Supreme Court

New South Wales

Case Name:	The Owners – Strata Plan No 90018 v Parkview Constructions Pty Ltd
Medium Neutral Citation:	[2022] NSWSC 1123
Hearing Date(s):	11 August 2022
Date of Orders:	24 August 2022
Decision Date:	24 August 2022
Jurisdiction:	Equity - Technology and Construction List
Before:	Stevenson J
Decision:	Plaintiff granted leave to amend its Technology and Construction List Statement; defendant to pay the plaintiff's costs of its Notice of Motion seeking leave
Catchwords:	PRACTICE AND PROCEDURE – proposed amendment to Technology and Construction List Statement – whether amendment will introduce new causes of action under the Home Building Act 1989 (NSW) BUILDING AND CONSTRUCTION – residential building work – whether separate causes of action for each breach of the statutory warranties under the Home Building Act 1989 (NSW) – whether single cause of action for all breaches of those statutory warranties or for each individual statutory warranty – application of Onerati principle STATUTORY CONSTRUCTION – construction of statutory warranties under the Home Building Act 1989 (NSW) – whether separate cause of action for each breach of the statutory warranties under the Home Building Act 1989 (NSW) – whether single cause of

	action for all breaches of those statutory warranties or for each individual statutory warranty – application of Onerati principle
Legislation Cited:	Civil Liability Act 2002 (NSW) Design and Building Practitioners Act 2020 (NSW) Home Building Act 1989 (NSW) Home Building Amendment (Statutory Warranties) Act 2006 (NSW) Explanatory Note, Home Building Amendment (Statutory Warranties) Bill 2006 (NSW) (Legislative material)
Cases Cited:	Baron Corporation Pty Ltd v Owners of Strata Plan 69567 [2013] NSWCA 238 Conquer v Boot [1928] 2 KB 336 Dymocks Book Arcade Pty Ltd v Capral Ltd [2011] NSWSC 1423 Honeywood as executrix of the estate of the late Neville Honeywood v Munnings & Anor (2006) 67 NSWLR 466; [2006] NSWCA 215 Lane Cove Council v Michael Davies & Associates [2012] NSWSC 727 Onerati v Phillips Constructions Pty Ltd (in liq) (1989) 16 NSWLR 730 The Owners – Strata Plan 70030 v Decon Australia [2016] NSWSC 19 The Owners – Strata Plan 76841 v Ceerose Pty Ltd [2016] NSWSC 1545 The Owners – Strata Plan No 66375 v King [2018] NSWCA 170 The Owners – Strata Plan No 69567 v Baseline Constructions Pty Ltd (in external administration) [2013] NSWSC 409
Category:	Procedural rulings
Parties:	The Owners – Strata Plan No 90018 (Plaintiff/Applicant) Parkview Constructions Pty Ltd (First Defendant/Respondent) The Quay Haymarket Pty Ltd (Second Defendant/Respondent)
Representation:	Counsel: G A Sirtes SC with D J Byrne (Plaintiff/Applicant)

	M Ashhurst SC with L Corbett (First Defendant/Respondent) S Docker (Second Defendant/Respondent)
	Solicitors: DEA Lawyers Pty Ltd (Plaintiff/Applicant) Mills Oakley Lawyers (First Defendant/Respondent) HWL Ebsworth Lawyers (Second Defendant/Respondent)
File Number(s):	2016/257304

JUDGMENT

1 The plaintiff is the Owners Corporation in respect of a strata title development in Haymarket comprising 286 residential apartments and associated parking and storage spaces.

2 The development was designed and constructed by the first defendant, Parkview Constructions Pty Ltd ("the Builder") pursuant to a contract made on or about 26 September 2012 between the Builder and the then owner of the site, the second defendant, The Quay Haymarket Pty Ltd ("the Developer").

3 The strata plan was registered on 1 September 2014.

4 The building work was completed, and a final occupation certificate issued, on or about 15 December 2014.

5 The work performed by the Builder was "residential building work" for the purposes of the *Home Building Act 1989* (NSW) ("the HBA").[1]

6 It is common ground that the Owners Corporation commenced these proceedings within the relevant time limitation periods in that Act; namely, on 26 August 2016.[2]

7 The matter has not proceeded beyond service of the Owners Corporation's Summons and Technology and Construction List Statement. No List

[1] See the definition in Sch 1 cl 2.

[2] By reason of s 18E of the HBA the time limits on the Owners Corporation to commence proceedings were 16 December 2016 for a defect other than a "major defect" and 16 December 2020 for a "major defect". "Major defect" is defined in s 18E(4).

Responses have been served. No orders have been made for disclosure of documents or for the service of evidence.

8 There have, however, been extensive discussions between the parties. Many defects in the common property of the development have been rectified.

