SOCIETY OF CONSTRUCTION LAW AUSTRALIA

28 May 2019

Corrs Chambers Westgarth, Melbourne

Defects on large-scale construction projects – what you need to know following recent cases including Opal and Lacrosse

by

Michael Whitten QC[1] and **Andrew Downie**[2]

of **MTECC**[3]

[1] Michael Whitten QC is a barrister with over 20 years of experience working on many high-profile construction disputes and matters. He is the current Chair of MTECC.
[2] Andrew Downie is a barrister with over 10 years of experience working on construction matters and has worked on many complex construction cases. He is the current Treasurer of MTECC.
[3] Melbourne Technology, Engineering and Construction Chambers (MTECC) comprises leading specialist counsel at the Victorian Bar who practise as barristers, arbitrators and ADR practitioners in technology, engineering and construction law: https://mtecc.com.au/

Introduction

1. The legal, technical and social issues arising from defects in large-scale construction projects are becoming increasingly complex and challenging, not only to consumers and industry, but also to legislators and lawyers alike.

2. This paper considers aspects of the law in relation to defects in construction projects with applications of those principles by case studies on recent large-scale construction projects.

What are defects?

Defects defined

3. There is no precise definition of a defect. Generally speaking, a defect is some element of the design or construction of a structure, or the provision of goods and services, which falls short of what should have been supplied. What should have been supplied is generally defined by the relevant contract, although often, it will include references to external measures such as that provided by the Building Code of Australia (or NCC) and various Australian Standards.

4. Defects can relate to design or construction or both. Since builders often promise to deliver in accordance with their contract and a detailed specification, a defect often means a breach of contract. Design professionals, on the other hand, often promise to perform their works to a particular standard, and therefore a defect in the design may not necessarily mean a breach of that standard.[4] As such, a defect can have different implications for a party's liability depending on whether the defect is in the design or the construction.

[4] *Jennings v Zilahi-Kiss* [1972] 2 SASR 493, 512; *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286, [302].

Construction defects

5. In a building contract, often what is required to be supplied is found in the drawings and specifications. However, sometimes a defect is not as to something explicit in the drawings and specifications.

6. A builder will often warrant that works will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limitation, the *Building Act 1993* (Vic) and the regulations made under that Act.[5] The BCA is made law in Victoria by operation of the *Building Act 1993* and its regulations,[6] and therefore non-compliance with it will be a breach of the law and a breach of a warranty requiring compliance with it.

7. Often also, a contractual specification calling up a particular material for installation, will require installation in accordance with a particular Australian Standard or the manufacturer's instructions, non-compliance with which will also be a breach of the contract.

Design defects

8. A defect in design usually means a non-conformance with a particular standard, since design contracts by their nature do not usually specify exactly what is required as an outcome. Often design contracts will be guided by a general design brief, and that brief will set out the general expectations for the design. As such, a defect in the design will commonly arise out of specifying works and materials that do not comply with the BCA, a particular standard or a regulation. Examples include:

    a. preparing a design for a building that does not account for the correct setbacks in rr 409(2) and 414(2) of the *Building Regulations 2006*;

[5] For instance, see the *Domestic Building Contracts Act 1995* (Vic) (**DBCA**), subsection 8(c) and
[6] *Building Regulations 2018*, r 10.

b. designing a foundation for a home with footings that are not suitable for the particular soil conditions ignoring the requirements of AS2870-2011;

c. specifying a cladding material that is combustible and impermissible for that particular class of building in the BCA.

Patent v Latent Defects

9. A patent defect is something that is apparent when it is built and is observed or observable during any defects liability period. When a purchaser purchases a building with a patent defect, generally speaking, that purchaser is regarded as having taken the defect into account in agreeing the purchase price, and will have therefore suffered no loss as a result.[7] There is inconsistency between New South Wales and Victorian authority on whether the patent defect must have been observed or have been reasonably observable for no loss to have been suffered.[8]

10. A latent defect is something not reasonably observable or observed. It often manifests after the defects liability period, and therefore is something that an owner will commonly raise on a breach of contract or negligence claim.

Limitation periods

11. Since they are hidden, latent defects are at risk of becoming patent after the usual limitation periods - for breach of contract and negligence - 6 years from when the cause of action accrued.[9]

12. These have been modified for building actions because of the difficulties resulting from how a court approaches the question of when a cause of action accrues, which can cause injustice by parties not being able to sue for breach

---

[7] *Allianz v Waterbrook* [2009] NSWCA 224; *Beamish v Rosvoll (Domestic Building)* [2006] VCAT 440; *Bonarrigo v DSF Pty Ltd trading as LaRosa Tiling Company (Domestic Building)* [2012] VCAT 1404.
[8] *Bonarrigo v DSF Pty Ltd trading as LaRosa Tiling Company (Domestic Building)* [2012] VCAT 1404 at [41].
[9] *Limitation of Actions Act 1958* (Vic) s5.

of contract when a defect becomes manifest.[10] In Victoria, there is a 10-year limitation period for building actions running from the date of the occupancy permit or certificate of final inspection having been issued.[11] This extended limitation period is designed to take into account concealed or latent defects that may otherwise be time barred,[12] and provide an outer time limit for claims.

Remedies

13. The remedy for defects claims will often depend on the kind of defect and when it is observed.

Pre-completion defects

14. Where there is a patent construction defect that arises during the term of the contact, whether before or during the defects liability period, a contract will often specify a requirement for the builder to correct any defects on notice being given to it, and if it does not do so, the principal will be entitled to have another contractor carry out the rectification works and recover the costs from the builder as a debt.[13]

15. There is some controversy as to whether a defect arising before completion is a breach of the contract, or, a 'temporary disconformity' that is capable of being corrected prior to completion.[14] A contract may make it clear whether items of work are defects during the works and are required to be corrected as they arise, for instance, by requiring correction of defects during the works and before the defects liability period, in addition to correction of defects during the defects liability period.

