

**Owners Corporation I Plan No. PS 650567Y v Shangri-La Construction - [2026]  
VSC 117**

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Content received from court:	March 17, 2026
Download/print date:	March 24, 2026

IN THE SUPREME COURT OF VICTORIA Not  
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COMMERCIAL COURT  
COMMERCIAL LIST

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S ECI 2023 00698

**BETWEEN:**

OWNERS CORPORATION I PLAN NO. PS640567Y & ORS (according to the attached Schedule) Plaintiffs

v

SHANGRI-LA CONSTRUCTION PTY LTD (ACN 130 534 244) & ANOR Defendants  
(according to the attached Schedule)

v

DA QING LEE AND SOEK GAIK NG & ORS Third  
(according to the attached Schedule) Parties

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**JUDGE:** Delany J

**WHERE HELD:** Melbourne

**DATES OF HEARING:** 28 November and 12 December 2025

**DATE OF JUDGMENT:** 16 March 2026

**CASE MAY BE CITED AS:** Owners Corporation I Plan No. PS 640567Y v ShangriLa Construction Pty Ltd

**MEDIUM NEUTRAL CITATION:** [2026] VSC 117

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INSURANCE – Construction of claims made and notified design and construction professional indemnity policy – Insuring Clause – Whether director of Insured building company also an insured – What constitutes a Claim – Whether civil liability incurred in conduct of Professional Business – Thirdparty claim dismissed.

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<b><u>APPEARANCES:</u></b>	<b><u>Counsel</u></b>	<b><u>Solicitors</u></b>
Second Defendant	Mr M Robins KC and Mr S Waldren	Comlaw Barristers & Solicitors
Nineteenth and Twentieth Third Parties	Mr P Murdoch KC and Mr D Briggs	Kennedys

## **Contents**

HIS HONOUR:

### **A. Background**

1. These reasons for judgment are confined to the determination of a thirdparty claim for indemnity brought by the second defendant, Mr Naqebullah, against the nineteenth third party, Certain Underwriters at Lloyd’s Subscribing to Policy Number P0003310PI2017AU1, and against the twentieth third party, Certain Underwriters at Lloyd’s Subscribing to Policy Number P0003310PI2018AU2 (together, ‘the Underwriters’).
2. Two policies of insurance arise for consideration (the ‘Policies’). The Policies were issued by Arch Underwriting at Lloyd’s (Australia) Pty Ltd (‘Arch’) as agent for and on behalf of the Underwriters. The first policy was for a Period of Insurance from 6 August 2017 to 6 August 2018 and was underwritten by the nineteenth third party (‘2017/18 Policy’). The second policy was for a Period of Insurance from 6 August 2018 to 6 August 2019 and was underwritten by the twentieth third party (‘2018/19 Policy’).
3. The trial of this proceeding was scheduled to involve the determination of the claim by the sixtyfourth plaintiff, the State, against Mr Naqebullah and the thirdparty claim by Mr Naqebullah. At the commencement of the trial, the State moved for summary judgment against Mr Naqebullah. That application was not opposed. Following written and oral submissions and the tendering of evidence by the State, and after hearing briefly from senior counsel for Mr Naqebullah and for the Underwriters, those parties comprising the active participants in the proceeding, I informed the parties that I would grant the application for summary judgment. I excused the State from further participation in the proceeding.
4. On 30 October 2025, I gave judgment for the State against Mr Naqebullah in the amount of \$3,174,775.99 (excluding GST), together with interest of \$550,672.14. Those reasons for judgment dated 30 October 2025 were revised and published on 12 November 2025 (‘Primary Reasons’). [\[1\]](#) Enforcement of the judgment obtained by the State against Mr Naqebullah was deferred until the hearing and determination of the thirdparty claim to which these reasons relate. The parties to the thirdparty proceeding accept that they are bound by my factual findings in the Primary Reasons to the extent relevant to disputed questions of indemnity. [\[2\]](#)

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[\[1\]](#) *Owners Corporation 1 Plan No. PS 640567Y v Shangri-La Construction Pty Ltd* [2025] VSC 701.

[\[2\]](#) See *VACC Insurance Ltd v BP Australia Ltd* (1999) 47 NSWLR 716; [1999] NSWCA 427, [\[26\]](#), [\[32\]](#)–[\[34\]](#) (Fitzgerald JA, Meagher JA agreeing at [\[1\]](#)).

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5. These reasons assume a familiarity with and adopt the same definitions and terminology as appear in the Primary Reasons. Where reference is made to words or expressions that are

defined in the Policies upon which the claim by Mr Naqebullah against the Underwriters is based, these reasons should be read as adopting those defined words or expressions unless otherwise stated.

6. The trial of the thirdparty claim took place on 28 November and 12 December 2025.
7. The third-party claim by Mr Naqebullah falls to be determined in accordance with the following pleadings:
  - (a) Mr Naqebullah's third amended thirdparty statement of claim filed 26 November 2025 ('TP Claim');
  - (b) the defence of the nineteenth third party to the further amended thirdparty statement of claim filed 11 November 2024; and
  - (c) the defence of the twentieth third party to the further amended thirdparty statement of claim filed 11 November 2024.
8. Mr Naqebullah relied on:
  - (a) opening submissions filed 23 October 2025;
  - (b) closing submissions filed 8 December 2025;
  - (c) the witness statement of Mr Naqebullah filed 26 November 2025; and
  - (d) the witness statement of Rita Shaya filed 26 November 2025.
9. The Underwriters did not call any witnesses. They relied upon opening and closing submissions filed 23 October 2025 and 8 December 2025, respectively.
10. The disposition of the thirdparty claim raises four questions for determination:
  - (a) Is Mr Naqebullah an Insured under the 2017/18 Policy and/or the 2018/19 Policy?
  - (b) Was there a 'Claim' and notification within the Period of Insurance of the 2017 /18 Policy or the 2018/19 Policy?
  - (c) Is the indemnity sought by Mr Naqebullah 'in respect of any civil liability incurred in their conduct of the Professional Business'?
  - (d) Does the cladding endorsement in the 2018/19 Policy preclude Mr Naqebullah's claim for indemnity?
11. For the reasons that follow, I have determined:
  - (a) Mr Naqebullah is an Insured under the 2017/18 Policy and the 2018/19 Policy.
  - (b) There was no Claim and notification within the Period of Insurance of the 2017 /18 Policy or the 2018/19 Policy.

- (c) The indemnity sought is not in respect of civil liability incurred in their conduct of the Professional Business.
- (d) The fourth question regarding the cladding endorsement is unnecessary to answer.

## **B. The Policies**

12. In the case of each Policy, the ‘Contract’ or ‘Contract of Insurance’ relevantly comprises:
  - (a) a Professional Indemnity Design and Construction Proposal Form (‘Proposal Form’);
  - (b) a Professional Indemnity Certificate of Insurance (‘Certificate of Insurance’);  
and
  - (c) Arch’s policy terms, titled ‘Professional Indemnity Contract of Insurance Design and Construction Civil Liability’ (‘Policy terms’).
13. The 2017/18 Proposal Form was completed by Mr Naqebullah in his capacity as managing director of ShangriLa. The 2018/19 Proposal Form was completed by Ankita Gala in their capacity as Chief Financial Officer of ShangriLa. Although in some respects the answers differed, the questions in the two Proposal Forms and the language of the forms is otherwise relevantly identical.
14. ShangriLa is identified as the Insured in the Certificates of Insurance for both Policies. ShangriLa Design Pty Ltd is also listed as the Insured in the Certificate of Insurance for the 2018/19 Policy.
15. Turning to the Policy terms, the Insuring Clauses are identical across the Policies. The terms are otherwise materially equivalent across the Policies with the exception that the 2018/19 Policy includes a cladding endorsement. Key aspects of the Policy terms are discussed below.
16. Below the document title, the Policy terms state:

The person or persons (referred to as “the Insured”) named in the Schedule on the Certificate of Insurance attached to this Contract of Insurance have made to Arch Syndicate 2012 at Lloyd’s (“Underwriters”), who have subscribed our name(s) to this Contract, a written proposal and declaration, bearing the date stated in the Schedule and containing particulars, representations and statements in reliance on which it is hereby agreed are the basis of this Contract and are to be considered as incorporated in it.

17. The relevant Insuring Clause, set out at clause 1 of Section A (‘Insuring Clause’), states:

This Contract is evidence that in consideration of the payment of the Premium stated in the Schedule, Underwriters will, to the extent and in the manner set out herein:

### **A. Insuring Clauses**

1. **Indemnify** the Insured against any **Claim** first made against any of them, during the Period of Insurance and notified by the Insured to

Underwriters in writing during the Period of Insurance in respect of any civil liability incurred in their conduct of the Professional Business.

18. As appears from the Insuring Clause, the Policies are 'claims made and notified' policies. Where a Claim is first made and notified during the Period of Insurance, indemnity is extended to an Insured in respect of civil liability incurred by the Insured in their conduct of the Professional Business.

19. 'Claim' is defined as meaning:

- (a) any Writ, Summons, Application or other originating legal or arbitral process, crossclaim, or counterclaim served upon any Insured alleging a breach of professional duty in the conduct of the Insured's Professional Business;
- (b) any demand alleging any civil liability or breach of professional duty by the Insured in their conduct of the Professional Business communicated to an Insured by whatever means.

All Claims arising from the same act error or omission, or consequent upon or attributable to one source or original cause, shall be deemed to be a single Claim.

20. 'Insured' is relevantly defined to mean:

- (a) the person(s), principal(s), members of the partnership, directors, company or corporation, statutory authority, association or the legal entity specified in the Schedule and Employees thereof being the basis of this Contract, and their predecessors in the Professional Business;
- (b) any person who becomes, during the Period of Insurance, a partner, director, or Employee of the Insured, but in each case solely in respect of work carried out for or on behalf of the Insured and in the conduct of the Professional Business;

21. 'Professional Business' is relevantly defined to mean one or more of the following services:

- (a) design, including advice in relation to design, in accordance with all relevant building, construction or engineering codes and standards;
- (b) drafting;
- (c) technical calculation;
- (d) specification;
- ...

PROVIDED always that it is performed by or under the direct supervision of:

- (i) a properly registered engineer, architect or surveyor;

- (ii) a quantity surveyor who is a member of the Australian Institute of Quantity Surveyors; or
- (iii) any other person providing a professional service of a skilful character according to an established discipline, appropriate to the professional services being performed or supervised.