9 The current List Statement alleges 85 defects in the common property and that each of those defects was caused by the Builder's breach of "one or more" of the statutory warranties specified in ss 18B(a)-(f) of the HBA.[3]

10 It is agreed that by reason of the combined operation of ss 18C and 18D of the HBA, the Owners Corporation, as successor in title to the Developer, is "entitled to the benefit of the statutory warranties"[4] in s 18B as against the Developer and is "entitled to the same rights" as the Developer had against the Builder "in respect of the statutory warranty".[5]

11 Now, by Notice of Motion filed on 16 July 2021, which on 11 August 2022 I granted leave to amend in accordance with a proposed Amended Notice of Motion dated 9 February 2022, the Owners Corporation seeks to amend its List Statement to:

(a) add a claim against the Builder (but not the Developer) for breach of the statutory warranty in s 37 of the *Design and Building Practitioners Act 2020* (NSW) ("the DBP Act");

(b) add claims concerning the external façade of the building, coatings on the inside face of glass windows in the building and the stair pressurisation systems installed in the two towers and carpark of the building (together, "the New Defects") under ss 18C and 18D of the HBA; and

(c) no longer press the claims for the 85 defects to which I have referred at [9] above, which defects, I infer, have either been rectified or are not pressed.

The proposed amendment to include a claim under the DBP Act

12 Mr Ashhurst SC, who appeared with Mr Corbett for the Builder, accepted that the Owners Corporation's proposed DBP Act claim is, at least arguably, brought within time. Mr Ashhurst also accepted that any prejudice occasioned to the Builder by the timing of the Owners Corporation's application to include a

[3] List Statement at C23.
[4] Section 18C(1).
[5] Section 18D(1).

claim under the DBP Act is not significant. That is because, as Mr Ashhurst accepted, an action under Pt 4 of the DBP Act is one to which the proportionate liability regime in Pt 4 of the *Civil Liability Act 2002* (NSW) applies.[6] Thus, as the Builder's subcontractors also owed the Owners Corporation the duty of care imposed by s 37 of the DBP Act, the Builder may plead that those subcontractors are concurrent wrongdoers without the need to rely on any contractual claim the Builder might have against those subcontractors.

13 Accordingly, I propose to grant the Owners Corporation leave to bring the DBP Act claim as against the Builder.

14 As I have said, the Owners Corporation does not seek to bring a DBP Act claim against the Developer.

The New Defects: a new cause of action under the HBA?

15 However, Mr Ashhurst submitted that leave should not be granted to the Owners Corporation to amend its claim under the HBA to incorporate a claim in respect of the New Defects.

16 That was because, Mr Ashhurst submitted, the introduction of each new defect would give rise to a new cause of action against the Builder (and also the Developer) in respect of the statutory warranties in s 18B of the HBA, and that such new causes of action are clearly out of time. As Mr Ashhurst put it in oral submissions, there is, he argued, a separate cause of action for each "singular breach of a singular statutory warranty", and that "what the whole Act envisages is that every time you breach a warranty you have a new cause of action".

17 That submission raises a question, not hitherto considered by this Court on a final basis as far as I am aware, as to whether a party in the position of the Owners Corporation seeking to bring proceedings in respect of a breach of a s 18B statutory warranty invokes a different cause of action for each defect in work said to be a breach of the statutory warranties.

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[6] Section 41(3) DBP Act.

18 This in turn raises a question of whether what the parties referred to as the "*Onerati* principle" applies to proceedings for a breach of a s 18B statutory warranty brought by a successor in title under ss 18C and 18D.

19 The parties referred to the relevant principle this way because of its articulation by Giles J (as his Honour then was) in *Onerati v Phillips Constructions Pty Ltd (in liq)*.[7]

20 In that case, Giles J summarised his findings as to the relevant principles as follows:

> "1. In curial proceedings, for the purposes of the principle of res judicata, there is but one cause of action for breach of contract founded upon breach of a promise such as to carry out the work in a good and workmanlike manner. There is not a number of causes of action according to particular defects or classes of defect resulting from the breach.
>
> 2. Accordingly, judgment in one proceedings will be a bar to second proceedings to recover damages with respect to defects or classes of defect not the subject of the first proceedings.
>
> 3. This will be so even where the defects or classes of defects the subject of the second proceedings were not apparent to the plaintiff at the time of the first proceedings."[8]

21 In reaching this conclusion, his Honour considered such authorities as *Conquer v Boot*,[9] in which case the defendant agreed to build a house "in a good and workmanlike manner" and in which it was held that:

> "… there is here but one cause of action – namely, that the defendant having promised properly to complete a bungalow for the plaintiff for a sum of money to be paid on completion, has failed to do what he promised, and that the particulars subjoined in the two actions are merely details of the manner in which he has failed to perform the one contract, and of the damages payable for his breach of it."[10]

