

Supreme Court's combustible cladding judgment backs previous Tribunal decision

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On Friday 26 March 2021, the Victorian Supreme Court of Appeal (the **Court**) in their judgment— *Tanah Merah Vic PTY Ltd (ACN 098 935 490) v Owners Corporation No 1 of Ps613436T and ORS* [2021] VSCA 72—backed the Victorian Civil Administrative Tribunal's (**VCAT**) previous decision that fire engineer Thomas Nicolas, building surveyor Gardner Group and architect Elenberg Fraser (the **Consultants**) were liable for the non-compliant combustible cladding that spread a fire at the Lacrosse apartment tower on Lonsdale Street in 2014.

In 2019 we [discussed the previous VCAT decision](#) and anticipated there would be a rise in the number of claims made in relation to non-compliant combustible cladding. The Court's decision indicates that builders will be able to rely on the receipt of building industry consultants' advice to avoid paying damages in combustible cladding claims.

The Incident

Jean-Francois Gubitta (**Mr Gubitta**), who lived at the Tower, left his cigarette burning in a plastic food container on the balcony. Fire quickly travelled up the external walls and spread on each level and everyone within the Tower evacuated. Mr Gubitta did not take part in the proceeding and no party sought default judgment against him. Therefore, no order was made against him and it was found that the builder will not be reimbursed for Mr Gubitta's 3%.

Previous decision

In the original VCAT decision, *Owners Corporation No. 1 of PS613436T v L.U. Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286, VCAT held that the Consultants breached their consultancy agreements with LU Simon by failing to exercise due care and skill in the provision of their services. The failure to exercise reasonable care by each of the Consultants and Mr Gubitta was held to be a cause of the harm to LU Simon resulting in its breach of the Design and Construct (D&C) Contract per s 51 of the *Wrongs Act 1958 (Wrongs Act)*.

VCAT determined that the \$12,765,812.94 claimed by the Owners as payable by LU Simon was to be apportioned between the consultants and Mr Gubitta.

Appeal decision

The three Consultants applied for leave to appeal on questions of law. The Court affirmed that LU Simon Pty Ltd, the builder who installed the combustible cladding, was in breach of implied warranty of Victoria's Domestic Building Contract Act and parts of the State's Building Act. However, the three Consultants were unsuccessful in arguing that the builder was negligent under the Wrongs Act.

The Court upheld VCAT's reasoning for determining that LU Simon had not failed to take reasonable care, which included, *inter alia*, the fact that LU Simon relied upon the Consultants' expertise in using combustible cladding to ensure compliance with the Building Code of Australia (**BCA**) and that it was not responsible for including the aluminium composite panels (**ACP**) in the design. The Court agreed that although LU Simon bore frontline responsibility to the developer and owner, it engaged highly skilled professionals for the large and complex project to direct and supervise its work where it lacked expertise.

The Court also held that VCAT made no error in determining that the breach of warranty claims that it had upheld against LU Simon were not apportionable.

Next steps

It is not immediately clear whether the decision will be appealed to the High Court. With the Court's determination that the use of ACP as part of the wall system on all buildings built around that time contravened the building code, the ruling may give hope to other apartment owners with historic combustible cladding cases.

We also expect building industry consultants who are unable to secure indemnity insurance for cladding-related projects will be increasingly exposed to liability when builders rely on their advice given under contractual arrangements with builders. This decision will have ramifications on the solvency of specialist consultants and will have a domino effect on the capacity of such consultants to obtain professional indemnity insurance.

All builders, building surveyors, architects and fire engineers should watch this space very carefully given the real likelihood of this decision being appealed to the High Court.

We would like to acknowledge the contribution of Lauren Connolly.

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