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Case Alert

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Lacrosse fire litigation: builder and consultants found liable for combustible cladding

Owners Corporation No.1 PS613436T & Ors v LU Simon Builders Pty Ltd & Ors [2019] VCAT 286

AT A GLANCE

- Fires caused by highly combustible 100% polyethylene core Aluminium Composite Panels (ACP) cladding have captured attention worldwide. This is the first decision in Australia dealing with the allocation of responsibility to the builder, and thereafter to building consultants, engaged to construct a domestic high-rise building with combustible ACP cladding.

- In this case the Victorian Civil and Administrative Tribunal upheld the Owners Corporations and lot owners' claims against the Builder following a fire in November 2014 that involved combustible cladding on the building façade. The fire caused significant damage to apartments and the building and resulted in the local authority issuing orders to remove and replace the cladding on the entire building.

- The decision is ground-breaking for a number of reasons, including:

  - affirming that a number of key warranties available to owners of domestic property against builders under the *Domestic Building Contracts Act 1995* (Vic) are non-apportionable. The warranties of suitability of materials, compliance with the law and fitness for purpose are absolute and not qualified by an obligation to take reasonable care. The result is that the Builder was 100% liable for the Applicants' damages claims;

  - identifying the roles and responsibilities of building consultants responsible for the selection, specification, compliance and signoff of combustible ACP cladding; and

  - illustrating that each building professional engaged in a construction project has obligations and responsibilities in the selection, specification, compliance and approval of combustible ACP cladding used on a high-rise building.

- While the decision turns on the factual history of the project and the contracts between the Builder and the building consultants, the Tribunal apportioned the damages payable by the Builder between the other

respondents as follows:

- Fire engineer – 39%
- Building surveyor - 33%
- Architect - 25%, and
- the smoker who started the fire - 3% (which is to be effectively absorbed by the Builder, as the smoker did not participate in the proceeding).

- The Applicants were successful in recovering compensation associated with reinstatement of the fire damage and the Tribunal has ordered the Builder to pay the Applicants $5,748,233.28 in damages based on the findings made yesterday. The Tribunal said that amounts sought by the Applicants associated with removal and replacement of the unburnt cladding ordered to be removed seemed reasonable, but no formal order was made in view of discussions between the parties on those sums. Resolution of the outstanding quantum sums is expected in the near future.
- It is anticipated that the Tribunal's decision will have far-reaching consequences for strata property owners, all building professionals and consultants involved in domestic construction projects that have used combustible ACP cladding, and those parties' respective insurer interests. It will also have a significant influence on the way a number of cladding claims are dealt with moving forward in the market.
- Wotton + Kearney acted for the Applicants.

Background

In the early hours of 25 November 2014, the Melbourne Metropolitan Fire Brigade attended a fire at the Lacrosse Building, Docklands following report of a balcony fire. The firefighters arrived to find the façade of the building engulfed in flames. The fire started from an unextinguished cigarette in a plastic container on top of a wooden table on unit 805's balcony. The fire spread from the table to the southern corner of the balcony where it readily ignited the highly flammable 100% polyethylene core of the aluminium composite panels (ACP) fitted to the building's façade. The fire then rapidly spread up the façade of the building, traversing 13 floors in about 12 minutes. The ACP cladding used on the building was purchased by the builder, LU Simon Builders Pty Ltd (Builder) from Chinese company Shanghai Huayuan New Composite Materials Co Ltd.

The building Owners' Corporations and apartment owners (Applicants) commenced litigation in the Victorian Civil and Administrative Tribunal following the fire by seeking to recover damages associated with the fire damaged units. They also sought to recover the costs for and relating to, removal and replacement of the unburnt ACP cladding that remained on the building, which was ordered to be removed and replaced by the Melbourne City Council.

The Applicants' primary claim was against the Builder, named on the Occupancy Permit under statutory warranties in the *Domestic Building Contracts Act 1995* (Vic) (DBCA), which are largely replicated in other states across Australia.

