and in accordance with the dictates of justice as required by s 58 of that Act: *Kelly v Mina* [2014] NSWCA 9 at [45]-[48] (Barrett JA, Ward and Leeming JJA agreeing).

48 The defendants' submissions characterised the proposed amendments as raising a question of law as to the proper construction of the HB Act that would need to be determined by the Court irrespective of whether it was pleaded, and suggested that leave was being sought to amend merely to avoid the plaintiff being taken by surprise by that question of law.

49 The proposed amendments do raise a question of law, but I otherwise reject those submissions. In my opinion, s 18E of the HB Act is a limitation provision of the kind that provides a defence that may be pleaded by a defendant but that does not extinguish the jurisdiction of the Court to entertain the plaintiff's claim. If the defence is not pleaded, the construction of s 18E and clause 109 of Schedule 4 to the HB Act will not arise for consideration by the Court: *Price v Spoor* [2021] HCA 20 at [5]-[10] (Kiefel CJ and Edelman J), [40]-[41] (Gageler and Gordon JJ) and [52], [78]-[79] and [87] (Steward J).

50 The question of law that the amendments raise is whether a limitation period of six years in respect of major defects and two years in respect of other defects applies to the plaintiff's claims under s 18E of the HB Act.

51 The defendants raised that question of law in the limitation defence pleaded in their List Response filed on 23 December 2019, as I have referred to earlier in these reasons.

52 They subsequently withdrew their reliance on any limitation defence after they had the opportunity to consider the plaintiff's contention that a seven year limitation period applies by reason of the transitional provision in clause 109 of Schedule 4 to the HB Act. That was done by the filing of the Amended List Response on 20 March 2020.

53 More than one year later, the defendants seek leave to re-introduce the limitation defence. Their only explanation for seeking to revert to their previous position, and for their delay since 20 March 2020 in seeking to do so, is the evidence of the defendants' solicitor that, in the course of preparing for the mediation on 11 May 2021:

> "… it occurred to me that the legislation may intend to distinguish between the date of entry into an actual building contract as opposed to the date of entry into a notional contract contemplated by the legislation and that if so, this may bear upon the applicable legislation and limitation periods. I had not turned my mind to this question in detail previously as Mr Iuliano had day to day carriage of the matter until he ceased employment with & Legal in about January 2021."

54 The plaintiff's solicitor gave evidence to the effect that if the defendants had not withdrawn the limitation defence in March 2020, and if the Court had not determined the construction of clause 109 of Schedule 4 and s 18E of the HB Act as a separate question in favour of the plaintiff, then he would have advised the plaintiff to seek to join the builder's subcontractors to the proceedings and to plead claims against those subcontractors in relation to the alleged breaches of statutory warranties relating to the work performed by each subcontractor, relying on s 18D(1) of the HB Act, and would have sought the plaintiff's instructions to take that course. According to the defendants' proposed cross-claim, the relevant subcontracts were entered into on various dates between 2001 and 2008. The plaintiff's solicitor submitted that the applicable limitation period under s 18E in respect of any such claims against subcontractors would be seven years. By reason of clause 109 of Schedule 4 to the HB Act, the 2011 amendments to s 18E would not apply. The seven year limited period expired in November 2020 on the basis that the relevant work had been completed in November 2013. Any claims that the plaintiff could now commence against those sub-contractors would therefore be likely to be met with a limitation defence.

55 I accept these submissions of the plaintiff. I also accept that, if leave to amend were granted to the defendants, the plaintiff would be prejudiced by the loss of the opportunity to apply to plead these additional claims and to join the subcontractors as defendants to the proceedings as an insurance policy against the defendants' limitation defence. I reject the defendants' submission that I should regard with scepticism the evidence of the plaintiff's solicitor that

he would have provided that advice and sought those instructions. It is the very kind of thing that a prudent solicitor would do in the circumstances, and there is no reason to think that the plaintiff's solicitor would have acted otherwise than prudently. On the contrary, the plaintiff's solicitor had acted prudently and proactively in writing to the defendants' solicitor on 3 February 2020 seeking to resolve the limitation issue that was then pleaded or bring it to a head. Nor is there any apparent reason why the plaintiff would not have taken the advice of its solicitor.

