

Lacrosse - Combustible Cladding

The Appeal

ASBC April 2021 Meeting

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Lacrosse Tower – 25 November 2014



Lacrosse – The Verdicts



- VCAT - 22 day trial in Sept and Oct 2019
- Victorian Court of Appeal – 3 day hearing February 2021

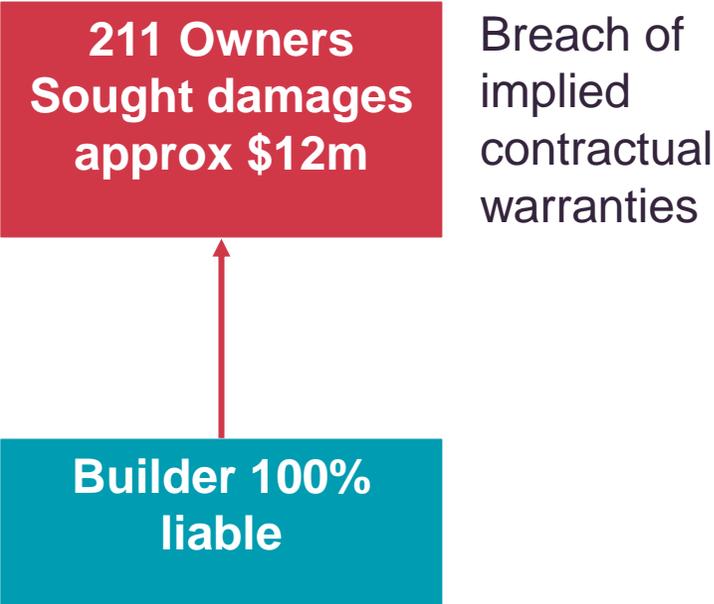
Tribunal Decision - Facts

Judge found:

- External cladding specified in the original design, namely Alucobond, failed to comply with the deemed-to-satisfy provisions of the BCA;
- The substitute aluminium composite cladding ultimately installed, namely Alucobest also failed to comply with the BCA (on the grounds that it was combustible).

