Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T - [2021] VSCA 72

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2019 0048

TANAH MERAH VIC PTY LTD (ACN 098 935 490) Applicant

v

OWNERS CORPORATION NO 1 OF PS613436T and ORS Respondents

S APCI 2019 0051

GARDNER GROUP PTY LTD (ACN 056 178 262) Applicant

v

OWNERS CORPORATION NO 1 OF PS613436T and ORS Respondents

S APCI 2019 0053

ELENBERG FRASER PTY LTD (ACN 081 961 855)	Applicant
v	
OWNERS CORPORATION NO 1 OF PS613436T and ORS	Respondents

JUDGES:	BEACH, OSBORN JJA and STYNES AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	22, 23 and 24 February 2021
DATE OF JUDGMENT:	26 March 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 72
JUDGMENT APPEALED FROM:	[2019] VCAT 286 (Judge Woodward)

BUILDING AND CONSTRUCTION – Applications for leave to appeal on questions of law from a decision of the Victorian Civil and Administrative Tribunal (VCAT) with respect to a domestic building dispute – Claims in respect of property damage and economic loss arising from fire at a multi-level residential building – Use of aluminium composite panels ('ACPs') on facades of building a cause of the damage suffered by the owners – Owners' claims against builder pursuant to statutory warranties concerning the suitability of materials, compliance with the law and fitness for purpose arising under *Domestic Building Contracts Act 1995* s-subs 8(b), (c) and (f).

BUILDING AND CONSTRUCTION – Builder's claim against building surveyor, architect and fire engineer for failure to exercise reasonable care in accordance with consultancy agreements – Whether owners' claim before VCAT apportionable under *Wrongs Act 1958* pt IVAA – Whether builder a concurrent wrongdoer in respect of the consultants for purposes of proportionate liability – Whether builder failed to take reasonable care in selecting and installing cladding – Whether Tribunal failed to consider aspects of the case against the builder alleging failure to take reasonable care – Whether open to contend on application for leave to appeal that *Building Act 1993* s 16 imposed a non-delegable duty of care upon the builder with respect to property damage and economic loss – Whether owners' claim against builder was one 'arising from a failure to take reasonable care' – Whether owners' claim properly characterised as one apportionable claim against all the respondents to the primary proceeding.

BUILDING AND CONSTRUCTION – Whether on the proper construction of the relevant specification the builder was permitted or directed to select and install ACPs which did not comply with the *Building Act 1993* and the *Building Code of Australia* ('BCA') – Use of ACP 'indicative to Alucobond' – Whether Tribunal erred in finding architect negligent in respect of its inspection and approval of ACP sample – Whether reasonably open to Tribunal to find owners' loss included an increase in insurance premiums – Whether Tribunal erred in its construction of BCA cl C1.12(f) – Meaning of 'laminate' in relevant provision of the BCA.

PROFESSIONAL NEGLIGENCE – Whether building surveyor acted as a member of a profession and in accordance with peer professional opinion – Whether the Tribunal erred in its conclusions with respect to the relevant peer professional opinion having regard to *Wrongs Act 1958* s 59(2) – Whether by issuing the stage 7 building permit the building surveyor made a representation to the builder that was misleading and deceptive.

CAUSATION – Whether the building surveyor's failure to identify and remedy omissions in the description of proposed cladding in the fifth fire engineering report was causative of loss – Whether counter-factual hypothesised to establish causation of loss as a result of building surveyor's negligence with respect to the fifth fire engineering report was inconsistent with findings of Tribunal as a whole.

APPORTIONMENT – Allocation of responsibility between building surveyor, architect, fire engineer and smoker who started fire – Whether Tribunal failed to consider the degree of departure by the building surveyor from the relevant standard of care in making apportionment findings.

BUILDING AND CONSTRUCTION – Leave to appeal refused with respect to proposed grounds of appeal advanced on behalf of the fire engineer and architect – Leave to appeal granted with respect to proposed ground 3 of the building surveyor's proposed grounds of appeal concerning the Tribunal's findings with respect to causation of loss consequent upon negligence with respect to the

fifth fire engineering report – Leave to appeal otherwise refused with respect to the further grounds advanced by the building surveyor – Appeal allowed with respect to proposed ground 3 of the building surveyor's proposed grounds of appeal – *Domestic Building Contracts Act 1995* s 8 – *Building Act 1993* s 16 – *Building Code of Australia* cl C1.12(f) – *Victorian Civil and Administrative Tribunal Act 1998* s 148 – *Wrongs Act 1958* pt IV AA, ss 24AE–24AI, 59 – *Toomey v Scolaro's Concrete Constructions Pty Ltd [No 2]* [2001] VSC 279 considered – *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 applied – *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 applied – *Brookfield Multiplex Ltd v Owners — Strata Plan No 61288* (2014) 254 CLR 185 considered – *Reinhold v NSW Lotteries Corporation [No 2]* (2008) 82 NSWLR 762 considered – *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450 considered – *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* (2008) 21 VR 84 considered – *Perpetual Trustee Company Limited v CTC Group Pty Ltd [No 2]* [2013] NSWCA 58 considered – *Permanent Custodians Ltd v Geagea (No 4)* [2016] NSWSC 934 considered – *Bolitho v City and Hackney Health Authority* [1998] AC 232 considered – *Jones v South Tyneside Health Authority* [2001] EWCA Civ 1701 considered.

APPEARANCES:	Counsel	Solicitors
For Tanah Merah Vic Pty Ltd in all proceedings	Mr T J Margetts QC with Mr J B Waters	Clyde & Co Australia
For the Owners in all proceedings	Mr W Thomas	Wotton & Kearney
For Gardner Group Pty Ltd in all proceedings	Mr C M Caleo QC with Ms V Blidman	DLA Piper Australia
For LU Simon Builders Pty Ltd in all proceedings	Mr P B Murdoch QC with Mr R Andrew	Colin Biggers & Paisley
For Mr A Galanos in proceeding S APCI 2019 0153	Mr C M Caleo QC with Ms V Blidman	DLA Piper Australia
For Elenberg Fraser Pty Ltd in all proceedings	Mr J A F Twigg QC with Mr C F E Dawlings	Clyde & Co Australia

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BEACH JA
OSBORN JA
STYNES AJA:

Introduction

1. **Following paragraph cited by:**

State of Victoria v L.U. Simon Builders Pty Ltd and Ors (Ruling) (26 July 2024) (Wise J)

8 This was described by his Honour Judge Macnamara in *Owners Corporation 1 Plan No PS 707553K and Ors v Shangri-La Construction Pty Ltd (ACN 130 534 244) and Anor* [1] as follows: [2]

"1 According to the Court of Appeal:

'Shortly before 2:23 am on 24 November 2014, a fire broke out on the balcony of apartment 805 of the 21 storey Lacrosse apartment tower in Latrobe Street, Docklands. The source of the ignition of the fire was an incompletely extinguished cigarette butt left in a plastic container by a person staying in the apartment, Jean-François Gubitta. The plastic container was sitting on a table with a timber top on the balcony of the apartment. The fire spread from the plastic container to the table and then to the nearby external cladding of the building.' (*Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T and Ors* [2021] VSCA 72, [1])

2 This conflagration generated complex litigation dealt with in the Victorian Civil and Administrative Tribunal in its Domestic Building List by Vice President Judge Woodward (as he then was) ([2019] VCAT 286), ending in the Court of Appeal, with the joint judgment from which I have just quoted. It attracted international attention, and triggered an upheaval in the State's building regulatory regime.

The reverberations of the Lacrosse conflagration continue to this day. Almost six years after the fire, the Minister for Energy, Environment and Climate Change, introducing a bill to amend the *Building Act* 1993 , said:

'The Victorian Government is committed to removing the scourge of combustible cladding from our communities. The safety of building occupants is our top priority.

As the Victorian Cladding Taskforce detailed in its final report in July 2019, rectification of combustible cladding on buildings is complex and difficult. Different

solutions will be required for different buildings. It will also take time—in large part due to the size and number of affected buildings and the nature of the building works to be carried out.

In the years that followed Melbourne's Lacrosse Fire in 2014 and the tragic Grenfell fire in the United Kingdom, it's become clear that often owners corporations are not adequately governed and resourced to deal with complex, large-scale building matters like cladding rectification.