Professional Business does not mean performance or supervision (where such supervision would normally be undertaken by a building contractor) of constructionrelated activities ... by the Insured or its Agent, where such performance or supervision is undertaken in the capacity solely as a building or engineering contractor.

22. Section C of the Policy terms is titled 'Automatic Coverage'. Under this heading, the terms state:

This Contract subject otherwise to its terms, conditions, limitations and exclusions includes cover for any Claim first made against the Insured during the Period of Insurance and notified by the Insured to Underwriters in writing during the Period of Insurance ...

23. Section C comprises 13 numbered clauses. Clause 7, upon which Mr Naqebullah placed reliance, is titled 'Continuity'.
24. Section E of the Policy terms is titled 'Exclusions'.

### **C. The pleadings and the Primary Reasons**

25. At the trial of the thirdparty proceeding, the parties adopted different positions concerning the importance or otherwise of the pleadings between the State and Mr Naqebullah and the Primary Reasons. In particular, the parties disagreed as to the extent to which those pleadings and the Primary Reasons limited the determination of disputed questions of indemnity.
26. The Underwriters contended questions relating to indemnity should be approached strictly through the lens of the pleadings as between the State and Mr Naqebullah and the findings in the Primary Reasons. Mr Naqebullah argued for factual findings beyond those in the Primary Reasons in support of his claim to be indemnified.
27. Mr Naqebullah advanced an approach that brings into account a claim made against ShangriLa by the OC in 2017, prior to the legislative amendments in 2020 upon which the State relied to obtain its judgment.

#### **C.1 The Primary Reasons**

28. Noting that the parties accept they are bound by the Primary Reasons, it is convenient to reproduce the following paragraphs of those reasons: [\[3\]](#).

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[\[3\]](#) *Owners Corporation 1 Plan No. PS 640567Y v Shangri-La Construction Pty Ltd* [2025] VSC 701, [\[2\]](#), [\[11\]](#), [\[16\]](#), [\[21\]](#), [\[24\]](#)–[\[25\]](#), [\[48\]](#), [\[51\]](#)–[\[55\]](#), [\[60\]](#)–[\[61\]](#), [\[63\]](#)–[\[64\]](#), [\[71\]](#) (citations omitted).

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2 The State brings this proceeding against Mr Naqebullah pursuant to s. 137F(3) of the *Building Act 1993* (Vic) (‘*Building Act*’). Section 137F relevantly provides:

**137F Subrogation**

- (1) This section applies if—
- (a) after the commencement of this Division, the Authority pays an amount to an owner of a building (the *payee*) by way of financial assistance in relation to cladding rectification work on the building; or
  - (b) before the commencement of this Division, an amount was paid by or on behalf of the Crown in right of the State of Victoria to an owner of a building (the *payee*) by way of financial assistance in relation to cladding rectification work on the building.
- (2) At the relevant time, the Crown is subrogated to all the rights and remedies of the payee against any person in relation to the installation or use of any noncompliant or nonconforming external wall cladding product, or other building work, that required the cladding rectification work to be undertaken.
- (3) If a right or remedy to which the Crown is subrogated under this section is exercisable against an entity that is not an individual, it is enforceable jointly and severally against the entity and the people who were its officers at the time the act or omission that gave rise to the right or remedy occurred.

...

11 The State submitted the only issue that arises for determination so far as it is concerned is whether ShangriLa breached statutory warranties contained in the DBC Act by using and installing EPS Cladding as part of the external façade of the Building.

...

16 In his witness statement Mr Naqebullah states that on or about May 2011, on behalf of ShangriLa, he advised and recommended to Bayside Project Management (‘BPM’) on behalf of MMD Mazor that the design of the external cladding on the Building would comprise of 100mm expanded polystyrene foam panels finished with an acrylic render system. On or

about May 2011 and at a subsequent meeting, the EPS design advice he gave was accepted by Mr Jonathan Hallinan of BPM on behalf of MMD Mazor. Mr Naqebullah was requested by Mr Hallinan to draw the Project Specification that was to be incorporated into the contract.

...

21 The ASOC alleges and the Defence admits there were terms of the contract by operation of s 8 of the DBC Act pursuant to which ShangriLa warranted that:

- (a) all materials to be supplied by the Builder for use in the work carried out under the Contract would be good and suitable for the purpose for which they were used and that, unless otherwise stated in the Contract, those materials would be new (as provided in s 8(b) of the DBC Act); and
- (b) the work under the Contract would be carried out in accordance with, and would comply with, all laws and legal requirements including, without limiting the generality of this warranty, the [Building Act](#) and the regulations made under that Act (as provided in s 8(c) of the DBC Act).

...

24 Section 8(f) of the DBC Act provides:

### **8 Implied warranties concerning all domestic building work**

The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—

...

- (f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

25 The recommendation to use EPS Cladding was a recommendation to use a form of cladding which is not a product permitted for such use by the relevant regulations and codes. The use of EPS Cladding was not

approved as an Alternate Solution by the relevant building surveyor. The use of EPS Cladding was also not in accordance with the approved drawings for construction of the Building.

...

48 The State submitted and I accept that s 137F(3) imposes strict liability on Mr Naqebullah by virtue of his status as an officer of ShangriLa at the time at which there were breaches of the statutory warranties in s 8 of the DBC Act by ShangriLa. Mr Naqebullah's liability does not arise because of any additional, separate or concurrent wrongdoing on his part personally.

...

51 What s 137F(3) requires is that the Court is satisfied that a right or remedy exists that would be 'exercisable' against an entity that is not an individual. The section does not require that the right or remedy is exercised against that entity.

52 I accept the submission that if the Court is persuaded that ShangriLa has breached one or more of the statutory warranties in s 8 of the DBC Act, that satisfies the requirement of the existence of a right or remedy against another entity and, in turn, enables and empowers the State to enforce its right or remedy against Mr Naqebullah personally pursuant to the statute.

53 I accept the proposition, submitted on behalf the State, that if the facts show there has been a breach of one or more of the statutory warranties, there is no substantive defence available to a claim of contravention. No issues as to the exercise or otherwise of reasonable care arise. Strict liability is the order of the day.

54 In *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)*, Judge Woodward (as his Honour then was) referred to *Barton v Stiff*, where Hargrave J (as his Honour then was):

confirmed the principle that a builder's liability for design and construction was not merely an obligation to use reasonable care. In particular, the warranty of fitness for purpose was absolute.

55 Judge Woodward went on to say:

Thus I accept the Owners' submission that the warranties are "not qualified or limited to an obligation to use reasonable care and skill."

...

60 I am satisfied on the evidence that ShangriLa has breached the statutory warranties in ss 8(b) and (c) of the DBC Act.

61 I agree with the State that, consistent with *Lacrosse*, the installation of EPS Cladding is ‘obviously not good or suitable for the purpose of being used in the external walls of a residential building and, therefore, breaches the warranty in s 8(b)’. The failure to comply with the BCA is ‘also sufficient to establish a breach of s 8(c)’. Those breaches of the statutory warranties are admitted on the pleadings.

...

63 I find that ShangriLa breached the statutory warranty in s 8(f) of the DBC Act when carrying out the work under the contract, the purpose of which was the construction of premium quality dwellings. That breach concerned the use of EPS Cladding in circumstances where such use was contrary to the BCA in relation to Type A construction which required external walls of the Building to be noncombustible.

64 The use of EPS Cladding involved the use of cladding which was not fit for purpose and in breach of the warranty in s 8(f). In addition, by installing cladding that did not comply with the performance requirements of the BCA, ShangriLa provided a building that did not meet the minimum standards for public safety.

...

71 The right or remedy to which the Crown is subrogated under s 137F(2) of the **Building Act** is exercisable against ShangriLa for breach of the statutory warranties. ShangriLa is not an individual. In those circumstances, by operation of s 137(3), the right or remedy which is exercisable against ShangriLa is enforceable against Mr Naqebullah, who was an officer of ShangriLa at the time of the act or omission that gave rise to the right or remedy.

## **C.2 Mr Naqebullah’s submissions**

29. Mr Naqebullah submitted the Primary Reasons reflect but do not go further than such findings as were necessary on the case pleaded by the State. Those findings do not exclude Mr Naqebullah from seeking further additional findings of fact where such additional findings are relevant to his entitlement to indemnity and are not contrary to findings in the Primary Reasons.
30. He submitted the crucial consideration is whether the liability as found in the judgment for the State was incurred by him ‘in the conduct by the Insured of the Professional Business’ within the Insuring Clause of either of the Policies, neither of which require a finding or allegation against him of a breach of professional duty. To answer that question demands an inquiry that goes beyond the State’s pleading and the Primary Reasons.
31. In determining whether the alleged claim has a particular character the Court must look at its substance. The manner in which the claim is framed against the insured will not be decisive as to whether the liability falls within cover. In support of that submission, Mr Naqebullah

cited the following passage from *FKP Commercial Developments Pty Ltd v Zurich Australian Insurance Ltd* ('*FKP Commercial Developments*'), where Jagot J said: [\[4\]](#).

*Allianz Australia Limited v Wentworthville Real Estate Pty Ltd trading as Starr Partners (Wentworthville)* [\[2004\] NSWCA 100](#); (2004) ANZ Ins Cas ¶61–598 at [\[45\]](#) said that where an exclusion was for claims of a particular character it was necessary to consider the substance of the claim. In reaching this conclusion, it should be noted that Mason P (with whom Sheller JA and Pearlman AJA agreed) said at [\[23\]](#)–[\[24\]](#):

It is submitted that the court must look at the substance of the claim, not the legal tag or tags which may be attached to it to signify the cause(s) of action, to determine whether the claim attracts indemnity under the policy. The manner in which a claim is framed against the insured will not be decisive as to whether liability falls within cover.

This legal proposition should be accepted. It is supported by the authorities cited by the appellant ...

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[\[4\]](#) [\[2022\] FCA 862, \[90\]](#).