---

[10] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 555 [103].
[11] *Building Act 1993*, s134.
[12] *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd* [2014] VSCA 165, [105] and [106].
[13] E.g. see clause 37 of AS2124-1992 and clause 35 AS4000-1997.
[14] *P&M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 WLR 146, 165. Cf *Owners of Strata Plan 80458 v TQM Design & Construct Pty Ltd* [2018] NSWSC 1304.

16. Also, where a contract requires a contractor to perform the works in a proper and workmanlike manner, then this likely renders a defect during the works a breach of the contract. Where a contract only requires the works to be handed over in conformance with the contract, drawings and specifications, then arguably a defect arising before completion is not a breach of contract.

17. Where a design defect on a construct only contract is identified during the works, the correction will often give rise to a variation where it involves different materials and/or methods of construction.

Post-completion defects

18. Where a latent defect manifests after the defects liability period, the contract may or may not govern what is to occur, depending of whether a final certificate has been issued.

19. In any event, as a matter of the builder's contractual right or a principal's obligation to mitigate its loss, a principal may be obliged to require the builder to return to rectify the defect.[15] This will almost always be a less expensive course for both parties, as engaging a third party rectification builder is likely to attract a hefty margin and loading for contingency and risk, and has the potential to blur the demarcation on warranties given in respect of each builder's work.

20. If a builder does not return to fix the defects, then, where the contract is still on foot, the dispute resolution provisions will be triggered. Often, that will lead, absent agreement, to a choice between arbitration and litigation. In either case, the principal will sue the builder for loss and damage caused by the defect.

[15] *Egan v State Transport Authority* (1982) 31 SASR 481, 484-485.

21. Where a design defect becomes apparent after the works are complete, and it is not possible to issue a variation to correct the works, then the usual remedy is to sue the designer for loss and damage caused.

22. Where a building has been sold by the original developer to a purchaser, then that purchaser may be able to sue the developer, the builder and/or the designer, depending on what the sale contract provides. For instance, the sale contract may:

    a. contain warranties from the vendor as to the workmanship in respect of the works the subject of the contract of sale;

    b. exclude observable defects from the above warranties; or

    c. exclude the vendor's liability for defects.

Usual defendant

23. Where there is a construction defect, the usual defendant is the builder. Where the plaintiff is not the developer but a subsequent purchaser, then the defendant could either be the vendor or the builder, depending on the sale contract, as discussed above.

24. With subsequent purchasers of domestic buildings, warranties as to workmanship and other matters are implied by the DBCA,[16] and those warranties run with the building so that subsequent purchasers can have the benefit of them.[17] This seems to be the case with individual subsequent owners as well as owners corporations resulting from the development.[18]

---

[16] DBCA s8.
[17] DBCA s9.
[18] *Body Corporate No 1/PS 40911511E St James Apartments v Renaissance Assets Pty Ltd* [2004] VSC 438; *Johnston v Stockland Development Pty Ltd (Building and Property)* [2014] VCAT 1634; *Owners Corporation PS No. 1 PS 519798G v May* [2016] VCAT 399 at [32].

25. Where a subsequent purchaser of a commercial building enjoys no contractual warranty by the vendor, the purchaser may seek to sue the builder and/or other practitioners considered responsible, in negligence.

26. Where a designer has been negligent, the usual defendant will often depend on the kind of contract entered between the builder and the owner. In a design and construct contract, the builder will usually warrant the efficacy of the design as well as the construction, and therefore be the usual defendant. If earlier design work was undertaken pursuant to an engagement between the principal and the designer, and that contract is later novated to the builder, any defects in the earlier design work (if part of that which is novated to the builder and for which it agrees to be responsible to the principal) may be the subject of a claim by the builder against the designer. Otherwise, the principal may sue the designer in contract and the builder may also be able to sue the designer in negligence (particularly if he is contractually precluded from claiming time or money from the principal). Similarly, on a construct only contract, where the principal supplies the design to the builder, the principal will sue the designer directly.

27. Where an owner sues all parties considered responsible for the defect, those defendants may then claim apportionment or contribution from the others in order to reduce their individual ultimate liability: discussed further below. However, if the owner sues say only the builder, the builder will then often apply for the joinder of and claim from other responsible parties. For instance:

    a. where an owner sues a builder because of the presence of defects, the builder will often join the subcontractor responsible for the works with defects in them;

b. where an owner sues a builder because of the presence of defects, the builder may claim the defects resulted from the design, and may join the designer; and

c. where an owner sues a designer for a defective design, the designer may blame the builder for not following the design and a particular standard and may join the builder, and the designer may also join its subconsultants and the building surveyor for approving an allegedly defective design.

28. In an industry that is rife with '$2' companies and constant risks of impecuniosity or insolvency, choices about the 'preferred' usual defendant will usually be driven by prospects on recovery and thus involve close consideration of the existence or otherwise of professional indemnity or other responsive insurance behind a proposed defendant.

Causes of action

29. The three common causes of action for defects are:

a. breach of contract;

b. negligence; and

c. misleading or deceptive conduct.

Breach of Contract

30. Section 8 of the DBCA implies into all major domestic building contracts warranties by the builder that:

a. the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;

b. all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;

c. the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and the regulations made under that Act;

d. the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;

e. if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed; and

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.

31. In commercial building contracts, most standard forms contain express warranties in similar terms.[19] Further, implied warranties, including under the Australian Consumer Law (**ACL**), at common law, or in order to give business efficacy to the contract, may lay the foundation for a breach of contract claim. Examples of warranties commonly implied at law in commercial contracts include a duty to exercise due care and skill,[20] a warranty in respect of design that the works as designed will be fit for the purpose agreed or known to be required,[21] and a duty to cooperate and not

[19] e.g. AS2124-1992 clause 30.1.
[20] *Cooper v Australian Electric Co Ltd* (1922) 25 WALR 66.
[21] *Gloucestershire CC v Richardson* [1969] 1 AC 480, 502.

hinder performance.[22] The ACL includes a consumer guarantee that goods supplied in trade or commerce to a consumer are to be of acceptable quality, which includes, amongst other things, that the goods are fit for all the purposes for which goods of that kind are commonly supplied and free from defects.