22 More recently, in *Honeywood as executrix of the estate of the late Neville Honeywood v Munnings & Anor*[11] Handley JA, with whom Giles JA and Hislop J agreed, held that there was nothing in the text of the HBA that "discloses an intention on the part of Parliament to displace the *Onerati* principle as between

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[7] (1989) 16 NSWLR 730.
[8] At 746.
[9] [1928] 2 KB 336.
[10] At 343-344 (Talbot J).
[11] (2006) 67 NSWLR 466; [2006] NSWCA 215.

the proprietor and the builder"[12] and that, as between those parties, the *Onerati* principle did apply:

> "… because all defects due to poor workmanship and the use of poor materials at different times during construction formed one composite breach of contract when the builder delivered possession of the poorly constructed house".[13]

23 The Court held that, because the homeowners had already sued the builder to judgment for certain defects, they could not later sue the builder for defects which subsequently emerged. It was in response to this decision that ss 18D(2) and 18E(2), to which I will return, were introduced into the HBA.

24 Thus, Mr Ashhurst did not dispute that "as between a homeowner and the builder, who have the common law contract" the *Onerati* principle applies.

25 Mr Ashhurst submitted, however, that the position is different for a party in the position of the Owners Corporation, as the Owners Corporation is not a party to the contract with the Builder into which the s 18B warranties are implied: the Developer being the other party to that contract.

26 As I have said, the Owners Corporation's rights against the Builder and the Developer derive from ss 18C and 18D of the HBA.

27 Section 18C provides:

> "(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."

28 Section 18D(1) 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."

29 Thus, as I have said, as the immediate successor in title to the Developer, that was itself entitled to enforce the statutory warranties implied into its contract with the Builder, the Owners Corporation is:

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[12] At [36].
[13] At [16].

(a) "entitled to the benefit of the statutory warranties" "as if" the Developer had done the work under a contract with the Owners Corporation;[14] and

(b) "entitled … to the same rights" that the Developer had (that is against the Builder) "in respect to the statutory warranty".[15]

30 This statutorily imposed regime has been described as creating a "notional" or "hypothetical" contract between an owners corporation and a developer and builder;[16] although it has also been held to be incorrect to describe the relationship as a "statutorily created contractual relationship" or "something equivalent thereto".[17] Rather, the HBA creates a statutory entitlement, coextensive with the contractual entitlement, as to statutorily implied warranties, already enjoyed by, here, the Developer against the Builder under the original building contract.[18]

31 Mr Ashhurst submitted that as the Owners Corporation's rights under the HBA do not strictly give rise to a claim in contract, the operation of the *Onerati* principle is limited; and, in effect as a consequence of this, each defect now sought to be pleaded would give rise to a new cause of action.

32 There are two decisions of this Court in which it has been accepted, or at least assumed, that, inconsistently with Mr Ashhurst's submission, the *Onerati* principle *does* apply to actions by an Owners Corporation seeking to enforce the rights created by ss 18C and 18D under the "notional contract" against the developer and builder of the property in question.

33 Thus, in *The Owners – Strata Plan 70030 v Decon Australia*[19] McDougall J said:

> "Many of the submissions for the developers … appeared to assume that what was being sought was either to amend, or to plead fresh causes of action. *On the face of things, that does not appear to be correct.* As Giles J said in *Onerati v Phillips Constructions Pty Ltd* (1989) 16 NSWLR 730 at 746, 'there is but one cause of action for breach of contract founded upon breach of a promise such as to carry out [building] work in a good and workmanlike

[14] Section 18C.
[15] Section 18D.
[16] For example The Owners – Strata Plan No 66375 v King [2018] NSWCA 170 at [297] and [324] (Ward JA) (as the President then was), [368] and [380] (Leeming JA) and [390] (White JA).
[17] As I did in The Owners – Strata Plan No 69567 v Baseline Constructions Pty Ltd [2013] NSWSC 409 at [71]; see Baron Corporation Pty Ltd v Owners of Strata Plan 69567 [2013] NSWCA 238 at [49] (Barrett JA).
[18] Baron Corporation Pty Ltd at [49] (Barrett JA, with whom McColl JA and Young AJA agreed).
[19] [2016] NSWSC 19.

> manner. There is not, his Honour said, a number of causes of action according to particular defects or classes of defect resulting from [that] breach.'
>
> I do not think that Mr Davie of Counsel, who appeared for the developers, contested the correctness or applicability of that principle."[20] (Emphasis added.)

34 Mr Ashhurst pointed out that McDougall J's judgment was given ex tempore and submitted that McDougall J had, because counsel for the developers had not contested the point, assumed without deciding that the *Onerati* principle applies to actions to enforce the HBA statutory warranties.