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32. Mr Naqebullah submitted the pleaded form of the State's claim against him does not preclude a finding that his conduct in the Professional Business caused the breach(es) of warranty and thereby the consequent civil liability. It matters not that the State did not formally allege a breach of professional duty by ShangriLa or Mr Naqebullah. The Primary Reasons do not preclude a finding that, although the concurrent liability in s. [137F\(3\)](#) is articulated by reference to a breach of statutory warranties, liability was nonetheless a civil liability incurred in ShangriLa's and Mr Naqebullah's conduct of the Professional Business because it was their conduct in the Professional Business that caused or founded that breach of warranty.
33. He submitted the Primary Reasons expressly acknowledge his evidence that he advised and recommended to the owner that the Building would include EPS Cladding. The unchallenged evidence is that the noncompliant EPS Cladding was installed because of the specification and technical advice (provided under his supervision) that ShangriLa was obliged to provide under the Design and Construct Contract. The only logical conclusion is that it was the conduct by ShangriLa and Mr Naqebullah in the Professional Business that directly caused and led to the civil liability as found.
34. Mr Naqebullah submitted it is not an answer to seek to avoid his evidence by characterising the liability under the statutory warranties as 'strict liability'.
35. Mr Naqebullah does not seek to challenge the ultimate conclusion in paragraph 48 of the Primary Reasons. As a matter of law, his liability does not rest on any wrongdoing on his part. Equally, nothing in the Insuring Clause requires such wrongdoing for the indemnities provided under the Policies to be invoked.

### C.3 Underwriters' submissions

36. The Underwriters submitted that following judgment for the State, Mr Naqebullah's claims for indemnity under the Policies no longer rest on unproven allegations. They are to be determined by reference to the proven facts as found in the Primary Reasons; that judgment being binding on both Mr Naqebullah and the Underwriters. It is not open to Mr Naqebullah in his thirdparty claim to challenge or seek to rewrite the grounds on which the judgment was granted against him. [5]. The absolute nature of the statutory warranties relied on by the State means that it is irrelevant whether ShangriLa or Mr Naqebullah relied on the opinions or advice of others, including where those others are experts.

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[5] In support, the Underwriters cited *VACC Insurance Ltd v BP Australia Ltd* (1999) 47 NSWLR 716; [1999] NSWCA 427, [26], [32]–[34] (Fitzgerald JA, Meagher JA agreeing at [1]).

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37. The State alleged its right of subrogation under s 137F of the *Building Act* (and hence its ability to bring a claim against Mr Naqebullah) arose on 16 December 2020. Several of the facts giving rise to a claim by the State against Mr Naqebullah did not occur until 2020.
38. The Underwriters advanced the propositions below based on the pleadings as between the State and Mr Naqebullah and the findings in the Primary Reasons.
39. First, concerning the State's case:
- (a) The State neither sought nor obtained any judgment or order against the builder, ShangriLa. The State's pleading concerned ShangriLa solely as a party to a domestic building contract.
  - (b) The claim by the State against ShangriLa involved breaches by that company of only some of the DBC Act warranties. The statutory warranties relied on do not include any statutory warranty requiring ShangriLa (or Mr Naqebullah) to exercise reasonable care, skill or diligence or that the building work would be carried out in a proper and workmanlike manner.
  - (c) The State's allegations made in (a) and (b) above were not made for the purpose of securing judgment against ShangriLa but as necessary steps leading to judgment against Mr Naqebullah. It was not part of the State's case, and nor did it allege, that ShangriLa breached any professional duty in the conduct of ShangriLa's Professional Business.
  - (d) As part of its case, the State submitted there is no substantive defence available to Mr Naqebullah to its claim that there has been a contravention of the warranties implied by ss 8(b), (c), (e) and (f) of the DBC Act. That is because the warranties of fitness for purpose and suitability of materials are absolute and are not qualified by or limited to an obligation to use reasonable care and skill.

- (e) All the State needed to demonstrate was that ShangriLa used EPS on the external walls and that it did not comply with the BCA (and therefore the relevant warranties pleaded). Such a finding enabled the State to enforce its right or remedy against Mr Naqebullah personally pursuant to s. 137F(3) of the [Building Act](#).
40. Second, the claim by the State and its case against Mr Naqebullah did not allege any wrongdoing or breach by Mr Naqebullah personally nor did it allege breach by him of his, or of any, professional duty in the conduct of any person's Professional Business.
41. Third, because Mr Naqebullah did not challenge the State's case against him, he is bound by the Primary Reasons, the pleadings and the evidence that establishes the precise nature of his liability to the State:
- (a) That is the only liability Mr Naqebullah now has and is the only liability in respect of which he can seek indemnity under the Policies.
- (b) It cannot be the case that the Policies respond because some demands that are not the demands that led to the liability might have engaged interest in the Policy.
- (c) Even if Mr Naqebullah were an Insured, which is denied, he is precluded from advancing an argument that the claim against him by the State concerned or involved an allegation of breach of professional duty in the conduct of ShangriLa's Professional Business, whether by ShangriLa or by him. The consequence of that is that his case must fail.
42. Fourth, Mr Naqebullah's liability is one that he attracted solely because he was a director at the relevant time of a company whose actions have led to the judgment in favour of the State:
- (a) Section 137F of the [Building Act](#) imposes liability on an officer of a corporate entity where that officer would otherwise have no liability or duty and confers a cause of action that inheres only to, and may only be exercised by, the State and not the Owners. This is the section upon which the State relied to found its claim against Mr Naqebullah.
- (b) The State's claim centred on its claim as subrogee of the rights of the Owners at a particular time to take proceedings pursuant to s 9 of the DBC Act 'as if' it were a party to the building contract.
- (c) Because the State was not a party to the building contract, the State did not bring a contractual claim. It brought a claim made by virtue of the provisions of the statute.
- (d) The State's reliance upon the warranties and contraventions of the DBC Act was reliance only upon warranties concerning the buildings that the builder constructed. The State made no claim against Mr Naqebullah outside its claim based on statutory warranties in s 8 of the DBC Act. The State did not place any reliance on other warranties in the DBC Act that pertained to breaches of duty and breaches of duty of care.

- (e) The warranties described in the Primary Reasons relied on by the State did not involve issues of what Mr Nagebullah or anyone else at ShangriLa did or may have done in the way of making recommendations. All the State needed to prove, and did, was breach of the warranties pleaded. The liability regime in relation to combustible cladding is a strict liability regime.

#### **C.4 Discussion**

43. It goes without saying that the issues on the pleadings between the State and Mr Nagebullah the subject of the Primary Reasons are not the same as the issues raised in the thirdparty proceeding, which fall to be determined on the pleadings in that proceeding.
44. If the submission of the Underwriters is properly understood as saying that a consideration of issues in the thirdparty proceeding may only proceed by reference to the pleadings as between the State and Mr Nagebullah and the Primary Reasons, that submission must be rejected. Provided there is no inconsistency with the Primary Reasons, there is no difficulty if additional factual findings are needed to determine contested questions of indemnity.
45. It may be that the Underwriters are correct and that on a proper analysis the claim requiring consideration for the purposes of determining questions of indemnity is the claim against Mr Nagebullah embodied in the State's amended statement of claim filed 30 July 2024. If that is so, the Primary Reasons which dealt with that pleaded claim (and not evidence of facts and circumstances external to that pleading and to Mr Nagebullah's defence) and the Primary Reasons will be the only materials that are relevant to disputed questions of indemnity. However, to approach the contested questions relating to indemnity on that basis is to assume the Underwriters' approach is correct. It would be to fail to consider and determine the third-party claim by reference to the pleadings in the third-party proceeding and to fail to give appropriate consideration to Mr Nagebullah's submissions.

#### **D. Insurance policy construction principles**

46. Mr Nagebullah advanced detailed submissions concerning the principles to be applied when the Court is called upon to construe a policy of insurance. Those principles are not controversial. It is convenient to refer to them as discussed in Mr Nagebullah's submissions.
47. A policy of insurance, like any other commercial agreement, is to be construed in accordance with the established principles of construction. [6]. The general approach to be taken was conveniently summarised by the Court of Appeal in *MLC Nominees Pty Ltd v Daffy*: [7].

As has been said before, a policy of insurance is a commercial contract and should be given a businesslike interpretation. Interpreting a policy of insurance (like any other commercial document) requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure. That said, it has been recognised that, in cases of ambiguity, a 'liberal approach' will generally be adopted in the construction of insurance contracts. This does not mean, however, that a court can attribute a different meaning to the words of a policy simply because the court regards the meaning as otherwise working a hardship on one of the parties.

- [6] In his written submissions, Mr Naqebullah directed the Court to the following authorities in support: *Alex Kay Pty Ltd v General Motors Acceptance Corporation* [1963] VR 458, 462 (Sholl J); *Legal & General Insurance Australia Ltd v Eather* (1986) 6 NSWLR 390, 394–395 (Kirby P); *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, 589 [22] (Gleeson CJ), 600–603 [74] (Kirby J); *CGU Insurance Ltd v Porthouse* (2008) 235 CLR 103, 116 [43] (Gummow, Kirby, Heydon, Crennan and Kiefel JJ); and *Todd v Alterra at Lloyds Ltd (on behalf of the underwriting members of Syndicate 1400)* (2016) 239 FCR 12; [2016] FCAFC 15, [42]–[43] (Allsop CJ and Gleeson J).
- [7] (2017) 19 ANZ Insurance Cases ¶62-135; [2017] VSCA 110, [66] (Beach and McLeish JJA, Keogh AJA) (citations omitted).

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48. In *Chubb Insurance Company of Australia Ltd v Robinson*, [8] in the course of reviewing the relevant construction principles, the Full Court of the Federal Court agreed with the statements of principle by Beach J in *Todd v Alterra at Lloyds Ltd (on behalf of the underwriting members of Syndicate 1400)*, [9] observing: [10].

[103] Justice Beach delivered a separate judgment in *Todd*. At [71]–[77], his Honour stated several construction principles in respect of policies of insurance as follows:

- (a) The policy must be read and construed as a whole (at [71]);
- (b) Textual analysis is to be given primacy and words and their use must be construed in context and not in a vacuum. Uncertainty and ambiguity in the words used may only be ascertainable once context is first appreciated (at [72]); and
- (c) In construing the policy, the commercial purpose or object to be secured by the policy must be considered (at [76]).

[104] We agree with his Honour’s remarks.

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- [8] (2016) 239 FCR 300; [2016] FCAFC 17.
- [9] (2016) 239 FCR 12; [2016] FCAFC 15.
- [10] *Chubb Insurance Company of Australia Ltd v Robinson* (2016) 239 FCR 300; [2016] FCAFC 17, [103]–[104] (Foster, Robertson and Davies JJ).

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49. In *Bank of Queensland Ltd v AIG Australia Ltd*, Bathurst CJ considered a policy of insurance as a commercial contract, on the basis that it should ‘be construed by asking what a reasonable businessperson would have understood the relevant terms to mean’. [11]. That task is to be undertaken by reference to the text, context and purpose of the agreement. [12].

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[11] [2019] NSWCA 190, [3]. See also at [61] (Macfarlan JA).