Taking note of the advice of the Cladding Taskforce, the Government decided it needed to intervene to support owners of buildings assessed as higher-risk to rectify their combustible cladding. This support includes funding, but also a critical role for the Government in helping to advise and guide owners and owners corporations through the process of rectification. This is why the Government has established Cladding Safety Victoria.' (Hansard Legislative Assembly, 4 September 2020, 2124)

3 The Minister concluded, saying:

'The Cladding Safety Victoria Bill is a Bill to make our community safer. For the owners who are concerned about a cladding fire that might put their families at risk. For the young couple renting an apartment who now feel afraid because they were told they couldn't have a barbecue on their balcony. For the elderly couple who fear a fire evacuation in their high-risk building because they are not stable on their feet'. (*Ibid, 2126*)".

Owners Corporation 1 Plan No PS 707553K v Shangri-La Construction Pty Ltd (ACN 130 534 244) (24 August 2023) (Macnamara J)

1 According to the Court of Appeal:

"Shortly before 2:23 am on 24 November 2014, a fire broke out on the balcony of apartment 805 of the 21 storey Lacrosse apartment tower in Latrobe Street, Docklands. The source of the ignition of the fire was an incompletely extinguished cigarette butt left in a plastic container by a person staying in the apartment, Jean-François Gubitta. The plastic container was sitting on a table with a timber top on the balcony of the apartment. The fire spread from the plastic container to the table and then to the nearby external cladding of the building." (*Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T and Ors* [2021] VSCA 72, [1])

Shortly before 2:23 am on 24 November 2014, a fire broke out on the balcony of apartment 805 of the 21 storey Lacrosse apartment tower in Latrobe Street, Docklands. The source of the ignition of the fire was an incompletely extinguished cigarette butt left in a plastic container by a person staying in the apartment, Jean-François Gubitta. The plastic container was sitting on a table with a timber top on the balcony of the apartment. The fire spread from the plastic container to the table and then to the nearby external cladding of the building.

2. The cladding to which the fire spread was constructed with an aluminium composite panel ('ACP') known as Alucobest, which contained a polyethylene core. Alucobest ACPs had

been installed as the external panel cladding on the eastern and western facades of the building.

3. At 2:23 am, a smoke detector in the hallway just outside the front door of the apartment activated and generated an automatic alarm to the Metropolitan Fire Brigade ('MFB'). When the first fire crew arrived on the scene at 2:29 am, the fire was travelling rapidly up the cladding and spreading onto the balcony on each level. Six minutes later, the fire had reached the roof of the building.

4. The damage to the Lacrosse building, caused by the fire, was extensive. Additionally, there was substantial internal property damage. The claimed losses from the fire exceeded $12 million.

5. In March 2016, proceedings were commenced in the Victorian Civil and Administrative Tribunal ('VCAT') in relation to the damage caused by the fire. As ultimately constituted, the proceeding involved 211 applicants, comprising owners' corporations and the owners of individual apartments in the building ('the Owners'). At issue in the proceeding was the attribution of responsibility to, and among, eight respondents in the proceeding for the damage caused by the fire and for the replacement cost of cladding which had not been damaged but was now recognised to constitute a significant fire hazard. The eight respondents were:

   · the first respondent, the builder, LU Simon Pty Ltd ('LU Simon');

   · the second and third respondents, respectively the building surveyor, Stasi Galanos, and his employer, Gardner Group Pty Ltd ('Gardner Group');

   · the fourth respondent, the architect, Elenberg Fraser Pty Ltd ('Elenberg Fraser');

   · the fifth respondent, the fire engineer, Tanah Merah Pty Ltd, trading as Thomas Nicolas ('Thomas Nicolas');

   · the sixth respondent, Gyeyoung Kim, the occupier of apartment 805;

   · the seventh respondent, Mr Gubitta; and

   · the eighth respondent, the superintendent under the building contract, Property Development Solutions (Vic) Pty Ltd ('PDS').

6. The proceeding was heard over five weeks in September and October 2019, by Judge Woodward, sitting in VCAT as a Vice President of the Tribunal. Only the first five respondents took part in the hearing. They were each separately represented, except for the second and third respondents who were jointly represented.

7. The claims at trial were divided into the Owners' claims against LU Simon and the other respondents ('the Owners' claim'), and LU Simon's claims against the other respondents ('LU Simon's claim').

8. On 28 February 2019, the Tribunal delivered reasons for judgment on the Owners' claim and LU Simon's claim. [1] In broad terms, the Tribunal upheld the Owners' claim against LU Simon, holding that LU Simon had breached warranties concerning the suitability of materials, compliance with the law and fitness for purpose implied into its Design and Construct Contract ('the D&C Contract') and was therefore primarily liable to pay damages to the Owners.

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[1] *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286 ('Reasons').

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9. Each of Gardner Group, Elenberg Fraser and Thomas Nicolas (who, for convenience, we will refer collectively to as 'the consultants') were found to have breached consultancy agreements to which they were parties with LU Simon, by failing to exercise due care and skill in the provision of their services. Additionally, the Tribunal found that Mr Gubitta breached a duty of care he owed the Owners by failing to ensure that his cigarette was fully extinguished before leaving it in the plastic container.

10. The failure to exercise reasonable care by each of the consultants and Mr Gubitta was held to be a cause of 'the harm to LU Simon resulting in its breach of the D&C Contract within the meaning of s 51 of the *Wrongs Act 1958* '. Moreover, the Tribunal concluded that each of the consultants and Mr Gubitta were concurrent wrongdoers within the meaning of s 24AH of that Act.

11. Having made those findings, the Tribunal then determined that the damages payable by LU Simon to the Owners were to be apportioned between the consultants and Mr Gubitta pursuant to pt IVAA of the *Wrongs Act* in the following proportions:

    - Gardner Group: 33 per cent;
    - Elenberg Fraser: 25 per cent;
    - Thomas Nicolas: 39 per cent;
    - Mr Gubitta: 3 per cent.

    The Tribunal then determined that, because Mr Gubitta had not taken part in the proceeding and no party had sought judgment against him, there would be no order directly affecting Mr Gubitta. Thus, the effect of the Tribunal's apportionment was that LU Simon would not be reimbursed for 3 per cent of the damages it was liable to pay to the Owners.

12. On 7 March and 1 April 2019, the Tribunal made orders giving effect to the Reasons it had published on 28 February 2019.

13. In separate applications, each of Gardner Group, Elenberg Fraser and Thomas Nicolas now seek leave to appeal from the Tribunal's orders. In the final versions of the three applications there are some 25 proposed grounds of appeal, although there is some overlap between the applications in relation to some of the grounds. Prior to the hearing of the applications, the parties were required to identify the issues they contended were raised by the proposed grounds of appeal and written cases. The parties identified 11 issues that required resolution.[2] The issues are:

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[2] For completeness we should say that in oral submissions, Thomas Nicolas abandoned one of its proposed grounds (ground 6.18), and substantially confined the reach of another (ground 6.19). This did not, however, reduce the number of issues previously identified by the parties as needing to be resolved.

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1. Were the Owners' claims against the respondents[3] apportionable claims under pt IVAA of the *Wrongs Act 1958* ?

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[3] The respondents to the proceeding in VCAT.

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2. Was LU Simon a concurrent wrongdoer in respect of the consultants for the purposes of s 24AH of the *Wrongs Act* ?

3. Did LU Simon fail to take reasonable care?

4. On the proper construction of the T2 Specification[4] and Elenberg Fraser's drawings, was LU Simon directed and/or permitted to select the product Alucobest or any composite metal cladding product that was contrary to the *Building Act 1993* and the *Building Code of Australia* ('the BCA')?

5. Did the Tribunal err in finding that Elenberg Fraser was negligent in respect of its inspection and approval of the Alucobest sample?[5]

6. Was it reasonably open to the Tribunal to find that the Owners' loss included an increase in insurance premiums?

7. Did the Tribunal err in its construction of cl C1.12(f) of the BCA?

8. Did the Tribunal err in its conclusion that the 'peer professional opinion' was 'unreasonable' for the purposes of s 59 (2) of the *Wrongs Act* ?[6]

9. By issuing the Stage 7 Building Permit[7] did Gardner Group make a representation to LU Simon that was misleading and deceptive?

10. Was Gardner Group's failure to identify and remedy the omission in the Fifth FER[8] causative of any loss?

11. Did the Tribunal fail to consider the degree of departure by Gardner Group from the relevant standard of care in making [its] apportionment findings?

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[4] A specification issued by Elenberg Fraser on 17 April 2008, which formed part of the design of the Stage 7 Building Permit issued on 2 June 2011, and which was also incorporated into the D&C Contract executed in May 2010.

[5] An Alucobest sample was sent by LU Simon to Elenberg Fraser in May 2011, and inspected by David Palmer, who was the project architect.