32. Often a claim for breach of contract is regarded as the preferred cause of action, because there are a number of warranties to select from, some of which do not import a particular standard of care. As such, defects may be regarded as an automatic breach of a warranty that the works will be carried out in accordance with the plans and specifications, whereas the presence of a defect may not necessarily amount to a breach of a duty of care, when the relevant standard of care is considered.

33. At common law, an award of damages for breach of contract is intended to, so far as money can do it, place the innocent party in the same situation, with respect to damages, as if the contract had been performed.[23] This commonly includes damages for expectation damages, such as loss of profits that would be expected to result from the contract but for its breach; and reliance damages, such as expenses paid by reason of having entered into the contract.

Negligence

34. Negligence is often pleaded as a concurrent cause of action and as an alternative to a breach of contract claim, particularly where there is uncertainty about the scope of the warranties in the contract or the validity of the contract. Negligence will be pleaded where there is no contract between the plaintiff and defendant.

---

[22] *Mackay v Dick* (1881) 6 App Cas 251, 263.
[23] *D & F Estates Ltd v Church Commissioners for England* [1988] 2 All ER 992, [1003].

35. The elements of a claim in negligence are:

    a. a duty of care in respect of a particular type of harm;

    b. breach, by failing to exercise reasonable care; and

    c. harm, loss or damage, usually physical injury, property damage and/or pure economic loss.

36. In building cases, claims for rectification of defects are regarded not as property damage, but as a pure economic loss, since they only represent financial loss in the amount required to correct them.[24] However, defects in a building that, for instance, leads to a fire that causes damage to the inhabitants' belongings is property damage. The distinction seems to be whether the damage caused by the defects is to 'other property'.[25] If it is inherent damage to that property, then it is pure economic loss.

37. The distinction between property damage and pure economic loss is important, since the considerations for whether a duty of care arises differ depending on the kind of harm. For property damage, all that is required is that the type of harm is reasonably foreseeable. For pure economic loss, where the posited duty is novel, a salient features analysis is required.[26] A duty of care will exist where, inter alia:[27]

    a. the type of harm is reasonably foreseeable;

    b. the plaintiff was vulnerable to the acts or omissions of the other party in the sense that it could not have taken steps to protect itself from the from the defendant's want of reasonable care; and/or

    c. the plaintiff relied on the defendant and that reliance was known; and/or

---

[24] *Murphy v Brentwood District Council* [1991] 1 AC 398, 464-466.
[25] *Aswan Engineering Co v Lupdine Ltd* [1987] 1 WLR 1, 21. See also *Cattanach v Melchior* (2003) 215 CLR 1 at [20] and [30].
[26] *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258 at [103].
[27] *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185.

d. the defendant assumed responsibility towards the plaintiff.

38. The issue of vulnerability has been a substantial hurdle in the way of demonstrating a duty of care was owed in construction projects. There is rarely a circumstance where a purchaser could not have taken steps to protect itself in the purchase of a property, for instance, by the inclusion of detailed warranty provisions in the sale contract. Similarly, where an owner engages a builder, often the contract will provide for the builder to be responsible for its subcontractors and the warranties in the building contract will cover damage caused by those subcontractors. Whether or not a duty of care is owed between parties in a project who are not directly contracting with one another is a problem when the contracting party linking those other parties becomes insolvent, and an innocent party tries to leapfrog over the contractual chain to sue parties that it did not engage.

39. Three well known instances where a party was able to sue outside of the contractual chain are:

a. *Bryan v Maloney*,[28] in which a builder who built a home with inadequate footings was held to owe a duty of care to a subsequent purchaser, particularly because of the assumption of responsibility for the building and reliance by the owner on the builder building it property. The significance of the fact of it being a residential dwelling and a significant investment to the purchaser was a factor. It is unclear whether the same result would occur now, given the detailed implied warranties in the DBCA.

b. *Junior Books Ltd v Veitchi Co Ltd*,[29] in which a specialist flooring subcontractor nominated by the principal was regarded as owing a duty of care to the principal for pure economic loss resulting from flooring

[28] (1995) 182 CLR 609.
[29] [1983] 1 AC 520.

defects. This decision is controversial and subsequently the House of Lords said it was confined to its facts and therefore 'cannot be regarded as laying down any principal of general application in the law of tort'.[30]

c. *Moorabool Shire Council v Taitapanui*,[31] in which a building surveyor was regarded as owing a duty of care to subsequent purchasers to avoid pure economic loss when issuing the building permit, by reason of the vulnerability of the subsequent owners to a building surveyor's negligence, and the nature of the building surveyor's 'gatekeeper' role prescribed by building legislation.

40. At common law, an award of damages for negligence is to put the plaintiff in the same position as would be the case had the wrong not been committed.

Misleading or Deceptive Conduct

41. Section 18 of the ACL provides:

> *A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

42. 'Conduct' is defined as:

> *doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, and understanding or the requiring of the giving of, or the giving of, a covenant.*

43. Contractual warranties may constitute actionable representations.[32] A representation as to future matters will be taken to have been misleading if the maker cannot show it was made on reasonable grounds.[33]

---

[30] *D & F Estates Ltd v Church Commissioners for England* [1988] 2 All ER 992.
[31] [2006] VSCA 30.
[32] *RCR Energy Pty Ltd v WTE Co-Generation Pty Ltd* [2017] VSCA 50.
[33] ACL section 4.