[12] *Bank of Queensland Ltd v AIG Australia Ltd* [2019] NSWCA 190, [3] (Bathurst CJ).

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50. In *AIG Australia Ltd v Kaboko Mining Ltd*, the Full Court of the Federal Court observed the following as to definition provisions in an insurance policy: [13].

In addition it must be recognised that usually definitions do not have substantive effect. They are not to be construed outside of the operative provisions to which they apply. Where there is an issue as to the proper construction of an operative provision in a commercial instrument then the provision should be read by inserting the definition into the provision. The same principles as to construing definitional provisions as stated in the context of the proper construction of statutes ... apply to the construction of commercial instruments ...

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[13] [2018] FCA 2055, [43] (Allsop CJ, Derrington and Colvin JJ) (citations omitted).

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51. Finally, the following statement by Gibbs CJ in *Australian Casualty Co Ltd v Federico* is to be noted: [14].

The ordinary rules of interpretation apply to a policy of insurance. As in the case of any other commercial contract, a court may depart from the strictly literal meaning of a particular expression to place upon it an alternative construction which is more reasonable and more in accord with the probable intention of the parties if the words will bear that construction ... Further “the trend is, if anything, to adopt a liberal interpretation in favour of the assured, so far as the ordinary and natural meaning of the words used by the insurers permits this to be done ...”

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[14] (1986) 160 CLR 513, 520 (citations omitted).

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### **E. Is Mr Nagebullah an Insured?**

52. Mr Nagebullah alleges that both Shangri-La and he personally (as director of Shangri-La when carrying out work for and on behalf of Shangri-La and in the conduct of the Professional Business) are the Insured within the meaning of the Policies.

53. The Underwriters admitted ShangriLa was an Insured but did not admit that Mr Naqebullah is an Insured. They submitted the plain meaning of the definition of ‘Insured’ is that the entity specified in the Schedule on the Certificate of Insurance and, where applicable, its employees are the Insured.
54. Mr Naqebullah is not named as an Insured in either Proposal Form or in either Certificate of Insurance. To determine whether, nevertheless, Mr Naqebullah is an Insured, it is necessary to consider the documents that constitute the Contracts of Insurance. That is, the Proposal Forms in reliance on which, as stated in the Policy terms, the Underwriters subscribed their names to the Contract, the Policy terms, including the definition of ‘Insured’, and the Certificates of Insurance.
55. It is clear from these documents, viewed objectively, that the parties to the Contracts of Insurance intended for any directors of the Insured company to be an Insured under the Policy, without their names appearing on the Certificate of Insurance.
56. Turning first to the Proposal Forms, I accept the submission by Mr Naqebullah that if a question in an insurance proposal is ambiguous or vague, any such ambiguity or vagueness is to be read against the insurer and not the insured. [\[15\]](#).

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[\[15\]](#) *Ristorante Ltd v Zurich Insurance Plc* [2021] EWHC 2538 (Ch), [\[34\]](#)–[\[36\]](#) (Snowden J). See also *Revell v London General Insurance Co Ltd* (1934) 50 Ll L Rep 114, [116](#) (MacKinnon J).

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57. The opening words of the Proposal Forms specify that they must be completed by a ‘Partner, Principal or Director of the Firm or Company’. In this case, that is a director of ShangriLa.
58. Question 1 of the Proposal Forms does not invite the person completing the form to name the directors of the company or the members of the firm, if any, that are intended to be included under the cover being applied for.
59. Question 1(a) requires the name of the ‘Firm, Company or Sole Practitioner’ intended to be included under the insurance cover. The question also includes the following prompt: ‘It is essential that you specify the names of all Entities, including Service Companies, that you wish to be included under this insurance cover’.
60. Question 1 does not state that if specified in the Proposal Form, such ‘Entities’ will appear in the Schedule on the Certificate of Insurance. A director of a company is not an ‘Entity’. Neither question 1(a) or the Proposal Forms more broadly instruct or advise the person completing the form to list directors if it is desired to insure those persons. I reject the submission by the Underwriters that if the person completing the form wished to specify the directors of a company as an Insured, they would need to say so on the Proposal Form. Question 1 cannot be understood as a call for specific individual directors to be listed.

61. As stated at the outset of the Proposal Forms, the questions are required to be answered to enable a quotation to be given. It is correct, as submitted on behalf of the Underwriters, that the Policies are not directors and officers policies. While that is the case, a number of the questions in the Proposal Forms are directed to the professional qualifications, experience and status of the directors. Separate questions are directed to the qualifications of staff. The purpose of those questions, concerning both the directors and the staff, is to enable the insurer to evaluate the risk of entering into the policy. That is, the risk of indemnifying those persons individually, being the directors and the relevant employees of the company, and also the risk of indemnifying the company itself. The commercial context of providing insurance cover for directors and employees involved in the provision of professional services provides the reason for these and other like questions.
62. Each of the following questions seek information about the directors which is pertinent to the risk of providing the directors with cover:
- (a) Question 1(c) requires the person completing the form to not only state the address(es) of the company but also to specify which director is responsible at each location.
  - (b) Question 2(a) requires particulars of all directors, including their name, age, qualifications, the date those qualifications were obtained and their years practising as a director in the current business practice as well as in previous business practices.
  - (c) Question 2(b) requires the person completing the form to say whether any director is a member of a professional body or association and, if so, to provide their details and membership status.
63. Question 3 requests the total number of staff, excluding directors, across various categories. Question 4 then requires details of all technical staff employed to carry out the professional services, including their age, qualifications, date qualified, time employed and disciplines undertaken.
64. I agree with the submission by Mr Naqebullah that questions 3 and 4 proceed on the assumption that directors were always intended to be included in the persons proposed to be insured. The details sought about staff, who the Underwriters agree are covered, are similar to those sought regarding the directors.
65. Question 5 asks for a 'clear description' of the intended Insured's professional services in full. That question does not limit the information sought to the professional services provided by the technical staff identified in the answer to question 4. Rather, question 5 is directed to a comprehensive description of the professional services provided by the company. The reasonable businessperson would anticipate the reference to 'professional services' to be a reference to the professional services provided by the company via its directors, whose qualifications, professional associations and addresses for which those persons are responsible are set out earlier in response to questions 1(c), 2(a) and 2(b), and by the staff, in particular the technical staff, identified in the answers to questions 3 and 4.
66. Question 15 relevantly enquires about financial or other connections or associations of any director. Viewed objectively, that question is seeking information relevant to an assessment

of the risk concerned with insuring those persons on account of their individual financial or other connections or associations. It is not a question focused on the identification and assessment of risk concerning the company or the firm proposed to be insured.

67. Questions 23 to 25 also seek information concerning individual directors, partners and principals, with questions 24 and 25 requiring a response which distinguishes between the position of the company or firm and the position of the partners, principals or directors. Each of these questions is consistent with a director being an Insured under the proposed policy.
68. Turning to the Policy's terms, on a proper construction of the definition of 'Insured', Mr Naqebullah is an 'Insured'. That is the case having regard to the text of the definition, the context in which that definition appears, particularly within the policy wording itself, and to the purpose of the Policies.
69. Looking first to the text, part (a) of the definition is poorly structured and expressed. The placement of commas and the use of the word 'or' before the words 'the legal entity specified in the Schedule and Employees thereof' gives rise to ambiguity.
70. The Underwriters submitted that if it had been intended to afford cover to the directors, in addition to the Employees of the Insured, the Policy could easily have done so by including in part (a) of the definition the words: 'and the directors thereof'. Instead, the definition in the Policies refers to the 'Employees thereof' only.
71. It is true that the wording could have been clearer, including as suggested by the Underwriters, but that does not mean the director, Mr Naqebullah, is not an Insured.
72. The reference in part (a) of the definition to 'directors, company', if given a businesslike interpretation, one which gives effect to the commercial purpose or object to be secured by the Policy, appropriately reads as follows:

directors [of the] company ... the legal entity specified in the Schedule and Employees thereof ...
73. The context in which part (a) of the definition appears supports a construction to the effect that a director at the time of the proposal is an Insured, even though that person is not named in the Schedule.
74. The reference in part (a) to 'Employees thereof', being Employees (as defined in the Policy terms) of the legal entity specified in the Schedule, has the result that there can be no doubt that Employees of the company insured are also Insured persons. Part (b) of the definition extends that cover to an Employee of the Insured who becomes an Employee during the Period of Insurance, and also to any partner or director in the same position.
75. If the Underwriters are correct, a person who was a director at the time of the proposal and who became an Employee during the Period of Insurance will be indemnified, but a person who was a director at the time of the proposal and who remained a director but did not become an Employee would not be covered. Similarly, a person who became a director of the Insured during the Period of Insurance would be covered, but a director of the company intended to be insured identified in response to question 1(c) in the proposal as the person responsible for the company's business at a specified location, would not themselves be an

Insured in relation to activities at that location unless specifically named in the Schedule. Such a construction is not to be preferred in circumstances where the Proposal Forms did not ask or invite in question 1 the identification of any directors of the company to be included under the insurance cover.

76. For the reasons discussed, having regard to the content of the Proposal Forms and to the wording of the Policy terms, Mr Naqebullah is an Insured under the 2017/18 Policy and the 2018/19 Policy.
77. In the alternative, Mr Naqebullah sought to rely on s. 48 of the *Insurance Contracts Act 1984 (Cth)* ('ICA') as the basis of his entitlement to be indemnified as an Insured, submitting that he is a 'third party beneficiary'. The Underwriters submitted that s. 48 does not assist Mr Naqebullah because he is not a third party beneficiary as defined in that section. I do not agree.
78. Section 11 of the ICA defines 'third party beneficiary' as:

under a contract of insurance, means a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends.

79. As is apparent from the Proposal Forms for the Policies, Mr Naqebullah is referred to both by name and in his capacity as the director of ShangriLa. If I am incorrect in my construction of the Proposal Forms and the Policy terms, Mr Naqebullah is a third party beneficiary and is entitled to the benefit of insurance under the Contracts of Insurance by operation of s. 48 of the ICA.

**F. Was there a 'Claim' and notification during the Period of Insurance of the 2017/18 Policy or the 2018/19 Policy?**

80. As stated in the Insuring Clause, the Policies only respond in favour of the Insured 'against any Claim first made against any of them, during the Period of Insurance and notified by the Insured to Underwriters in writing during the Period of Insurance'.
81. The Periods of Insurance under the 2017/18 and 2018/19 Policies expired prior to the coming into operation of the legislation upon which the State relied to found Mr Naqebullah's liability to it. On 1 February 2024, the State obtained orders joining Mr Naqebullah to the proceeding. Notwithstanding that is the case, Mr Naqebullah submitted that his claim is a 'Claim' first made and notified during the Period of Insurance of the 2017/18 Policy or 2018/19 Policy. The Underwriters deny that allegation.