[6] An issue run before the Tribunal by Gardner Group.

[7] A building permit issued by Gardner Group on 2 June 2011.

[8] The reference to the 'Fifth FER' is a reference to the fifth iteration of the Fire Engineering Report prepared by Thomas Nicolas bearing the date November 2010, but finalised on about 9 December 2011.

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14. For the reasons set out below, we have concluded that none of the challenges to the Tribunal's Reasons which are raised by these issues have any real prospect of success save for the question raised by issue 10.

15. Before turning to the issues in detail, it is necessary to say something more about the background facts and the Tribunal's Reasons.

Background facts

16. The Lacrosse project commenced in 2007. In April of that year, Gardner Group was engaged by the developer to provide regulatory advice and building surveying services. In around October 2008, Mr Galanos was appointed the relevant building surveyor for the project. Gardner Group entered into a formal consultancy agreement in January or February 2010 ('the Gardner Group Agreement'). On 13 May 2010, it gave notice to the Melbourne City Council, under s 80 of the *Building Act 1993* , of its appointment as the relevant building surveyor.

17. In June 2010, the Gardner Group Agreement was novated to LU Simon. Gardner Group was contracted by LU Simon to ensure that the design and materials used in the construction of the building complied with the BCA.

18. In June 2007, Elenberg Fraser was appointed as the architect for the project. It was initially retained by the developer, having entered into a client and architect agreement dated 12 June 2007. In August 2010, this agreement was novated to LU Simon ('the Elenberg Fraser Agreement').

19. Elenberg Fraser designed the external walls of the proposed building. In what was known as the T2 Specification, and in the relevant architectural drawings, the use of aluminium composite panels, 'Composite metal panel wall and soffit cladding system indicative to Alucobond manufactured by Alucobond Australia Pty Ltd', was specified ('the ACP Specification'). The ACP Specification applied to the external walls of the eastern and western facades of the building, including the relevant wall of the balcony of apartment 805.

20. In August 2007, Thomas Nicolas was first engaged to provide fire safety engineering services. It was subsequently engaged by the developer during 2010 to provide fire safety engineering services, which included preparing a fire engineering report for the building. It signed a consulting agreement in July 2010 ('the Thomas Nicolas Agreement'), which was novated to LU Simon at about the same time.

21. The design of the building proceeded between 2007 and 2010, with the use of ACP to the eastern and western facades first being proposed by Elenberg Fraser in late 2007. The drawings prepared for town planning approval referred to 'lightweight wall infill' which later became ACPs in the architectural design.

22. Early in the design phase of the project, Thomas Nicolas prepared the fire engineering design brief. Later, between 2008 and 2010, it prepared a number of fire engineering reports for the building.

23. Early in the design phase, Con Nicolas, as the principal of Thomas Nicolas, became aware that the design of the eastern and western facades of the building included ACPs. The Tribunal inferred that Mr Nicolas was aware of the proposed use of the ACPs from about March or April 2008 at the latest. The various fire engineering reports prepared by Thomas Nicolas did not address the presence of combustible ACPs in the design of the building.

24. There was no evidence that any of the design team raised any questions or concerns at any time about the fact that none of the various iterations of the fire engineering reports referred to infill wall panels or otherwise referenced the ACPs proposed for use on the eastern and western facades of the building.

25. On 17 April 2008, Elenberg Fraser issued the T2 Specification. The T2 Specification formed part of the design for the Stage 7 Building Permit issued on 2 June 2011. The T2 Specification was also incorporated into the D&C Contract executed in May 2010. At the time the T2 Specification was issued, the term 'superintendent' referred to Elenberg Fraser.

26. As we have already noted, the T2 Specification included details for the ACPs — 'Composite metal panel wall and soffit cladding system indicative to Alucobond manufactured by

Alucobond Australia Pty Ltd'. The expression 'indicative to' was defined in cl 1.4 of the General Requirements to mean:

> Where used in relation to a manufacturer and/or product reference, this shall demonstrate the level of quality required. The Contractor shall ensure that all products meet the aesthetic and performance requirements specified before commenced on site.

27. Elenberg Fraser's obligations under the Elenberg Fraser Agreement included inspecting and approving samples as required in the architectural specification. Clause 4.4 of Section 01-001 headed 'General Requirements of the T2 Specification' set out how samples were to be reviewed by the superintendent (Elenberg Fraser).

28. Section 04-203 of the T2 Specification headed 'Metal Roof and Wall Cladding' provided that all elements were required to be non-combustible, or not easily ignitable, with low flame spread characteristics, and that they would not produce excessive quantities of smoke or toxic gases.

29. Clause 5.14 of Section 01-100 General Requirements specified the 'Fire Protection' for the building which included:

    A. Fire performance in terms of fire resistance of elements and structure shall be determined in accordance with AS 1530 and the BCA.

    B. Internal surfaces and linings that are required to be rated in terms of 'surface spread of flame' shall be rated by the method specified in AS 1530 or if required to be Class 0, to the BCA.

30. Clause 6.9 of Section 01-100 General Requirements provided:

    A. All materials, components, equipment and workmanship shall comply with all Statutory Authority codes and regulations, Australian Standards and any other regulations, rules or by-laws applicable to both the design and the execution of the Works.

31. Callum Fraser, a director of Elenberg Fraser, gave evidence at the Tribunal that the T2 Specification encompassed Alucobond, which contained a 100 per cent polyethylene core.

32. The tender for the design and construction of the Lacrosse project closed on 16 May 2008. However, the project then stalled. In 2009, the Lacrosse project was split into two stages with the east tower to be built in Stage 1 and the west tower to be constructed in Stage 2. On 17 September 2009, LU Simon submitted a tender for Stage 1.

33. On 14 May 2010, LU Simon executed the D&C Contract with the then developer, 675 La Trobe Street Pty Ltd. The D&C Contract nominated PDS as the superintendent. PDS was retained by the developer to provide project management and superintendent services for the project.

34. The largest stage of the construction works was Stage 7. On 15 April 2011, LU Simon applied for the Stage 7 Building Permit. On 5 May 2011, Gardner Group issued a Regulatory Review which raised no issue concerning the proposed use of ACPs. On 18 May 2011, Thomas Nicolas prepared the fifth iteration of its Fire Engineering Report ('the Fifth FER'). The Fifth FER did not identify the proposed use of ACPs on the external facade of the Lacrosse building or raise an issue in this regard. The Fifth FER was used in support of a building regulation 309 application to the MFB in respect of the project. [9]

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[9] Building reg 309 in force at the time required the report and consent of the chief fire officer to an application for a building permit which involved any of a series of specified fire safety matters if those matters did not meet the DTS provisions of the BCA.

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35. On 24 May 2011, LU Simon provided Elenberg Fraser with a sample of the Alucobest ACP it proposed to install on the external eastern and western facades of the building, together with a letter and its sample submission form.

36. On 24 May 2011, David Palmer of Elenberg Fraser, sent an email to George Vasilakis of LU Simon. The subject line of the email was, 'Alucobest Sample'. The email provided:

> George, Confirming receipt of the Alucobest sample.
>
> The colour of the sample is acceptable. Could you please confirm that the Alucobest composite panel meets the warranty and other requirements of the specification. Pending this information we confirm that the 4mm sample is acceptable. Once I receive it I will return the completed samples submission form. I will bring the sample along to the meeting tomorrow morning along with the façade screen acid etched sample.

37. Later that day, Mr Palmer received a response from Mr Vasilakis, which stated, 'David, Just received Alucobest's Warranty terms which are 15 years in accordance with the specs and Head Contract.' This email confirmed to Mr Palmer that the Alucobest ACPs met the warranty and other requirements of the T2 Specification.

38. On the same day, Mr Palmer signed a sample submission form and an architect's advice which approved the Alucobest sample and stated 'confirming 15 year warranty in line with spec — as advised'. Minutes of a design development meeting on 25 May 2011 recorded that Elenberg Fraser had signed off on the sample of the Alucobest ACP for the building. Mr Galanos, Gardner Group and Thomas Nicolas were not aware that Mr Palmer had approved the sample of Alucobest.

39. On about 1 June 2011, LU Simon ordered 4708.28m² of Alucobest ACPs. On 2 June 2011, Gardner Group issued the Stage 7 Building Permit, signed by Mr Galanos. At the time, Mr Galanos knew that he was giving approval for LU Simon to construct the building using ACPs with a polyethylene core as part of the external walls of the building.

