Cladding Update - Lacrosse Tower Fire Decision: Importance of Statutory Warranties

The Victorian Civil and Administrative Tribunal ("**Tribunal**") handed down an award on 28 February 2019, which ultimately holds the Builder liable for breach of statutory warranties with the Building Certifier, Architect and Fire Design Engineer liable to indemnify the Builder for 97% of the $5.7 million losses assessed to date, which included $100,000 for strata managers fees and $700,000 for increases in insurance premiums.

Although, yet to be resolved, it seems likely that a similar finding will be made with respect to other non-agreed items such as bringing unburnt parts of the building into compliance, loss of rental and accommodation expenses valued at $6.8 million.

The Tribunal found that primary liability lay with the Builder (LU Simon) for breaching statutory warranties under Victoria's Domestic Contracts Act 1995. However, the Tribunal also found that to the extent the Builder was liable to the Owners, the Builder was entitled to be compensated by the consultants that it relied upon in deciding to use Alucobest cladding panels.

The fire was started by an unextinguished cigarette butt. Around midnight on 24 November 2014, one of the occupants of unit 805 had a smoke on the balcony before going to bed. He put the butt in a plastic food container on a timber table which was used as an ashtray and contained aluminium foil with a small plant, some seeds and other cigarette butts. The unextinguished cigarette butt transitioned to flames when it came into contact with the packet of seeds and the fire spread to the plastic container and then to the timber table. From there the fire spread to the combustible material located nearby, probably including the washing basket of clothes, a nearby vacuum cleaner and the air conditioning unit. The air conditioning unit seems to have been the point at which direct flame came into contact with the Alucobest cladding.

The smoke detector within the unit had been covered with tin foil, but at 2:23am the smoke detector in the hallway outside the unit activated. By the time the fire brigade got there at 2:29am the fire was travelling rapidly up the external cladding onto balconies at every level.

The central finding of the Tribunal was that the primary cause of the spread of the fire was the use of an Aluminium Composite Panel with 100% polyethylene core as the external cladding, noting that polyethylene has a calorific value similar to petrol, diesel and propane.

Under a design and construct contract with the Developer, the Builder was primarily responsible for the external cladding selected. The Builder claimed that each of the Building Certifier, Architect, Superintendent and Fire Design Engineer failed in their "duty of care" to provide warning of the potentially disastrous consequences of that selection.

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The Tribunal considered the consultants' responsibilities through a detailed analysis of the terms on which they had been engaged, the correspondence and advices through the design development and construction phase, and the enquiries and testing conducted by each of the consultants. The Tribunal was particularly critical of the lack of rigour in invoking "deemed to satisfy" provisions in order to claim compliance with the Building Code of Australia; noting substantial literature expressing concerns about the core material existed as early as 1968, and a specific advisory issued by the Australian Building Codes Board in 2010, which should have alerted experts of the need for particular care.

The Wrongs Act 1958 in Victoria allows for liability to be apportioned between several parties where they are all, to some degree, legally responsible for loss and damage suffered. New South Wales has similar provisions under its Civil Liability Act 2002. Having regard to the specific conduct of the consultants in this case, the Tribunal held that the consultants should compensate the Builder for the amount the Builder was required to pay the owners in the following proportions:

- Certifier 33%
- Architect 25%
- Fire Engineer 39%

A total of 97% cover for the Builder. This might seem remarkable, given the Tribunal acknowledged existing law, which usually holds that a Builder has a duty to apply its own expertise to advice that it is given, which is often worthy of some proportion of the responsibility.

The cover could have been 100%, but although the Tribunal found that the occupant who has failed to properly extinguish his cigarette was 3% responsible the Builder had not sought any orders for compensation against that individual.

The Contract Superintendent was found not to have failed to have exercised reasonable care.

Although the circumstances of each case will vary, and in New South Wales different legislation will apply, the decision should send shockwaves through professional indemnity insurers given the many buildings within Australia that have Aluminium Composite Panel problems. Perhaps, it was in the hope of avoiding such a precedent that the claim by the Owners and Builder in this case was subject to a rigorous defence. The hearing took 22 days, involving 17 barristers, multiple experts and volumes of documents. The case is still not finished. Perhaps, Lacrosse Tower will prove an extreme case, although for the present it seems that multiple parties must be considered in any negotiations or litigation for compensation.

This case shows the importance of the statutory warranty scheme, thankfully New South Wales now has a 6 year warranty for aluminium cladding issues.

The stakes are high, and not just financial. In the award, the Tribunal drew attention to the fact that at the Lacrosse Tower fire all occupants, more than 400, were evacuated in less than 5 minutes. The Grenfell disaster casts a long shadow.

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Key takeaways

- The Tribunal found the Builder primarily liable for breaching statutory warranties under Victoria's Domestic Contracts Act 1995.
- Consultants were held responsible for compensating the Builder for their reliance on the cladding choice that contributed to the fire.
- The fire spread rapidly due to the use of Aluminium Composite Panels with a polyethylene core, which is highly flammable.
- The Tribunal highlighted the lack of rigorous compliance with the Building Code of Australia by the consultants involved.
- Liability can be apportioned among parties responsible for loss and damage, as per the Wrongs Act 1958 in Victoria and similar laws in NSW.

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