

# Lacrosse Towers fire - How far does an architect's liability extend?

11 April 2019

9 min. read

[cladding](#) / [building](#) / [construction](#) / [dispute resolution](#) / [lacrosse towers](#) / [legislation](#)

## Key issues:

- A recent decision of the Victorian Civil and Administrative Tribunal found an architecture firm proportionately liable for damage caused by fire to one of the Lacrosse Towers apartment buildings in Melbourne.
- It was alleged that the architecture firm had breached its contract with the builder by failing to perform certain obligations pursuant to that contract.
- The decision by the Victorian Civil and Administrative Tribunal is a strong reminder to all involved in the building industry that the scope of an architecture firm's responsibility for any project can extend beyond the pure design of the project.

A recent decision of the Victorian Civil and Administrative Tribunal (**VCAT**) found an architecture firm proportionately liable for damage caused by fire to one of the Lacrosse Towers apartment buildings in Melbourne.

In 2014, one of the Lacrosse Towers apartment buildings was extensively damaged by a fire. The fire was ignited by a cigarette butt that was left in a makeshift ashtray on a balcony of the building, which then rapidly spread up the exterior wall cladding to balconies on other levels of the building. The fire proceeded to spread rapidly as a result of unsuitable cladding material being used in the construction of the building. The quantum of damages claimed was in excess of \$12.7 million.

The VCAT proceedings considered the responsibility for damage caused by the fire and primarily focussed on the selection, approval and installation of the aluminium wall cladding that carried the fire up the building.

Of the \$12.7 million of damages claimed, approximately \$4.85 million was agreed between the parties, resulting in a balance of approximately \$7.9 million to be considered by VCAT. Of that balance, Justice Woodward granted a further \$900,000 (approximately) in favour of the owner corporations, and otherwise called for further steps to occur before he was willing to make orders regarding the balance of the alleged damages.

While VCAT primarily found the builders liable for damages, VCAT attributed the responsibility for payment of the awarded damages (approximately \$5.7 million) as follows:

1. the architecture firm: 25%;
2. the building surveyor: 33%;
3. the fire engineer: 39%; and
4. the resident who smoked the cigarette: 3%.

The judgment of His Honour Justice Woodward is in excess of 200 pages in length and considers in detail the liability of each of the parties listed above. Given the liability of each individual party could be the subject of its own publication, this article focuses on the findings of VCAT such that they relate to the architecture firm involved in the project.

## The contract

The architecture firm initially entered into a consultancy agreement with the developer for the Lacrosse Towers project, which was later novated to the builder of the project. Relevantly, the contract provided that the architecture firm shall:

- *“where appointed as principal design consultant, be responsible for the proper coordination and integration of the work of all other consultants appointed by the client into the design of the works”; and*
- *“inspect the works during construction for compliance with the brief, contract material and all legislative requirements applicable to the services, exercising the knowledge, skill and expertise of an appropriately experienced, competent and qualified architect and provide monthly certificates in respect of such inspection to the client...”*

## The claim against the architects

It was alleged that the architecture firm had breached its contract with the builder by failing to perform certain obligations pursuant to that contract. In summary, the claims made against the architecture firm were that the architecture firm:

- failed to ensure that its design of the external cladding:
  - satisfied all the legislative requirements applicable to the design of the work, including the applicable requirements of the *Building Code of Australia (BCA)*; and
  - was otherwise fit for purpose; and
- failed to check whether the sample of the proposed external wall cladding provided by the builder:
  - complied with the BCA; and
  - was otherwise fit for purpose.

## Arguments for the architects

The architecture firm argued that it was not liable for the damage caused to the building for the following reasons:

- it was ultimately the builder’s responsibility to select the appropriate materials to be used in the construction of the building;
- where the architecture firm had identified a particular product as part of its design, it was for visual reasons only and the builder was still obliged to select a product that satisfied the necessary performance requirements (including legislative requirements);
- the architecture firm had taken on a design responsibility and was responsible for ensuring that its design complied with the law, but its job was that of assistance, not lead design consultant;
- the obligation upon the architecture firm to inspect the sample of the proposed wall cladding material only extended to an obligation to inspect the sample for visual characteristics; and
- architects are not experts in the BCA and should not have been expected to inspect the sample of the proposed wall cladding for anything other than the look or intent of its design.

