

The Current Approach in Cladding Defect Claims

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The decision of the Court of Appeal in *Owners SP 92450 v JKN Para 1 Pty Limited* [2023] NSWCA 114, has clarified how Courts respond to claims by owners of buildings for defects involving combustible cladding and importantly sets out the elements which need to be established by parties involved in similar cases.

It is the latest in a series of cases in NSW where the Courts had to consider how to deal with cladding which were installed prior to the prohibition on certain cladding products in NSW announced in 2018.

The decision is also the second widely reported decision on cladding products, and compliance with the BCA. It enforces the strictness of the statutory warranties owed by contractors to owners of residential buildings under the HBA, and is likely to be carried forward in future residential building legislation.

Background

The case involved a 28-storey mixed use building located in Parramatta, which was constructed with aluminum composite panels (ACPs) as external cladding. Toplace Pty Ltd (**Builder**) constructed the building pursuant to a contract with JKN Para 1 Pty Ltd (**Developer**).

At the time of construction, the Building Code of Australia (BCA) required that external walls of buildings be “non-combustible”. However, there were no specific requirements to determine the threshold where a material was non-combustible. The BCA measures compliance through either:

- Deemed to satisfy requirements – where a design or construction is deemed to comply with the performance requirements of the BCA; or
- Performance-based (or alternative solution) – where a design or construction does not otherwise comply with the deemed to satisfy provisions but is developed to achieve compliance with the performance requirements by the building surveyor or certifier.

Prior to the issue of an occupation certificate, NSW Fire and Rescue indicated the ACPs used for the external cladding were not sufficiently fire resistant. Fire and Rescue recommended certification for the external façade, and sought written advice from the certifier once necessary works were completed.

The concerns from NSW Fire and Rescue were not addressed and the ACPs were not replaced prior to completion. The developer proceeded to register the strata plan and obtained final occupation certificates for the Building. The owners corporation, became a subsequent owner of the Building upon the registration of the strata plan.

On 10 August 2018, Commissioner for Fair Trading NSW announced a building product use ban prohibiting the use in a building of ACPs with a core greater than 30 per cent polyethylene pursuant to the powers under the *Building Products (Safety) Act 2017* (NSW) (**BPSA**). The legislation was a response to the tragic fires which broke out at the Grenfell Towers in London and the Lacross Apartments in Melbourne, which were exacerbated by the combustible cladding on the façade.

In April 2019, Parramatta City Council raised further concerns about the fire safety of the building, and the cladding.

The owners corporation subsequently commenced proceedings in the Supreme Court of NSW against the Builder and Developer for breach of statutory warranties under the *Home Building Act 1989* (NSW) (*HBA*). The owners corporation claimed:

- The cladding did not comply with the requirements of the BCA with respect to fire resistance;
- The cladding was not good and suitable material as it was combustible; and
- The building was not reasonably fit for occupation because they are combustible.

The estimated cost of rectifying the cladding was \$5 million.

In the first instance decision, the primary judge considered that while the cladding was not compliant with the deemed to satisfy requirements of BCA, an alternative solution under the BCA was not formulated at the time of construction or at the date of the hearing. The owners corporation did not adduce evidence of any alternative solution.

The primary judge considered that in the absence of any evidence about the availability of an alternative solution for the cladding “could not then or now be performed”, it was not open to the Court to find a breach of the relevant statutory warranties because it was possible that the cladding could be found to be non-combustible under an alternative solution

His honour considered there was a formal or technical breach of the BCA but was not satisfied the breach warranted an award of damages. The Court considered it was unreasonable to award \$5 million worth of rectification if the owners corporation could not establish if the proposed rectification was reasonable and necessary.

The Law

The HBA sets out strict statutory warranties owed by builders and developers to owners of residential buildings.

Section 18B(1) of the HBA provides:

- *The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work—*
 - *a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,*
 - *a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,*
 - *a warranty that the work will be done in accordance with, and will comply with, this or any other law,*
 - *a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,*
 - *a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,*

- *a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.*

In *Taylor Construction Group Pty Ltd v Strata Plan 92888 t/as The Owners Strata Plan 92888* [2021] NSWSC 1315, the Supreme Court of NSW affirmed a decision of the NSW Civil and Administrative Appeal Panel which found that a builder and developer breached the statutory warranties under the HBA because there was evidence that the cladding product used on the building was combustible. The cladding was therefore not compliant with laws under s18B(1)(c) and not fit for purpose under sections 18B(1)(e) and 18B(1)(f).¹

The Court of Appeal affirmed the approach in *Taylor* that non-compliance with the BCA would amount to a breach of the statutory warranties.

The owners corporation was not required to go further than proving a breach of the BCA by the builder and developer.² The Court of Appeal found that the owners corporation was not required to go further by proving that the builder and developer could not have complied by acting differently with respect to an alternative solution.

The reasonableness of the proposed rectification was an issue of mitigation which would need to be proved by the defendants.³

The Court of Appeal found the primary judge's approach to the alleged breach of the BCA as a "formal breach" to be in error. There is no legal distinction between a substantive and formal breach of the performance requirements of the BCA.⁴

In any instance the non-compliance of the cladding with the performance requirements of the BCA was a substantive breach because the cladding did not comply with the minimum standards in the BCA and was therefore a breach of the statutory warranties under section 18(1)(c) of the HBA which entitled the owners corporation to the removal and replacement of the cladding.

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