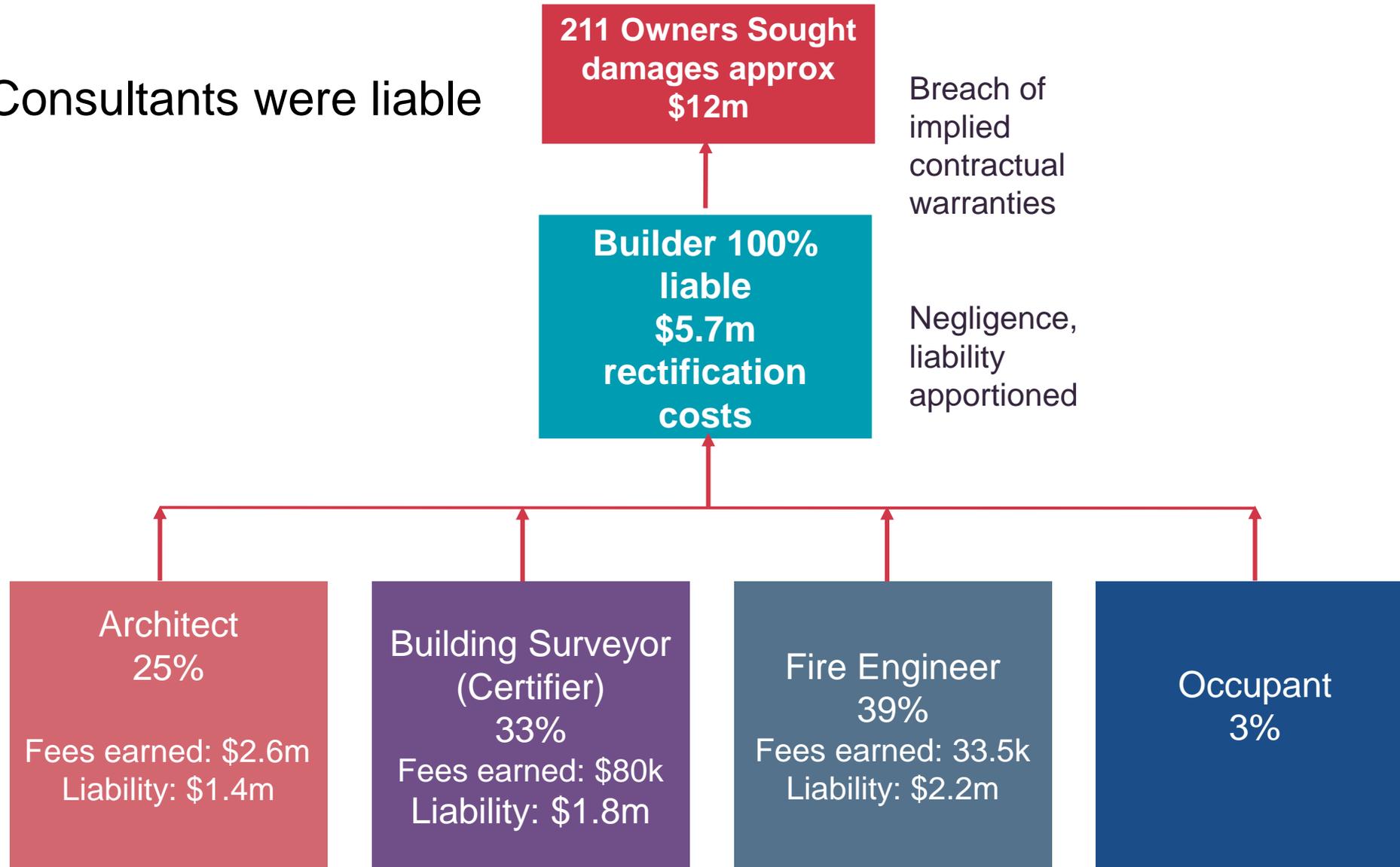
Tribunal Decision - Liability

Builder was liable



Tribunal Decision - Liability

Consultants were liable



Court of Appeal - Proceedings

- **Appeal proceedings were brought by:**
 - **Architect**
 - **Fire Engineer**
 - **Building Surveyor (Certifier)**

- **VSCA Decision handed down on 26 March 2021**

- **11 issues for consideration**
- **Court rejected 10 of them**
- **1 issue to be considered –(apportionment of compensation between consultants).**

Court of Appeal- Decision

1. **Held** that builder had breached implied warranties by constructing a building that did not comply with BCA;
2. **Held** that use of ACP's as part of wall system contravened BCA;
3. **Held** that Builder was not negligent for use of ACP's;
4. **Held** builder can rely on consultant's knowledge under consultancy agreements in regards to technical issues.

Court of Appeal– Decision (cont'd)

➤ 4 primary issues

1. Apportionment of builder's breach of its statutory warranties;
2. Responsibility for the selection of the ACP;
3. Compliance with the DTS provisions under the BCA; and
4. Application of peer professional defence.

Apportionment of builder's breach of its statutory warranties

- Tribunal held that breaches of warranties were not apportionable because they did not rise from the builder's failure to take reasonable care.
- Fire Engineer argued that it was not open on the evidence for the Tribunal to conclude that there was no want of reasonable care on the part of LU Simon
- Architect argued that the Tribunal should have commenced its analysis by;
 - identifying the damage or loss that was the subject of the Owners' claims, and
 - then asked if there was a person other than LU Simon whose acts or omissions also caused that loss or damage.
 - If the loss or damage claimed arose from a failure to take reasonable care by any of the persons identified, then, so it was contended, the whole of the Owners' claims, against all of those found to have been a cause of the loss and damage, were apportionable.
- These arguments were rejected.
- Court of Appeal agreed that claim against the builder were not apportionable because they did not arise from any failure to take reasonable care.

Responsibility for the selection of the ACP

- Tribunal found that Architect's breach its obligations to LU Simon was in part based on its finding that Architect's design specified ACPs for the external walls of the Lacrosse building that failed to comply with the BCA.
- More particularly, the Tribunal found that the Alucobond Specification by its terms at least permitted, and on one view expressly prescribed, an ACP with a 100 per cent polyethylene core
- The reference to Alucobond manufactured by Alucobond Australia Pty Ltd in the T2 Specification was a reference to an ACP with a polyethylene core.
- Architect argued that it was for LU Simon, in the implementation of the T2 Specification under the D&C Contract, to select materials that complied with applicable legal requirements
- Court of Appeal rejected this on basis that it would ignore the obligations under the consultancy agreement and would have the unreasonable result of absolving the Architect of its liability to LU Simon as a consequence of the contractual obligations owed by LU Simon to the developer

Compliance with the DTS provisions under C1.12(f) the BCA

- Certifier was engaged to ensure that the design and the materials used complied with the BCA.
- Certifier argued that the ACPs met the DTS provisions contained in C1.12(f) arguing that the use of the word 'laminate' in the BCA does not include the polyethylene core and therefore the core of the ACP was not required to be non combustible.
- Court of appeal agreed with the Tribunal - purpose of this part of the BCA was to provide effective fire safety in buildings.

Application of peer professional defence

- Wrongs Act provides that in some circumstances a peer professional opinion constitutes a defence to a claim of negligence on the part of an individual practising a profession.
- However, peer professional opinion cannot be relied on for the purposes of this section if the court determines that the opinion is unreasonable
- Court of Appeal found that practice of issuing of building permits under AS 1530.3 (flammability reporting) relying on BCA C1.12(f) for the use of ACP's with a polyethylene core was unreasonable.

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