44. Where building professionals such as an engineer or a building surveyor review and approve design documents, and the design in fact did not comply with say the BCA, claims may be made against those practitioners in misleading or deceptive conduct.[34]

45. Section 236 of the ACL provides that if a person has contravened s.18, and a 'person suffers loss and damage because of the conduct of another person' then 'the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention'. The section has been regarded as imposing no express indication of the kinds of damage that are too remote to be recovered. As for the measure of damages, the usual approach is to adopt the measure of damages in tort.[35]

46. The limitation period for a claim in respect of a contravention of section 18 ACL is 6 years after the date on which the cause of action accrued, which is when the loss or damage occurs.[36]

Loss and damage

Construction Defects

47. When there are defects in a building caused by incorrect design or construction, there are two general methods of assessing the loss and damage and awarding damages:

    a. the cost of correcting the defects so the building is in conformance with the contract less any unpaid amounts owing; or

    b. the diminution in value to the building caused by the defects.

---

[34] *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286 (**Lacrosse**), [408] to [410] and [515] to [521].
[35] *Gates v City Mutual Life Assurance Soc Ltd* (1986) 160 CLR 1, 13; *Murphy v Overton Investments Pty Ltd* [2004] HCA 3; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525.
[36] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.

48. Sometimes the two methods arrive at the same value. For instance, where there are defects in the windows of a building, and those windows require replacement, then the cost to remove and replace the windows will often reflect the loss of value of the building, since a purchaser will take the cost of repair into account in the purchase price.

49. However, where defects are so severe that demolition and reconstruction is required, there will usually be a large difference between the two measures.

50. The measure of damages recoverable by a principal for breach of a building contract is the difference between the contract price for the work and the cost of making the work conform to the contract, provided:

    a. the work is necessary to produce conformity; and

    b. the work is a reasonable course to adopt.[37]

51. This principle originated from the leading case of *Bellgrove v Eldridge*,[38] in which a house was built in such a way that it was unstable, and therefore the only way to ensure stability was to demolish and reinstate it in conformance with the contract, less the demolition value of the house and the unpaid money under the contract.

52. In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*,[39] a tenant, without the consent of the landlord, modified a building foyer to suit its business. The landlord claimed damages to reinstate the foyer, in the sum of $1.4M. The tenant alleged the damages were to be assessed as diminution of value, which the trial judge agreed with, and awarded $34,000. On appeal, the Full Court of the Federal Court awarded damages to reinstate the foyer, as this was necessary to produce conformity with the contract and a reasonable course to adopt to do so. The High Court agreed.

---

[37] *Bellgrove v Eldridge* (1954) 90 CLR 613.
[38] (1954) 90 CLR 613.
[39] [2009] 236 CLR 272.

53. In the English House of Lords decision of *Ruxley Electronics & Construction Ltd v Forsyth*[40] a builder agreed to build a swimming pool, and the contract specified the pool would have a diving area of seven feet, six inches deep. After construction, the diving area was six feet deep. The owner sued the builder for breach of contract, claiming the cost to demolish and reinstate a pool with the deeper diving area. There was evidence that the owner did not intend to actually demolish and reinstate the pool. At first instance, the judge rejected the owner's claim and awarded loss of amenity. The Court of Appeal awarded demolition and reinstatement costs. The House of Lords upheld the appeal and awarded loss of amenity, on the basis that the demolition and reinstatement was unreasonable. Also, the House of Lords commented that the intention of the innocent party about what he intends to do with the award of damages may be relevant to the issue of reasonableness.

54. As for intention to reinstate, in Australia the position is that intention is relevant insofar as it sheds light on the issue of the true nature of loss.[41] A related issue is ability to reinstate. For instance, the plaintiff may not be able to reinstate as it has sold the property at a discount, and therefore an absence of an intention to reinstate may not disentitle the plaintiff from claiming reinstatement costs. However, if a plaintiff is able to apply the damages award and reinstate the building, but does not intend to, then this may be relevant to disentitle the plaintiff from its claim, like the situation in *Ruxley*.

55. Where there are multiple ways of rectifying a building, then the cheapest way to do so is usually what the court awards.[42] Of course, if the contract specifies a particular standard (e.g. highest standard) then a rectification method to achieve that standard is necessary.[43]

---

[40] (1996) 1 AC 344.
[41] *Stone v Chappel* [2017] SASFC 72.
[42] *Lester v White* [1992] 2 NZLR 483 at 499.
[43] *Dymocks Book Arcade Pty Ltd v Capral Ltd* [2013] NSWSC 343 at [320].

Design Defects

56. Where a designer has designed a building that requires rectification, a damages award is calculated with the purpose of putting the owner in the position it would have been in had the design been prepared correctly.[44]

57. In *Cooperative Group Ltd v John Allen Associates Ltd*[45] Ramsey J summarised the principles for awarding damages for a negligent design, as follows:

    a. The first stage is for a claimant to establish what would have happened if the construction professional had in fact exercised proper care and skill.

    b. If the construction professional had used proper care and skill, the claimant would have proceeded with the construction of the building in accordance with the proper design, then the measure of damages will be the costs of remedying the defect but less a credit for any higher costs which would have been payable for a proper design in the first place.

    c. If, however, the claimant would have abandoned the project, then the loss would be measured by reference to the wasted expenditure.