The Builder in turn claimed against other building consultants responsible for specification of ACP and ensuring its compliance to the building regulations (the architect, fire engineer and building surveyor). The Builder also joined the smoker who lit the cigarette and the tenant of unit 805 for the purposes of apportionment on the basis that they were concurrent wrongdoers who caused the Applicants' loss. Neither of those parties participated in the litigation.

The statutory framework of the Applicants' claims

The Applicants relied on the statutory framework set out in section 8 of the DBCA. Section 8 implied into the Builder's Design & Construct Contract warranties as to:

- Suitability of materials (s.8(b), DBCA);
- Compliance with the law (including the Building Code of Australia (BCA)) (s.8(c), DBCA);
- Fitness for purpose, in this case a 21-storey residential apartment building (s.8(f), DBCA).

The Applicants claimed that, by using the highly combustible ACP cladding on the building that was not fire-resistant and did not meet the performance requirements of the BCA, the Builder breached the warranties in the DBCA causing the Applicants' loss. The Builder then sought to "pass on" the Applicants' claim to the building surveyor, architect and fire engineer under contracts with the developer that were novated to the Builder.

The BCA, and its proper construction, particularly in the context of Section C "Fire Resistance", was also central to the determination of the issues.

The legal issues

The argument advanced and ultimately accepted by the Tribunal in this case was that the ACP cladding installed on the building was non-compliant with the BCA, which prohibits the use of materials that "spread" fire. Rather than avoid the spread of fire in the building as required by the building regulations, the ACP cladding in this case caused a fire that could have potentially remained confined to a small section of the balcony. The fire, instead, spread quickly up the façade of the building and caused significant loss and damage.

The trial, which lasted over six weeks, was mainly concerned with the claims by the Builder against the architect, fire engineer and building surveyor. The Builder argued that those building consultants should have alerted the Builder to the presence of ACP and prevented the use of the non-compliant ACP cladding on the building.

Complex factual issues were raised but ultimately, the arguments condensed to the following key issues:

- Were the warranties in the DBCA pleaded by the Applicants absolute, or apportionable?
- Did the Builder fail to take reasonable care in relation to its selection of Alucobest ACP and installation of that ACP cladding on the building?
- What were the fire engineer's responsibilities? Should the fire engineer have more proactively identified the fire hazards?

- What was the responsibility of the building surveyor, having regard to its legislative role, to establish that the design and materials used on the building complied with the BCA?

- What was the responsibility of the architect that specified the use of "a composite metal panel wall and cladding system indicative to Alucobond manufactured by Alucobond Australia Pty Ltd"?

The decision

LU Simon was held 100% liable to the Applicants for breaching the warranties in the DBCA regarding suitability of materials, compliance with the law, and fitness for purpose. The Tribunal noted in the decision that it was unsurprising that the Builder did not seek to mount a substantive defence to these claims, as there was none. The Applicants had an "unarguable" entitlement to damages.

The Tribunal accepted that the DBCA warranties pleaded by the Applicants were not qualified or limited to an obligation to use reasonable care and skill.

However, the Tribunal found that the damages to be paid by the Builder were 100% apportionable between the following parties:

- Fire engineer: 39%

- Building surveyor: 33%

- Architect: 25%

- Smoker: 3% (as the smoker had not taken part in the proceedings, and judgment had not been sought against him by any party, there was no order made directly against him, such that the Builder would not be reimbursed for this portion).

The Tribunal said that the contractual matrix within which the various building consultants operated was "pivotal in ascribing liability" in this case. The contracts were made between sophisticated, experienced professionals who entered into commercial arrangements and were found to reflect the duty in this case.

In making its determination as between the building consultants and the Builder, the Tribunal emphasised that the level of qualifications and nature of responsibilities held by the building consultants led to a fair expectation that the fire engineer, the building surveyor and the architect (in that order) should have a "better grasp than building practitioners of fire risks and the application of the BCA to those risks".

