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We Didn't Start the Fire – VCAT Hands Down Decision on the Fire at Lacrosse Tower

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The Victorian Civil and Administrative Tribunal (VCAT) recently handed down its findings into which of the eight respondents were responsible for the damage caused by the fire at the Lacrosse apartment tower, 673-675 La Trobe Street, Docklands (Melbourne).

His Honour Judge Woodward found builder LU Simon to be primarily responsible, but apportioned 97% of liability to the project consultants: the fire engineer, 39%; the building surveyor, 33% and the architect, 25%. This was because 'each of the building professionals engaged in the process of construction was an important link in the chain of assurance and compliance'. [1]

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Facts

Around midnight on 24 November 2014, the resident (Jean-Francois Gubitta) of apartment 805 returned to his home, in the Lacrosse apartment tower in Melbourne's Docklands. After dropping his backpack on the bed, Gubitta went out onto the balcony to check if his clothes were dry and to smoke. He left his cigarette butt in a plastic food container serving as an ashtray which was sitting on the timber topped balcony table.

A fire caught hold, travelled up the external wall cladding, spreading onto the balcony on each level. The fire reached the roof of the tower above level 21 before it was brought under control.

Proceedings

211 applicants (Owners) brought proceedings against the following respondents:

- the builder of the tower, LU Simon
- the building surveyor, Stasi Galanos, and his employer, Gardner Group
- the architects, Elenberg Fraser
- the fire engineer, trading as Thomas Nicolas
- the occupier of 805, Gyeyoung Kim
- Mr Gubitta, and
- the superintendent under the building contract, Property Development Solutions.

Findings

His Honour Judge Woodward found that:

- LU Simon's selection of Alucobest did not cause the fire or fire spread [2]
- LU Simon breached the warranties of suitability of materials, compliance with the law and fitness for purpose implied into its Design and Construct (D&C) Contract under s 8 of the *Domestic Building Contracts Act*, and is therefore primarily liable to pay damages
- However, LU Simon's engagement of Elenberg Fraser, Gardner Group and Thomas Nicolas acquitted it of its

obligation to exercise reasonable care [3]

- Gardner Group did not exercise due care and skill by failing to:
  - issue the Building Permit for Stage 7 and approving Elenberg Fraser specification of aluminium composite panels with a core containing combustible polyethylene (ACPs)
  - notice and query the incomplete description in a report produced by the Thomas Nicolas
- Elenberg Fraser did not exercise due care and skill by failing to:
  - remedy defects in its design that caused the design to be non-compliant with the BCA and not fit for purpose
  - ensure that the ACP sample was compliant with Elenberg Fraser's design intent as purportedly articulated by the T2 specification and the BCA
- Thomas Nicolas did not exercise due care and skill by failing to:
  - conduct a full engineering assessment of the Lacrosse tower in accordance with the requisite assessment level
  - recognise that ACPs proposed for use in the Lacrosse tower did not comply with the BCA and a failure to warn LU Simon and the other parties of that fact
- Mr Gubitta owed a duty of care to the owners in the disposal of his cigarette, however his responsibility for the loss and damage is minimal.

Who is Liable?

The failure of the building surveyor, architects and fire engineer to exercise reasonable care was a cause of the harm to LU Simon, resulting in a breach of the D&C Contract within the meaning of s51 of the *Wrongs Act*. Each was found to be a concurrent wrongdoer under s24H of that Act.

The damages of AUD5,748,233.28 payable were assigned in the following proportions:

- Gardner Group, 33%
- Elenberg Fraser, 25%
- Thomas Nicolas, 39%, and
- Mr Gubitta, 3%.

No party sought to claim against Mr Gubitta. As such, LU Simon will be unable to claim his 3% of the apportioned damage and will have to pay it themselves.

Further sums claimed totalling AUD6,823,165.65 are yet to be resolved.

What Does this Mean for you?

Builders should be aware of the effects of implied statutory warranties. In a situation where it is reasonable to rely on the skill of its professional team, the builder is still not excused from the consequences of those warranties, where those implied warranties are unqualified. The builder bears the front line responsibility to the developer and owners.

In this case, LU Simon’s breaches of the implied warranties didn't arise from any failure to take reasonable care, but instead as a result of the breaches by the professional team members. These were still treated as LU Simon's breaches of the D&C Contract, but as a result of the professional team's conduct, 97% of the damages were apportioned to the professional team.

Consultants should be aware of the risk of claims arising from historic engagements involving the use of combustible cladding.

Unsurprisingly, PI insurers will likely be watching this space with some concern.

The decision is likely to be the subject of an appeal in the Supreme Court of Victoria. Undoubtedly, this result and any further legal action will attract significant attention given recent cladding events. The implications of this decision has demonstrated there are significant ramifications for all parties in the contractual chain of responsibility [4]. As such, His Honour noted that the judgment "should not be read as a commentary generally on the safety or otherwise of ACPs and their uses". [5]

Footnotes:

[1] Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property) VCAT 286 [307].
[2] [294].

[3] [306].
[4] [37].
[5] [10].

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