## The decision

VCAT was of the view that some of the arguments advanced by the architecture firm, particularly those which argued that the architecture firm was only concerned with matters from a ‘visual’ perspective, were inconsistent with the evidence submitted on behalf of the architecture firm and were otherwise inconsistent with the terms of the contract between the architecture firm and the

builder.

In this regard, VCAT found that:

- individuals from the architecture firm on the project (and who gave evidence) clearly considered the inspection of samples of materials and the specification of materials as a task that went beyond 'merely a statement of visual intent';
- it was clear on the contract terms that, if the architecture firm was to identify a 'proprietary product' as part of its design of the project, reference to such 'proprietary product' is directed at far more than just the visual characteristics of the product;
- any identification of a 'proprietary product' by the architecture firm was viewed as the architecture firm specifying the use of that 'proprietary product' or something that has an equivalent level of quality, and not just visual quality;
- it was self-evident that the commercial intent of the agreement, reached between firstly the architecture firm and the developer and then novated to the builder, was designed to facilitate the ongoing involvement of the architecture firm in (and thus their responsibility for) the development of the project;
- the architecture firm was appointed and had acted in the capacity as lead design consultant; and
- it made commercial sense for the builder to seek to ensure that the architecture firm, who was responsible for conceiving the design of the project, was also responsible for coordinating its implementation.

As a result, VCAT found that the architecture firm had failed to perform its obligations under, and had otherwise breached its contract with the builder. VCAT was of the view that the architecture firm had an express obligation to exercise care and skill and ensure that the contract material (which included the 'for construction' architectural drawings) complied with the legislative requirements, including the BCA.

It was also noted by VCAT that whilst other entities had reviewed the design documentation and materials specified, including the building surveyor and the fire engineer (who may have been more experienced in complying with the BCA than the architecture firm), the architecture firm was sufficiently experienced to be alert to the requirement not to select materials that unduly contributed to the spread of fire.

## **Proportionate liability**

In seeking to reduce its liability for breach of the contract with the builder, the architecture firm argued that its culpability should reflect the fact that its design was considered and reviewed by each of the building surveyor and the fire engineer. Whilst some of the evidence given on behalf of the architecture firm went against this submission, such evidence illustrating that the architecture firm had strong convictions concerning the materials to be used (including the material for the external wall cladding), VCAT was of the view that the architecture firm's place in the liability hierarchy was materially below that of the specialist building surveyor and the fire engineer.

VCAT found that there were flaws inherent in the architecture firm's design of the building that gave rise to a failure to comply with the BCA, but it would be expected in the ordinary course of things that either the building surveyor or fire engineer would have identified and corrected those flaws.

In light of those findings, VCAT attributed 25% responsibility to the architecture firm for the damage caused to the building.

## Take away points

The decision by VCAT is a strong reminder to all involved in the building industry that the scope of an architecture firm's responsibility for any project can extend beyond the pure design of the project.

Rather, their responsibility can (depending upon the terms of the contract) extend to ensuring that the design of the project and the materials used in the construction of the project meet legislative requirements, including satisfying the Building Code of Australia. This can occur despite the engagement of other, more experienced building professionals on the same project. In these circumstances, the architecture firm was found to be 25% responsible for the damages awarded by VCAT. In a large commercial or residential development, that can amount to a sizeable sum of money.

The decision also serves as a reminder to architectural firms to carefully review the terms of their contracts with developers or builders, particularly in respect of the nature of their obligations and exposure to potential risk.

Instances such as the Lacrosse Towers fire have resulted in new legislation being introduced in respect of exterior cladding used in the construction of buildings, as well as a checklist for current owners of buildings that may have unsuitable cladding. For a quick guide to completing the cladding checklist, see the recent article from our Construction team [here](#).

For more information or discussion, please contact HopgoodGanim Lawyers' [Dispute Resolution](#) team.

11 April 2019

[cladding](#) / [building](#) / [construction](#) / [dispute resolution](#) / [lacrosse towers](#) / [legislation](#)  
[Previous article](#) [Next article](#)