58. Where design defects result in a structure that cannot be salvaged or repaired, then the owner may be entitled to the cost of demolition and wasted expenditure.[46] Where the structure is capable of being rectified and it is reasonable to rectify, the owner may be awarded damages for rectifying the defects.[47] If, on the non-negligent design, the owner would not have proceeded with the construction, the owner may only be entitled to any

[44] *Auburn Municipal Council v ARC Engineering Pty Ltd* [1973] 1 NSWLR 513, 531.
[45] [2010] EWHC 2300 (TCC).
[46] *Auburn Municipal Council v ARC Engineering Pty Ltd* [1973] 1 NSWLR 513.
[47] *W Jeffreys Holdings Pty Ltd v Appleyard & Assoc* (1990) 10 BCL 298.

wasted expenditure, and not the cost to put the structure in the state it would have been had the correct design been produced.[48]

Wrongs Act - Contribution and Proportionate Liability

59. At common law, liability among defendants for breach of contract or negligence is usually solidary, meaning each are jointly and severally liable for a successful plaintiff's awarded damages, and the plaintiff may recover against any one or other of them.

60. The common law has been altered in Victoria by the *Wrongs Act* 1958.

Contribution

61. Part IV of the *Wrongs Act* permits a defendant to join one or more parties responsible for the 'same damage' (a **Contributor**), and to permit recovery from each Contributor of an amount representing each Contributor's proportion of the responsibility for the damage.

62. The key provisions are as follows:

    a. Section 23A(1):

        > *... a person is liable in respect of any damage if the person who suffered that damage, or anyone representing the estate or dependents of that person, is entitled to recover compensation from the first-mentioned person in respect of that damage whatever the legal basis of liability, whether tort, breach of contract, breach of trust or otherwise.*

    b. Section 23B(1):

        > *... a person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise).*

    c. Section 24(2):

---

[48] *Brown Falconer Group Pty Ltd v South Parklands Hockey & Tennis Centre Inc* [2005] SASC 75.

> *... in any proceedings for contribution under section 23B the amount of the contribution recoverable from any person shall be such as may be found by the jury or by the court if the trial is without a jury to be just and equitable having regard to the extent of that person's responsibility for the damage…*

63. The effect of this legislation is to create a cause of action accessible by a defendant.[49] It does not limit the amount a plaintiff can recover from a defendant. As such, the risk that a Contributor will be insolvent and therefore cannot contribute falls on the defendant claiming contribution, and not the plaintiff.

64. There are often highly technical arguments about whether the damage the subject of the claim against the defendant is the 'same damage' as that being claimed by the defendant against the Contributor. For instance, a claim against a contractor for damage caused by defective workmanship is not the same damage as the failure of an insurer to provide indemnity against that damage.[50] Where an owner sued an architect for negligent certification resulting in an inability to claim against the contractor for late completion, and sued the contractor for late completion, the architect was denied a contribution claim against the contractor, since the claims were in the alternative.[51]

Proportionate liability

65. As a result of an inquiry by Professor Davis into the law of joint and several liability in 1995,[52] each State has enacted legislation providing for proportionate liability for claims for economic loss or damage to property arising from the failure to use reasonable care. The Commonwealth has done so with respect to claims for misleading or deceptive conduct.[53] That permits

---

[49] *Van Win Pty Ltd v Eleventh Mirontron Pty Ltd* [1986] VR 49.
[50] *Bovis Construction Ltd v Commercial Union Assurance Co plc* [2001] 1 Lloyd's Rep 416.
[51] *Royal Brompton NHS Trust v Hammond* [2002] 1 WLR 1397 (HL(e)).
[52] Commonwealth of Australia, Inquiry into the Law of Joint and Several Liability: Report of Stage Two, 1995.
[53] *Competition and Consumer Act* 2012, s.87CB.

one defendant to raise, as a defence (if that defendant is found liable), the liability of another 'concurrent wrongdoer' as a basis for reducing that defendant's liability to the plaintiff.

66. In Victoria, Part IVAA of the *Wrongs Act* 1958 came into operation on 1 January 2004. The key provisions include:

a. Section 24AF:

> *(1) This Part applies to—*
>
> *(a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care; and*
>
> *(b) a claim for damages for a contravention of section 18 of the Australian Consumer Law (Victoria).*

b. Section 24AH:

> *(1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.*
>
> *(2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.*

c. Section 24AI:

> *(1) In any proceeding involving an apportionable claim—*
>
> *(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and*
>
> *(a) judgment must not be given against the defendant for more than that amount in relation to that claim.*

> *(3) In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up.*

67. Proportionate liability shifts the risk of insolvency of a concurrent wrongdoer to the plaintiff.

68. The legislation across States differs mainly in respect of:

    a. whether a party can contract out of the legislation; and

    b. if the concurrent wrongdoer is existing (in the sense of not being dead or wound up) whether that person must be joined to the proceeding for the defence to be effective.

69. In Victoria, a party cannot contract out of the legislation, and a defendant must seek to join a concurrent wrongdoer (that is not dead or wound up) for that defendant to benefit from apportionment. That then requires a plaintiff to plead a claim against the joined concurrent wrongdoers, even though the plaintiff may not have any direct interest in prosecuting a case against that party, to ensure 100% of its total damages sound in judgments against all concurrent wrongdoers found liable.

70. The main issues on apportionment are usually whether:

    a. the claim is an 'apportionable claim';

    b. the claim arises from a failure to take care; and

    c. a person is a concurrent wrongdoer.

71. The Courts have approached the question of whether the claim arises from a failure to take reasonable care by looking at the evidence, rather than the pleading. In *Dartberg*,[54] Middleton J opined:

> *In my view, Pt IVAA could apply in the circumstances of this proceeding according to its own terms. Where a claim brought by an applicant does not have as one of its necessary elements any allegation of failing to take reasonable care, an additional enquiry into the failure to take reasonable care may become relevant in the course of a trial to determine the application of Pt IVAA. Even though the claims in this proceeding themselves do not rely upon any plea of negligence or a "failure to take reasonable care" in a strict sense, a failure to take reasonable care may form part of the allegations or the evidence that is tendered in the proceedings. At the end of the trial, after hearing all the evidence, it may be found that Pt IVAA applies.*

72. Depending on the precision and ambit of the pleaded case, most defect claims in construction disputes can be directly or indirectly fashioned from a failure to take reasonable care; either in pure negligence or breach of an express or implied contractual term to similar effect.

