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## University of Sydney can't advance 'unclear' claims over flammable building panels



Construction 2023-08-25 1:02 pm By [Sam Matthews](#) | Melbourne

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The University of Sydney has lost a bid to amend its claims against a consultant in litigation over allegedly defective building work carried out on its Charles Perkins Centre in Camperdown.

The university's case takes aim at builder Multiplex Constructions, its guarantor Brookfield Australia Investments Limited, as well as various other subcontractors and consultants including consultant McKenzie Group Consulting (NSW) Pty Ltd, which is targeted in relation to façade panels which the university says are combustible, pose an undue risk of fire, and are not compliant with the requirements of the Building Code nor suitable for functional use.

McKenzie acted as a certifying consultant on the project, engaged to provide Building Code certification, identify non-compliant designs and assist in fixing them, and provide advice as necessary to Multiplex and other subcontractors.

The university sought to file an amended claim that ditched its case against McKenzie under the Design and Building Practitioners Act in favour of a case alleging breach of duty and misleading or deceptive conduct.

In a decision handed down in the NSW Supreme Court on Thursday, Justice James Stevenson ruled against allowing the university to advance the new case, taking aim at the allegation that if McKenzie had advised Multiplex that the façade panels were not suitable for the project, Multiplex would have replaced them.

“[T]he university does not know how it could be that, had McKenzie acted in accordance with what the university contends to have been its duty, Multiplex would probably have arranged for the façade panels to be removed and ‘an alternative compliant product installed in their place’,” the judge said.

“Further, simply to allege that this ‘probably’ would have happened without identifying, in any way, what ‘credible sequence of events’ might have achieved this result, places McKenzie in the position where it has no idea what case it has to meet in relation to this critical aspect of the university’s case... I think it is incumbent on the university to identify the ‘potential scenarios’ whereby it contends that McKenzie acting in accordance with its alleged duty would lead to the replacement of the façade panels with ‘compliant product’.”

Justice Stevenson said the same problem infected the university’s claim that McKenzie engaged in misleading or deceptive conduct under the Australian Consumer Law through various representations about the project and its certification.

The judge rejected the university’s argument that it suffered loss and damage because, if not for McKenzie’s misleading and deceptive conduct, and having known that the work had not reached practical completion and was not carried out according to relevant standards, the university “would have taken steps to ensure that [Multiplex] rectified the façade panels at no extra cost to the university.”

“For the reasons set out above regarding the corresponding allegations concerning McKenzie’s alleged duty of care, I decline to give the university leave to make such unclear allegations,” the judge said.

Justice Stevenson invited further submissions about whether the university should be allowed another opportunity to re-plead its case, having already suffered a previous pleadings defeat in April.

In its amended pleading, the university sought to allege that McKenzie owed it a duty of care as “a company providing professional certifying services on commercial projects, and...a member of a recognised class of professionals.”

The university said McKenzie breached that duty when it failed properly assess the use of the façade panels; identify that the panels gave rise to an “undue risk of fire spread” and were not compliant with the Building Code; and to advise the university that the panels were combustible and unsuitable for use in the Charles Perkins Centre façade, “in circumstances where a competent professional certifier in the position of McKenzie would not have engaged in that conduct”.

The University of Sydney is represented by Lucas Shipway, instructed by Minter Ellison. Multiplex Constructions is represented by David Weinberger, instructed by Carter Newell.

The case is *The University of Sydney v Multiplex Constructions Pty Ltd*.