56 In my opinion, it would be contrary to the overriding purpose and dictates of justice to impose that prejudice on the plaintiff by granting leave to the defendants to amend, in circumstances where the defendants' only reasons for seeking to make the amendments at a time that would cause that prejudice are limited to the evidence of the defendants' solicitor referred to above.

57 The defendants complain that they will suffer prejudice if leave to amend is refused, because they will be deprived of the ability to raise a limitation defence to the plaintiff's claims relating to non-structural defects. That prejudice is a result of the defendants' decision to withdraw the limitation defences on 20 March 2020 – a decision that was presumably made with the benefit of legal advice given after careful consideration of the plaintiff's argument laid out in its correspondence of 3 February 2020 which specifically drew the defendants' attention to the relevant transitional provision on which the defendants now seek to rely in aid of the proposed amendments. The defendants are therefore the author of any prejudice they may suffer and it would be unjust to permit them to avoid such prejudice by granting leave to amend with the consequential prejudice to the plaintiff to which I have referred above.

58 The defendants' application for leave to amend is refused for those reasons. It is therefore unnecessary to consider whether the construction of clause 109 of Schedule 4 to the HB Act on which the proposed limitation defence depends is reasonably arguable.

59 It is also unnecessary to consider the extent of delay and additional cost that would result from the amendments, although some additional cost would have undoubtedly have been incurred due to the need for the various experts to

prepare a further round of evidence addressing the question whether defects are major defects within the meaning of s 18E(1)(b). Given the number of experts and the number of alleged defects involved, I would not have been persuaded by the defendants' assertion that this additional evidence would be *"of narrow compass".* Preparing it would not have been disproportionate.

60 There will be an order dismissing the defendants' application for leave to amend.

The proposed Cross-Claim

61 The proposed Cross-Summons and List Cross-Claim would join as parties to the proceedings:

(1) the architect who allegedly provided services to the builder in relation to the building (the proposed second cross-defendant, or the **architect**);

(2) the hydraulic engineer who allegedly designed the hydraulic engineering systems for the builder with respect to the building (the proposed third cross-defendant, or the **hydraulic engineer**);

(3) the structural engineer who allegedly provided design structural engineering services to the builder with respect to the building (the proposed fourth cross-defendant, or the **structural engineer**);

(4) the air conditioning contractor who allegedly designed, installed and commissioned mechanical ventilation systems for the building with respect to the building (the proposed fifth cross-defendant, or the **AC contractor**); and

(5) the contractor who allegedly provided building design, consultancy and supervision services with respect to the building (the proposed sixth cross-defendant, or the **supervisor**).

62 The proposed Cross-Summons and List Cross-Claim also named as the proposed first cross-defendant the certifier who allegedly issued the final occupation certificate for the building (the **certifier**). However, the certifier went in liquidation on 30 June 2021 and the defendants have not yet decided whether to apply for leave under s 471B of the *Corporations Act 2001* (Cth). In those circumstances, the defendants did not press their application for leave to file the Cross-Summons and List Cross-Claim in respect of the certifier.

63 The pleaded elements of the defendants' proposed cross-claims against each of the other subcontractors are that if the defendants/cross-claimants *"are*

liable to the Plaintiff as alleged by the Plaintiff in these proceedings" (which is denied) then:

(1) the relevant sub-contractor will have failed to undertake the work with reasonable professional skill, care and diligence in accordance with an implied term of the contract between the builder and the sub-contractor (and, in the case of the AC contractor and the supervisor, statutory warranties implied by Part 2C of the HB Act);

(2) the relevant sub-contract will have breached duties of care owed to the builder, the developers (being the owners of the land at the time the work was undertaken) and the plaintiff; and

(3) the relevant sub-contractor is therefore liable to contribute to or indemnify the builder and the developers for any amount for which they are found liable to the plaintiff in these proceedings pursuant to s 5 of the LRMP 1946 Act.

