"Lacrosse" decision on ACPs

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Introduction

On 28 February 2019, Woodward J, a judge of the County Court of Victoria and the Vice President of the Victorian Civil and Administrative Tribunal published reasons for decision in the matter of *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd*,[1] otherwise known as "*Lacrosse*".

Lacrosse is the name of a 21-storey building at 673–675 La Trobe Street, Docklands in Victoria. On 24 November 2014, a fire started on the balcony of apartment 805 of the Lacrosse building and rapidly spread up the face of the building to the roof. The fire was found by the judge to have been started by Mr Gubitta, a resident in apartment 805, who attempted to extinguish his cigarette in a plastic food container on a timber topped table on the apartment's balcony. The face of the building was clad with aluminium composite panels (ACPs), specifically a product known as Alucobest. The judge found that the spread of the fire was caused by Mr Gubitta's failed attempt at extinguishing his cigarette and the ACPs. The proceeding concerned responsibility for the fire, in particular, the selection and installation of the ACPs.

There were several kinds of damage caused, which amounted to a total claim of $12.7M. First, there was damage caused to the apartments and belongings of the applicants, properly characterised as property damage. Second, there were additional insurance premiums by reason of the unburnt cladding remaining on the building until replacement works are concluded. Third, there was an order of the Victorian Building Authority for the owners to remove the cladding, and therefore there was a future amount to be incurred in respect of the removal and replacement of the cladding, properly characterised as pure economic loss and referred to as "compliance costs".[2]

There were 211 applicants to the proceeding, being the owners of the affected apartments and three owners' corporations (Owners). There were eight respondents, including:

- the builder, LU Simon Builders Pty Ltd (Builder), that built the building and installed ACPs under a design and construct contract (D&C Contract) with the original developer
- the architect, Elenberg Fraser Pty Ltd (Architect), who prepared the design with ACPs in them
- the building surveyor, Gardner Group and Mr Galanos (Surveyor), who issued the building permit based on designs with ACPs in them
- the fire engineer, Thomas Nicholas (Fire Engineer), that issued a fire engineering report based on the designs without raising ACPs as an issue
- the superintendent, PDS (Superintendent), that supervised the contract works
- Mr Gubitta, the resident smoker in apartment 805
- Mr Kim, the owner of apartment 805

Project background

By way of background to the project, the original developer entered contracts with each professional consultant (that is, the Architect, the Fire Engineer and the Surveyor) in 2007 for the development of two towers.

During 2007 the design was developed between the professional consultants and in 2008 the Architect produced a specification known as the "T2 specification. This required the cladding for the project to be "indicative to Alucobond" and the T2 specification detailed non-combustibility and testing requirements for the cladding. The T2 specification placed obligations on the "superintendent" to monitor compliance. Based on the drafting of the T2 specification, it was clearly intended that the Architect would also be the superintendent.

Because of the global financial crisis, the project stalled in 2008 and resumed with a new developer in 2010 for the construction of one tower only. The developer entered the D&C Contract with the Builder in 2010, which incorporated the T2 specification, and the developer entered into a consultant agreement with PDS in 2010. Each professional consultant (not including the Superintendent) had their contracts novated to the Builder. The Fire Engineer approved the design prepared by the Architect, and the Surveyor issued the stage 7 building permit, permitting the construction of the building with ACPs.

In May 2011, a sample of Alucobest was provided to the Architect and the Superintendent, and they both approved that sample. The Lacrosse building was built and the Surveyor issued the occupancy permit in June 2012.

Litigation structure

The Owners sued the Builder for, amongst other things, breach of contract under the warranties implied from the Domestic Building Contracts Act 1995 (Vic)

(DBCA). 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 s 8(b), (c) and (f) of the DBCA. There were other allegations made of a strict nature, such as an allegation that the ACPs had a safety defect under the Australian Consumer Law but they were not pursued at trial. The Owners were careful to avoid allegations that the Builder breached a duty of care to them.

