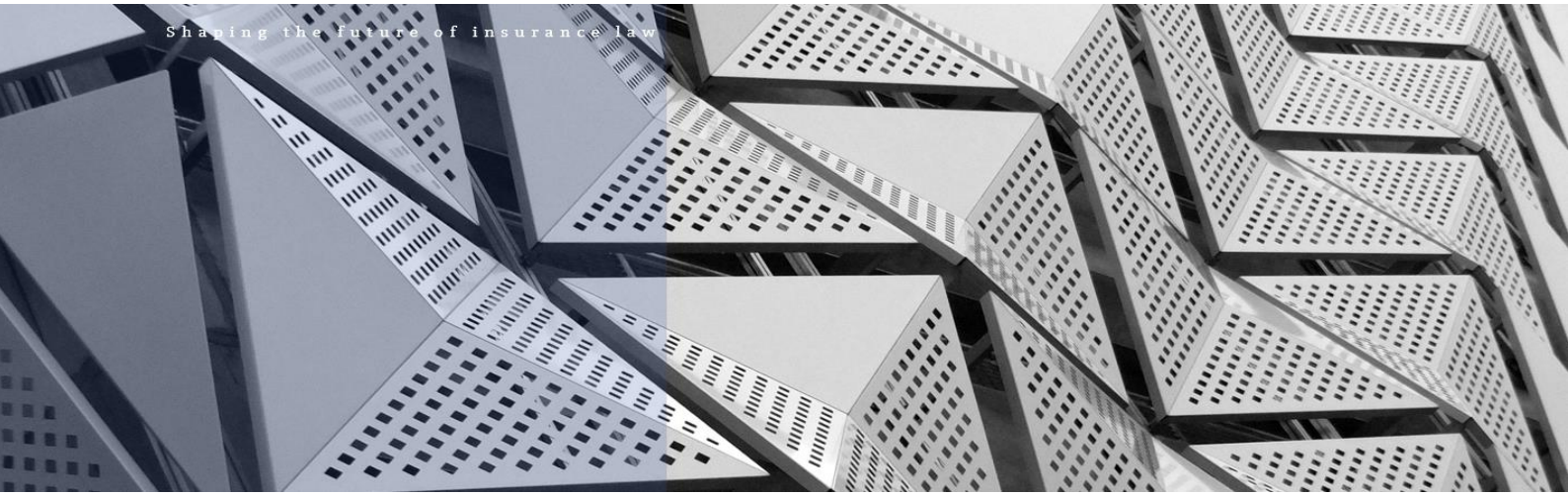
wotton kearney



The Lacrosse appeal and its professional indemnity implications

31 MARCH 2021

AT A GLANCE

On 26 March 2021, The Victorian Court of Appeal handed down its much-anticipated judgment in the Lacrosse matter, essentially upholding the trial judge's findings in the landmark 2019 decision.

Critically, the Court of Appeal:

- upheld the trial judge's award to the Applicants (the owners corporation and lot owners),
- did not disturb the trial judge's apportionment of liability – fire engineering consultant (39%), the building surveyor (33%), and the architecture firm (25%) – the smoker who started the fire was held liable for 3%, but that was effectively absorbed by the builder,
- clarified a critical aspect of the application of the apportionment of liability regime in Victoria,
- confirmed that the BCA compliance pathway for the ACP cladding (relied on by the building surveyor) was not open, and
- found that *The Wrongs Act 1958* (Vic) s.59 and s.60 defences were still not available to the respondent consultants.

BACKGROUND TO THIS LANDMARK CASE

Fires caused by highly combustible 100% polyethylene core Aluminium Composite Panels (ACP) cladding have captured attention worldwide. This appeal upholds the first decision in Australia dealing with the allocation of responsibility to the builder, and thereafter to building consultants, engaged to construct a domestic high-rise building with combustible ACP cladding.

The original decision

The Lacrosse case was initially heard in the Victorian Civil and Administrative Tribunal, which upheld the owners corporation's and lot owners' claims against the builder following a fire in November 2014 that involved combustible cladding on the Lacrosse building façade. The fire caused significant damage to apartments and the building and resulted in the local

authority issuing orders to remove and replace the cladding on the entire building.