64 The List Cross-Claim does not plead any material facts relied on by the cross-claimants in support of the allegations that each sub-contractor breached the pleaded implied terms, statutory warranties or duties of care. The only fact pleaded as giving rise to the sub-contractors' alleged liability is a prospective finding of liability against the cross-claimants in favour of the plaintiffs (which liability is denied). Nor does the List Cross-Claim identify, either by pleading or particulars, the specific alleged defects in relation to which the cross-claimants contend that a finding of liability against them in favour of the plaintiff would result in a liability of each specific sub-contractor to indemnify or contribute. That is so, notwithstanding that the defendants/cross-claimants say that they now have full particulars of the nature and extent of the alleged defects through the joint expert reports that have been prepared.

65 In my opinion, in the absence of the material facts being pleaded, or at least particulars of the alleged defects in respect of which each subcontractor's alleged liability is said to arise, the proposed Cross-Summons and List Cross-Claim do not serve the basic functions of pleadings. They do not state with sufficient clarity the case that must be met so as to ensure that the proposed cross-defendants have the opportunity of meeting the case against them. The proposed Cross-Summons and List Cross-Claim would be liable to be struck out as embarrassing in their present form and it would therefore be inappropriate to grant leave to the defendants/prospective cross-claimants to

file them: see, for example, *Lucantonio v Benscrape Pty Ltd* [2020] NSWSC 579 at [115]-[122] and the authorities there cited.

66 The defendants referred to r 9.11 of the *Uniform Civil Procedure Rules 2005* (NSW) as potentially removing the need for the proposed cross-defendants to a file a defence to the cross-claims at this stage if leave were granted. I do not consider that this is a good reason to grant leave to file a pleading that does not serve the basic functions of a pleading.

67 There will be an order dismissing the application for leave to file the proposed Cross-Summons and List Cross-Claim. That does not preclude the defendants from seeking leave in the future to file a properly pleaded cross-claim within the relevant limitation period, which they submitted will expire in 2023 at the earliest. However, that is not to suggest that any such application should be deferred until shortly before the expiry of the limitation period.

68 If and when the defendants make such an application and if leave is then granted, it will be appropriate to consider whether defences to the cross-claims should be filed and the necessary procedural steps to facilitate the hearing of the plaintiff's claim together with the cross-claims. If the hearing and determination of the cross-claims were to be deferred until after the determination of the plaintiff's claims, as the defendants proposed, it seemed to me that this may be an inefficient use of the publicly funded resources of the Court and may also give rise to a risk of inconsistent findings within the same proceedings.

Costs

69 The defendants have been unsuccessful on both the application for leave to amend (save for those amendments not opposed by the plaintiff) and in their application for leave to file the cross-claims. In my opinion, there is no reason why costs should not follow that event.

Conclusion and orders

70 For the reasons above, I make the following orders:

(1) Extend the time for the defendants to file their notice of motion seeking leave to amend from 16 June 2021 to 22 June 2021.

(2) Grant leave to the defendants to further amend their Technology and Construction List Response by:

(a) making the amendments marked in double underlining in the Further Amended Technology and Construction List Response that is Annexure A to the defendants' notice of motion filed on 22 June 2021, with the exception of such amendments to paragraphs A2, B3, C9 and C24; and

(b) deleting paragraph 26(b) as marked in the Further Amended Technology and Construction List Response that is Annexure A to the defendants' notice of motion filed on 22 June 2021.

(3) Order that the defendants pay the plaintiffs' costs thrown away (if any) by reason of the amendments in respect of which leave is granted in Order 2 above.

(4) Order that the defendants' notice of motion filed on 22 June 2021 is otherwise dismissed.

(5) Order that the defendants pay the plaintiff's costs of and incidental to the notice of motion filed on 22 June 2021 in an amount agreed or assessed.

****