

Combustible cladding—is it viable?

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The Victorian Civil Administrative Tribunal (the Tribunal) has handed down its first decision regarding non-compliant combustible cladding. The decision of *Owners Corporation No. 1 of PS613436T v L.U. Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286 concerns the Lacrosse apartment tower located at 673-675 La Trobe Street, Docklands (the Tower) and will be of particular interest and relevance to a number of professions and trades—including builders, building surveyors, architects and fire engineers.

An internal audit conducted by the Victorian Building Authority identified that non-compliant combustible cladding has been used on a number of buildings across Victoria. Of the buildings audited, it was found that more than 50% used non-compliant combustible cladding, so we expect there will be a number of future claims in this area. This decision will serve as precedent for claims made by owners of the building and the relevant Owners Corporation.

The incident

Jean-Fracois Guibitta lived at the Tower. At midnight on 24 November 2014, Mr Guibitta went onto the balcony for a cigarette. He left his cigarette burning in a plastic food container (which was being used as an ashtray) on the balcony. At 2.23 am, the smoke detector generated an alarm. The Fire Brigade arrived at 2.29 am. At this time, there was fire travelling up the external walls and spreading on each level. Everyone within the Tower was evacuated and the fire was under control by 2.55 am.

The decision

The legal action involved 211 Applicants, including the Owner's Corporation and the owners of the apartments. There were eight Respondents, including the builder, the building surveyors, the architects, the fire engineers, the occupier of the apartment where Mr Guibitta lived and Mr Guibitta himself.

The Tribunal, with his Honour Judge Woodward presiding, found:

- the builder was liable to pay damages to the Applicants because it breached the building contract it entered into with the developer. However, it was found that the builder did not fail to exercise reasonable care in the construction of the Tower by installing the combustible aluminium composite panels
- the building surveyors breached their agreement with the builder by failing to exercise due skill and care in issuing the building permit when the cladding did not comply with the Building Code and in failing to identify the incomplete description of the cladding on the engineering report. The building surveyors also failed in their peer professional opinion defence
- the architects breached their agreement with the developer by failing to remedy the design defects and failing to ensure that the cladding sample they provided to the builder was compliant
- the fire engineers breached their agreement with the developer by failing to conduct a full engineering assessment and failing to identify that the cladding did not comply with the Building Code. The Tribunal noted that certain aspects of architects and fire engineers' conduct was also misleading and deceptive as well as in breach of the Australian Consumer Law
- no adverse finding against the occupier of the apartment, and
- Mr Guibitta's responsibility for the loss was marginal.

At the time of the hearing, the builders had paid \$5,748,233.28 to the Applicants. The Tribunal found that the Respondents were to reimburse the builder in the following proportions:

- the building surveyors are to pay 33%
- the architects are to pay 25%
- the fire engineers are to pay 39%, and
- Mr Guibitta is to pay 3%.

However, Mr Guibitta 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 Guibitta's 3%.

Of the \$12,765,812.94 claimed by the Applicants, the parties agreed to \$4,851,937.19. The remaining \$7,913,875.73 relates to property damages, insurance premiums, compliance costs and future costs regarding the recladding works. The further claims of \$6,823,165.65 are not yet resolved and the Tribunal disallowed \$194,414.01.

Next steps

There is no evidence to suggest this decision will be appealed. However, this will become clearer once the further claims of \$6,823,165.65 are decided upon.

We anticipate there will be a rise in the number of claims made in relation to non-compliant combustible cladding, especially given the Victorian Building Authority's findings. In these claims, it is likely there will be issues with Claimants being out of time to bring proceedings, as generally a Claimant will have 10 years of the date of the certificate of occupancy or final inspection to bring an action. All builders, building surveyors, architects and fire engineers should watch this space very carefully.

To view Victoria Building Authority's audit report, [click here](#).

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