

Cladding Claims: Apportioning liability – an Australian Perspective

Owners Corporation No. 1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property) [2019] VCAT 286.

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A fact-specific recent decision by the Victorian Civil and Administrative Tribunal in Australia has found that the contractor was liable to pay damages to the owners of the apartments for the damage caused by a cladding fire, which occurred in November 2014. However, the contractor was successful in passing on the liability to the fire engineer, building surveyor and architect on the project. This is the first decision in Australia to consider the apportionment of responsibility between different parties for the installation of non-compliant combustible cladding.

Background

On 25 November 2014, a fire broke out at the 21-storey Lacrosse Tower in Melbourne, when a resident discarded an unextinguished cigarette on the eighth floor balcony of the building. This led to the evacuation of approximately 400 people.

In only 11 minutes, the fire spread up the external face of the building to the 21st floor, potentially due to the installation of Aluminium Composite Panels ('ACP'), which have been criticised as they consist of a reportedly highly flammable polyethylene core. The panels were also non-compliant with the Fire Resistance specifications in clause CP2 3.1 (b) of the Building Code of Australia ('BCA'), which specifies that in residential high-rise buildings '*external walls must be non-combustible*'.

The BCA places particular emphasis that 'Type A construction' which includes residential high-rise buildings, should be the most fire resistant type of construction. Under the BCA only buildings which are less than 25 meters (Type C) can be constructed using combustible cladding.

In 2016, Owners Corporations and the Strata Apartment Owners of the Lacrosse Building, ('the owners') commenced proceedings against LU Simon Builders PTY Ltd ('the contractor'), to recover the costs of fire damage, and to replace the remaining undamaged external cladding on the building.

Following this, the contractor commenced proceedings against its professional consultants: the fire engineer, building surveyor and architect under indemnities included within their appointments.

The supplier and the manufacturer of the ACPs used on the building were not parties to the proceedings.

Decision

On the 28 February 2019, the Tribunal found that the contractor was liable to pay damages of A\$5,748,233.28. However, it was ordered that the professional consultants should reimburse the contractor almost entirely all these costs in the following proportions:

- The fire engineer: 39%;
- The building surveyor: 33%; and
- The architect: 25%

The remaining 3% was held attributable to the resident, as the incompletely extinguished cigarette was the initial cause of the fire, however it was held that this amount

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would instead be payable by the contractor. This is because the resident did not take part in the proceedings, despite being named as a defendant.

In installing the non-compliant cladding, the contractor breached the implied warranties of suitability of materials and fitness for purpose set out in Section 8 of the *Domestic Building contracts Act 1995 (Vic)*. However, there was no evidence that the contractor: “*did not act reasonably or in accordance with what would be expected of a reasonably competent builder*”.

Instead, it was held that each of the professional consultants had breached their obligations to the contractor under their consultancy agreements and failed to exercise reasonable skill and care. In particular:

- The fire engineer failed to conduct a full engineering assessment of the tower in accordance with the International Fire Engineering Guidelines 2005 and include this assessment in the fifth Fire Engineering Report. Further, there was a failure to recognise that the panels used at the tower did not comply with the BCA, and to advise the contractor or the other professional consultants of this failure and advise of a solution.
- The building surveyor issued a Building Permit for Stage 7 of the construction, which approved the use of ACPs and failed to notice that there was an incomplete description of the cladding system in a report produced by the fire engineer.
- The architect failed to remedy the defects in its design, which gave rise to the design being non-compliant with the BCA and subsequently approved a sample of ACPs.

The original design specified that ‘Alcobond’ panels should be used to construct the Lacrosse Tower. Instead, cheaper ‘Alucobest PE’ panels, which were manufactured in China, were eventually utilised. The judgment found that it was irrelevant which product was used as they were both ACPs with a 100% polyethylene core.

It is expected that final orders, which include costs, will be given in the next few weeks.

Commentary

Fire safety issues surrounding cladding have been reported widely in the press recently and this decision is likely to be appealed by the professional consultants.

In the meantime, and although the Australian judgment has no binding effect on the courts of England and Wales, this decision may be referred to as potential guidance where the facts match those of this case.

The fact that the professional consultants engaged by the contractor were held responsible for the advice that they provided in this case, will be of note to consultants operating in the cladding industry in Australia and potentially more widely.

However, the judge stressed his ruling was fact specific and “*should not be read as commentary generally on the safety or otherwise of ACPs and their uses*”.

This article is only intended to provide general information and should not be relied upon as legal advice.

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