The appeal

The appeal was brought by the architecture firm (Elenberg Fraser) (**Architect**), the fire engineering consultant (Thomas Nicolas) (**Fire Engineer**) and the building surveyor (Gardner Group) (**RBS**) after the trial judge found that the builder, LU Simon (**Builder**), while being 100% liable for the Applicants' damages claims, had relied on the advice of its consultants. Accordingly, the trial judge found the Builder was able to pass that liability down to the consultants, with that liability being apportioned amongst them.

The Court of Appeal expressed its gratitude to Vice President Woodward for the exceptionally high quality of reasons at first instance, noting those had made their task considerably easier than it might otherwise have been.

THE KEY ISSUES

The Court of Appeal's decision is heavily informed by the facts of the case and the grounds of appeal that were advanced by the consultants. Nonetheless, it provides some critical guidance on key issues affecting consultant professionals and their insurers.

Apportionment and the need to consider the precise claim made

The issue on appeal

A key issue on appeal was the operation of the proportionate liability regime as contained in Part IVAA of the *Wrongs Act 1958* (Vic) (**Wrongs Act**). Critically, the Applicants' primary position in the proceeding was that the Builder was liable to the Applicants by reason of the operation of statutory warranties contained within the *Domestic Building Contracts Act 1996* (Vic) (**DBCA**). The warranties relied on by the Applicants did not involve alleged breaches by the Builder to take reasonable care.

The Applicants' primary position was that the apportionment regime did not apply, as the regime only applies to claims for economic loss arising from a failure to take reasonable care. Accordingly, they argued the Builder was not entitled to apportion its primary liability to the Applicants. At first instance, the Tribunal agreed. It then went on to find that the Builder was entitled to recover from its contracting consultants.

On appeal, the Fire Engineer and the Architect argued that, when viewed in substance, the Applicants' claims against the Builder should be the subject of the apportionment regime as the claims involved circumstances arising out of a failure to take reasonable care.

The findings

After undertaking a careful and detailed analysis of the precise wording of the legislation and relevant authorities, the Court of Appeal dismissed this ground of appeal and observed:

- The starting point for deciding whether a claim is an "apportionable claim" for the purposes of the apportionment regime is the terms in which the claim is framed.
- The framing of the claim is an essential determinant of whether a claim can be said to arise from a failure to take reasonable care.
- The statutory definition does not extend to claims "involving circumstances arising out of a failure to take reasonable care".
- A contrary view would create anomalous consequences including:
  - enabling the primacy of contract in determining the allocation and extent of risk at common law in certain situations to be displaced, and
  - subordinating the statutory provisions supplementing the law of contract to a rule that would have the capacity to destroy their purpose.
- In the context of the DBCA warranties, a contrary view would also enable a builder:
  - to substantially avoid liability under statutory warranties that do not include any requirement that the owners establish a failure to take reasonable care,
  - to substantially avoid liability despite the warranties not being capable of being excluded by contract (the warranties survive for the benefit of successive owners and are supported by a statutory scheme of insurance), and
  - enable a builder to avoid liability under the warranties even when concurrent wrongdoers may be insolvent or under-insured.

In reaching this decision, the Court departed from the observations made by the Court in both *Dartberg*[1] and *Godfrey Spowers*[2];

[1] Dartberg (2007) 164 FCR 450
[2] Godfrey Spowers (2008) 21 VR 84

The implications

This finding has far-reaching implications for the construction industry and beyond. In short:

- A claimant can potentially avoid a defendant relying on the apportionment regime by pleading a claim founded on a contractual obligation and/or warranty if that obligation and/or warranty is not founded on an obligation to take reasonable care.
- Contracting parties can effectively avoid the operation of the apportionment regime by agreeing to contractual obligations and/or warranties that are not founded in obligations to take reasonable care.
- Arguably parties can "contract out" of the application of the apportionment regime by agreeing to terms that, if breached, would not enliven the operation of that regime.

Apportionment – difficulty in upsetting apportionment findings

It is also worth noting the Court of Appeal's reluctance to entertain opening up the Tribunal's assessment of the apportioned responsibilities of the parties, quoting the High Court's observations in Prodreberske[3], which observed that "*a finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds'. Such a finding, if made by a judge, is not lightly reviewed*".

Construction of C1.12(F) of The Building Code of Australia

The issue

A core issue in the dispute was whether the cladding, which went up in flames, met the requirements of the Building Code of Australia (BCA). In this case, the RBS argued that the cladding did meet a particular "deemed to satisfy" (DTS) provision contained in C1.12(f) of the BCA.