73. A person is a concurrent wrongdoer if that person is liable to the plaintiff for the loss and damage.[55] Like contribution claims, there can be highly technical arguments focusing on whether the concurrent wrongdoer caused the loss and damage the subject of the claim.

74. Finally, contribution under Part IV is not available from a defendant against whom an apportionment judgment is given under Part IVAA.[56] As such, contribution is often pleaded in the alternative to an apportionment defence, in case the claim is held not to be apportionable .

Case studies

[54] *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450 (**Dartberg**) at [30]; *Reinhold v New South Wales Lotteries Corporation (No 2)* [2008] NSWSC 187, [30]; *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd* [2008] VSCA 208 [108]-[109].
[55] *Shrimp v Landmark Operations Limited* [2007] FCA 1468, [59] – [62]; *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245, [64].
[56] *Wrongs Act 1958* s24AJ.

Lacrosse

75. This matter was decided in the Victorian Civil and Administrative Tribunal (VCAT) in February 2019 by Judge Woodward of the County Court, as a Vice President of VCAT. It involved combustible aluminium composite panel (ACP) cladding. A tenant in an apartment on the eighth floor extinguished a cigarette in a plastic food container on a wooden table, and the smoldering cigarette set the table on fire, which then started a fire on the balcony, which transferred to the cladding and ran up the wall to the top of the 21 storey building. This caused property damage to the tenants' belongings and loss of rent. Also, the Victorian Building Authority ordered the removal of the ACP cladding, which meant that the owners would be required to incur these costs, as pure economic loss. The claims amounted to $12.7M.

76. The ACP the subject of the litigation was comprised of two thin pieces of aluminium sandwiching a polyethylene (PE) core. The PE core is combustible (similar to petrol) and the aluminium is not. However, the Judge held that based on the evidence, once the fire reached the ACP, the surface layer degraded exposing the PE core, which gave the fire fuel and resulted in the fire spreading up the face of the building. The litigation was about who was responsible for the fire, in particular, the selection of the ACP cladding.

77. The project involved a developer who engaged the surveyor, the fire engineer and the architect (the Consultants) in 2007 to prepare a design. The ACPs were specified in 2008, and not one of the Consultants queried the inclusion of the ACPs, despite the combustible nature of the product. The builder was engaged in 2010 pursuant to a design and construct contract that included a specification for the ACP cladding, and a superintendent was appointed that year also. The Consultants had their contracts novated to the builder. The builder selected a cladding material that was similar in structure

to that specified but had a different brand name. The Judge held that the selection of this different product made no difference to the end result.

78. The owners and owners corporations sued the builder for breach of warranty. In particular, the owners sued the builder alleging breach of the warranties relating to suitability of materials, compliance with the law, and fitness for purpose in subsections 8(b), (c) and (f) DBCA. The builder joined the Consultants and sought recovery from them, alleging they had breached their novated contracts and caused the builder to suffer loss and damage, and that they were otherwise concurrent wrongdoers with the builder under Part IV *Wrongs Act 1958*. The builder also joined the owner of the apartment from which the fire originated and the tenant who extinguished the cigarette. This was on the basis that they were concurrent wrongdoers in respect of the owners' claims, since the former did not regulate the extent of combustible materials on his balcony, and the latter started the fire.

79. The architect joined the superintendent, alleging that it had responsibility for approving the materials and inspecting the works, and it was also a concurrent wrongdoer with the builder and the Consultants in respect of the owners' and the builder's claims. Also, the builder and the Consultants had contribution claims against one another under Part IV *Wrongs Act 1958*, in the alternative to the apportionment defences, in the event that the claim was not an apportionable claim.

80. In the result, the Judge held:

> *The ACPs were not compliant with the deemed to satisfy (DTS) provisions of the BCA, in particular section CP2(a)(iv) which provides 'A building must have elements which will, to the degree necessary, avoid the spread of fire … in a building'.*

81. The surveyor's argument that there was a concession for the DTS provisions under section C1.12(f) BCA for bonded laminate materials was held to be unreasonable.

82. By reason of the combustible nature of the ACPs and their non-compliance with the BCA, the builder breached its warranties to the owners under the DBCA and was required to pay them damages for their loss and damage.

83. The claim against the builder was not an apportionable claim. The owners had carefully pleaded their case against the builder to obtain that result. The Court found that claim against the builder did not arise from a failure to take reasonable care and that it had exercised due care and skill by engaging the Consultants.

84. The Consultants breached their novated contracts with the builder, on the basis that they had breached an overarching standard of care to exercise due care and skill, by their negligence.

85. The builder's claim against the Consultants was an apportionable claim, as it arose from a failure to take reasonable care, and they were each concurrent wrongdoers.

86. Also, the fire engineer and the surveyor, since they had given approvals for a design where those approvals were to the effect that the design complied with the BCA, had engaged in misleading or deceptive conduct as the design was not compliant with the BCA.

87. The Consultants were required to indemnify the builder in the following proportions: as to the fire engineer, 39%; as to the surveyor, 33%; as to the architect, 25%. The smoker was 3% responsible, and since no judgment was sought against him, the builder was to pay the equivalent of that amount to the owners. The Superintendent was not responsible for the loss and damage.

88. Ultimately, liability followed the contractual chains, in that the builder was liable to the owners, and the Consultants liable to the builder. Also, the percentages of apportioned responsibility followed the degree of expertise

relevant to the risk that eventuated, in that the fire engineer had the largest share, then the surveyor and then the architect.

Opal Tower

89. The Opal Tower is a building in Sydney Olympic Park. It was completed in 2018 and occupied in December 2018. It has 36 storeys and 3 basement levels below ground. It is a unique building, in that it is triangular in shape and the features include a series of inset walls that look like slots running up the building. The structural design for the Opal Tower was carried out by WSP. The design of the post-tensioned concrete floors was carried out by Australian Prestressing Services. The precast panel walls were fabricated by Evolution Precast Systems. The building was built by Icon Co.