35 I do not read McDougall J's reasons that way. In the passage I have emphasised, his Honour stated that "on the face of things" the submission that the owners corporation in that case was seeking to amend to introduce "fresh causes of action" was "on the face of things" not correct. His Honour appears to me to be here expressing an opinion, albeit perhaps a provisional one. The effect of Mr Ashhurst's submissions was that, if this is the correct reading of his Honour's reasons, his Honour was in error.

36 The issue also arose in my decision in *The Owners – Strata Plan 76841 v Ceerose Pty Ltd*,[21] although in that case it was common ground that the *Onerati* principle *did* apply to actions brought by an owners corporation under ss 18C and 18D of the HBA.

37 Thus, in relation to an application by an owners corporation to amend its List Statement to introduce what the parties in that case referred to as the "Water Ingress Defect", I said:

> "[50] However, the question arises as to whether introduction of the Water Ingress Defect would amount to the introduction of new causes of action.
>
> [51] The Owners Corporation's claim is in contract (albeit relying on the statutory warranties implied by the [HBA]).
>
> [52] In *Onerati v Phillips Constructions Pty Ltd (in liq)* (1989) 16 NSWLR 730, Giles J held at 746 that:
>
> > In curial proceedings, for the purposes of res judicata there is but one cause of action for breach of contract founded upon breach of a promise such as to carry out the work in a good and workmanlike manner. There is not a number of causes of action according to particular defects or classes of defect resulting from the breach.

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[20] At [16]-[17].
[21] [2016] NSWSC 1545.

[53] His Honour followed the decision in *Conquer v Boot* [1928] 2 KB 336, in which Sankey LJ said:

> The cause of action here is: (1.) the contract to complete in a good and workmanlike manner a bungalow, and (2.) the breach of it. I do not think that every breach of it – every particular brick or particular room that is faulty – gives rise to a separate cause of action. I am of the opinion that the cause of action here was the contract and the breach of it… I do not think it is possible to say that every one of these breaches is a separate cause of action. [At 342]

[54] Similarly Talbot J said (at 344):

> There is one contract and one promise to be performed at one time.

[55] Giles J's decision in *Onerati* was followed by the Court of Appeal in *Honeywood v Munnings* (2006) 67 NSWLR 466; NSWCA 215.

[56] It was common ground before me that the same principles apply (as far as concerns res judicata) in relation to the warranties implied into building contracts under s 18B of the [HBA].

[57] The Owner's Corporation's claim is for breach of those statutory warranties, that is a claim in contract, and the Owners Corporation now purports to add the Water Ingress Defect as a particular of that claim.

[58] Mr Miller submitted that '[t]he judgment in *Onerati* said nothing about limitations and when a cause of action accrues in contract' and drew attention to an observation to this effect by Sackar J in *Lane Cove Council v Michael Davies & Associates* [2012] NSWSC 727 at [59].

[59] It is true that cases such as *Conquer v Boot* and *Onerati* were concerned with the doctrine of res judicata and dealt with circumstances where a party to a building contract had sued a builder to judgment, and then sought to bring further proceedings arising from later discovered defects.

[60] However, it seems to me that if there is 'but one cause of action for breach of contract' (per Giles J at [52] above) for the purposes of the doctrine of res judicata, the same must be true for the purposes of the law of limitation. That is because both are concerned with whether a right to bring a cause of action has been extinguished.

[61] McDougall J proceeded on this basis in *Owners Strata Plan 70030 v Decon Australia* [2016] NSWSC 19. As in this case, his Honour was dealing with an application for leave to amend a claim for breaches of the statutory warranties under s 18B of the [HBA] and to add further allegations of defective work. His Honour stated:

> Many of the submissions of the developers … appeared to assume that what was being sought was either to amend, or to plead fresh causes of action. On the face of things, that does not appear to be correct. As Giles J said in *Onerati* … at 746, 'there is but one cause of action for breach of contract founded upon breach of a promise such as to carry out [building] work in a good and workmanlike manner.' There is not, his Honour said, 'a number of causes of action according to particular

defects or classes of defect resulting from [that] breach'. [At [16]]

[62] That being so, it is at least arguable that the addition of the Water Ingress Defect to the Owners Corporation's claim does not introduce a new cause of action and that considerations such as those which concerned Ward J (as her Honour then was) concerning s 65 of the *Civil Procedure Act* in *Dymocks Book Arcade Pty Ltd v Capral Ltd* [2011] NSWSC 1423 (especially at [23] ff) do not arise here. In *Dymocks* her Honour was dealing with a claim in negligence, not contract. Accordingly the *Onerati* point did not arise for consideration.

[63] For those reasons, I would not have refused the Owners Corporation leave to introduce the Water Ingress Defect on a limitations basis (although I may, as a precaution, have ordered that the amendment date only from the date of the application to amend, and not from the commencement of the proceedings)."

