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A WIN FOR OWNERS CORPORATIONS: BIOWOOD CLADDING CONFIRMED AS COMBUSTIBLE

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The Case

On 4 August 2020, NCAT's Appeal Panel upheld a finding by NCAT that Biowood cladding installed on the façade of a multi-storey building are combustible and must be removed: *Taylor Construction Group Pty Ltd -v- The Owners-Strata Plan No. 92888* [2020] NSWCATAP 163.

The case involved an appeal brought against the decision of NCAT on 15 November 2019 in which it was held that Biowood cladding installed on the façade of a building were in breach of the statutory warranties under the Home Building Act 1989 (**HBA**), were combustible and posed an undue risk of fire spreading and that the Biowood cladding had to be replaced with cladding that complied with the statutory warranties and are non-combustible.

Mueller's represented the successful owners corporation in the first instance case in NCAT and then in the Appeal against the builder and developer.

Biowood Cladding

In reaching its decision, the Appeal Panel said the following:

1. The NCAT decision of 15 November 2019 was correct.
2. The Biowood cladding installed on the facade of the building as attachments to external walls were combustible.
3. Any fire spread via the external walls where the Biowood cladding is located could enter the building from the façade by windows and balconies from level to level.
4. As the Biowood cladding extends up the façade and joins each level they may (if ignited) allow fire spread into the building.
5. Accordingly, the Biowood cladding posed an "undue risk" or unwarranted or excessive risk of fire spreading via the façade of the building which constituted non-compliance with the BCA because they "impairs fire resistance".

Occupation Certificates

The Appeal Panel also confirmed that an occupation certificate issued for a building does not prevent an owners corporation from suing a builder or developer for breach of statutory warranties under the HBA.

In the appeal, the builder argued that NCAT was wrong in allowing the owners corporation to claim that the installation of the Biowood cladding was in breach of the statutory warranties because the building was

issued with an interim occupation certificate which created a presumption that the works performed in the building complied with the statutory warranties and all of the relevant codes and standards including the BCA. In other words, the builder said that the occupation certificate was supreme and to bring a claim for a breach of statutory warranties was an impermissible challenge to the validity of the occupation certificate.

The Appeal Panel confirmed the decision of NCAT that occupation certificates do not prevent owners from suing for building defects and in so doing so adopted what the NSW Court of Appeal said in the case of *Ku-ring-gai Council -v- Chan* [2017] NSWCA 226, that the, “*occupation certificate does not in terms certify that the building work does not, or is not likely to, contain latent defects.*”

Conclusion

The decision in the case sets a precedent that, in effect, means that the use of Biowood cladding material in a building is a breach of the statutory warranties in the HBA on the basis that the material is combustible and creates an undue risk of fire spreading throughout the building. This is also the first reported case where a Court or Tribunal has upheld a finding that a particular type of cladding is combustible. The outcome of the case represents a win for owners corporations and sends another timely warning to builders and developers that use of combustible cladding is fraught with risk that carries with it substantial consequences.

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

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