40. The building was constructed during 2011 and 2012. Between 18 May 2012 (when Mr Galanos received the application for an occupancy permit) and 14 June 2012 (being the date the occupancy permit was issued), Gardner Group carried out its final inspections of the project as constructed. Mr Galanos undertook the final inspection on 13 June 2012 and issued the occupancy permit on 14 June 2012.

41. As we have already said, the fire occurred in the early hours of 24 November 2014.

The primary decision in more detail

42. As we have already noted, the trial at VCAT was divided into the Owners' claim and LU Simon's claim. In the Owners' claim, the Tribunal found against LU Simon, holding that it breached warranties implied into the D&C Contract by ss 8(b), (c) and (f) of the *Domestic Building Contracts Act 1995* ('the DBC Act '). Section 8 relevantly provided:

> The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract —
>
> (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used, and that, unless otherwise stated in the contract, those materials will be new;
>
> (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the *Building Act 1993* and the regulations made under that Act;
>
> …
>
> (f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to be achieved, so as to show that the building owner relies on the builder's skill and judgment, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

43. The Tribunal found, however, that LU Simon did not fail to exercise reasonable care in the construction of the building by installing the ACPs on its eastern and western facades. As a result, the Tribunal held that the Owners' claims against LU Simon were not apportionable, and LU Simon was liable for the full amount of the Owners' loss and damage caused by the fire. In consequence of this finding, the Tribunal did not go on to consider what were described as secondary or contingent claims against the other respondents (or relevantly, for present purposes, the consultants and Mr Gubitta). We will return to this aspect of the Tribunal's findings below when considering issues 1 to 3.

44. At the commencement of his Reasons, Vice President Woodward said that 'for convenience' references in his Reasons to Gardner Group would include Mr Galanos, unless the context suggested otherwise. [10] Thus, Mr Galanos and Gardner Group were, by and large, dealt with together under the name 'Gardner Group'. The Tribunal held that Gardner Group breached the Gardner Group Agreement by failing to exercise due care and skill in:

- issuing the Stage 7 Building Permit and, in so doing, approving the ACP Specification, which specification did not comply with the BCA; and
- failing to notice and query the incomplete description of the cladding systems in the Fifth FER.

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[10] Reasons [5].

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45. The Tribunal rejected Gardner Group's defence that it was not negligent because it had acted in a manner that was widely accepted in Australia, by a significant number of respected practitioners in its field, as competent professional practice in the circumstances. [11] The Tribunal concluded that peer professional opinion, supportive of Gardner Group's defence to the claim of negligence against it, was unreasonable. [12]

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[11] Cf s 59(1) of the *Wrongs Act*.

[12] See s 59(2) of the *Wrongs Act*.

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46. With respect to Elenberg Fraser, the Tribunal concluded that it breached the Elenberg Fraser Agreement by failing to exercise due care and skill in:

- failing to remedy defects in its design (namely, the ACP Specification and design drawings providing for the extensive use of ACPs on the eastern and western facades of the building, including the balconies) that caused the design to be non-compliant with the BCA and not fit for purpose; and
- failing as head design consultant to ensure that the ACP sample provided by LU Simon was compliant with Elenberg Fraser's design intent as purportedly articulated by the T2 Specification and the BCA.

47. With respect to Thomas Nicolas, the Tribunal concluded that it breached the Thomas Nicolas Agreement by failing to exercise due care and skill in:

- failing to conduct a full engineering assessment of the building in accordance with the requisite assessment level dictated within the IFEG[13] and failing to include the results of that assessment in the Fifth FER; and

- failing to recognise that the ACPs proposed for use in the building did not comply with the BCA and failing to warn at least LU Simon (and probably also Gardner Group, Elenberg Fraser and PDS) of that fact, whether by disclosing those matters in the Fifth FER or otherwise.

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[13] International Fire Engineering Guidelines.

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48. The Tribunal held that aspects of the conduct of each of Gardner Group and Thomas Nicolas giving rise to the breaches of duty identified, also constituted the making of representations to LU Simon that were misleading and deceptive in contravention of the *Australian Consumer Law* .

49. In relation to Mr Gubitta, the Tribunal concluded that he breached a duty of care he owed to the Owners to take care in the disposal of his smouldering cigarette, and to ensure that it was fully extinguished before leaving it in the plastic container. The Tribunal went on to say, however, that it agreed with a submission made on behalf of the Owners that the extent of Mr Gubitta's responsibility for the loss and damage was 'minimal'.

50. In relation to the remaining respondents (Gyeyoung Kim and PDS) the Tribunal concluded that the evidence did not support any finding being made against them.

51. The Tribunal held that the failure to exercise reasonable care by each of Gardner Group, Elenberg Fraser, Thomas Nicolas and Mr Gubitta was a cause of the harm to LU Simon resulting in its breach of the D&C Contract within the meaning of s 51 of the *Wrongs Act* , and that each was a concurrent wrongdoer within the meaning of s 24AH of that Act. The Tribunal held that the damages that LU Simon was obliged to pay the Owners for its breaches of the D&C Contract, all arose naturally according to the usual course from the breach of the various consultancy agreements or were within the reasonable contemplation of the parties to those agreements. The Tribunal then apportioned the damages payable by LU Simon to the Owners in the proportions to which we have already referred (Gardner Group, 33 per cent; Elenberg Fraser, 25 per cent; Thomas Nicolas, 39 per cent; and Mr Gubitta, 3 per cent).

52. Thus, the ultimate result at first instance was that LU Simon was required to pay the Owners damages in full and thereafter be indemnified by Gardner Group, Elenberg Fraser and Thomas Nicolas for 97 per cent of those damages (LU Simon being unable to obtain a reimbursement from Mr Gubitta because no party sought judgment against him).

Issue 1–3: Were the Owners' claims against the respondents apportionable under pt IVAA of the *Wrongs Act 1958* ? Was LU Simon a concurrent wrongdoer in respect of the consultants for the purposes of s 24AH of the *Wrongs Act* ? Did LU Simon fail to take reasonable care?

53. The arguments advanced by the parties in relation to issues 1 to 3 were interrelated. It is therefore appropriate to deal with these issues together. The submissions in support of the proposed grounds of appeal covered by these issues were advanced primarily by counsel for Thomas Nicolas and counsel for Elenberg Fraser. Broadly speaking, Thomas Nicolas advanced the following contentions:

    (1) The Tribunal erred in failing to consider the claim made against LU Simon that it failed to take reasonable care in selecting Alucobest as the product to be used as external cladding. That claim (which Thomas Nicolas contends was not considered by the Tribunal) was a claim that LU Simon failed to take reasonable care in identifying, checking and confirming that the material it chose (Alucobest) was compliant with the BCA, and the obligations imposed on LU Simon by s 16 of the *Building Act* .

    (2) The Tribunal erred in not considering LU Simon's defence that the claim against it was apportionable within the meaning of pt IVAA of the *Wrongs Act* .

    (3) The Tribunal failed to apply the correct test and/or misapplied the correct test under pt IVAA in determining whether the Owners' claim against LU Simon was apportionable.

    (4) The Tribunal erred in concluding that the Owners' claim against LU Simon was not apportionable.

54. In its written case in this Court, Thomas Nicolas appeared to contend 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. In oral argument, however, counsel for Thomas Nicolas eschewed any such argument and said that its principal complaint was that the Tribunal failed to deal with an important aspect of the case alleging a lack of reasonable care against LU Simon (being the matter referred to in sub-paragraph (1) above), and if that complaint was made out, then the decision of the Tribunal had to be set aside and the matter remitted to the Tribunal for further hearing and determination.

55. In oral argument, counsel for Elenberg Fraser also made submissions that the Tribunal erred in its failure to determine that claims made by the Owners were apportionable. Like Thomas Nicolas, Elenberg Fraser also contended that the Tribunal erred in arriving at its conclusion that LU Simon had not failed to take reasonable care. The arguments advanced by Elenberg Fraser, however, were not the same as those advanced by Thomas Nicolas.

56. Elenberg Fraser contended that, at VCAT, each of the Owners made one apportionable claim against all of the respondents. That claim, in the broad or considered against LU Simon separately, was submitted to be apportionable irrespective of whether LU Simon failed to take

reasonable care. Elenberg Fraser contended 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.