38 Mr Ashhurst submitted that, for the reasons I have recorded above,[22] the concession I recorded at [56] was wrongly made, at least in so far as it related to claims made under ss 18C and 18D of the HBA.

Causes of action for breach of the HBA statutory warranties

39 The statutory warranties are created by s 18B of the HBA which provides:

"(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

[22] At [17], [25] and [31].

> 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."

40 The effect of s 18B is thus to imply into any residential building contract, and in this case into the building contract between the Developer and the Builder, the six warranties specified in subpars (1)(a)-(f).

41 As I have said, by reason of ss 18C and 18D of the HBA, an owners corporation is "entitled to the benefit" of those statutory warranties as against the Developer and is entitled to the "same rights" as the Developer has against the Builder "in respect of" those statutory warranties. This occurs under the "notional" or "hypothetical" contract created by those sections between, here, an owners corporation and its predecessor in title, and the builder with whom that predecessor in title contracted to do the residential building work.

42 Handley JA's reasoning in *Honeywood v Munnings* appears to have proceeded on the basis that, as between the original proprietor and the builder, there is one cause of action for defects caused by any breach of any of the six s 18B statutory warranties. Thus, in the passage I have set out at [22] above, his Honour referred to all the defects having been caused by poor workmanship and the use of poor materials. Although his Honour did not mention the s 18B warranties in terms, these were breaches of the warranties in both ss 18B(1)(a) and (b).

43 In my opinion there are a number of indications in the words used in Pt 2C of the HBA that, as between a successor in title and its predecessor in title, and the builder with whom that predecessor in title contracted, there are in fact six separate causes of action corresponding to each of the six statutory warranties, rather than one cause of action for any breach of any of the warranties.

44 For example, s 18D(2) provides:

> "This section does not give a successor in title or non-contracting owner of land any right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency, except as provided by the regulations."

45 Thus, s 18D(2) provides that s 18D does not give a party in the position of the Owners Corporation (as successor in title to the Developer) a right to enforce "a" statutory warranty if "the", that is *the same*, warranty has already been enforced by the Developer in relation to a particular deficiency.

46 The subsection thus contemplates separate enforcement of one or more of the statutory warranties.

47 Section 18E(1) governs the time by which proceedings for a breach of "a" statutory warranty must be commenced, again suggesting a separate cause of action for each warranty.

48 Thus, s 18E(1) provides:

> "(1) Proceedings for a breach of a statutory warranty must be commenced in accordance with the following provisions—
>
> (a) proceedings must be commenced before the end of the warranty period for the breach,
>
> (b) the warranty period is 6 years for a breach that results in a major defect in residential building work or 2 years in any other case,
>
> (c) the warranty period starts on completion of the work to which it relates (but this does not prevent proceedings from being commenced before completion of the work),
>
> (d) if the work is not completed, the warranty period starts on—
>
> (i) the date the contract is terminated, or
>
> (ii) if the contract is not terminated—the date on which work under the contract ceased, or
>
> (iii) if the contract is not terminated and work under the contract was not commenced—the date of the contract,
>
> (e) if the breach of warranty becomes apparent within the last 6 months of the warranty period, proceedings may be commenced within a further 6 months after the end of the warranty period,
>
> (f) a breach of warranty ***becomes apparent*** when any person entitled to the benefit of the warranty first becomes aware (or ought reasonably to have become aware) of the breach." (Emphasis in original.)

49 Section 18E(2) provides:

> "(2) The fact that a person entitled to the benefit of a statutory warranty specified in paragraph (a), (b), (c), (e) or (f) of section 18B has enforced the warranty in relation to a particular deficiency in the work does not prevent the person from enforcing the same warranty for a deficiency of a different kind in the work (***the other deficiency***) if—

> (a) the other deficiency was in existence when the work to which the warranty relates was completed, and
>
> (b) the person did not know, and could not reasonably be expected to have known, of the existence of the other deficiency when the warranty was previously enforced, and
>
> (c) the proceedings to enforce the warranty in relation to the other deficiency are brought within the period referred to in subsection (1)." (Emphasis in original.)

50 Section 18E(2) thus contemplates the separate enforcement of five of the six warranties specified in s 18B (those in subpars (1)(a), (b), (c), (e) and (f)) and the possibility of the further enforcement of "the same" warranty; albeit only in the circumstances specified in s 18E(2)(a)-(c).

51 These provisions suggest that there is a separate cause of action to enforce the promises made in each of the six warranties.

52 Whether there are six separate causes of action for breach of each of the six warranties, or only one cause of action for all breaches of any of the six warranties, I do not see how it can follow that there is a separate cause of action for each individual breach of each of those warranties.

53 On the contrary, there are indications in the wording of ss 18E(1) and 18E(2) that, save as provided by those sections, the *Onerati* principle continues to apply so that there is "but one cause of action" in respect of each statutory warranty.

