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Consultants in construction industry remain in the line of fire

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In a judgment handed down nearly as quickly as the flames that once spread up the façade of the Lacrosse apartment tower in Latrobe Street, Docklands, the Victorian Court of Appeal (Beach and Osborn JJA and Stynes AJA) on 26 March 2021 refused to grant leave in all but one of the building consultants' 25 grounds of appeal.

Key takeaways

The Victorian Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 and Ors [2021] VSCA 72* has strongly affirmed [the original decision of Judge Woodward in the Victorian Civil and Administrative Tribunal \(VCAT\)](#). In particular, the following findings were affirmed:

- that the use of combustible aluminium composite panels (ACPs) on the facade of the building was not compliant with the Building Code of Australia;
- that the installation of the ACPs breached the statutory warranties given by the builder under the *Domestic Building Contract Act 1995 (Vic)*;
- that a builder in the period from 2007 to 2010 was not expected to have known about the risk of installing ACPs on buildings like Lacrosse;
- that despite the builder's breaches of the statutory warranties, by operation of the *Wrongs Act 1958 (Vic) (Wrongs Act)*, liability for the losses suffered by the building owners ultimately falls on the various building consultants and the individual who started the fire; and
- that the 'peer professional defence' will not be available to building surveyors who have approved the use of ACPs in circumstances like on the Lacrosse building as the widespread

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KEY CONTACT

JANE HIDER

Partner

+61 3 9672 3218

+61 423 026 218

jane.hider@corrs.com.au

OTHER CONTACTS

JOSEPH BARBARO

Partner

+61 3 9672 3052

joseph.barbaro@corrs.com.au

BEN DAVIDSON

Partner

+61 3 9672 3500

+61 418 102 459

ben.davidson@corrs.com.au

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practice was deemed to be unreasonable.

The decision means that all participants in the construction industry, from contractors to building industry professionals, who have specified, installed or approved the use of combustible cladding on buildings will continue to be challenged by claims made by owners' corporations and other property owners.

Background

As is now well known, shortly before 2:23 am on 24 November 2014 a fire, resulting from an incompletely extinguished cigarette butt left to burn out in a plastic container, broke out on the balcony of apartment 805 of the 21 storey Lacrosse apartment tower.

The fire spread across 14 floors of the building's façade within 12 minutes. The rapid spread of the fire was a consequence of the ACPs that had been installed on the building's façade.

Although all of the 400 or so occupants were successfully evacuated from the building, damage to the building was substantial. The owners and the owners' corporation (**Owners**) claimed to have incurred losses exceeding \$12 million.

VCAT decision

To recover their losses, the Owners brought a claim in VCAT against the building professionals involved in the construction of Lacrosse (and against the person who originally left the cigarette in the plastic container on the balcony). The building professionals included the builder (**Builder**) and the building surveyor, architect and fire engineer (collectively, the **Consultants**).

The trial at VCAT can be divided into two groups of claims, these being:

1. the Owners' claims against the Builder; and
2. the Builder's claims against the Consultants.

The Owners were largely successful in their claims against the Builder, with Judge Woodward ordering the Builder to compensate the Owners for their loss.

At the same time, the Builder succeeded in its claims against the Consultants, with Judge Woodward ordering the Consultants to reimburse the Builder in respect of 97% of the damages awarded to the Owners.

The practical impact of his Honour's findings was that, although the Builder was held liable to the Owners, it was able to pass this liability on to the Consultants.

Judge Woodward reached this outcome having decided that the Owners' claims against the builder were not apportionable, and that the Builders' claims against the Consultants were apportionable.

This decision meant that the Consultants were required to reimburse the Builder for the amounts it was liable to the Owners. This aspect of the Judge's decision was highly contentious and was the subject of most of the grounds of appeal.

In Victoria, apportionment of damages is regulated by the Wrongs Act. The Wrongs Act provides that the liability of a defendant who is a concurrent wrongdoer must be limited to an amount reflecting the proportion of the loss or damage claimed that the court considers

just, having regard to the extent of the defendant's responsibility for the loss and damage.

The damages were ultimately awarded in the following proportions:

Defendant	Successful claim	Proportionate responsibility
Builder		
LU Simon Builders Pty Ltd	Breach of statutory warranties regarding materials, compliance with law and fitness for purpose. (The argument that the Builder failed to show reasonable care was not successful.)	3%*
Consultants		
Building surveyor (Gardner Group Pty Ltd and its employee)	Breach of consultancy agreement by failing to exercise due care and skill. Misleading or deceptive conduct, to some extent.	33%
Architect (Elenberg Fraser Pty Ltd)	Breach of consultancy agreement by failing to exercise due care and skill.	25%
Fire engineer (Tanah Merah Pty Ltd trading as Thomas Nicolas)	Breach of consultancy agreement by failing to exercise due care and skill. Misleading or deceptive conduct, to some extent.	39%

* The occupant whose cigarette appeared to have caused the fire did not participate in the proceedings but his proportional responsibility was assessed as 3% of the overall amount payable to the Builder. Since the occupant did not participate in the proceedings, Judge Woodward noted that the Builder remained liable to this extent.