Moreover, the Builder was relieved of its obligation to exercise reasonable care due to its engagement of those building consultants, each being "an important link in the chain of assurance and compliance with the BCA". The Tribunal placed the Builder into a separate category to the other building consultants, stating that in situations where the skill required is beyond that to be expected of a reasonably competent builder, the builder engages specialist expertise provided by these building consultants to compensate for the builder's "shortcomings". There was also no evidence that the use of Alucobest ACPs sourced by the Builder and installed on the building were materially different to the specification of an ACP "indicative to Alucobond".

The Tribunal held that the fire engineer's omissions were the "highest in the relative importance of the acts of the parties which caused the damage". The fire engineer, being the only building consultant involved that said it knew ACP cladding was non-compliant and a fire risk, was "uniquely placed to raise the red flag on the use of ACPs". It was engaged to provide its specialist expertise in fire safety, and this afforded the fire engineer with

"front line responsibility" for identifying and avoiding potential non-compliances such as the use of ACP cladding.

The Tribunal found that it was "essentially undisputed" that the fire engineer failed to conduct a full fire engineering assessment (which it expressly agreed in its terms of engagement to perform), which at least required some inquiry into and assessment of the range of construction materials for the purpose of establishing potential fire hazards.

The next most culpable building consultant was the building surveyor. The Tribunal found that the building surveyor failed to exercise due care and skill in issuing the Building Permit, which approved the architect's specification of a non-BCA-compliant ACP cladding "indicative to Alucobond". The building surveyor also should have noticed and queried the incomplete description of the cladding systems in the report prepared by the fire engineer.

The ACP cladding was held not to satisfy the "Deemed-to-Satisfy" provisions of the BCA. The Tribunal observed that a building surveyor was "precisely the kind of person who should have appreciated that BCA C1.12(f) could not have been intended to give a concession to a product incorporating a layer of highly combustible polyethylene". The building surveyor attempted to mount a "peer professional opinion" defence, which failed. Indeed, the Tribunal referenced a submission by counsel for the Applicants that the widespread use of a product over time without reported serious incident does not mean it is safe (for example, asbestos).

The architect, held 25% liable to the Builder, tried to argue that the selection of the ACP cladding was ultimately the Builder's responsibility under the Design & Construct contract. However, the Tribunal held that this contractual issue "trumped" all others because although the Builder assumed a number of obligations under that contract with the developer (and not the architect), it did so on the basis that it would ultimately enter into the consultant agreement with the architect. Under the consultant agreement, the architect was responsible for completing the design and coordinating design issues, acting as the head design consultant, and assumed all liability and risk in the design.

The Tribunal dismissed claims by the Respondents that the storage of items on the balcony of apartment 805 contributed to the ignition of the ACP cladding or subsequent fire spread and made no adverse findings against the tenant or Applicants in that regard.

What's of interest

Since the Grenfell disaster in London, combustible ACP cladding has become an issue of critical industry concern to building and apartment owners, the authorities, and the public generally.

As the first decision in Australia that has considered roles and responsibilities of the builder and other building consultants regarding the use of combustible ACP cladding on domestic property, this landmark judgment will inform a wide range of industry participants and their liability and professional indemnity insurer interests, depending upon the extent of coverage. Perhaps most material is the Tribunal's finding of high culpability and apportionment of the building consultants' liability in comparison to the Builder's conduct. The Builder's engagement of the consultants (and the terms on which those consultants accepted their engagement) effectively outsourced the key decision making process with regard to the selection, approval and installation of combustible ACP cladding. The Tribunal criticised the steps taken by the building professionals and in effect gave a loud and clear message that there needed to be more proactive identification of fire hazards.

The recovery by the Applicants included the cost of bringing the unburnt part of the building into compliance, which has important implications for Owners' Corporations and apartment owners in domestic buildings containing non-compliant ACP cladding.

While the Tribunal caveated use of the decision as a general commentary on the use or safety of ACPs generally, a number of aspects of the Tribunal's decision will no doubt inform the way that all stakeholders will look to enforce and defend their rights and interests involving the use of combustible ACP cladding on high-rise construction projects. The decision also has implications for all buildings containing non-compliant or defective items.

Need to know more?

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