54 Sections 18D(2) and 18E(2) were introduced into the HBA by the *Home Building Amendment (Statutory Warranties) Act 2006* (NSW) in response to the Court of Appeal's decision in *Honeywood v Munnings*.

55 The Explanatory Note relating to the Bill introducing s 18E(2) into the HBA reads:

> "In the recent decision of the Court of Appeal in *Honeywood as executrix of the estate of the late Neville Honeywood v Munnings & Anor* [2006] NSWCA 215, the Court held that the enactment of Part 2C did not disclose an intention on the part of Parliament to displace a principle applied by the Supreme Court in *Onerati v Phillips Constructions Pty Limited (In liq)* (1989) 16 NSWLR 730 (the ***Onerati* principle**). Application of the principle operates to prevent a person who has previously taken legal proceedings in the Consumer, Trader and Tenancy Tribunal or a court against a contractor for breach of a statutory warranty because of a deficiency in work or materials from bringing further proceedings for breach of warranty in respect of a different deficiency that

> existed at the time of completion of the work. The later proceedings cannot be brought even if the person was not aware of the deficiency concerned at the time of bringing the first proceedings – the deficiencies are treated as one composite breach of warranty.
>
> The object of this Bill is to amend the Principal Act:
>
> (a) to displace the Onerati principle by enabling a person to bring proceedings to recover with respect to several but distinct deficiencies arising from breach of the same statutory warranty providing certain requirements are met, and
>
> (b) to clarify the effect of section 18D of the Act in relation to the entitlement of a successor in title to take the benefit of the statutory warranty of a predecessor in title."[23]

56 Thus, the stated object of the 2006 amendments was to ameliorate the effect of the *Onerati* principle by "clarifying" the effect of s 18D and, by s 18E(2), "displacing" the *Onerati* principle "providing certain requirements are met"; the implication being that if those requirements were not met, the *Onerati* principle would continue to apply.

57 Section 18D(2) displaces the effect of the *Onerati* principle for the benefit of a successor in title as, although the successor in title cannot enforce a particular statutory warranty for the particular deficiency that its predecessor in title enforced, it can otherwise do so. That is, the successor in title can enforce the same statutory warranty for a different deficiency. That provision would not be necessary if the *Onerati* principle did not otherwise apply to the enforcement of a statutory warranty.

58 Section 18E(2) applies more generally. It provides that the fact that any person (an original homeowner or a developer who contracted with the builder, or a party in the position of the Owners Corporation that has the benefit of the statutory warranties by reason of ss 18C and 18D) has enforced the identified five statutory warranties in relation to a particular deficiency does not prevent that person from enforcing "the same warranty for a deficiency of a different kind" provided that the requirements of subpars 18E(2)(a) and (b) are satisfied; that is, in substance, in the case of latent defects.

59 As Mr Sirtes SC, who appeared with Mr Byrne for the Owners Corporation, pointed out, the effect of these amendments was to ameliorate some consequences of the *Onerati* principle but otherwise proceeded upon the

[23] Explanatory Notes, Home Building Amendment (Statutory Warranties) Bill 2006 (NSW).

assumption that the *Onerati* principle applies to actions for breach of the s 18B statutory warranties.

60 All these factors point to the conclusion, in my opinion, that a breach of any of the six s 18B statutory warranties either gives rise to "but one cause of action" in respect of that statutory warranty or, perhaps, as may be implicit in Handley JA's reasoning, "but one cause of action" for breach of the suite of six statutory warranties (in either case, subject to the exceptions provided for in ss 18D(2) and 18E(2)).

61 A particular defect might constitute a breach of more than one of the statutory warranties. And there may be multiple breaches of the one warranty. I do not see that as being inconsistent with this conclusion.

62 I see nothing in the words of the HBA to compel the conclusion that there is a separate cause of action for each defect constituting a breach of one or more of the statutory warranties.

63 It is true, as Mr Ashhurst submitted, that the effect of s 18E(1) is that a party seeking to enforce a statutory warranty must commence proceedings within the relevant warranty period: two years or six years depending on whether the defect is a "major defect",[24] and a further six months thereafter if the breach of warranty becomes apparent within the last six months of the relevant warranty period so that s 18E(1)(e) is enlivened. Warranty periods commence on completion of the work to which it relates.[25] Thus, warranty periods can commence, and perhaps are likely to commence, on different dates, depending on when the work in question was completed.

64 It is also true, as Mr Ashhurst also pointed out, that it is possible for a person to commence proceedings before work is completed, that is, before the warranty period starts.[26] Thus, a cause of action for a breach of a particular statutory warranty can arise before the warranty period commences; for example, if a breach of warranty becomes apparent before completion of the work to which it relates.

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[24] Section 18E(1)(b).
[25] Section 18E(1)(c).
[26] Section 18E(1)(c).