**F.1 The pleadings**

82. In his TP Claim, Mr Naqebullah alleges that ShangriLa and he personally were made aware of the '2017/18 Claim' by the receipt of two letters dated 10 August 2017 from the solicitors for the OC, Tucker Partners Legal ('Tucker Partners'), which, in addition to claiming \$37,418.41 as costs of complying with an emergency order, stated, inter alia, that the OC would have a damages claim against ShangriLa in the future ('2017/18 Claim').

83. Mr Naqebullah alleges the 2017/18 Claim constituted a Claim within the meaning of the Policies.
84. He alleges that by no later than 11 August 2017, ShangriLa notified its insurance broker, CCM Insurance ('CCM'), of the circumstances described in the 10 August 2017 letters and directed its broker to notify the Underwriters of the 2017/18 Claim or, alternatively, of the circumstances likely to result in a Claim ('2017 Circumstances'). Mr Naqebullah pleaded reliance on s. 54 of the ICA in relation to CCM's failure to notify.
85. In the alternative, Mr Naqebullah alleges that if, which is not admitted, notice of the 2017/18 Claim and/or the 2017 Circumstances was not given by CCM to the Underwriters on or about 11 August 2017, or within the Period of Insurance of the 2017/18 Policy, then:
- (a) the letter received by ShangriLa on 19 June 2019 attaching a Building Notice in respect of the Building; and
  - (b) ShangriLa's awareness on or about 2 July 2019 of the commencement of VCAT Proceeding No. BP 1087 of 2019 in respect of the matters the subject of the 2017/18 Claim or, alternatively, the 2017 Circumstances,
- constitute the '2018/19 Claim', which in turn constitutes a Claim within the meaning of the 2018/19 Policy.
86. Separately, Mr Naqebullah alleges that on or about 28 September 2022, he gave notice of a Claim against him personally on the basis of joint and several liability with ShangriLa for the State's claim.
87. At paragraph 42 of the TP Claim, Mr Naqebullah pleads by reference to the 'single Claim' wording found at the end of the definition of Claim in the Policy terms. He pleads that if the Court finds ShangriLa breached the statutory warranties owed to the Owners under the DBC Act and, if he is found to be jointly and severally liable with ShangriLa to the State or severally liable to the State for any or all of the State's claims, then:

...

- c. the State SOC Claim in so far as it is made against each of the Builder and Mr Naqebullah:
  - (a) in so far as it is made against the Builder:
    - A. is a demand alleging civil liability communicated to the Insured on or about 11 August 2017; alternatively
    - B. is a demand alleging civil liability communicated to the Insured on or about June or July 2019;.

### Particulars

Refer to paragraphs 29 to 32 and 32A to 32C  
above.

- (b) in so far as it is made against Mr Naqebullah, is a demand alleging civil liability communicated to the Insured on or about 28 September 2022;

#### **Particulars**

Refer to paragraph 38 above.

- (c) and, in each case, arise from the same act, error or omission, or consequent upon or attributable to one source or original cause and accordingly are deemed to be a single Claim within the meaning of the Arch PI Policies (clause B, Definition of “Claim”) (the **Single Claim**);
- d. any such liability the subject of the Single Claim is a civil liability incurred by the Insured (being the Builder and Mr. Naqebullah) in their conduct of the Professional Business within the meaning of that term in the Arch PI Policies;
- e. the Single Claim is a Claim first made against the Insured during the Period of Insurance under the 17/18 Policy, alternatively the 18/19 Policy, in respect of a civil liability incurred in the conduct of the Professional Business within the meaning of each of those terms in the Arch PI Policies;

#### **Particulars**

Mr. Naqebullah refers to the email sent by Rita Shaya to Enrique Sicurella on 18 July 2019 (10.34 am) together with attachments.

Further particulars may be provided following discovery.

- f. the Single Claim is a *Claim* in respect of which the *Insured* had given notice to the *Underwriters* of the facts that had given rise to the *Claim* as soon as reasonably practicable after the *Insured* had become aware of those facts, but before the expiry of the *Period of Insurance*, under the 17/18 Policy, alternatively the 18/19 Policy within the meaning of those terms in the Arch PI Policies;

#### **Particulars**

Mr. Naqebullah refers to and repeats the facts described in paragraphs 29 to 32L (inclusive) above.

- g. accordingly, the Single Claim is a claim pursuant to which Mr. Naqebullah is entitled to be indemnified in respect of any claim

subsequently made against him from those facts referred to in paragraph 42 (f) above on the same basis and to the same extent as the Builder is so entitled to indemnity.

88. In response to these allegations, the Underwriters plead that no Claim within the meaning of the Policies was first made against Mr Nagebullah in the Period of Insurance covered by either Policy. Separately, picking up the concluding words of the definition of 'Professional Business' in the Policy terms, the Underwriters allege the work the subject of the allegations was not work performed by Mr Nagebullah or by ShangriLa in the conduct of the Professional Business. That is because such work was the performance or supervision (where such supervision would normally be undertaken by a building contractor) of construction related activities, undertaken by Mr Nagebullah or ShangriLa in the capacity solely as a building contractor.

## **F.2 Mr Nagebullah's submissions**

89. Mr Nagebullah submitted that the Underwriters agreed to indemnify the Insured against any Claim first made 'against any of them', that is:

- (a) any Claim first made against any of the Insureds;
- (b) during the Period of Insurance; and
- (c) notified by the Insured to the Underwriters, in writing, during the Period of Insurance.

90. He submitted that parts (a) and (b) of the definition of Claim are to be read independently of one another. In this case, part (b) is engaged because 'a demand alleging a civil liability was made in the conduct by the Insured of the Professional Business communicated to the Insured by whatever means' in 2017.

91. Mr Nagebullah submitted the foundation for the civil liability claim was articulated in the 10 August 2017 letters. The letters included an explicit claim for \$37,418.41, said to be incurred by the OC in complying with an existing emergency order, and a copy of a letter from the City of Monash to the OC dated 24 July 2017, which made it plain that further works would need to be undertaken to make the Building compliant. The 10 August 2017 letters collectively constituted an unequivocal demand by the OC, the first plaintiff in this proceeding, for 'any civil liability' incurred by ShangriLa in the conduct of the Professional Business. The \$37,418.41 claim against ShangriLa was sufficient to satisfy the definition of Claim because the company was itself one of the Insureds.

92. Mr Nagebullah submitted that s 54 of the ICA applies to the failure by CCM to notify the Underwriters of the 2017/18 Claim. However, if the Court does not accept his submission to the operation of s 54 in terms of the 2017/18 Policy, he submits that the Insured have the benefit of the continuity provision under the 2017/18 Policy.

93. On 19 June 2019, ShangriLa received a further letter from Tucker Partners, enclosing a copy of a Building Notice. As admitted by the Underwriters, Arch was informed of that correspondence on 19 June 2019.

94. Mr Naqebullah submitted that, ‘no doubt for proper commercial purposes of their own’, the Underwriters wanted to ensure there would only be one limit of liability under the Policies in respect of a single Claim, which would be of benefit to them. The Policies were crafted accordingly.
95. He submitted the claim made against him and the 2017/18 Claim ‘*arise out of the same act error or omission, or are consequent upon or attributable to one source or original cause*’, namely, the EPS Cladding advice and the drawing of the Specification by Mr Naqebullah. For the purposes of the 2017/18 Policy, these ‘*are accordingly deemed to be a single Claim*’.
96. In closing submissions, Mr Naqebullah identified the demand alleging civil liability against him as having been made when he first received notice of the intention of the State to apply for orders joining him to the VCAT proceeding. On 28 September 2022, he gave notice to the Underwriters of that demand and provided a copy of the proposed points of claim against him seeking damages. He submitted that ‘[t]hat demand is the foundation point for these ThirdParty proceedings’.
97. Mr Naqebullah submitted that the Underwriters determined their position concerning indemnity in respect of the claim before there was any writ or other legal originating process against him. On or about 8 March 2023, the Underwriters adjudicated on his claim, before he was joined to the proceeding. It follows that the claim, the subject of the thirdparty proceeding, falls within the terms of part (b) of the definition of Claim in the Policies.
98. Mr Naqebullah submitted that the claim against him and the claim against ShangriLa constitute a single Claim within the definition in the Policies. ShangriLa could never have undertaken the design and construct contract without having a registered builder as a director. As a qualified and registered domestic and commercial builder, Mr Naqebullah was the officer of the builder responsible for the overall supervision of the preparation of the specification and the provision of technical advice to the owner as part of the discharge of the design and construction contractual obligations of the builder. It follows there is no relevant distinction between the professional services provided by ShangriLa and the professional services provided by qualified individuals who are its officers. Those circumstances establish the ‘connector’ in the words in the definition of Claim in the Policy which create the single Claim. Exactly the same conduct was alleged against ShangriLa as that which created the civil liability of Mr Naqebullah.
99. Mr Naqebullah submitted that it matters not that the details of the personal claim against him were not articulated until September 2022. Nor does it matter that he was first joined to the proceeding in 2024 or that the liability under s. 137F(3) of the **Building Act** was only created when that legislation was enacted. Those matters do not prevent the claim by him falling within the Insuring Clause provided the claim is a civil liability which falls within the single Claim definition, as Mr Naqebullah submits is the case.
100. He submitted that while the State is entitled to point to the physical conditions existing at the end of the build as evidence in support of its claim for breach of warranty, that physical condition does not exist in isolation. The warranted obligation relates to the whole of the

work performed, including design and specification. The physical form of the Building is the result of the conduct of Mr Naqebullah in the Professional Business, in the absence of which, a different physical condition would have existed.