90. Shortly after occupation, the residents complained of a loud banging noise in the building, and ongoing noises. Investigation of the source of the noise revealed substantial cracking to the panels and hob beams supporting the inset walls on level 4 and level 10.

91. As a result of safety concerns, the residents were evacuated on Christmas eve, and allowed to return shortly afterwards. The residents were evacuated again on 27 December 2018 following the identification of more structural damage on level 4.

92. On 27 December 2018, the Minister for Planning and Housing commissioned an inquiry and report into a) the cause of the damage, b) the means of rectification and c) how to avoid the issue in the future. An interim report was delivered on 14 January 2019, followed by a final report on 19 February 2019.

93. The major damage included damaged hob beams and plates on levels 4 and 10. The hob beams sit at the bottom of the inset wall panels and on top of the supporting columns. The hob beams take the load from the wall panels and

spread that load horizontally and onto the columns, so the columns can take the weight of the inset walls. Because of possible design and construction defects in them, the hob beams cracked, which meant more load was being applied to the columns. Fortunately, the Opal Tower had been over-engineered, so the columns could take a lot more load than that designed, so additional load from the damaged hob beams was unlikely to structurally jeopardise the rest of the building.

94. The exact cause of the damage was not identified. However, there were faults in both the design and construction that were identified as being relevant to the damage. These are:

    a. Construction and material issues:

        (1) lower strength concrete used than specified;

        (2) insufficient grout coverage between the panel and hob beam;

        (3) insufficient concrete cover and inadequate reinforcement;

        (4) thicker panels constructed than those designed, which overhung the hob-beams rather than sitting flush, and

    b. Design issues and failure to meet AS3600 Concrete Structures:

        (1) inadequate bursting or splitting resistance of the hob on level 4 above column C34; and

        (2) inadequate bursting or splitting resistance of the hob on level 10 connecting to columns C21 and C38.

95. The proposed rectification method was not complete nor independently analysed. The recommendation from Icon Co and WSP included bolstering the strength of damaged hob beams by grouting of joints, sandwiching the hob beams and wall panels with added panels, and the addition of exterior columns adjacent to some panel walls. It was also noted that further

structural elements needed to be checked before undertaking rectification work.

96. The report advanced three recommendations which would have avoided the issue if implemented beforehand:

    a. Creation of a registry of engineers that sets high levels of competency and requires minimum standards of professional practice and ongoing education, to be managed by government and an appropriate professional body. This would permit certifications and approvals associated with the design of a building to only be done by those with appropriate qualification and specialisation.

    b. Independent certification of major project designs by registered engineers, including for any alterations up to completion.

    c. Regime of critical stage on-site inspections for major projects by independent registered engineers, to ensure compliance of the construction with the design.

97. The authors also recommended an open repository for all certifications so as to make the design and certification procedures transparent to all stakeholders, and the creation of a building structure review board, whose role would be to review and report on major incidents of design and construction related structural damage to buildings.

98. At this stage it is unclear whether litigation has been issued.

99. Based on the report, there seems to be reasonably equal blame between design and construction for the issues that occurred. As such, it is expected that if proceedings were to be issued, they would be similar in structure to Lacrosse, in that:

a. each owner and owners corporation would sue the builder and/or designer (depending on, amongst other things, whether the contract is construct only or design and construct);

b. the builder and/or designer would allege each other is a concurrent wrongdoer under the relevant New South Wales apportionment legislation;[57]

c. the builder and/or designer would join subcontractors and subconsultants, respectively, and allege they are concurrent wrongdoers with the builder and/or designer and owed duties of care to the owners directly, alternatively make claims against them under their subcontracts for indemnity or damages for breach of contract;

d. each owner and owners corporation would then make contingent claims against the subcontractors and subconsultants in the event their claim is considered to be an apportionable claim (being a claim for economic loss or damage to property, whether in contract, tort or otherwise, arising from a failure to take reasonable care).

100. However, unlike Lacrosse, from the final report it appears that the damage is pure economic loss only, for instance, lost rental and the cost to rectify the defects, and not property damage. This is because the damage appears to have resulted from latent defects, and the damage is to the building and not 'other property'. This means any claims by the owners and owners corporations against subcontractors and subconsultants (and potentially the designer, if it is a design and construct contract), may be hard fought on the question of whether there is a duty of care owed by them to the owners and owners corporations.

[57] *Civil Liability Act 2002* Part 4.

Epworth flooding litigation

101. In 2014, the Epworth hospital engaged a builder to undertake renovations for an upgrade of the Epworth Freemans Hospital in East Melbourne. The plumber, engaged by the builder, was instructed to redirect a live water pipe around a demolition site on the third floor. The redirection was done poorly, by cutting the previous copper pipe, adding a plastic pipe for the redirection and using duct tape to attach the plastic pipe to the now redundant pipe as support. It was alleged that this was done in contravention of the relevant standard, AS/NZS 3500.1.2003. Someone unknown removed the copper pipe, which was supporting the diversion, which led to the live diverted pipe collapsing and flooding the hospital, causing over $10M in property damage and business interruption costs.

102. The plaintiffs sued the builder under the building contract for breach of warranty, alternatively breach of a duty of care. The builder then joined the plumber under the subcontract alleging that it was a concurrent wrongdoer by the plumber's breach of its duty of care to the plaintiffs. The builder also made a third-party claim against the plumber for a) contribution under Part IV *Wrongs Act 1958* for breach of its duty of care, and b) for damages or an indemnity under its subcontract as a result of the plumber's breach of warranty. The plumber joined the demolition subcontractor, alleging the demolition subcontractor removed the pipe support, and alleged it was therefore a concurrent wrongdoer under Part IVAA *Wrongs Act 1958*. The plumber also alleged the builder was a concurrent wrongdoer, on the basis that it did not supervise the works properly and that it did not mark the live pipes, thereby causing someone to remove the pipe assuming it was not necessary. The demolition subcontractor defended the proceeding, alleging the builder and the plumber were concurrent wrongdoers. The plaintiff made contingent claims against the plumber and the demolition subcontractor, on

the basis that if one or all of apportionment defences succeed, the plaintiff can obtain judgment against those parties.