57. In relation to the Tribunal's failure to conclude that there was a want of reasonable care on the part of LU Simon, counsel for Elenberg Fraser, like counsel for Thomas Nicolas, eschewed any complaint that it was not open to the Tribunal to reject such a finding against LU Simon. Elenberg Fraser's complaint on this issue, again like the complaint of Thomas Nicolas, was confined to a contention that the Tribunal failed to deal with part of the case advanced against LU Simon at trial. Specifically, Elenberg Fraser submitted that the Tribunal failed to consider the question of LU Simon's selection of Alucobest in the context of its responsibilities as a builder. Elenberg Fraser submitted that there was a case in negligence advanced against LU Simon at trial that even if the T2 Specification permitted LU Simon to select Alucobest, as a builder, LU Simon was negligent because it selected a product that did not comply with the BCA. As it was put by counsel for Elenberg Fraser:

> We say the judge [Tribunal] considered the question of the builder's selection, or rather the specification of this material in the design, in the context of a designer but not in the context of the responsibilities of a builder.

58. Gardner Group did not advance any submissions of its own in relation to the issue of a lack of reasonable care on the part of LU Simon or the issues concerning apportionability under pt IVAA of the *Wrongs Act* , although in its written case in this Court it adopted some of the submissions made by Thomas Nicolas on the issue of apportionability.

59. In light of the way the arguments were put by Thomas Nicolas, it is appropriate to commence the analysis of the present issues with a consideration of issue 3, the question of whether there was any error by the Tribunal in failing to find that there was a want of care on the part of LU Simon.

Did the Tribunal fail to consider part of the case against LU Simon?

60. As we have already observed, the complaints made in this Court about the Tribunal's failure to find that there was a want of reasonable care by LU Simon are confined to contentions that the judge did not deal with the whole of the case advanced against LU Simon. In the event that any of these complaints are upheld, the parties submit that it will be necessary to remit the proceeding to the Tribunal so that the entirety of the claim against LU Simon can be fully determined.

61. Plainly, the question of whether the Tribunal failed to determine some aspect of the case against LU Simon falls to be resolved by a consideration of the Tribunal's Reasons. Before dealing with the relevant parts of the Reasons however, it is necessary to deal with a question of fact.

62. At trial, there were issues raised about LU Simon's possible selection of Alucobond in accordance with the T2 Specification, and its actual selection of Alucobest as being 'indicative to Alucobond'. That is, first there was a question of whether or not LU Simon could or should have been held to have been negligent if it in fact selected Alucobond, notwithstanding the T2 Specification; and secondly, there was a question of whether LU Simon was in fact negligent in selecting Alucobest and not Alucobond.

63. The issue of whether LU Simon's selection of Alucobest over Alucobond was a cause of the fire or its spread was the subject of a joint report prepared by the expert fire engineers whose evidence was tendered at trial. Ultimately, all of the relevant experts agreed that the selection of Alucobest over Alucobond did not contribute to the spread of the fire.

Tribunal's Reasons

64. Before we refer to the relevant parts of the Tribunal's Reasons, we wish to make the following preliminary observations. First, the Tribunal's Reasons are of an exceptionally high quality. Secondly, the clarity with which, and the detail in which, the Reasons are expressed has made our task of dealing with the present applications considerably easier than it might otherwise have been. And for that we are indebted to the Vice President. We move now to the specifics of the Tribunal's Reasons.

65. After setting out matters of background, the Tribunal turned to the relevant contracts entered into by each of LU Simon and the consultants. The Tribunal observed that these contracts were 'pivotal in ascribing liability for the various claims in the proceeding'. [14] The Tribunal next observed that 'despite this (or perhaps because of this) each of Elenberg Fraser and Thomas Nicolas sought to deflect attention from their respective Consultant Agreements'. [15] Having made these observations, over the next 36 paragraphs of its Reasons, the Tribunal described the salient features of the various contracts. [16]

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[14] Reasons [44] .

[15] Ibid .

[16] Ibid [45]–[80] .

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66. With reference to the Elenberg Fraser Agreement, the Tribunal noted that the agreement provided that Elenberg Fraser was 'responsible for the proper coordination and integration of the work of all the other consultants' and was required to 'inspect the works during construction for compliance with … all legislative requirements …'. [17]

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[17] Ibid [70] .

67. The Tribunal dealt with the issue of whether LU Simon's choice of Alucobest over Alucobond was in any way causally relevant. In conformity with the expert evidence of the fire engineers to which we have already referred, the judge found that the choice of Alucobest over Alucobond was not causally relevant, [18] saying that, 'the relevant necessary condition for the ignition of the Alucobest panels and the subsequent spread of the fire, was the installation of an ACP with a 100 per cent polyethylene core, not the choice of the Alucobest product over Alucobond PE (as it came to be known)'. [19] After further discussion, the judge then said:

> I have concluded above that the relevant necessary condition for the ignition of the Alucobest panels and subsequent spread of the fire was the installation of an ACP with a 100% polyethylene core, not the choice of the Alucobest product over Alucobond PE. On the submissions of Gardner Group, that still leaves the question whether the choice of Alucobond with the 100% polyethylene core over another product in the Alucobond range (namely Alucobond Plus or Alucobond A2) was a necessary condition for the ignition of the ACP on the balcony of apartment 805 or for the spread of the fire beyond that balcony. [20]

[18] Ibid [191]–[192].

[19] Ibid [192].

[20] Ibid [223].

68. Next, so far as is relevant to the present issues, the Tribunal dealt with a submission made by Gardner Group about the existence of unsealed penetrations in the Alucobest panels and the issue of whether this 'contributed negatively to the extent of the spread of the fire'. [21] The Tribunal referred in detail to the evidence relevant to this issue, before concluding that it was not satisfied that the penetrations in the Alucobest panels contributed to the fire spreading more rapidly than it would otherwise have done. [22]

[21] Ibid [235].

[22] Ibid [239].

69. After analysing a number of other issues, the Tribunal turned to the question of whether LU Simon had failed to take reasonable care. The Tribunal first observed that the elements of the

claims against LU Simon for failing to take reasonable care were ‘somewhat elusive on the pleadings’. [23] The Tribunal then identified the claims made against LU Simon in closing submissions as being:

- its selection of Alucobest ACPs in circumstances where those ACPs had insufficient supporting documentation and no test certificate under AS1530.3; and

- its failure to ensure that the ACPs installed by it as part of the external walls of the Lacrosse tower were non-combustible as required by the BCA or otherwise complied with the DTS [deemed-to-satisfy] provisions of the BCA, which failure gave rise to a breach by LU Simon of s 16 of the *Building Act* . [24]

No party in this Court sought to cavil with the Tribunal’s identification of the claims that had been made against LU Simon at trial.

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[23] Ibid [293] .

[24] Ibid .

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70. Thomas Nicolas submitted in this Court that it is what the Tribunal said next which is critical, and which demonstrates that the Tribunal did not deal with part of the case advanced against LU Simon. The Tribunal said:

> I have found above that the choice of the Alucobest product over Alucobond PE (as it came to be known) was not a necessary condition for the ignition of the Alucobest panels. And in my discussion of the claims against Elenberg Fraser below, I have dismissed the argument that LU Simon was obliged by the D&C Contract (including the T2 Specification) to select a non-combustible ACP notwithstanding the specification of an ACP ‘indicative to Alucobond’. Thus, in simple terms, I am satisfied that LU Simon’s selection of Alucobest ACP’s as ‘indicative to Alucobond’ did not cause the fire or fire spread. It is therefore unnecessary for me to consider the anterior question of whether LU Simon failed to exercise reasonable care in the process of selection of the Alucobest ACPs.
>
> The question whether LU Simon’s installation of non-compliant ACP’s was a failure to exercise reasonable care, is less straightforward. [25]

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[25] Ibid [294]–[295] .

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71. Thomas Nicolas submitted that the Tribunal's use of the word 'installation' in the second last line of the extract above shows that the Tribunal excluded from its consideration the wider case against LU Simon that it was negligent in selecting an Alucobond product with a polyethylene core.