This argument was founded on a submission that the core component of the cladding, being its polyethylene core, was not a "laminate" and, accordingly, was the subject of an exemption for non-combustible materials within that provision of the BCA.

The findings

The Court of Appeal agreed with the Tribunal's analysis that this exemption did not apply but adopted a slightly different analysis.

The Court found that the RBS' contention led to the conclusion that the clause effectively regulates only the combustibility of the external laminates and the precise extent to which adhesive may be used as an element of the construction. The Court found that this interpretation leaves open the possibility of further layers within the material being combustible, which would make the BCA limitation of the extent of the use of adhesives pointless.

The implications

The Court of Appeal's findings effectively puts an end to this "compliance pathway" for combustible cladding under the BCA.

> **Potential exposure may lead to a reassessment of professional indemnity risks in the sector and is likely to re-shape both consultant contracts and design and construct contracts in the future**

Peer professional opinion defence

The issue

The RBS contended, at first instance, that it was entitled to rely on the peer professional opinion defence contained within section 59 of the Wrongs Act, which provides that in certain circumstances, peer professional opinion constitutes a defence to a claim of negligence on the part of an individual practising a profession.

The Tribunal determined that the practice that was relied on by the RBS in advancing this defence, which involved the issuing of building permits for the use of ACPs with a polyethylene core, was relevantly "unreasonable". It found the RBS could not use this defence and the RBS appealed the finding.

[3] Podrebersek (1985) 59 ALJR 492

The findings

The Court of Appeal agreed with the RBS's submissions that the question to ask was not whether the relevant practice was unreasonable but rather whether the acceptance of that practice was unreasonable. Nonetheless, it found that the Tribunal had addressed this issue.

Having considered the relevant authorities, the Court of Appeal observed that it is obviously open to a Court to conclude that an opinion is unreasonable if it lacks a logical basis (in the sense of a rationally defensible basis), but the ultimate question is simply whether, in all the circumstances of the case, the opinion was unreasonable.

The Court agreed with the Tribunal's conclusion that, having reviewed the evidence given, the practice of approving ACPs in these circumstances did not withstand logical analysis and was "unreasonable".

The implications

In seeking to establish a "peer professional opinion" defence, careful consideration needs to be given to the expert evidence relied on in support of that defence. Critically, any expert peer professionals will need to demonstrate they, either individually or collectively, subjected the relevant practice to robust scrutiny and logical analysis.

Statutory duties under the Building Act

It is also worth noting that The Court of Appeal expressed doubt that s.16 of the *Building Act 1993* (Vic) imposes an independent statutory duty on a builder (a breach of which results in damages) or that such a duty is non-delegable (either generally, or in the circumstances of the case). Section 16 contains its own remedy for a breach of the section (penalty provisions) and is not an independent vehicle that creates a cause of action against a builder for non-compliance.

THE KEY TAKEAWAY FOR CONSTRUCTION PROFESSIONALS & THEIR INSURERS

From an insurance perspective, this decision may lead to debate between insureds and insurers regarding the application of assumed liability exclusions.

Based on the Lacrosse appeal decision, insureds may lose the benefit of the apportionment regime if they have an agreement imposing strict obligations and/or warranties that will result in a material departure from what the parties would otherwise be held liable for at general law (with the benefit of the apportionment legislation).

That potential exposure may lead to a reassessment of professional indemnity risks in the sector and is likely to re-shape both consultant contracts and design and construct contracts in the future.

Equally, however, it's important not to lose sight of the fact that the Lacrosse matter remains a decision limited to its facts. While clearly the Court of Appeal has expressed some definitive and helpful views, especially concerning the operation of Victoria's apportionment legislation and the peer professional opinion defence, the outcome in Lacrosse remains, in large part, a product of the particular contractual arrangements between the parties and the manner in which the case was run and defended.

Need to know more?

For more information, please contact our Construction PI specialists.

Nick Lux
Partner, Melbourne
T: +61 3 9604 7902
E: nick.lux@wottonkearney.com.au

Andrew Brennan
Partner, Melbourne
T: +61 3 9604 7933
E: andrew.brennan@wottonkearney.com.au

Andrew Moore
Partner, Sydney
T: +61 2 8273 9943
E: andrew.moore@wottonkearney.com.au

Robert Finnigan
Partner, Sydney
T: +61 2 8273 9850
E: robert.finnigan@wottonkearney.com.au

FOR MORE INSIGHTS FROM W+K, VISIT:
https://www.wottonkearney.com.au/knowledge-hub/