The Builder subsequently joined to the proceeding as further respondents the Architect, the Surveyor, the Fire Engineer, Mr Kim and Mr Gubitta, and made claims against each professional consultant for breach of their novated contracts. The Builder alleged Mr Kim and Mr Gubitta owed duties of care to the Owners and that it was a concurrent wrongdoer with them, alternatively was owed contribution from them, therefore giving rise to a defence under Pt IVAA of the Wrongs Act 1958 (Vic) and alternatively a claim under Pt IV of the Wrongs Act for contribution. The allegation against Mr Kim, as the owner of apartment 805, was that he failed to regulate storage of combustible items on his balcony, leading to the fire spread.

The Architect joined the Superintendent to the proceeding, alleging that the Superintendent failed to monitor compliance with the T2 specification and that it failed to inspect the installation of the ACPs, which it alleged were installed improperly. The Architect alleged that the Superintendent was a concurrent wrongdoer with it and the other parties, alternatively owed the Architect contribution, once again referring to Pts IVAA and IV of the Wrongs Act.

Once all parties were joined and allegations were made by the Builder (mainly against the professional consultants) and the Architect (mainly against the Superintendent), the Owners amended their pleadings to allege each party, apart from the Builder, owed to them a duty of care that each party breached by their negligence, entitling them to claim loss and damage. Each claim made by the Owners substantially replicated the claims made by the Builder and the Architect. The proceeding involved a complicated web of allegations and claims by each party against many of the others.

Findings — ACPs

The more concerning findings in the proceeding were made in respect of the ACPs. Structurally, ACPs are a product with two thin outer layers of aluminium that sandwich a light polymer core. Alucobest and Alucobond have two 0.5 mm aluminium layers sandwiching a polyethylene (PE) core. They are used for cladding projects as they are attractive, lightweight and relatively inexpensive.

His Honour noted that ACPs were first imported into Australia in the late 1970s.[3] Concerns about fire risk were raised in the late 1990s[4] and compliance with the Building Code of Australia (BCA) combustibility requirements was a live issue being considered by the Australian Building Codes Board in 2010.

His Honour found that the Alucobest panels that were used were combustible within the meaning of the BCA and in accordance with AS1530.1.[5] This is because the PE core has a calorific value similar to petrol, diesel and propane,[6] and the direct flame impingement on the Alucobest panel was sufficient to degrade the outer aluminium sheet and expose the PE core.[7] Essentially, as soon as fire hit the Alucobest panel, the non-combustible aluminium layer degraded, exposing the combustible fuel load which enabled the spread of fire up the building.

The BCA has non-combustibility requirements for a building in s CP2(a)(iv), which provides: "A building must have elements which will, to the degree necessary, avoid the spread of fire … in a building." The BCA requirements are important because they are made law under the Building Act 1993 (Vic) and its regulations. His Honour found that Alucobest did not meet the performance requirements in CP2(a)(iv) of the BCA as it did not avoid the spread of fire.[8] His Honour also found that the selection of Alucobest over Alucobond did not matter, as the relevant necessary condition for the spread of fire was the installation of an ACP with a 100% PE core[9] which both had.

His Honour found that the use of those ACPs were primarily responsible for causing the spread of fire up the side of the building,[10] the other cause being the unextinguished cigarette. His Honour applied the test in s 51 of the Wrongs Act to arrive at this conclusion as to causation.

Findings — peer professional opinion

The Surveyor argued that there was a deemed to satisfy (DTS) concession under the BCA, which would allow the use of otherwise combustible ACPs on a building despite the wording of s CP2(a)(iv). The Surveyor placed most reliance on s C1.12(f) of the BCA, which provides:

> The following materials, though *combustible* or containing *combustible* fibres, may be used wherever a *non-combustible* material is *required*:
> (f) Bonded laminated materials where—
> (i) each laminate is *non-combustible*; and
> (ii) each adhesive layer does not exceed 1 mm in thickness; and
> (iii) the total thickness of the adhesive layers does not exceed 2 mm; and

(iv) the *Spread-of-Flame Index* and the *Smoke-Developed Index* of the laminated material as a whole does not exceed 0 and 3 respectively.

The Surveyor argued that the aluminium layers were "laminates", the adhesive layer between the aluminium layers and the core was less than 1 mm, and that the relevant certification in respect of Spread-of Flame Index and Smoke-Developed Index for Alucobond (being AS1530.3[11]) were 0 and 1 respectively, and therefore the Alucobond would be permissible under this concession.[12] That is, the Surveyor ignored the combustible PE core entirely. As to this construction, the judge held that the PE core was a layer or laminate and therefore the concession did not apply, and this was reinforced by the purpose of the concession in focusing on the combustibility of each part of the material.[13]

The Surveyor alleged that even if its construction of s CP2(a)(iv) was incorrect, it was reasonable and supported by peer professional opinion and therefore a permissible defence under s 59 of the Wrongs Act, which provides as follows:

(1) A professional is not negligent in providing a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by a significant number of respected practitioners in the field (peer professional opinion) as competent professional practice in the circumstances.
(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court determines that the opinion is unreasonable.

The competent professional practice was argued by the Surveyor to be the issue of a building permit relying on the Surveyor's construction of s C1.12(f) and certification under AS1530.3.[14] The judge held that this construction was held by the surveying profession,[15] but it could not withstand logical analysis and therefore it was unreasonable.[16] As such, it was not an available defence.

Findings — breach

In the result, the Builder was found to have breached the warranties in s 8(b), (c) and (f) of the DBCA, but it did not breach a duty of care in constructing the tower by selecting and installing the cladding.[17] The argument that the Builder breached a duty of care was important to the professional consultants, who all wanted to have the Builder as a concurrent wrongdoer under Pt IVAA of the Wrongs Act, so as to reduce their liability by way of a defence under that part.

Each of the professional consultants were found to have breached their consultant agreements with the Builder by failing to exercise due care and skill.[18]

The Surveyor was found to have breached its consultant agreement by issuing the building permit and approving the Architect's specification of the cladding and failing to notice and query the incomplete description of the cladding in the Fire Engineer's report.

The Architect was found to have breached its consultant agreement by failing to remedy defects in its design by specifying ACPs that were not fit for purpose and by failing to ensure an ACP sample provided by the Builder was fit for purpose, as required by the specification it prepared.

The Fire Engineer was found to have had a duty to warn in proactively identifying fire hazards, which extended to warning the Builder and probably also the Architect, the Superintendent and the Surveyor.[19] The content of that duty was to warn that the ACPs proposed for use did not meet the DTS requirements of the BCA.[20] Also, the Fire Engineer had a duty to advise about a solution to the non-compliance.[21] The Fire Engineer was found to have breached its consultant agreement by failing to conduct a full engineering assessment of the building and failing to include that in its report, and by failing to recognise the ACPs specified would not comply with the BCA.

Also, the judge found that by their conduct, the Surveyor and the Fire Engineer represented in trade or commerce that the drawings and specifications containing reference to the ACPs were BCA compliant, and therefore engaged in misleading or deceptive conduct.[22] The judge held that the Surveyor's opinion was not based on reasonable grounds, for the same reason that the peer professional opinion defence did not succeed, as discussed above.[23] On reliance, the Builder submitted that the Surveyor was misled by the Fire Engineer and this in turn caused the Builder to be misled. The judge agreed with this, noting authority that a party suffering loss need not establish that it relied upon another party's conduct, but instead it can establish liability by proof that others did, as a result of which the first party suffered loss.[24]

The judge made no findings against the Superintendent, other than its participation in the sample approval process did not amount to a failure to exercise reasonable care.[25] The absence of findings against the Superintendent was facilitated by the Superintendent settling shortly before trial and remaining in the proceeding in name only for the purposes of apportionment under Pt IVAA of the Wrongs Act. Because of its non-participation, there was insufficient evidence for any findings against it.[26] Also, his Honour held that the decision of *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288*[27] presented an "insurmountable obstacle" to any assertion that the Superintendent owed the Owners a duty of care to avoid pure economic loss.

There was no evidence that the presence of items on the balcony contributed to the fire spread and therefore no adverse findings against Mr Kim.[28]

Findings — apportionment

As noted above, the Owners argued that the Builder breached strict warranties under the DBCA, and did not breach a duty of care, so as to avoid a defence by the Builder that it was a concurrent wrongdoer with the other respondents, under Pt IVAA of the Wrongs Act.[29] The relevant wording is in s 24AF of the Wrongs Act, which provides a defence to a party to:

> 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.

That is, if the claim against the Builder did not arise from a failure to take reasonable care, the Builder could not defend itself by arguing the claim against it was apportionable as between the various respondents.

The professional consultants argued that the Builder was negligent in selecting the non-compliant ACPs and therefore their claim was apportionable with that of the Builder. The judge held that there was no failure by the Builder to take reasonable care in selecting Alucobest over Alucobond, and the selection of ACPs for use was an error, but it was not negligent as the Builder was not aware of the risks and was not responsible for the incorporation of the ACPs into the design.[30] His Honour stated as follows:

> Certainly LU Simon bears front-line responsibility to the developer and owner. But for a large and complex project, it has sought to cover acknowledged shortcomings in its own expertise by engaging highly skilled professionals to (in a variety of different ways) direct and supervise its work.[31]

In the result, the individual claims by the Owners against the professional consultants was not pressed and the Owners instead relied on the breach of warranty claim against the Builder which was found to not be apportionable.[32]

The judge considered whether any absolute obligations were owed by the professional consultants to the Builder or whether those obligations arose from a lack of due care and skill. The Builder argued that the obligations were absolute and therefore the professional consultants could not benefit from an apportionment defence under Pt IVAA of the Wrongs Act. For instance, the Builder referred to the obligation on the Surveyor to ensure the building permit was issued where the documentation the subject of the permit complied with the BCA.[33]

The judge referred to the decision of the Victorian Court of Appeal in *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd*[34] and held that Pt IVAA of the Wrongs Act is engaged where the evidence establishes in fact that the breaches arose from a failure to exercise reasonable care and that the evidence established such a failure.[35] For that reason, the judge held that the claim by the Builder against the professional consultants was apportionable.

In weighing the apportionment of responsibility as between the respondents, the judge made the following apportionments:

- Fire Engineer — 39%
- Surveyor — 33%
- Architect — 25%
- Mr Gubitta — 3%

The Fire Engineer received the largest apportionment because it was the only consultant involved with knowledge that the ACPs were non-compliant, and despite this, it did not raise the alarm.[36] Also, the purpose of its appointment was to guard against the risk that eventuated.[37] The Surveyor had the second largest apportionment as it was the "gatekeeper" and it failed to make inquiries about the use of ACPs with the Fire Engineer.[38] The Architect prepared the flawed design but its culpability was lower because it was not a specialist and it would be expected that the Fire Engineer or the Surveyor would pick up on the non-compliance.[39]

Curiously, Mr Gubitta was argued to owe a duty of care to the Owners but the apportionment was made as though Mr Gubitta owed a duty of care to the Builder. The judge held that because Mr Gubitta did not take part in the proceeding and no judgment was sought against him, "[the Builder] will not be reimbursed for 3% of the damages it is liable to pay to the Owners".[40]

Findings — damages

As for the damages the subject of apportionment, only $4.8 million was agreed.

The remaining $7.9 million comprised costs of reinstatement of property damaged by fire in the sum of $1.2 million, additional insurance premiums in the sum of $701,270.16, compliance costs for replacement of the cladding in the sum of $5.9 million and unquantified future costs for recladding works.

The judge noted that further sums in the amount of $6.8 million were yet to be resolved and either must be the subject of agreement or further hearing. As such, the matter is not over as the majority of the loss and damage claim is yet to be assessed.

Discussion

The *Lacrosse* litigation involved a number of complicated and voluminous pleadings between the parties. The Owners' pleading made claims not just against the

Builder, but also against each respondent including the professional consultants. The professional respondents relied on apportionment defences and contribution claims to seek to apportion the Owners' claims between themselves. Despite this complexity in the pleadings, the decision was much narrower, and followed contractual lines, by the Builder being required to indemnify the Owners for their loss and the consultants being responsible to indemnify the Builder under their contracts each in proportion to their responsibility for the loss.

Although the Builder was found to be 100% liable to the Owners, the result was great for the Builder as it was indemnified as to 97% by the insured professional consultants, with findings that the Builder was entitled to rely on the expertise of those consultants. That is, the Builder had frontline responsibility for the loss but its responsibility for the loss was caused by the negligence of the consultants it relied on which enabled it to be indemnified by those consultants.