72. After identifying the relevant issues so far as the claims against LU Simon were concerned, the Tribunal set out the various submissions of the parties as follows:

> Gardner Group submits that LU Simon was the principal contractor with control over the Lacrosse project. Its obligations were contained within a D&C Contract and it was obliged under s 16 of the *Building Act* to construct buildings that comply with the building permit and which comply with the *Building Act* , *Buildin g Regulations* and the BCA. It continues:
>
> > Section 16 makes it apparent that a builder does not discharge its obligations merely by building a building in accordance with a building permit (in other words, merely by relying on the work of the [relevant building surveyor]). The builder is independently fixed with liability, pursuant to an offence provision, to construct buildings that comply with the BCA. If liability is established against Gardner Group and Mr Galanos for permitting the use of an ACP containing a 100% polyethylene core on the external façade of the Lacrosse building, then LU Simon must be fixed with liability in respect to the same wrongful conduct.
>
> Similarly, Elenberg Fraser submits that:
>
> > As a tier 1 or close to tier one builder, LU Simon is expected to know the material aspects of the BCA relevant to its construction obligations [citing the evidence of the expert building surveyors]. Under the D&C Contract, LU Simon was required to manage the design process and procure the permit to construct and under the T2 Specification it was required to select a compliant design/product. When LU Simon selected the material it ought to have known that ACPs, and in particular the PE core, were combustible ... [Mr Moschoyiannis][[26]] may well have relied on the consultants to advise him to the contrary, but he was negligent as a builder not to undertake a more detailed investigation of the materials and design.
>
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>
> [26] Mr Moschoyiannis was a director of LU Simon who had overall responsibility for the Lacrosse project. See Reasons [19].
>
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>
> Thomas Nicolas' submissions refer primarily to matters relating to the selection of Alucobest, but observe that:

> It seems curious that Mr Moschoyiannis claimed to be knowledgeable about PE in the context of HDPE, yet claimed he didn't know it was a plastic, or combustible when discussing Alucobond (PE). Accordingly, his evidence of his knowledge of PE-cored ACPs must be treated with caution.

After referring to evidence of Mr Moschoyiannis that he did not know that there was any risk with an ACP because 'it's protected by aluminium laminate covers', Thomas Nicolas also observe that: 'Implicit in this answer is that Mr Moschoyiannis knew that PE posed a fire risk in Alucobond (PE) panels and that from reading the Alucobond brochure, the risk of fire of the PE was protected by the aluminium laminate covers'.

Unsurprisingly, the Owners argue against a finding that LU Simon failed to take reasonable care. Such a finding would open up the possibility of LU Simon being entitled to a reduction in its liability to the Owners as a 'concurrent wrongdoer' within the meaning of Part IVAA of the *Wrongs Act* . The Owners submit that: 'the evidence in this case does not suggest any failure to take reasonable care on LU Simon's part'. They argue:

> The installation of the Alucobest panels at Lacrosse resulted from a deliberate decision to use those panels for the external cladding. The fact that they did not meet the statutory warranties given by LU Simon, because they were not compliant or fit for purpose, does not of itself constitute a lack of reasonable care. To find that the choice of Alucobest was a failure to take reasonable care would be effectively to open the doors to such an argument in almost every case; as a decision that is subsequently found to be incorrect could almost always be constructively treated as if the decision-maker, by making the wrong choice, had failed to exercise reasonable care.

Dealing first with Thomas Nicolas' submission urging caution in considering Mr Moschoyiannis' evidence, that evidence was summarised in LU Simon's submissions as follows:

> Like many other people, Mr Moschoyiannis did not know that polyethylene was a flammable material. Further, Mr Moschoyiannis had seen aluminium composite panels being used in the industry since he graduated from University in the 1980s and had no reason to be concerned about their use. Mr Moschoyiannis was, like so many others in the industry, misinformed by the material which Alucobond published at that time. See also the Alucobond brochure 'Alucobond — 40 years of excellence — From a Pioneer to the Synonym'. Similar comforting statements were made in the Alucobest brochure …, where in addition to reference to various ASTM test results, it is stated that Alucobest has 'Outstanding characteristics of fireproofing' next to an image of a flaming match. [27]

[27] Reasons [295]–[300] (footnotes and internal references omitted, emphasis in original).

73. The Tribunal accepted LU Simon's summary of Mr Moschoyiannis' evidence, saying it accepted that evidence as truthful. [28]

[28] Ibid [301].

74. The Tribunal then said that LU Simon's construction of the Lacrosse building using non-compliant ACPs was clearly an error — which error had given rise to a breach of warranty by LU Simon under the DBC Act. [29] The Tribunal then stated that while LU Simon's breach of warranty rendered it liable to compensate the Owners, it was trite that not every error was negligent. [30]

[29] Ibid [302].

[30] Ibid.

75. The Tribunal held that despite any breach of its obligations to comply with the BCA, LU Simon had not been shown to have failed to take reasonable care. We summarise the Tribunal's reasons for this conclusion [31] as follows:

[31] Ibid [303]–[307].

(1) LU Simon was unaware of the fire risks associated with ACPs.

(2) LU Simon acted in furtherance of its obligations under the D&C Contract.

(3) In using combustible ACPs, LU Simon relied upon Elenberg Fraser, Gardner Group and Thomas Nicolas to ensure compliance with the BCA.

(4) LU Simon was not responsible for including ACPs into the design.

(5) LU Simon had no role in the inclusion of the words 'indicative to Alucobond' in the T2 Specification.

(6) Given that LU Simon was unaware that the installation of the ACPs in accordance with the D&C Contract posed a fire risk and failed to comply with the BCA, the obvious course for a builder to take in 2010 and 2011 was to use a product that was 'indicative to Alucobond'.

(7) LU Simon sought and obtained approval for the use of Alucobest from Elenberg Fraser.

(8) Compliance with the BCA in respect of both the design and proposed construction of the building was the responsibility of the building surveyor, especially when assessing whether to issue a building permit.

(9) Gardner Group issued the Stage 7 Building Permit, giving approval for LU Simon to construct the building using ACPs with a polyethylene core as part of the external walls.

(10) The failure of Thomas Nicolas to identify any issue with the use of aluminium composite panels was critical. Mr Moschoyiannis' evidence was that 'silence or absence of an alternative solution in the fire engineering report indicate[d] compliance on a deemed-to-satisfy basis'.

(11) There was no evidence that any of LU Simon's conduct in installing ACPs as required under the D&C Contract and as approved by the Stage 7 Building Permit, involved a failure to take reasonable care. Moreover, there was no expert evidence from any party to the effect that LU Simon did not act reasonably or in accordance with what would be expected of a reasonably competent builder in the circumstances of the case.

(12) While LU Simon bore frontline responsibility to the developer and owner:

> for a large and complex project, it has sought to cover acknowledged shortcomings in its own expertise by engaging highly skilled professionals to (in a variety of different ways) direct and supervise its work. [32]

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[32] Ibid [307] .

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76. With respect to the Tribunal's twelfth point, the Tribunal elaborated by saying:

> That is not to say, of course, that a substantial commercial builder like LU Simon is inoculated against a finding of negligence, so long as it can show that it complied with the specifications and instructions given by other building professionals. Clearly its expertise and experience is such that there will be many instances where it would be reasonable to expect it to identify errors by another building professional. The case law is replete with

examples of this. But where (as here) the skill involved is beyond that which can be expected of a reasonably competent builder and there is no actual relevant knowledge, I consider that LU Simon's relationship with each of the other building professionals is analogous to that between a developer and a building professional. In *Berryman v Hames Sharley (WA) Pty Ltd* ,[33] Hasl uck J rejected the architect's allegation of contributory negligence, finding that the client developer was dependent on the architect's professional skills. [34]

Consideration

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[33] (2008) 38 WAR 1, [569] .

[34] Reasons [308] (citation in original).

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77. The submission that the Tribunal failed to consider an aspect of the case alleged against LU Simon in respect of its alleged failure to take reasonable care is without substance. Thomas Nicolas' submission that the Tribunal's Reasons at [295] show that the Tribunal limited its consideration of the issue to one of installation, without reference to selection, is totally without merit. On any fair reading of the Reasons, the reference at [295] to 'installation of non-compliant ACPs' plainly included LU Simon's selection of those ACPs. The point is made more stark when one remembers that the only claim against LU Simon in relation to the actual installation of the ACPs had already been rejected by the Tribunal earlier in its Reasons. [35]

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[35] Ibid [239] .

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78. Further, the Tribunal's recitation of the various submissions made by the consultants on the issue of LU Simon's exercise of reasonable care discloses that the Tribunal's reasons for not being satisfied that LU Simon had in fact failed to exercise reasonable care were responsive to the cases that were actually made against LU Simon at trial. If there was any doubt about this, such doubt is eradicated when one notes that the Tribunal had already said that, putting the choice of Alucobest over Alucobond to one side, that still left 'the question whether the choice of Alucobond … was a necessary condition for the ignition of the ACP'. [36]

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[36] Ibid [223] .

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79. Similarly, we are unpersuaded by the submissions of Elenberg Fraser that the Tribunal somehow considered the selection process engaged in by LU Simon 'in the context of a designer but not in the context of the responsibilities of a builder'. To the contrary, the Tribunal's Reasons which we have already summarised show that the issue of LU Simon's selection of the ACPs was one that the Tribunal considered in the wider context — taking into account the terms of the D&C Contract and the terms of the consultants' agreements.

