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CASE IN NSW.

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SAYS NCAT.

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Introduction

In a major development for the strata industry, the New South Wales Civil and Administrative Tribunal (NCAT) has recently held that Biowood cladding installed externally on a Sydney building is combustible and must be removed as it is a major defect in breach of the statutory warranties contained in section 18B of the *Home Building Act 1989* (HBA).

The Case

In the recent case of *The Owners – Strata Plan No. 92888 v Taylor Construction Group Pty Ltd and Frasers Putney Pty Ltd* [2019] NSWCATCD JS Mueller & Co Lawyers represented the Owners Corporation of Strata Plan 92888 against the builder, Taylors, and the developer, Frasers (the respondents).

The owners corporation claimed that due to the combustible nature of the Biowood panels installed by the builder, the Biowood cladding posed an undue risk of fire spreading and was not in compliance with the Building Code of Australia and the Australian Standards.

NCAT accepted the owners corporation's evidence that there was an undue risk of fire spreading once the Biowood panels were ignited extending up the façade of the building which would allow fire to spread into the building.

Ramifications of this Case

The only known case in Australia prior to this case on cladding combustibility was the *Lacrosse* case in Melbourne, which was discussed at some length by NCAT. However, that case only related to aluminium cladding and not Biowood.

This case is now the first case in New South Wales, and presumably the first in Australia, that has established that Biowood panels installed in a building are combustible and breach the statutory warranties under section 18B of the HBA.

The Compliance Issue

In coming to its decision about the undue risk of fire spread from the Biowood panels, NCAT considered the relevant standards and the provisions of the Building Code of Australia (**BCA**), in particular Clause 2.4 of the BCA Specification C1.1, Clause 7 and AS/NZS 1530.3

NCAT said the effect of the relevant codes and standards was that it required the owners corporation's building and buildings of a similar type to be of Type A Construction. Buildings which are required to be Type A Construction "*must have non-combustible external walls, common walls and flooring and floor framing of the lift pits*".

Was the Biowood Cladding Fit for Purpose?

The respondents argued that:

- the Biowood panels were non-combustible because at the time of construction they were BCA compliant;
- since the Biowood panels were BCA compliant, the minimum standards were met, the real risk of any contemplated danger was minimised, the building was fit for occupation upon the issuance of the interim occupation certificate and the material used for the cladding being Biowood was fit for its purpose.

NCAT rejected the respondents' arguments. It held that "*combustible Biowood used as an attachment to a non-combustible external wall presents an undue risk of fire spread. As such, the Biowood attachment diminishes the fire resistance of the external walls. The evidence adduced by the applicant is that Biowood is a material that has the risk of permitting fire spread via the façade as it will allow fire spread from compartment to compartment via the exterior of the building*".

As a result, NCAT said that Biowood was not fit for purpose when it was used as an attachment to the building.

NCAT also relied also on the "common sense test" referred to in the *Lacrosse* fire case and said that "*it must consider the purpose and type of building. The building is a multi-storey residential building of Type A construction. The common-sense test dictates that it is illogical to stipulate that the external walls must not be combustible and then allow them to be covered in combustible attachments*".

Did the Occupation Certificate Mean that the Biowood Cladding was Satisfactory?

The respondents also relied on the interim occupation certificate to argue that the Biowood panels were compliant and fit for their purpose hence the reason why an interim occupation certificate was issued. They claimed that the interim occupation certificate creates an irrebuttable presumption of law and is conclusive evidence that the building and cladding are BCA compliant or that NCAT was bound to reach those conclusions by the issue of the interim occupation certificate.

NCAT was not satisfied that the respondents' submissions concerning the issuance of the interim occupation certificate correctly stated the legal position. NCAT held that it was not bound by the administrative action of a principal certifying authority issuing an interim occupation certificate. NCAT considered that if it was bound by the occupation certificate that "*would undermine the legislative intent of the HBA*".

Conclusion

A number of multi-storey buildings in NSW have Biowood panels installed on their façade which make them look aesthetically pleasing. But this recent decision by NCAT confirms that Biowood panels are combustible and pose a risk of fire spreading from one part of these buildings to another. The owners corporations of buildings which have Biowood cladding require urgent assessment of the risks involved and their rights in light of this new decision.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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