101. Mr Naqebullah submitted the State's judgment against him for civil liability is in respect of the provision of professional services by him in an operational capacity as an officer of the builder. Had he not been intimately involved in the specification and installation of the cladding system, he would not have had the exposure found in the Primary Reasons.
102. The VCAT proceeding was commenced by the Owners on 20 June 2019. The State was joined as a party to this proceeding in November 2023. Mr Naqebullah was joined as a defendant in 2024.
103. Mr Naqebullah submitted that the Underwriters' contentions proceed upon the false premise that the State's subrogation to the claim by the Owners against ShangriLa is a separate and distinct claim from the identical claim against Mr Naqebullah made available through s. 137F of the **Building Act**. This is untenable in light of the role performed by Mr Naqebullah as the director of ShangriLa. Where the liability alleged against Mr Naqebullah is one of joint and several liability with ShangriLa, there is an identity in the claim made initially by the Owners and subsequently by the State in relation to the claim ultimately pleaded against Mr Naqebullah as an officer of the builder. On a proper construction of the Policy terms, there has been a single Claim within the definition in part (b).

### **F.3 The Underwriters' submissions**

104. The Underwriters submitted that the legislative history of s. 137F dictates there was no legal basis for any Claim to be in existence against Mr Naqebullah during the Period of Insurance of either of the Policies. In those circumstances, there could not have been a notification of a Claim by the State against Mr Naqebullah during either of the Periods of Insurance.
105. The Insuring Clause responds to a liability 'incurred' by the Insured. The reference to 'incurred' invites a consideration of how the liability in respect of which indemnity is sought was in fact incurred. Liability may be incurred by a judgment following a legal process initiated by a writ, to which reference is made in part (a) of the definition of Claim. It may be that liability is incurred by agreement or settlement following a demand, being a claim falling within part (b) of the definition of Claim. In this case, Mr Naqebullah's liability was 'incurred' by means of the State's pleaded case and the judgment. It follows that the relevant definition of Claim is the first limb in part (a).
106. The Underwriters submitted that the definition of Claim mandates that the relevant claim alleges a breach of professional duty or civil liability by the Insured in their conduct of the Professional Business. If it does not, as is the case with the State's pleading, the Policies do not respond.
107. Concerning the 'single Claim' contention, Mr Naqebullah does not plead that either the 2017 /18 Claim or the 2018/19 Claim form part of an alleged 'single Claim'. The TP Claim instead treats the Owners' claims against ShangriLa and the alleged (but nonexistent) claim by the State against ShangriLa as claims first made in August 2017 or, alternatively, in June or July 2019. Mr Naqebullah pleads that the State made a separate claim against him, which was first made on or about 28 September 2022.

108. It is alleged that the State's claim against Mr Naqebullah and the State's claim against ShangriLa are deemed, by operation of the aggregation clause in the Policies, to be a 'single Claim'. It is then alleged (notwithstanding the allegation that the claim against Mr Naqebullah was first made on 28 September 2022), that the single Claim was first made in the 2017/18 Policy Period of Insurance or the 2018/19 Policy Period of Insurance.
109. The Underwriters submitted the aggregation provisions of the Policies cannot be used to treat claims made in later policy years as having been made (or notified) in an earlier policy year (as Mr Naqebullah seeks to do).
110. By September 2022, the Periods of Insurance specified in the Policies had long since expired. As confirmed by senior counsel for Mr Naqebullah in closing address, this is not a case where Mr Naqebullah relies on s. 40(3) of the ICA. He relies solely on the operation of s. 54 of the ICA.
111. The TP Claim alleges that the failure of ShangriLa's broker, CCM, to make the initial notification of a Claim in August 2017 or during the Period of Insurance of the 2017/18 Policy is an act or omission to which s. 54 applies. The failure to notify that is pleaded is a failure by ShangriLa to notify the Claim made against it by the OC. That plea relates exclusively to ShangriLa. There is no plea by Mr Naqebullah alleging that s. 54 operates to cure his failure to notify a Claim against him in the Period of Insurance for the 2017/18 Policy or 2018/19 Policy. Nor could there have been a failure to notify by him at that time. The legislation relied on by the State to found its claim against him had not come into existence.
112. Further difficulties arise because no Claim was made by the State against ShangriLa. No plea is made that the OC's claim against ShangriLa and the State's claim against Mr Naqebullah form part of the single Claim. This argument relies on the aggregation provision deeming a Claim made years after the expiry of the Policies to fall within one or other of the applicable Policy years.
113. Even if the case were pleaded differently, s. 54 only operates where a Claim is made within the Period of Insurance but not notified to the insurer. There was not and could not have been a Claim against Mr Naqebullah before the end of the later of the two Periods of Insurance. That being so, s. 54 has no scope of operation.

#### **F.4 Consideration**

114. For the reasons that follow, Mr Naqebullah did not first make and notify a Claim against him during the Period of Insurance of either the 2017/18 Policy or 2018/19 Policy. That includes the making and notifying of a single Claim, as provided for in the concluding words of the definition of Claim.
115. The Policies are 'claims made and notified' professional indemnity policies. It is a requirement of the Policies that an indemnifiable Claim, being a Claim in respect of which civil liability was incurred by an Insured, is both made and notified to the Underwriters within the temporal limits of the Policies.
116. It is a prerequisite to the operation of the Insuring Clause that the Claim is first made against and notified by 'the Insured' within the Period of Insurance. The relevant Insured,

Mr Naqebullah, did not have a Claim ‘first’ made against him within the Period of Insurance of the 2017/18 Policy or within the Period of Insurance of the 2018/19 Policy.

117. Picking up part (a) of the definition of Claim, the originating legal process served on Mr Naqebullah was not served until well after 6 August 2019. As Mr Naqebullah alleges in his TP Claim, the State’s claim against him was made in late September 2022. Because there was no Claim against him at any time during the Period of Insurance, there was nothing for the Insured, Mr Naqebullah, to notify to the Underwriters.
118. If the definition in part (b) of the definition of Claim applies, as Mr Naqebullah contends is the case, there was no demand alleging any civil liability or breach of professional duty against Mr Naqebullah made by the OC or by any other person in relation to cladding issues prior to the expiry of the 2018/19 Period of Insurance. The making of such a Claim before the expiry of the Period of Insurance is required by the Insuring Clause as a precondition for the Policy to respond.
119. There was a Claim first made against ShangriLa during the Period of Insurance of the 2017/18 Policy. The 2017/18 Claim is one falling within part (b) of the definition of Claim. It was a demand that ShangriLa pay \$37,418.41. ShangriLa notified its broker about the demand, however, the broker failed to pass on notification to the Underwriters. If ShangriLa was seeking indemnity, s .54 of the ICA may have assisted it in relation to the failure to notify. However, that failure to notify is not a failure to notify a Claim against Mr Naqebullah.
120. The Underwriters were notified of a further Claim within the Period of Insurance of the 2018 /19 Policy. As is the case with the 2017/18 Claim, the notification of the 2018/19 Claim was not a notification of a Claim against Mr Naqebullah. It was notification of a Claim against ShangriLa.
121. Mr Naqebullah’s submission in closing that notification by him on 28 September 2022 constituted sufficient notification of a Claim, and that a Claim falling within part (b) of the definition was made in relation to which the Underwriters determined their position on indemnity before he was joined to the proceeding, is a submission in support of a case that is not pleaded. The denial of indemnity on 8 March 2023 relied on to found this argument is not pleaded. It is not open to Mr Naqebullah to raise and to seek to rely on a new argument that is not pleaded in support of his case for indemnity.
122. Contrary to Mr Naqebullah’s submissions on the applicability of part (b) of the definition of Claim, I consider that his civil liability was ‘incurred’ in respect of a legal process falling within part (a) of the definition. There was no liability incurred by him in response to the demand first made against him in 2022. After he was joined as a party to the proceeding, he defended the claim against him. Mr Naqebullah only incurred his liability to the State upon it obtaining judgment against him in late 2025.
123. It was not until 16 December 2020 that the State was in a position to avail itself of the statutory right of subrogation in s 137F , upon which it relied to make a claim against Mr Naqebullah.

124. Mr Naqebullah's claim to be entitled to indemnification is not advanced by his submission that the claim against him was alleged to be joint and several with ShangriLa. Section 137F does provide for joint and several liability. However, that section was not in existence during the Periods of Insurance of the Policies.
125. I do not accept Mr Naqebullah's submission that the 2022 claim against him is a 'single Claim', comprising the 2022 claim together with the 2017/18 Claim and/or the 2018/19 Claim. Any such single Claim must be made within the relevant Period of Insurance. That could not have occurred in this case because the relevant legislation did not exist until after the Periods of Insurance of the Policies had concluded.
126. Mr Naqebullah's 'single Claim' submission is correct in that the deeming words at the end of the definition of Claim — which conclude with reference to a 'single Claim' — are intended to limit the liability of the Underwriters where there are multiple Claims consequent upon or attributable to one source or original cause. However, what those words do not do is to extend the operation of the Insuring Clause to more than one Claim arising from the same act error or omission, or consequent upon or attributable to one source or original cause to a Claim first made and notified after the expiry of the Period of Insurance.
127. The 'single Claim' construction for which Mr Naqebullah contends, if adopted, would have the effect that no matter how many years after the Period of Insurance specified in the relevant policy had expired, an Insured (who had not during the Period of Insurance had a Claim made against them) would be covered for a Claim made outside of the Period of Insurance which is notified to the Underwriters, provided the Claim arises from the same act, error or omission, or consequent upon or attributable to one source or original cause, as a Claim that *was* made against another Insured and notified during the Period of Insurance. Such a construction is not supported by the text of the 'Insuring Clause'.
128. Separately, to adopt such a construction would be to defeat the commercial purpose or object of the 'claims made and notified' policies.
129. I do not agree with Mr Naqebullah's submission that it 'matters not that the detail of the personal claim against ... [him] was not articulated until ... September 2022' or that the liability under s 137F was only created when that provision was enacted.
130. I agree with the Underwriters that the word 'incurred', as discussed further in section G of these reasons, invites a consideration of how the civil liability in respect of which indemnity is sought was in fact incurred. In the case of Mr Naqebullah, it was incurred only pursuant to s 137F following the amendments to the **Building Act** relied on by the State to obtain judgment against him.
131. I reject the validity of the submission that because Mr Naqebullah was the registered builder and director of ShangriLa, those circumstances establish the 'connector' in the words of the definition of Claim which create the single Claim. It does not assist Mr Naqebullah to bring his personal circumstances within the definition of a Claim to say that he had a particular role in relation to ShangriLa when there was no claim against him personally falling within the definition of Claim within the Periods of Insurance.