80. It remains under this heading for us to deal with the submission (advanced by Thomas Nicolas, and supported by Elenberg Fraser) that 'the judge erred in finding that LU Simon was not a concurrent wrongdoer and/or contributorily negligent', in circumstances where s 16 of the *Building Act* imposed a statutory duty on LU Simon, which statutory duty was 'non-delegable, due to the personal nature of the obligation'.

81. Having regard to these submissions, it is necessary to set out the terms of s 16 of the *Building Act* . That section provided:

> (1) A person must not carry out building work unless a building permit in respect of the work has been issued and is in force under this Act and the work is carried out in accordance with this Act, the building regulations and the permit.
>
> Penalty: 500 penalty units, in the case of a natural person.
>
> 2,500 penalty units, in the case of a body corporate.
>
> (2) Subsection (1) does not apply to building work exempted by or under this Act or the regulations.

82. In support of the submission that s 16 imposed a statutory duty on LU Simon, Thomas Nicolas placed reliance upon the decision of Eames J in *Toomey v Scolaro's Concrete Constructions Pty Ltd [No 2]* . [37] In support of the submission that this statutory duty was 'non-delegable, due to the personal nature of the obligation', reference was made to the High Court' s decisions of *New South Wales v Lepore* [38] and *Leichhardt Municipal Council v Montgomery*. [39]

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[37] [2001] VSC 279 ('*Toomey*').

[38] (2003) 212 CLR 511, 598–600 [254]–[259] (Gummow and Hayne JJ) ('*Lepore*').

[39] (2007) 230 CLR 22, 29–30 [9]–[10] (Gleeson CJ) ('*Leichhardt MC*').

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83. The submission that s 16 of the *Building Act* imposed a non-delegable duty on LU Simon should be rejected, as should the submission that the Tribunal somehow erred in failing to have proper regard to the existence of that alleged non-delegable duty.

84. First, contrary to Thomas Nicolas' submission, *Toomey* is not authority for the proposition that s 16 of the *Building Act* imposes a statutory duty on a builder. *Toomey* was a case involving a claim for damages by a seriously injured plaintiff who fell from stairs or a landing at a block of apartments. One of the issues in the case was whether cl D2.16 of the BCA (provisions that required balustrades to be provided in certain circumstances, and which specified certain minimum characteristics of such balustrades) created an enforceable statutory duty, breach of which would sound in damages. While the reasons of Eames J contain a detailed consideration of that issue, [40] his Honour was not called upon to determine, and did not determine, whether s 16 of the *Building Act* imposed any statutory duty on any party. [41] No r did he consider a duty of care with respect to damage to property and pure economic loss.

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[40] *Toomey* [2001] VSC 279, [125]–[150] .

[41] Although we should note for completeness that Eames J recorded at [142] of his reasons an apparent submission of counsel that s 16 created a statutory duty. His Honour then, however, proceeded to answer the question of whether cl D2.16 (rather than s 16) im posed a statutory duty.

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85. Secondly, insofar as it is contended in this Court that the Tribunal failed to deal with this issue in its Reasons, we would observe that Thomas Nicolas' submissions at trial in relation to s 16 of the *Building Act* were limited to a contention that s 16 of the *Building Act* required LU Simon to carry out work in accordance with the T2 Specification; a submission that the section required LU Simon to comply with the BCA; and a submission that LU Simon was required to satisfy itself that it was constructing the facade in compliance with the BCA. While *Toomey* was footnoted in Thomas Nicolas' written closing submissions at first instance, no submission was made to the Tribunal of the kind now made in this Court.

86. If Thomas Nicolas, or any other applicant for leave to appeal, wished to contend that s 16 of the *Building Act* imposed a non-delegable statutory duty on LU Simon actionable by way of a claim for damages in respect of damage to property and pure economic loss, this should have occurred before the Tribunal. No such contention was, however, made at first instance.

87. Moreover, any such contention would need to have been supported by argument, with reference to relevant authorities, additional to *Lepore* and *Leichhardt MC* , such as *Sovar v Henry Lane Pty Ltd* ,[42] *Byrne v Australian Airlines Limited* ,[43] *Brodie v Singleton Shire Council* [44] and *AS v Minister for Immigration and Border Protection*. [45] No such argument was advanced by any of the applicants for leave to appeal, either at first instance or in this Court.

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[42] (1967) 116 CLR 397 ('*Sovar*').

[43] (1995) 185 CLR 410 ('*Byrne*').

[44] (2001) 206 CLR 512 (‘*Brodie*’).

[45] (2016) 312 FLR 67 .

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88. In our view, the Tribunal dealt appropriately with the submissions made to it concerning s 16 of the *Building Act* . There can be no doubt that the Tribunal concluded that LU Simon breached s 16 of the *Building Act* . So much is made plain by the Tribunal’s conclusion that LU Simon breached the warranty implied by s 8(c) of the DBC Act,[46] and the Tribunal’s identification of the claims made against LU Simon as including LU Simon’s failure to ensure that the ACPs complied with the BCA, ‘which failure gave rise to a breach by LU Simon of s 16 of the *Building Act* ’. [47] Having identified these matters, the Tribunal made further reference to the way in which the consultants put the s 16 issue at trial, [48] before giving its reasons for rejecting the consultants’ contentions. [49]

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[46] Reasons [282], [291] .

[47] Ibid [293] .

[48] Ibid [295] .

[49] Ibid [303]–[308] .

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89. Noting that there was no argument of the kind now put made to the Tribunal, and no real argument in this Court beyond little more than mere assertion, we do not think it appropriate to conduct a detailed analysis of the issues now sought to be argued. Whilst this Court retains a discretion to permit a new ground to be raised upon an appeal of this type, it is not in the interests of justice to do so in the present case. [50] The parties joined issue on a particular basis after a lengthy hearing and should be held to the grounds raised before the Tribunal.

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[50] See *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, 438, quoting *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473, 480 (Lord Watson). This principle has been applied in *Green v Sommerville* (1979) 141 CLR 594, 608 ; *O'Brien v Komesaroff* (1 982) 150 CLR 310, 319 ; *Coulton v Holcombe* (1986) 162 CLR 1, 7–8 ; *Water Board v Moustakas* (1988) 180 CLR 491, 497 ; *Banque Commerciale SA v Akhil Holdings Ltd* (19 90) 169 CLR 279, 284 ; *Whisprun v Dixon* (2003) 200 ALR 447, 461 [51] ; *Botsman v Bolitho* (2018) 57 VR 68, 105 [167] ; *Commissioner of State Revenue v Mondous* (2018) 55 VR 643, 661–2 [77]–[79] .

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90. That said, we would take leave to doubt that s 16 of the *Building Act* imposes a statutory duty, breach of which sounds in damages, or that any such duty is non-delegable, either generally,

or in the circumstances of this case. Telling against the proposition that s 16 creates a right of action is the fact that s 16 contains its own remedy for a breach of the section (the penalty provisions), and the fact that it is difficult to say that the section exists to protect a limited class of people. As was said by Lord Browne-Wilkinson in *X v Bedfordshire County Council*:

> There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by a private right of action … . [51]

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[51] [1995] 2 AC 633, 731. See further, *Sovar* (1967) 116 CLR 397, 405 ; *Byrne* (1995) 185 CLR 410, 460 ; *Brodie* (2001) 206 CLR 512, 541 [58] .

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91. In any event, it follows from what we have said above that those proposed grounds of appeal in which it is contended that the Tribunal erred in its treatment of, or conclusion about, whether LU Simon failed to take reasonable care must be rejected.

Did the Tribunal err in relation to the issue of apportionability?

92. As we have already observed, the Tribunal found that LU Simon breached warranties implied into the D&C Contract by ss 8(b) , (c) and (f) of the DBC Act . It also found that each of the consultants and Mr Gubitta failed to exercise reasonable care and that these failures were a cause of loss to LU Simon. Having determined these issues, the Tribunal turned to the question of proportionate liability and said:

> In considering these issues, my task is made easier by my findings above that LU Simon's breaches of the warranties implied by the DBC Act did not arise from a failure to take reasonable care, but that the breaches by each of Gardner Group, Elenberg Fraser and Thomas Nicolas of the Consultant Agreements, did so arise. I have also found that the claim against Mr Gubitta arises from a failure to take reasonable care. As discussed above, I am therefore largely spared the complex and uncertain analysis admirably engaged in by the learned author of a recent article in the *Building and Construction Law Journal*.[52] I am also spared consideration of the arguments arising from the various claims against LU Simon and the Owners alleging contributory negligence. Those claims are defeated by my findings that neither of these parties failed to exercise reasonable care. [53]

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[52] Grant Lubofski, '*A Contractual Path Around Proportionate Liability?*', (2018) 34 BCL 5.