103. The matter involved insured parties, and the builder and demolition subcontractor were covered by the same liability policy. The plumber claimed indemnity under that policy, and under its own policy with another insurer. The issues between the defendants were resolved, and the matter proceeded to trial on a limited basis, being:

    a. whether the building contract excluded claims by Epworth for business interruption claims, which was a construction argument of a clause of the building contract; and

    b. whether the plumber owed a duty of care to the owners, in circumstances where the owners did not have a direct contract with the plumber, and where, by making that claim, the owners were seeking to circumvent the exclusion in the building contract.

104. The matter settled on the first day of trial, so the above issues were not determined.

'Catalyst' building, Darwin

105. The Catalyst building is one of nine apartment blocks in Darwin and Palmerston caught up in a non-compliance building issue. The buildings range from two to 12 storeys and were all built over the past five years.

106. In April 2019, the Northern Territory Infrastructure Department advised about 200 owners that Catalyst contained non-compliant structures requiring urgent assessment and rectification. The structural problem in each of the buildings relates to the "transfer slabs", which are reinforced concrete slabs that distribute floor loads onto support posts and columns. The concern is reportedly that the columns that hold up the slab may push through the slab and create a punching shear.

107. The nine buildings have not been deemed unsafe and residents can continue to live in them while the rectification process continued.

108. The department first received a complaint about the engineer's work in 2017, after someone on a building site raised concerns about the transfer slab being put in place. Since then, the department has engaged a separate engineering company to audit the work of the structural engineer.

109. Residents have been told they have seven working days to engage a structural engineer, who then has another seven days to devise a short-term solution to ensure the buildings meet Australian standards. They then have a further 30 days to create a plan to fix the issue in the long term.

110. It is unclear how much it could cost to repair the issue in each building, but at present the owners will have to foot the bill. Departmental officials have confirmed that most of the owners would not be protected by an NT Government-regulated insurance scheme for some homeowners. The Master Builders Fidelity Fund was launched by the NT Government in 2013 to protect consumers from defects. However, many buildings are not covered by the fund because of their height and age. As a result, a class action against the builder and other practitioners involved in the project appears likely.

111. The structural engineer has been referred to the Building Practitioners Board for an inquiry into alleged misconduct pertaining to a pattern of non-compliance with the National Construction Code.

Neo200, Melbourne

112. The ‘Neo200’ apartment complex at 200 Spencer Street in Melbourne was designed by Hayball Architects and built by LU Simon in 2007. ACPs formed part of the construction of the balconies. The building was awarded the 2008 Master Builder Association’s Excellence in Construction Award.

113. In 2016, following an audit sparked by the 2014 Lacrosse fire, Neo was deemed a moderate risk but "safe to occupy".

114. In July and October 2018, the City of Melbourne's municipal building surveyor served building notices requiring owners to show cause why the combustible cladding should not be removed.

115. On 4 February 2019, a fire broke out on the 22nd floor and spread rapidly up five levels of the building's 41 storeys. Residents of the 372 apartment building were evacuated. Fortunately, there were no casualties. The ACPs may have contributed to the spread of the fire up the building before it was extinguished.

Shore Dolls Point Apartments class action

116. In February 2019, a class action was launched by William Roberts Lawyers funded by global litigation funder IMF Bentham on behalf of the owners corporation for Shore Dolls Point Apartments against Halifax Vogel Group, the Sydney based importer of Alucobond, and its German manufacturer, 3A Composites.

117. The claim for the cost of replacing the PE core cladding with suitable cladding or other material, together with all associated costs, is based on misleading and deceptive conduct in contravention of the TPA and ACL in relation to representations that the cladding was suitable for the purposes advertised, was compliant with relevant building codes and standards and passed fire safety tests (AS1530.3). It is also alleged that the cladding was not fit for purpose in breach of the acceptable quality guarantee under s.54 of the ACL, and not of merchantable quality as required by s.74D(3) of the former TPA.

118. By targeting the importer and manufacturer, the Plaintiffs may be able to bypass issues about whether developers, builders or both bear liability for

installing the potentially deadly cladding on hundreds of buildings around Australia.

Royal Womens Hospital

119. Between 2006 and 2008, the Melbourne Royal Womens Hospital was demolished and reconstructed by Baulderstone (now Lendlease). The project included Alucobond cladding.

120. In 2015, the VBA audit identified the hospital had been constructed using non-compliant (i.e. combustible) cladding and referred the matter to the Department of Health and Human Services to determine appropriate action.

121. In 2017, Lendlease entered into confidential arrangements with the Principal, as a result of which Lendlease agreed to undertake replacement of the cladding.

122. In March 2018, Lendlease commenced proceedings in the Victorian Supreme Court[58] against the building surveyor, architect, fire engineer and façade contractor, variously for breach of contract, negligence and (against some) misleading and deceptive conduct. Pleadings have closed with liability reports served. Proportionate liability claims have been pleaded between defendants inter se. Quantum reports are being prepared and mediation is to be completed by November 2019.

123. One of the issues in the case, which might be seen to distinguish it from Lacrosse, is the manner in which the Alucobond was used as part of an engineered façade panel system design. Ultimately, and like Lacrosse, much will depend on the proper interpretation of the BCA at the relevant time and its application to the way in which Alucobond was used on the project.

[58] S ECI 2018 00062

……..