65 However, it does not seem to me to follow from any of these matters that there are different causes of action for each breach of each statutory warranty.

66 The effect of multiple possible warranty periods is that the party entitled to the benefit of the statutory warranty must commence proceedings before the expiry of the earliest relevant warranty period. Thus, for example, a person must commence proceedings for a breach involving a non-major defect within two years from when work in respect of that defect was completed.

67 Where, as here, there is no suggestion that proceedings commenced beyond two years of completion of the works relevant to the New Defects, no warranty period or limitation question arises.

68 Once proceedings are commenced in time, the proceedings can be amended to include new claims and the amendment will date back to the time when the proceedings were commenced; unless the Court otherwise orders.

69 Were separate causes of action to arise in respect of each defect constituting a breach of one or more of the s 18B statutory warranties, alarming consequences would follow. Many building cases involve allegations of multiple, sometimes hundreds, of defects. In this case, a total of 88 defects was alleged. If there were separate causes of action for each defect, a party in the position of the Owners Corporation could sue to judgment in multiple proceedings, perhaps in different jurisdictions having different monetary jurisdictional limits, a builder or developer for defects constituting different breaches of one or more of the statutory warranties. I think it unlikely that Parliament intended this result. The words used by Parliament do not suggest it did.

70 In this case, the Owners Corporation adopts a rolled up pleading as follows:

> "23. Each of the defects in the Common Property was caused by [the Builder's] breach of one or more of the Statutory Warranties.
>
> 24. By reason of the matters in paragraphs C11 to C14 above, as a beneficiary of the Statutory Warranties owed by [the Builder], the Plaintiff is entitled to recover from [the Builder] damages for any loss and damage suffered by the Plaintiff as a consequence of any breach of the Statutory Warranties.
>
> 25. By reason of the matters in paragraphs C15 to C19 above, as a beneficiary of the Statutory Warranties owed by [the Developer] the Plaintiff is entitled to

recover from [the Developer] damages for any loss and damage suffered by the Plaintiff as a consequence of any breach of the Statutory Warranties.

26. As a consequence of the defects in the Common Property in breach of the Statutory Warranties, the Plaintiff has suffered loss and damage."

71 The Owners Corporation thus pleads that each of the defects, now to be confined to the New Defects, was caused by the Builder's breach of "one or more of the Statutory Warranties".

72 The effect of the proposed amendment will be to amend, mutatis mutandis, the presently pleaded causes of action for breach of "one or more of the Statutory Warranties".

73 The effect of the amendment will not be to introduce a new cause of action.

74 My conclusions are as follows:

(1) separate causes of action for breaches of the statutory warranties created by s 18B of the HBA do *not* arise each time there is a defect that constitutes a breach of such warranties;

(2) for each of the six statutory warranties created by s 18B of the HBA there are either single causes of action available to a party entitled by reason of ss 18C and 18D of the HBA to enforce such warranties or, perhaps, but one cause of action for a breach of the statutory warranties taken together;

(3) subject to the specific exceptions created by ss 18D(2) and 18E(2) of the HBA, the *Onerati* principle does apply to claims for breach of those statutory warranties;

(4) the opinion McDougall J expressed in *Decon* was correct, and the concession made before me in *Ceerose* was well made; and

(5) the Owner's Corporation's proposed amendment to its List Statement to include a claim under the HBA in relation to the New Defects has the effect of amending its existing cause or causes of action and does not have the effect of introducing a new cause of action.

75 In those circumstances, Mr Ashhurst accepted that the amendment would date back to the commencement of proceedings and should only be denied if the amendment would unduly prejudice the Builder's ability to meet the claims for the New Defects.

76 Mr Docker, who appeared for the Developer, submitted that the amendment should be on terms that it commences only on 16 July 2021, on which date the Owners Corporation filed its application for leave to amend. I do not accept that

submission. To impose those terms on the amendment would cause the amendment to be futile as it would take effect well after the expiry of the warranty period referred to in s 18E(1) of the HBA.

77 Accordingly, I think the better course is to consider the position of both the Builder and the Developer in terms of whether undue prejudice would be caused to them were the amendment to be allowed such that the amendment should be denied for that reason.

Prejudice

78 As I have said, there have been extensive communications between the parties in the six years since these proceedings were commenced; the result of which is that many defects have been rectified, evidently including all or most of the 85 defects in the current List Statement.

79 The Owners Corporation circulated a proposed Amended Technology and Construction List Statement adding their claims for the New Defects on 3 February 2021.

80 As I have said, the Owners Corporation filed a Notice of Motion on 16 July 2021 seeking leave to amend.

81 Both of these events occurred after the expiry of the “major defects” warranty period on 16 December 2020.

82 The Owners Corporation’s claims concerning the New Defects will involve consideration of the events occurring prior to December 2014.