[53] Reasons [579] (footnote in original, other citations omitted).

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93. While the Owners' claims against LU Simon were originally pleaded more widely than those pursued at trial, the Owners' claim against LU Simon at trial related only to the breaches of warranties to which we have referred. Before the Tribunal, no claim was made by the Owners against LU Simon that LU Simon failed to take reasonable care.

94. Having found for the Owners against LU Simon on the only claims made by them against LU Simon, the Tribunal then proceeded on the basis that those claims were not apportionable within the meaning of pt IVAA of the *Wrongs Act* . It did so because the breach of warranty claims which it upheld did not 'aris[e] from a failure to take reasonable care' [54] by LU Simon. The Tribunal then proceeded to determine LU Simon's claims for contribution against the consultants (and Mr Gubitta) — all of which claims were apportionable within the meaning of pt IVAA.

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[54] See s 24AF(1)(a) of the *Wrongs Act* .

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95. In its defence at first instance, LU Simon denied any liability for the Owners' claims against it. In the alternative, it pleaded that each of the consultants and Mr Gubitta[55] were liable as a result of their respective failures to take reasonable care, and that LU Simon (pursuant to the provisions of pt IVAA of the *Wrongs Act*) was only liable in an amount reflecting that proportion of the loss or damage claimed that the Court considered just, having regard to the extent of LU Simon's responsibility for the loss and damage. [56]

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[55] And the other respondents at trial (Gyeyoung Kim and PDS).

[56] See s 24AI of the *Wrongs Act* .

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96. In this Court, Thomas Nicolas contended that, on the pleadings, the Tribunal was bound to consider the whole of LU Simon's defence. Thus, it was submitted, that in respect of the claims made by the Owners against LU Simon and the other respondents to the primary proceeding (relevantly for present purposes, the consultants and Mr Gubitta), the Tribunal erred in failing to determine those claims in their entirety, and then in failing to apportion liability for the Owners' claims amongst LU Simon and the other respondents who had been found liable.

97. These submissions are without merit. They ignore the way in which the proceeding was conducted at first instance. The following matters are plain from the opening and closing submissions of the parties before the Tribunal:

(1) The Owners' primary claim was against LU Simon for breach of the warranties implied by ss 8(b) , (c) and (f). While the Owners made alternative claims against the other respondents to the proceeding at first instance, (including the consultants and Mr Gubitta) those claims were secondary and contingent upon the Tribunal determining that the breach of warranty claims were apportionable. As was made clear by the Owners in their opening and closing submissions to the Tribunal, the Owners did not pursue any claim against any other respondent unless the Tribunal held that the breach of warranty claims were apportionable.

(2) No party (and specifically, none of the consultants) objected to the course taken by the Owners before the Tribunal. Moreover, after the Tribunal delivered its Reasons, and called for submissions in relation to the orders that should be made, no party (including the consultants) raised any argument against the Tribunal making an order on the Owners' claims against LU Simon for the amount of the Owners' claim — with the claims against the consultants and Mr Gubitta then being dismissed with no order as to costs.

98. There is simply no basis upon which it can be sensibly suggested that the Tribunal erred in law in not taking a course which no party contended it should have taken at first instance. The position is even more stark in this case because, far from asserting before the Tribunal that it should not take the course that it took, the consultants acquiesced to the course taken by failing to take any objection or make any submission to a contrary effect.

99. The Tribunal was empowered by s 53 of the DBC Act to make any order it considered fair to resolve the dispute before it. In the circumstances we have identified, the Tribunal acted fairly.

100. These conclusions are sufficient to dispose of Thomas Nicolas's submission that the Tribunal erred in not considering LU Simon's defence that the claim against it was apportionable within the meaning of pt IVAA of the *Wrongs Act* . Before proceeding to the remaining more fundamental issues agitated by Thomas Nicolas and Elenberg Fraser on the apportionability question, it is necessary to examine more closely the relevant provisions and operation of pt IVAA of the *Wrongs Act* .

Part IVAA of the Wrongs Act

101. Part IVAA of the *Wrongs Act* consists of ss 24AE to 24AS. The expression 'apportionable claim' is defined in s 24AE to mean, 'a claim to which this Part applies'. Section 24AF(1) then specifies the claims to which pt IVAA applies as follows:

(1) This Part applies to—

(a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care; and

(b) a claim for damages for a contravention of section 18 of the Australian Consumer Law (Victoria).

102. Section 24AF(2) contemplates that a proceeding may involve two or more apportionable claims:

(2) If a proceeding involves 2 or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.

103. Section 24AH(1) defines a concurrent wrongdoer as follows:

A concurrent wrongdoer, in relation to a claim, is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.

104. Section 24AI(1) , then relevantly provides:

In any proceeding involving an apportionable claim —

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage;

105. **Following paragraph cited by:**

Oberin v Brandrick (28 October 2022) (Her Honour Judge Burchell)

49 Both parties relied on the Court of Appeal decision in *Tanah Merah v Owners Corporation* [5] (*"Tanah Merah"*). The second defendant relied on the Court's observations that s 24AI(2) of the *Wrongs Act* "*specifically contemplates that a proceeding may involve both an apportionable claim and a claim that is not an apportionable claim*". [6] Their Honours also said that, by applying well settled rules of construction, the word "claim" in each of these provisions (ss24AF, 24AH and 24AI) is to be given the same meaning. [7] Further, unless a contrary intention appears, words in the singular include the plural. [8] However , *Tanah Merah* did not consider the effect of s 24AJ and 23B .

via
[7] Ibid at [106] .

Oberin v Brandrick (28 October 2022) (Her Honour Judge Burchell)

49 Both parties relied on the Court of Appeal decision in *Tanah Merah v Owners Corporation* [5] *("Tanah Merah")*. The second defendant relied on the Court's observations that s 24AI(2) of the *Wrongs Act* "*specifically contemplates that a proceeding may involve both an apportionable claim and a claim that is not an apportionable claim*". [6] Their Honours also said that, by applying well settled rules of construction, the word "claim" in each of these provisions (ss24AF, 24AH and 24AI) is to be given the same meaning. [7] Further, unless a contrary intention appears, words in the singular include the plural. [8] However , *Tanah Merah* did not consider the effect of s 24AJ and 23B .

via
[6] Ibid at [105] .

Section 24AI(2) specifically contemplates that a proceeding may involve both an apportionable claim and a claim that is not apportionable.

106. Immediately we should say that, by applying well settled rules of construction, the word 'claim' in each of these provisions (ss 24AF, 24AH and 24AI) is to be given the same meaning. [57]

[57] Cf *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661, 673 [29] .

107. **Following paragraph cited by:**

Whitaker v F.P & H.S Keogh Pty Ltd (Building and Property) (25 July 2024) (C Edquist, Senior Member)

215. In *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd* [129] ('*Lacrosse*', because the case concerned the Lacrosse building in Docklands) Judge Woodward (as His Honour then was), sitting as a vice president of the Tribunal, ruled that the three warranties implied into the building contract by s 8 of *DBC Act* relied on by the owners ss 8(b) , (c) and (f) were absolute. [130] This finding was not disturbed by the Court of Appeal when *Lacrosse* was appealed in *Tanah Merah Vic Pty Ltd v*

Owners Corporation No 1 of PS613436 [131] (‘*Tanah Merah*’). However, *Tanah Merah* left open the prospect that other warranties created by s 8 of the *DBC Act* might be apportionable.

via

[131] [2021] VSCA 72 at [107] (Beach, Osborn JJA and Stynes AJA) .

Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) (08 March 2022) (Member C Edquist)

129. The purpose of the statutory scheme was outlined by the majority of the High Court in *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* ,[57] (in a passage cited with approval by the Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436* [58] (***Tanah Merah***) in the context of the Victorian legislation), as follows:

via

[58] [2021] VSCA 72 at [107] (Beach, Osbourn JJA and Stynes AJA) (***Tanah Merah***).

The history and the essential purpose of the statutory scheme containing these provisions was addressed by the majority of the High Court[58] in *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* , as follows:

The Davis Report was not mentioned in the Second Reading Speech or the Explanatory Notes to the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) , which introduced Pt 4 of the *Civil Liability Act* . This may be because some seven years had passed since the release of the Davis Report. In the Second Reading Speech it was suggested that the provisions were directed not only to problems regarding insurance but also, as the title to the amending Act suggested, to defining the limits which should be placed on personal responsibility. