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Consultants beware – you might be liable for combustible cladding following the Lacrosse Tower judgment

Parties to construction involving combustible cladding, in particular professionals such as architects, engineers and surveyors, should be concerned by the liability and insurance implications of the first Australian judgment on liability for combustible cladding, which sheeted home liability to three consultants who were not in a direct contractual relationship with the applicant owners (Owners Corporation No.1 of PS613436T, Owners Corporation No. 2 of PS613436T, Owners Corporation No. 4 PS613436T & Ors v LU Simon Builders P/L, Stasi Galanaos, Gardner Group & Ors [2019] VCAT 286).

While Justice Woodward was at pains to note that the decision turned on the facts of the case, there are some broad lessons to draw, in particular for **professionals who have been involved in construction with combustible cladding, who will need to look at their professional indemnity (PI) insurance immediately, especially their notification and disclosure obligations**.

Who (or what) caused for the Lacrosse Tower fire?

In November 2014, a smouldering cigarette on an eighth-floor balcony of the Lacrosse building in Melbourne sparked a fire that raced up the aluminium-clad building façade, reaching the 21st floor in just 11 minutes. The rapid spread of the fire was due to the extensive contiguous installation of combustible Alucobest aluminium composite panels (**ACPs**), with a 100% polyethylene core, on the external building façade.

In the aftermath of the fire, 211 applicants (representing the relevant owners corporations and owners of individual apartments) brought a damages claim in the Victorian Civil and Administrative Tribunal (**VCAT**). The owners claimed over $24 million against the builder, the building surveyor and his employer, the architect, the fire engineer, the French backpacker whose cigarette ignited the fire (Mr Gubitta), the occupier of the apartment in which the fire originated and the superintendent under the building contract.

While Judge Woodward found that the cause of the fire was the failure of Mr Gubitta to fully extinguish his cigarette, the extensive damage to the tower was caused by the installation of the ACPs, and accordingly, the primary focus of the proceeding concerned the selection, approval and installation of the ACPs that carried the fire and the attribution of responsibility among the eight respondents for the damage caused. He found:

- the Alucobest ACP panels used as part of the external walls of the Lacrosse tower were combustible within the meaning of the Building Code of Australia (**BCA**) and the cladding did not meet the performance requirements of the BCA to avoid the spread of fire in the building; and
- the builder breached the warranties of suitability of materials, compliance with the law and fitness for purpose implied into its design and construction contract with the developer of the tower by the Domestic Building Contracts Act 1995 (Vic) (similar warranties are implied in other states in Australia but their application may differ).As section 9 of that Act provides that the implied warranties run with the building, the Owners were allowed to bring the proceedings against the builder for breach of those warranties as if they were parties to the design contract.

The builder's breach of the statutory warranty ≠ failure to exercise reasonable care

Although liable for breach of contract, noting that "not every error is negligent", Judge Woodward found no evidence that the builder failed to take reasonable care in installing the cladding. Important aspects of this finding were that:

- the builder did not have any relevant knowledge of the danger of ACPs, nor was it reasonably expected that a competent builder in the circumstances would have such knowledge; and
- in the context of a large and complex construction, the builder had sought to cover the shortcoming in its knowledge by engaging skilled professionals.Those contracts were pivotal in ascribing liability to the other building professionals in the chain of responsibility, with Judge Woodward stating that "each of the building professionals engaged in the process of construction of the Lacrosse tower was an important link in the chain of assurance and compliance with the BCA."

Judge Woodward found that the fire engineer, the building surveyor and the architect failed to exercise due care and skill in the selection, approval and installation of the ACPs and that this conduct amounted to a breach by each entity of its respective consultant agreement with the builder. Further, the fire engineer and building surveyor were found to have made misleading and deceptive representations about the suitability of the ACP to the builder in breach of section 18 of the Australian Consumer Law.

Apportionment of liability

Finding that the failure to exercise reasonable care by each of the fire engineer, the building surveyor, the architect and Mr Gubitta was a cause of harm to the builder resulting in its breach of the design contract, Judge Woodward found each to be a concurrent wrongdoer within the meaning of section 24AH and pursuant to section 51 of the Wrongs Act 1958 (Vic), and ordered that the $5.7 million in damages payable by the builder to the Owners be apportioned in the following proportions:

1. Building surveyor: 33%

2. Architect: 25%

3. Fire engineer: 39%

4. Mr Gubitta: 3%.

As no judgment was sought against Mr Gubitta, it was held that the builder would not be reimbursed for Mr Gubitta's proportion of the liability.

Key lessons from the Lacrosse Tower judgment

It is important to note that in claims in negligence for pure economic loss (e.g. the costs of rectifying combustible cladding where there has been no fire), it will be difficult to establish a duty of care. For such claims, affected parties may need to rely upon other causes of action in contract or under statute. In that regard, it is notable that in the class action recently commenced by residential property owners against the manufacturer and importer of Alucobond PE to recover rectification costs and other economic loss, the primary claim is for breach of trade practices legislation and not negligence.

Putting that to one side, the key lessons from the Lacrosse Tower judgment are:

- in the event of a fire causing damage to a residential property, the builder may be primarily liable to the property owner under statute (e.g. if the property is a building to which implied warranties attach), but may in turn have the right to recover for negligence (in tort, contract or under statute) against professionals on whom the builder relied provided that the builder did not have any relevant (actual or constructive) knowledge of the risks;
- **this will have immediate implications for the PI insurance market for building industry professionals**.In particular, professionals who have been involved in construction with combustible cladding, or cannot satisfy their PI insurers of that risk, may see their insurers impose exclusions in respect of any liability caused by combustible cladding or seek to increase premiums, perhaps to a point where it is uneconomical to insure (which may cause professionals to breach statutory requirements or contractual provisions requiring the insurances to be held).**Professionals need to both carefully consider their duty of disclosure to insurers of incoming policies and be in a position to make a comprehensive and effective circumstances notification to trigger cover under expiring PI policies in the event insurers impose a partial or total cladding exclusion on incoming PI policies**;
- in light of that risk of uninsurability, and as recovery rights against building industry professionals are contingent upon their ability to pay, **builders and other parties** (eg. property owners) with potential claims against professionals in respect of combustible cladding **should immediately consider putting the professionals on notice of potential claims to assist professionals to trigger their PI cover before exclusions are applied**;
- further, **parties to project-specific design and construct PI insurance that is expiring should give notification of circumstances before the policy expires if there are known combustible cladding risks**.

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