132. In the context of s 137F, the ‘connector’ that exists giving rise to Mr Naqebullah’s liability is Mr Naqebullah in his position as an officer of ShangriLa when statutory warranties were breached by the use and installation of EPS Cladding. If cover were otherwise available in favour of Mr Naqebullah as an Insured in respect of a Claim made against him falling within either of the Policies, which for the reasons discussed it is not, he is not entitled to be indemnified because his liability pursuant to s 137F arose from the ‘performance or supervision ... of constructionrelated activities’. Cover in respect of such activities is excluded by the carve out at the end of the definition of Professional Business.
133. Finally, contrary to the submissions of Mr Naqebullah, the continuity provision pleaded at paragraph 14 of the TP Claim does not operate to extend the indemnity to claims against Mr Naqebullah pursuant to s 137F of the Building Act first made and notified after the expiry of all relevant Period(s) of Insurance. So much is clear from the text of the continuity provision in clause 7.

**G. Is the indemnity sought by Mr Naqebullah ‘in respect of any civil liability incurred in their conduct of the Professional Business’?**

**G.1 Mr Naqebullah’s submissions**

134. Concerning the ‘Professional Business’ of the Insured, Mr Naqebullah submitted so long as one or more of the services identified in that definition is engaged by a claim for civil liability then the Professional Business definition in the Policy is satisfied.
135. Mr Naqebullah submitted that part (iii) of the proviso in the definition of Professional Business applies to his circumstances. Providing services as a registered building practitioner in drafting a specification under a design and construct contract constitutes the provision of professional services of a skilful character, as contemplated by the Policies.
136. He submitted that a domestic or commercial builder is a recognised profession involving the application of skill including the preparation, drafting and implementation of a project specification and the provision of technical advice within the scope of the builder’s expertise. Inherent in the drafting of a specification is that the expertise of the registered builder is responsible for that specification. The selection of materials to be used in the Building was an integral part of preparing the specification. This is reflected by what was ultimately incorporated in clause 10.9 of the project specification concerning cladding.
137. Mr Naqebullah gave technical advice to the thenowner. His role as draughtsman and supervising professional in relation to the preparation of the specification, the stamped final version of which forms part of the building permit documents of 24 November 2011, is explained in his witness statement. His handwriting appears throughout the final version of the specification.
138. As set out by Mr Naqebullah in his witness statement, there was significant preliminary work done on the design and specification prior to the commencement of the building contract. The tender documents included a ‘very brief architectural specification’ only, with cladding being referred to in a ‘very generic’ way. ShangriLa’s design responsibility prior to the commencement of construction related to the preparation of a detailed specification. There was no separate architectural specification prepared. The final specification was the

document signed by the builder and owner on 22 August 2011 and stamped by the Relevant Building Surveyor on 24 November 2011, the same date on which the stage 1 building permit was issued.

139. Mr Nagebullah submitted that the Building was constructed consistently and in accordance with the specification. It was his intention to use the EPS Cladding that was in fact used. If the use of that cladding as specified constituted a breach of the statutory warranties, as found in the Primary Reasons, the builder was therefore liable to the OC for damages as compensation. Through s. 137F, the State has, in effect, indemnified those persons and become subrogated to their rights to claim against the builder. Mr Nagebullah submitted that is a paradigm example of a civil liability incurred by the builder in the conduct of the Professional Business as defined in the Policy.
140. In *FKP Commercial Developments*, the insuring clause in the design and construct professional indemnity insurance policy relevantly stated: [16].

We agree to indemnify the *insured* against *loss* incurred as a result of any *claim* for *civil liability* first made against the *insured* and notified to us during the *period of insurance*, based on the *insured's* provision of the *professional services*.

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[16] [2022] FCA 862, [14] (Jagot J).

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141. Mr Nagebullah submitted that Jagot J's conclusions on the scope and requirements of the insuring clause in *FKP Commercial Developments* are of 'limited value in the present case because the criterion of "based on" is clearly narrower than the criterion of "incurred in" in the Insuring Clause in this case. He submitted the 'incurred in' criterion 'directs the reader to the activity being undertaken by the Insured in the Professional Business and not to the elements of the cause of action' relied on by the claimant.
142. In order to establish his entitlement to indemnity, it is not necessary for Mr Nagebullah to show there is an allegation of breach of professional duty. All that needs to be established is that the civil liability was incurred by the Insured in the conduct of the Professional Business.
143. He submitted that part (b) of the definition of Claim is engaged. It is not an essential requirement of that part that the demand allege a breach of professional duty. It is sufficient that the demand is a demand alleging civil liability by the Insured in their conduct of the Professional Business and communicated to the Insured by whatever means.
144. In *Blakeley v Insurance Australia Ltd* ('*Blakeley*'), the Court of Appeal addressed a very similar insuring clause. [17]. Assuming relevant definitions were inserted, the insuring clause in *Blakeley* stated: [18].

We indemnify the **Insured** ... for any **Civil Liability** to any third party which is incurred by the **Insured** in the conduct of *the business of provision by the Insured of the Professional Services Covered by this Policy: Management Consultancy*.

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[17] (2017) 53 VR 733; [2017] VSCA 378 .

[18] *Blakeley v Insurance Australia Ltd* (2017) 53 VR 733; [2017] VSCA 378, [167] (Ferguson CJ, Whelan and McLeish JJA). See also at [18].

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145. The Court of Appeal held that the purpose of the policy was to provide insurance cover for liability arising out of the management consultancy business, stating: [19].

That is the context in which the policy was entered into by the parties. Understood in that context and with that purpose in mind, the words ‘in the conduct of’ ought not to be given a narrow meaning..

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[19] *Blakeley v Insurance Australia Ltd* (2017) 53 VR 733; [2017] VSCA 378, [171] (Ferguson CJ, Whelan and McLeish JJA).

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## **G.2 The Underwriters’ submissions**

146. The Underwriters submitted that the Insuring Clause responds to a liability ‘incurred’ by the Insured. The reference to ‘incurred’ invites a consideration of how the liability in respect of which indemnity is sought was in fact incurred.
147. The claim by the State against Mr Naqebullah was not a claim in respect of any civil liability incurred in his (or ShangriLa’s) conduct of the Professional Business. The State made no allegation of any breach of professional duty in his (or ShangriLa’s) conduct of the Professional Business. Accordingly, the State’s claim does not fall within the Insuring Clause of the Policies.
148. The Underwriters advanced five reasons why the State’s claim against Mr Naqebullah does not fall within the Insuring Clause.
149. First, Mr Naqebullah’s liability has been established by the Primary Reasons. The State made no claim against ShangriLa under the DBC Act warranties for any civil liability or breach of professional duty in design. Nor was there a claim against Mr Naqebullah for any civil liability or breach of professional duty in design. The unchallenged evidence relied on by the State, forming part of the Primary Reasons, confirms that ShangriLa substituted EPS Cladding for the product that was approved in the building permit documents.
150. Second, Mr Naqebullah’s liability was not incurred ‘in the conduct of ShangriLa’s Professional Business’. His was a strict statutory liability, incurred by him because he was a director of a building company that used a noncompliant cladding product.
151. Third, where liability is established by a legal process, the Policies require that for them to respond, the liability must stem from allegations of breach of professional duty in the conduct of the Professional Business. That was not the case in this proceeding. As accepted in the

Primary Reasons, s. 137F imposes strict liability on Mr Naqebullah by virtue of his status as an officer of ShangriLa at the point in time when ShangriLa breached the statutory warranties. His liability arises regardless of whether he (or ShangriLa) provided any services of a professional kind.

152. Fourth, to the extent that the State sought to establish breaches by ShangriLa as an integer of its claim against Mr Naqebullah, it alleged breaches of only some of the warranties that ShangriLa gave as the builder carrying on construction works under a domestic building contract. The specific warranties the State relied on were concerned with the outcome — what materials were in fact used on the external walls — not with the process. They were not allegations in respect of any civil liability incurred because ShangriLa gave design advice.
153. Fifth, because the claim by the State was based on the warranties given by ShangriLa as the builder under a building contract, the State's claim related to work done by ShangriLa solely in its capacity as builder.

### **G.3 Consideration**

154. The unchallenged evidence of Mr Naqebullah establishes that he provided at least some of the services specified in the definition of 'Professional Business' in the Policies, including the provision of design advice and the preparation of the specification.
155. As a registered building practitioner under the **Building Act** and as a person who completed his Diploma of Building Surveying — while not a registered engineer, architect or surveyor, or quantity surveyor — I accept that Mr Naqebullah provided a professional service of a skilful character according to an established discipline, that of a registered building practitioner, appropriate to the professional services being performed.
156. However, the fact Mr Naqebullah performed such work does not establish that his liability to the State is in respect of any civil liability incurred in his conduct of the Professional Business.
157. The word 'incurred' in the Insuring Clause is critical. I agree with the Underwriters that Mr Naqebullah's liability was incurred by means of the State's pleaded case and the judgment that followed. As appears from the Primary Reasons, that liability was strict liability, no element or part of which required a consideration of Mr Naqebullah's provision of any design, specification or advice services prior to the installation and use of the noncompliant cladding.
158. The right of the State to be subrogated pursuant to s. 137F(2) is a right to be subrogated 'in relation to the installation or use of any noncompliant or nonconforming external wall cladding product, or other building work, that required the cladding rectification work to be undertaken'. As is clear from the terms of that subsection, the State has no right to be subrogated in relation to design services or advice that led to the selection of a noncompliant or nonconforming cladding product. Unsurprisingly, the State's case did not seek to establish liability on the part of Mr Naqebullah on the basis of his advice or involvement in specification or design. Rather, it relied on and proved breach of specific statutory warranties in s 8 of the DBC Act by ShangriLa, as discussed in paragraphs 21, 24, 52, 60 and 64 of the Primary Reasons.
159. Section 137F(3), upon which the State relied in its claim against Mr Naqebullah, provides that if the right or remedy to which the Crown is subrogated is exercisable against an entity

that is not an individual, that right or remedy is enforceable jointly and severally against the entity and the people who were its officers at the time the act or omission that gave rise to the right or remedy occurred. Mr Naqebullah is such a person.

160. The State did not proceed with any claim against the builder, ShangriLa. As I found in the Primary Reasons, Mr Naqebullah's liability did not arise because of any additional, separate or concurrent wrongdoing on his part personally. Section 137F(3) imposed strict liability on him by virtue of his status as an officer of ShangriLa at the time at which there were breaches of the statutory warranties in s 8 of the DBC Act by ShangriLa.
161. The statutory warranties in ss 8(b), (c) and (f) of the DBC Act are concerned with the material supplied by the builder for use in the work carried out under the contract.<sup>[20]</sup> In his defence to the claim made against him by the State, Mr Naqebullah admitted that ShangriLa constructed the Building using EPS Cladding. In the Primary Reasons I found that the use of that cladding contravened the statutory warranties in ss 8(b), (c) and (f) of the DBC Act.

