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When building work is not iron clad

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SNAPSHOT

- A recent Court of Appeal decision has provided clear guidance on who bears the evidentiary onus of establishing loss in combustible cladding disputes.
- Where the plaintiff claims damages for its losses, the courts have found the prima facie measure of damages is the cost of reinstatement, not the diminution in value of the defective building.
- Parties engaged in similar cladding litigation should consider whether alternative solutions to full replacement are possible.

On 26 May 2023, the NSW Court of Appeal handed down its decision in *The Owners – Strata Plan No 92450 v JKN Para 1 Pty Limited* [2023] NSWCA 114 (***Strata Plan No 92450***'). The decision involved a claim made by the owners corporation (**'the Plaintiff'**) of 'Parramatta Rise', a 28-storey mixed use tower in Parramatta (**'the Building'**), against JKN Para 1 Pty Ltd (**'the Developer'**) and Toplace Pty Ltd (**'the Builder'**) in connection with the installation of non-compliant cladding on the Building. The cladding used was aluminium composite panels known as Vitrabond FR (**'the Cladding'**).

After the interim occupation certificate was issued, Fire & Rescue NSW provided a Final Fire Safety report to the certifier recommending that the Cladding be certified compliant with an internationally recognised fire protection listing for full scale façade tests. Fire & Rescue NSW requested written confirmation once the necessary rectification works had been completed. However, a final occupation certificate was issued without this certification.

The Plaintiff sought rectification damages in the order of $5 million to replace the Cladding.

Building Code of Australia

The Building Code of Australia (**'BCA'**) is a 'performance-based' building code and each section of the BCA has minimum mandatory levels of compliance. At the time of construction, the 2013 version of the BCA required the Cladding be non-combustible. Compliance could be achieved if the Cladding complied with the 'deemed-to-satisfy' performance requirements of the BCA (i.e tested to AS1530.1:1994), via an 'alternative solution' assessed and certified by a fire engineer, or a combination of both.

The parties agreed the Cladding did not meet the deemed-to-satisfy requirements and neither established that there was an alternative Solution compliant with the performance requirements of the BCA with respect to fire resistance.

Additionally, the parties agreed the Cladding product used was banned under the *Building Products (Safety) Act 2017* (NSW) *('**BPA**')* by reason of it being combustible.

It was clear the Developer and the Builder had breached the requirements set out in the BCA.

Home Building Act 1989

The Plaintiff claimed the Developer and Builder had breached the statutory warranties under section 18B of *the Home Building Act* (**'Statutory Warranties'**) as:

- the Cladding did not comply with the *Home Building Act* (**'HBA'**), or 'any other law' (including the *Environmental Planning and Assessment Act 1979* and its associated regulations which gave legal effect to the BCA);

- the Cladding was not 'good and suitable' material as it was combustible; and
- the units were not fit for occupation because they were combustible.

The Plaintiff could rely on the Statutory Warranties as these were implied into the contract for the construction of the Building between the Builder and Developer and the construction of the Building amounted to 'residential building work' within the meaning of the *HBA*. Additionally, the Plaintiff was a 'successor in title' to the Developer (see sections 18C and 18D of the *HBA*).

The Plaintiff's entitlement to the Statutory Warranties was not disputed.

Decision at first instance

At first instance, the Court found against the Plaintiff.

The Court made three main findings:

1. The Cladding did not comply with the deemed-to-satisfy provisions of the BCA;
2. There was no evidence to show the Cladding on the Building had been tested in accordance with the relevant standard under the BCA to demonstrate its combustibility or otherwise. The Plaintiff's expert had mistakenly relied on a CSIRO test indicating the Cladding was combustible, which was based on a Vitrabond product different from that used on the building; and
3. It was not known whether the Cladding was compliant by way of an alternative solution, pursuant to the performance requirements of the BCA, because no attempt had been made to show there was an alternative solution before the certificate of construction was issued or at the time of the hearing. The Plaintiff failed to prove there was no alternative solution and the Respondent failed to prove that one existed.

Moreover, the Court rejected the argument that the Cladding material was 'not good and suitable' simply by virtue of being a banned product under the *BPA* and that the Cladding resulted in the Building not being reasonably fit for occupation.

On the question of loss, the Court declined to award reinstatement damages given the Plaintiff failed to show that an alternative solution 'could not then or now be performed' (at [62]).

NSW Court of Appeal decision

On appeal the first instance decision was overturned.

The central issues addressed were:

1. whether the Primary Judge erred in finding the installation of the Cladding did not breach the Statutory Warranties under section 18B(1)(c) of the *HBA* or alternatively, section 18(1)(e) or section 18(1)(b); and
2. the issue of loss and damage.

With respect to the first issue, the Court found that showing non-compliance through the deemed-to-satisfy provisions was sufficient to show non-compliance with the performance requirements of the BCA with respect to fire resistance (since no alternative solution was prepared *prior* to the issue of the construction certificate). This amounted to a breach of the warranty under section 18B(1)(c) of the *HBA* which the Builder and the Developer accepted in oral argument.

On the second issue, the Court reviewed the law in relation to assessing loss and damage noting 'where the claimant is entitled to have a building erected upon its land in accordance with the contract and the plans and specifications which formed part of it, the prima facie measure of damages is the cost of reinstatement, not the diminution in value of the defective building' (at [68]). However, there was a qualification to this rule being that 'not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt' (*Bellgrove v Eldridge* [1954] HCA 36 at 618 cited in *Strata Plan No 92450* at [69]).

In this case, the burden of proof for establishing loss was on the Plaintiff. By contrast, 'the party in breach of contract had the onus of displacing the prima facie rule for assessing damages as the cost of reinstatement' (*Builders' Insurers' Guarantee Corporation v The Owners – Strata Plan No 57504* [2010] NSWCA 23 at [79] cited in *Strata Plan No 92450* at [71]). The Court accepted the Builder and the Developer bore the evidentiary onus of displacing the prima

facie rule for assessing damages as the cost of reinstatement. The Court of Appeal held his Honour erred in finding the Plaintiff 'had the onus of establishing that an alternative solution "could not then or now be performed" … Having established that the respondents did not comply with the BCA, the Owners Corporation were not required to go further by proving that the respondents could not have complied by acting differently with respect to an alternative solution' (at [81]).

In short, on the question of the unreasonableness of the rectification costs, the onus was on the Builder and the Developer to show that what the Plaintiffs were asking for was unreasonable and they failed to do so.

Conclusion

Overall, this decision provides clarity as to what evidence is required to be provided and by whom in cladding disputes. In this case, while there were issues in establishing whether an alternative solution was possible, parties engaged in similar cladding litigation should consider whether alternative solutions to full replacement are possible.

Given the fact that Fire & Rescue NSW had raised concerns in relation to the Cladding, this case raises serious issues in connection with the conduct of the certifier. If the certifier for Parramatta Rise had taken the Cladding issue more seriously, the owners corporation could have avoided the stress and expense of the litigation and would not now be an unsecured creditor in the administrations of Toplace Pty Ltd and JKN Para 1 Pty Ltd, with poor prospects of recovering the entirety of the amount awarded by the Court.

Finally, this owners corporation was also unfortunate in that the building was completed prior to the establishment of the strata building bond scheme on 1 January 2018. Further, even if the Building Commissioner had been disposed to issue a Building Work Rectification Order pursuant to the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (as he has done in relation to a number of other Toplace related buildings in Sydney), the administration of Toplace Pty Ltd and JKN Para 1 Pty Ltd as well as the continuing absence of Mr Jean Nassif overseas mean that even these relatively new and powerful remedies do not assist the owners of Parramatta Rise.

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