Cladding decision highlights need for plaintiff's proof

Strata Plan 92450 v JKN Para 1 Pty Ltd & Toplace Pty Ltd [2022] NSWSC

AUGUST 2022

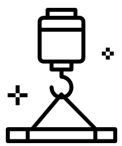
At a glance

- In this matter, an owners' corporation sought $5 million in damages to replace cladding it claimed was combustible.
- The NSW Supreme Court found that the plaintiff had failed to demonstrate that cladding was combustible or that an 'alternative solution' could not be performed to make it comply with the Building Code of Australia.
- While this decision favoured the defendants, it does not provide an escape mechanism for those liable for the use of non-compliant cladding.

Facts

An owners' corporation brought proceedings against an owner/developer (JKN) and design and construct contractor (Toplace) regarding allegedly combustible 'Vitrabond FR' aluminium composite panels (ACPs). The ACPs had been installed as cladding at a residential building located in Parramatta.

The ACPs used on the building are now banned products under the *Building Products (Safety) Act 2017* (NSW). The ACPs are comprised of fire-retardant elements, which would produce an inert compound and water vapour in a fire that would retard combustion. However, the core of the ACPs contained 35% or 40% polyethylene, which was combustible. The owners' corporation sought damages of $5 million, which was the estimated cost of replacing the ACPs.



The owners' corporation's case

The owners' corporation's case was that, in breach of the statutory warranties in the *Home Building Act 1989* (NSW) (HBA), the ACPs did not comply with the Building Code of Australia (BCA). To establish its case, the owners' corporation needed to prove that:

- the ACPs did not comply with the BCA because they are 'combustible' within the meaning of Australian Standard 1530.1, and
- an 'alternative solution' was not available (either at the time the building was constructed or now) to bring the ACPs up to compliance with the BCA.

Compliance with the BCA

The BCA is a complex document intended to define building construction standards. Compliance with the performance requirements of the BCA can be achieved by complying with the 'deemed to satisfy' provisions, by formulating an 'alternative solution', or through a combination of both.

The ACPs did not comply with the 'deemed to satisfy' provisions, and the Court found that no 'alternative solution' had been implemented at the time the building was constructed (possibly because the construction certificate was issued on the incorrect premise that the building complied with the 'deemed to satisfy' provisions of the BCA).

Decision

Justice Black determined that the owners' corporation failed to demonstrate that:

- the ACPs were 'combustible' – notably, there was no evidence of an AS 1530.1 test to demonstrate that the ACPs were combustible. The owners' corporation's expert evidence of combustibility was based on a test certificate that purportedly indicated that the ACPs were combustible. However, the test certificate referred to an unidentified Vitrabond product and the Court did not accept that it proved the particular ACPs used on the building were combustible. The Court also rejected the owners' corporation's reliance on a 2019 product brochure as demonstrating combustibility, and

- an 'alternative solution' could not be performed to make the ACPs comply with the BCA – the owners' corporation conceded that the development of an 'alternative solution' would require cone calorimeter testing to determine the risk of fire spread across the exterior of the building and how fire would adversely impact the building's exits because of the use of the ACPs. The owners' corporation did not undertake the cone calorimeter testing.

As a result, the owners' corporation did not establish a breach of the statutory warranties by JKN or Toplace.

In this case, the owners' corporation's critical failure was that it did not establish through its evidence that an 'alternative solution' could not be prepared. Justice Black held that it was not necessary for JKN or Toplace to prove that there was compliance with the 'alternative solution' path under the BCA in circumstances where the owners' corporation did not establish an affirmative case that an 'alternative solution' was not available at any time.

Finally, Justice Black also:

- rejected the argument that the ACPs were composed of material that is not good and suitable for its purpose (in breach of the statutory warranties) by reason that it is now a banned product under the Building Products (Safety) Act
- accepted that compliance with fire safety requirements regarding a building can be achieved by a retrospective formulation of an 'alternative solution' to produce conformity with the BCA (even if previously incorrectly certified)
- said that, had he found JKN and Toplace liable, the owners' corporation would not have been entitled to an award of $5 million on the basis that the cladding should be replaced in circumstances where the only breach of the BCA established was a failure to perform an 'alternative solution' at the time of construction, and
- indicated[1] that it may be appropriate to consider the evidence regarding section 140 of the *Evidence Act 1995* (NSW)[2], where the allegations against JKN and Toplace were that the building was constructed with combustible cladding that posed a threat to the safety of occupants, because such findings would have significant implications for JKN and Toplace.

Key takeaways for insurers

This decision does not provide an escape mechanism for those liable for the use of non-compliant cladding. This matter was decided on its facts, with the Court requiring the plaintiff to both prove that the materials were not compliant and, if the owners' corporation wanted substantive relief in the form of replacement costs, to also prove that no 'alternative solution' was available.

The decision creates another reminder to ensure that documents underpinning experts' assumptions regarding the compliance of a product relate to the specific product that is the subject of the dispute.

[1] but did not express a final view.
[2] specifically, the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34.

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Need to know more?

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