83 There will always be some prejudice involved in considering events many years past: memories fade, witnesses may disappear, and documents may prove difficult to locate.

84 The Builder has pointed to the fact that staff members who are said to have played a key role in the design and construction of the development project are no longer employed by the Builder, including the Builder’s project manager, site manager, senior contracts administrator, contracts administrator, design manager and construction manager. There is, however, no evidence that any steps have been taken to contact those individuals or as to whether they are or are not available to give evidence on behalf of the Builder.

85 In any event, as Mr Sirtes pointed out, it does seem likely that the issue concerning the New Defects will be determined by reference to expert evidence.

86 I will consider each of the alleged New Defects separately.

Cladding

87 The Owners Corporation has been aware of this alleged defect since 2017.

88 However, the Builder has also been aware of the Owners Corporation's contentions concerning the cladding since March 2018 when the Owners Corporation served a report by RED Fire Engineers Pty Ltd, in which the opinion was expressed that the external façade is combustible.

89 In August 2018, the Builder served a report by Stephen Grubits & Associates Pty Ltd in which the opinion was expressed that the cladding complied with BCA requirements and which suggested various options for amelioration.

90 The Builder's cladding subcontractor was placed into liquidation on 5 April 2016. The Builder's solicitor's enquiries reveal that it is unlikely that the cladding subcontractor had insurance that would have responded to any cross-claim. Thus, even if the Owners Corporation brought its claim about the cladding timeously, it seems unlikely that the Builder had a cross-claim of any value.

91 As Mr Ashhurst pointed out, despite ongoing discussion between the parties, an impasse was reached in May 2020 when the Builder formally denied liability in relation to the cladding issue.

92 It was not until the following year that the Owners Corporation applied to amend its List Statement.

93 Nonetheless, the Builder is equipped with expert evidence to deal with this claim.

Window glazing

94 In October 2020, the Owners Corporation served an expert report from Apex Diagnostics Pty Ltd in respect of the window glazing issue.

95 In July 2021, the Builder served an answering report from Karsai Consulting Pty Ltd. It opined that although it did appear that there were some issues with the window glazing, these were not defects arising from construction but rather are matters for ongoing maintenance.

96 Thus, again, it appears the Builder is equipped with expert evidence to deal with this claim.

Stairwell pressurisation

97 Both the Owners Corporation and the Builder have been aware of this for a number of years. The Owners Corporation became aware of the alleged problem in 2017. In December 2018, the building manager notified the Builder that the stair pressurisation system was not operating properly. The Builder sought the results of pressurisation tests. It achieved some results in 2019 but no further results until the proposed Amended List Statement was circulated in February 2021.

98 The relevant subcontractor used by the Builder in relation to this aspect of the work, Orion Mechanical Services Pty Ltd, is still trading. However, Mr Sirtes accepted that any claim that the Builder might have against Orion in contract is now statute barred. It may be that a claim is still available to the Builder against Orion in tort.

99 Unlike the position in relating to cladding, and window glazing, the Builder has not engaged an expert on this issue, although there was no suggestion made before me that it could not now do so.

Inevitable investigation under DBP Act claim

100 In any event, as there is in substance no contest that the Owners Corporation's claim in relation to each of the New Defects under the DBP Act can proceed against the Builder, it appears likely that the factual circumstances relating to each of the New Defects will be investigated in any event.

101 Although the issues that will arise in relation to the Owners Corporation's claim for breach of the statutory warranties under s 37 of the DBP Act will be different from those that would arise in relation to the Owners Corporation's claim for breach of statutory warranties in relation to the New Defects, the facts relevant

to the existence or otherwise of the defects are likely to be much the same. Thus, any prejudice that the Builder may suffer as a result of the Owners Corporation having leave to amend its List Statement to introduce these claims as part of its HBA claim, is likely to arise in any event by reason of the Owners Corporation's DBP Act claim.

102 The factor does not apply in relation to the Developer because, as I have said, the Owners Corporation does not bring a DBP Act claim against the Developer.

103 However, as Mr Docker fairly accepted, the Developer will doubtless have a cross-claim against the Builder.

Conclusion on prejudice

104 I am not, in these circumstances, persuaded that any likely prejudice to either the Builder or the Developer warrants an order that the Owners Corporation's proposed amendment takes effect otherwise than from the commencement of the proceedings.

Conclusion

105 I order that the plaintiff have leave to file and serve an Amended Technology and Construction List Statement in the form of the document attached to the plaintiff's Amended Notice of Motion of 11 August 2022.

106 I order that the defendants pay the costs of the plaintiff's Notice of Motion on and from 9 February 2022.

107 I grant liberty to apply for a different costs order than specified in [106]; such liberty to be exercised and accompanied by short (no more than a page) written submissions by 5.00pm on 29 August 2022.

108 I stand the matter over for directions on 2 September 2022.

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