The appeal

Left cumulatively liable for 97% of the Owners' losses, the Consultants appealed Judge Woodward's decision to the Victorian Court of Appeal. Given there was considerable overlap between the Consultants' 25 proposed grounds of appeal, the grounds were distilled into 11 issues for determination.

The issues set out by the Consultants for consideration, and the findings of the Court in respect of each of these issues, are as follows:

Issue	Summary of issue	Outcome
1.	Were the Owners' claims against the respondents' apportionable claims under pt IVAA of the Wrongs Act?	

	Judge Woodward made no error determining that the breach of warranty claims that he upheld against the Builder were not apportionable, as the Owners' claims against the Builder did not themselves arise from any failure to take reasonable care.	No – leave to appeal not granted
2.	Was the Builder a concurrent wrongdoer in respect of the consultants for the purposes of section 24AH of the Wrongs Act?	
	Because the claim was determined to not be apportionable, this issue did not need to be considered.	No – leave to appeal not granted
3.	Did the Builder fail to take reasonable care?	
	<p>The Court agreed with Judge Woodward that the Builder did not fail to take reasonable care, in part, because the Builder was unaware of the fire risks associated with the ACPs, was not responsible for incorporating ACPs into the design, and was entitled to rely on the Consultants to ensure compliance with the BCA.</p> <p>The Court also rejected a submission (which it considered was not previously raised in VCAT) that section 16 of the <i>Building Act 1993</i> (Vic) imposes a statutory, non-delegable duty on the Builder actionable by way of a claim in damages in respect of damage to property and pure economic loss.</p>	No – leave to appeal not granted
4.	On the proper construction of the Architect's specification and drawings, was the Builder directed and/or permitted to select the product Alucobest or any composite metal cladding product that was contrary to the <i>Building Act 1993</i> (Vic) and the Building Code of Australia (BCA)?	
	The Court held that references to ACP in the specification and drawings prepared by the Architect did not require the Builder to ensure that the material selected complied with the BCA. This remained the Architect's responsibility under its consultancy agreement.	No – leave to appeal not granted
5.	Did the Tribunal err in finding that the Architect was negligent in respect of its inspection and approval of the Alucobest sample?	
	The Court held that it made no commercial sense to limit the scope of the Architect's requirement to inspect samples as being limited to a visual inspection only (rather than approving based on regulatory compliance), and accordingly Judge Woodward did not err in the construction of the Architect's obligations in respect of the approval of samples. Further, the Court concluded that even if Judge Woodward had misconstrued the obligation, this would not impact the conclusion that the Architect's approach to the sample approval was in breach of its broader obligation as the head design consultant.	No – leave to appeal not granted

6.	Was it reasonably open to the Tribunal to find that the Owners' loss included an increase in insurance premiums?
	The Court held that evidence of an insurance broker, which was contained in an email attached to a witness statement and stated that "cladding at the property [had] accounted for approximately 80 per cent of the increases in premium from year", was properly taken into account by Judge Woodward to support the Owners' claim for damages in respect of an increase in insurance premiums, noting that VCAT is not bound by the rules of evidence and the relevant document had been tendered without objection.
7.	Did the Tribunal err in its construction of cl C1.12(f) of the BCA?
	Yes – leave to appeal not granted
8.	Did the Tribunal err in its conclusion that the 'peer professional opinion' was 'unreasonable' for the purposes of s 59(2) of the Wrongs Act?
	No – leave to appeal not granted
9.	By issuing the relevant Building Permit did the Building Surveyor make a representation to the Builder that was misleading and deceptive?
	No – leave to appeal not granted
10.	Was the Building Surveyor's failure to identify and remedy the omission in the fire engineering report causative of any loss?
	No – leave to appeal granted

11.	Did the Tribunal fail to consider the degree of departure by Building Surveyor from the relevant standard of care in making the apportionment findings?
The Court held that the Judge had considered the Building Surveyor's departure from the standard of care and related issues and that therefore this issue did not give rise to a question of law.	No – leave to appeal not granted

Conclusions

At the time of writing, the Court had not yet heard the parties in relation to consequential orders and costs. The judgment itself did not otherwise include any comment on whether the proportionate responsibilities between the consultants should be altered.

The decision effectively maintains the status quo that was put in place after the original VCAT decision was made and will come as little comfort for any consultants involved in designing buildings which specified ACP cladding, or their insurers.

Builders may be buoyed by the fact that LU Simon emerged relatively unscathed. However, each case will turn on its facts, including:

- the specific obligations imposed on each of the parties;
- the circumstances in which the design and construction of the project is undertaken (including when the relevant work takes place);
- the involvement of the builder in the selection and specification of the cladding material and its compliance with that specification.

Recent legislative changes, such as the [ban on specific combustible cladding products](#) (including ACPs), will help to ensure that the circumstances leading to this case do not happen again.

However, it remains to be seen whether the appeal will open the way for an increase in proceedings dealing with combustible cladding, in parallel with works done to rectify those buildings, including through the Victorian Government's Cladding Rectification Program.

It is also yet to be seen if building consultants, who were relying on arguments relating to apportionability similar to those raised by the architect and fire engineer in this case, will reconsider their position in relation to existing proceedings.

AUTHORS



✉ **Jane Hider**
Partner

✉ **Robert Kalenderian**
Associate

✉ **Mitchell Francis**
Lawyer

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