The Fire Engineer was regarded as the most culpable which is logical given it is the professional consultant whose specialty was to avoid the risk of fire in the construction of a building. The second-most culpable was the Surveyor who bears responsibility for ensuring the building can be built in accordance with the BCA, including its non-combustibility requirements. The Architect was the least culpable, being the person with the least knowledge of the fire hazard risk of ACPs. As such, the extent of culpability was proportionate to the extent of specialisation of the consultants to the kind of risk that eventuated, being fire.

The findings about whether a particular claim arose from a failure to take reasonable care were based on weighing finely balanced evidence in many instances.

As for the professional consultants, it appears that the consultants' agreements (each of which were largely uniform) did contain absolute terms unqualified by the requirement to take reasonable care and that it was arguable that the claims against them were not apportionable for that reason.[41] However, the judge decided to treat those absolute terms as being subordinate to broader obligations in the consultant agreements imposing a requirement for the consultants to perform services with due care and skill,[42] thereby rendering the claims against those consultants subject to apportionment defences.

As for the Builder, the finding that it was not negligent involved a consideration of whether the Builder knew or ought to have known of the risk of ACPs. The evidence was that the responsible person with the Builder did not know of the fire risk of ACPs. However, the Builder is a substantial and sophisticated builder operating in an industry where the fire risk of ACPs were well-known, on the evidence. Also, the T2 specification that bound the Builder included detailed testing requirements for the cladding which were not obtained. The finding that this claim did not arise from a failure to take reasonable care was similarly a difficult weighing exercise.

Finally, the decision was qualified as being in respect of the particular project under consideration, and therefore one cannot just assume that the installation of ACPs on a building will give rise to the same liabilities. The judge noted that the ACPs the subject of the proceeding may be compliant in certain instances, particularly where subject to a particular performance-based solution in the BCA.[43] However, the decision has firmly shut the door on a DTS concession in the BCA being an avenue for use of these ACPs, which is consistent with the Victorian Building Authority position published on 28 June 2016 in its *Industry Alert* titled "External walls and BCA compliance".[44]

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Footnotes

1. *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd* [2019] VCAT 286.
2. Above n 1, at [461].
3. Above n 1, at [172].
4. Above.
5. Australian Standard AS1530.1-1994 Methods for fire tests on building materials, components and structures — Combustibility test for materials.
6. Above n 1, at [193].
7. Above n 1, at [222].
8. Above n 1, at [194].
9. Above n 1, at [192].
10. Above n 1, at [193].
11. Australian New Zealand Standard AS/NZS 1530.3-1999 Methods for fire tests on building materials, components and structures — Simultaneous determination of ignitability, flame propagation, heat release and smoke release.
12. Above n 1, a [150].
13. Above n 1, a [270].
14. Above n 1, at [356].
15. Above n 1, at [379].
16. Above n 1, at [397].
17. Above n 1, at [294].
18. Above n 1, at [7].
19. Above n 1, at [511] and [514].
20. Above n 1, at [514].

21. Above n 1, at [514].
22. Above n 1, at [408]–[410] and [515]–[521].
23. Above n 1, at [410].
24. Above n 1, a [510], referring to *Ford Motor Co of Australia v Arrowcrest Group Pty Ltd* [2003] FCAFC 313.
25. Above n 1, at [535].
26. Above n 1, at [534].
27. *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185; 313 ALR 408; [2014] HCA 36; BC201408266.
28. Above n 1, at [7].
29. Above n 1, at [280].
30. Above n 1, at [306]–[307].
31. Above n 1, at [307].
32. Above n 1, at [459].
33. Above n 1, at [316] and [318].
34. *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* (2008) 21 VR 84; [2008] VSCA 208; BC200809232.
35. Above n 1, at [323].
36. Above n 1, at [595].
37. Above n 1, at [596].
38. Above n 1, at [593].
39. Above n 1, at [594].
40. Above n 1, at [7].
41. Above n 1, at [321].
42. Above n 1, at [57],
43. Above n 1, at [10]–[12].
44. Victorian Building Authority, External walls and BCA compliance, 28 June 2016, www.vba.vic.gov.au/__data/assets/pdf_file/0010/39349/Industry-Alert-External-walls-and-BCA-compliance.pdf.