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<sup>[20]</sup> While the State's claim involved allegations of breach of the statutory warranty in s 8(e), I did not consider it necessary as part of the Primary Reasons to determine whether there was such a breach, due to being satisfied that Shangri-La had breached the statutory warranties in ss 8(b), (c) and (f).

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162. As submitted by the Underwriters, the liability imposed by s 137F arose from what was built, not from what was designed or recommended. The statutory liability arose and existed irrespective of the reason why the builder used the nonconforming product.
163. The Policies provide indemnity in respect of civil liability incurred as stipulated in part (a) of the definition of Claim for any legal process alleging breach of professional duty. Mr Naqebullah's liability to the State did not depend in any way upon breach of professional duty by him or by ShangriLa, and no such breach was alleged by the State. The liability imposed by s 137F arose irrespective of whether Mr Naqebullah or anyone else breached their professional duty. For that separate reason, the Policies do not respond.
164. Assuming, contrary to my earlier findings, that:
- (a) part (b) of the definition of Claim applies;
  - (b) the Policies respond to any demand alleging any civil liability or breach of professional duty; and
  - (c) the liability of Mr Naqebullah was incurred in response to the 2022 demand,

he is nonetheless not entitled to be indemnified. That is so because, as referred to earlier, the carve out from the definition of Professional Business states that the definition does not include the 'performance or supervision ... of constructionrelated activities ... by the Insured or its Agent, where such performance or supervision is undertaken in the capacity solely as a building or engineering contractor'. Section 137F is directed to the very activities excluded from cover by the proviso in the definition of Professional Business.

165. At paragraph 16 of the Primary Reasons, I referred to Mr Naqebullah's evidence that he advised and recommended that the external cladding on the Building would comprise EPS. As stated at paragraph 25 of the Primary Reasons, EPS Cladding was not a product permitted for such use by the relevant regulations and codes and was not in accordance with the approved drawings for construction of the Building. The fact Mr Naqebullah made that recommendation and gave that advice is not a matter in respect of which his civil liability to the State was incurred.
166. I reject the submission by Mr Naqebullah that his liability to the State is 'in respect of' civil liability 'incurred in ... [his] conduct of the Professional Business'. His liability pursuant to the statute has nothing to do with work performed by him in the conduct of the Professional Business, being design, advice, drafting and specification work which included specifying the nonconforming product. That is the case by reference to the statutory cause of action upon which the State relied to found Mr Naqebullah's civil liability. It is also so, based on the pleaded case that the State relied on and proved, which forms the basis of Mr Naqebullah's civil liability for which he seeks indemnity under the Policies.
167. While the decision in *Blakeley* supports a generous approach to the words 'in the conduct of', here, the liability of Mr Naqebullah was not 'incurred' in the conduct of the Professional Business as defined in the Policy. Rather, it was a liability incurred by him:
- (a) because, as director, he was an officer of ShangriLa; and
  - (b) in relation to the performance or supervision of construction-related activities which are excluded from cover by the proviso in the definition of Professional Business, being the installation or use of noncompliant or nonconforming cladding.
168. For the reasons discussed above, the indemnity sought by Mr Naqebullah is not indemnity in respect of civil liability incurred in the conduct of the Professional Business falling within the scope of cover under the Policies.

**H. Does the cladding endorsement preclude Mr Naqebullah's claim for indemnity?**

169. In light of my earlier findings, it is unnecessary to determine whether the State's claim against Mr Naqebullah would, in any case, be excluded from cover under the 2018/19 Policy by the cladding endorsement that forms part of that Policy.

**I. Disposition**

170. The thirdparty claim by Mr Naqebullah against the Underwriters is dismissed.
171. Unless by 4:00pm on 20 March 2026 either Mr Naqebullah or the Underwriters file costs submissions of no more than 4 pages contending for different costs orders, I will order that Mr Naqebullah is to pay the costs of the Underwriters of the proceeding on a standard basis, including reserved costs, such costs to be taxed in default of agreement.
172. If costs submissions are filed in accordance with paragraph 171, then the other party (or parties) may file responding submissions of no more than 4 pages by 4:00pm on 26 March 2026.

173. Unless otherwise advised, I will determine any such costs issues on the papers.

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**SCHEDULE OF PARTIES**

S ECI 2023 00698

**BETWEEN:**

OWNERS CORPORATION I PLAN NO. PS 640567Y First Plaintiff

MMD MAZOR CONSTRUCTION PTY LTD (A.C.N. 137 919 147) Second Plaintiff

MICHAEL PRICE Third Plaintiff

JUN ZHU Fourth Plaintiff

BOWEN ZHANG Fifth Plaintiff

CHRISTOPHER BURROWS Sixth Plaintiff

MLK VENTURES PTY LTD (A.C.N. 609 216 186) Seventh  
Plaintiff

YUN FONG WONG Eighth Plaintiff

CHRIS THIRIMANNE Ninth Plaintiff

ANNE THIRIMANNE	Tenth Plaintiff
IAN DAVID KERR	Eleventh Plaintiff
GEORGIA PETROPOULOS	Twelfth Plaintiff
XIAOQING GUO	Thirteenth Plaintiff
WING MUI DIU	Fourteenth Plaintiff
CRAIG HOLMES	Fifteenth Plaintiff
JOANNE HOLMES	Sixteenth Plaintiff
DANIEL BAILEY	Seventeenth Plaintiff
ARTHUR CHRISTODOULAKIDIS	Eighteenth Plaintiff
MELISSA CHRISTODOULAKIDIS	Nineteenth Plaintiff
DAVID DAWSON	Twentieth Plaintiff
RYOKO DAWSON	Twenty-First Plaintiff
ELVIRA ANTONOPOLOUS	

	Twenty-Second Plaintiff
MICTON PTY LTD (A.C.N. 114 115 865)	Twenty-Third Plaintiff
KUANG LEE	Twenty-Fourth Plaintiff
MENGJI XU	Twenty-Fifth Plaintiff
LIK HUI TEO	Twenty-Sixth Plaintiff
YIN CHONG	Twenty- Seventh Plaintiff
SCOTT DOUGLAS MORISON FREEMAN	Twenty-Eighth Plaintiff
HUILIN ZHANG	Twenty-Ninth Plaintiff
HOUSING FIRST LTD (A.C.N. 116 093 004) (Formerly known as PORT PHILLIP HOUSING ASSOCIATION LTD)	Thirtieth Plaintiff
CHATHURIKA SIRIWARDENA	Thirty-First Plaintiff
BLOCKKAR BREAD PTY LTD (A.C.N. 060 395 191)	Thirty-Second Plaintiff
SANJAY ROY	Thirty-Third Plaintiff

PAUL DE BONO	Thirty-Fourth Plaintiff
DAYANG ZHANG	Thirty-Fifth Plaintiff
GRACE GWEE	Thirty-Sixth Plaintiff
VARGHESE KUTTIKADAN	Thirty-Seventh Plaintiff
LING WU	Thirty-Eighth Plaintiff
ASHWINI BHARGAVA (withdrawn from proceeding 20/02/2020)	Thirty-Ninth Plaintiff
PENELOPE ANNE BYRON	Fortieth Plaintiff
THOMAS PAPPAS	Forty-First Plaintiff
CHRISTINE ROBBINS	Forty-Second Plaintiff
GARY LEE WHEELER	Forty-Third Plaintiff
EMMA JANE WHEELER	Forty-Fourth Plaintiff
LEON KAYAYAN	Forty-Fifth Plaintiff

CLAYTON SUPER INVESTMENTS PTY LTD (A.C.N. 164 080 513)	Forty-Sixth Plaintiff
SPIROS KOSTOGLOU	Forty-Seventh Plaintiff
HUE MUN AU YONG	Forty-Eighth Plaintiff
N & A WILKINSON 2 PTY LTD (A.C.N. 168 296 651)	Forty-Ninth Plaintiff
JOHN GREY	Fiftieth Plaintiff
JOSEPHINE GREY	Fifty-First Plaintiff
STEVEN RAYMOND PATTISON	Fifty-Second Plaintiff
CHRISTOPHER GOLDFINCH	Fifty-Third Plaintiff
YANSONG SHEN	Fifty-Fourth Plaintiff
LENIGL PTY LTD (A.C.N. 168 604 233)	Fifty-Fifth Plaintiff
ROBERT SEMMEL	Fifty-Sixth Plaintiff
REGINA SCHMIDT	Fifty-Seventh Plaintiff
KONG CHIANG LEE	Fifty-Eighth Plaintiff

EMILIO FIUMARA	Fifty-Ninth Plaintiff
WILLIAM CHAN	Sixtieth Plaintiff
KERSHAN DIAS	Sixty-First Plaintiff
ANDREW JAMES FAULKS	Sixty-Second Plaintiff
ABBEY DAWN PTY LTD (A.C.N. 156 636 654)	Sixty-Third Plaintiff
THE STATE OF VICTORIA	Sixty-Fourth Plaintiff
- and -	
SHANGRI-LA CONSTRUCTION PTY LTD (A.C.N. 130 534 244)	First Defendant
OBAID NAQEBULLAH	Second Defendant
- and -	
DA QING LEE AND SOEK GAIK NG	First Third Party
FIRDOSH BEHILHOMKI	Second Third Party
PRISCILLA DEWI SISWARA	Third Third Party

YUNG TAN	Fourth Third Party
NANDANA MUDIYANSELAGE	Fifth Third Party
YAN CHEN AND TED-LOOI CHONG	Sixth Third Party
QUOC DAL NGUYEN AND THOA THI KIM CHONG	Seventh Third Party
DIANLONG TRAN	Eighth Third Party
DANXING WU	Ninth Third Party
KUK SUM KELVIN MO	Tenth Third Party
KUANG KING AND HEW NAM TAN	Eleventh Third Party
YIWEN JIN	Twelfth Third Party
JUN LI	Thirteenth Third Party
ZHU CHEN	Fourteenth Third Party
LIN CHEN AND XIYAN HUANG	Fifteenth Third Party

JULIAN SEMMELL

Sixteenth Third  
Party

WAI CHING TSANG

Seventeenth  
Third Party

MR MANAL MASOOD

Eighteenth  
Third Party

CERTAIN UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY  
NUMBER P0003310PI2017AU1

Nineteenth  
Third Party

CERTAIN UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY  
NUMBER P0003310PI2018AU2

Twentieth  
Third Party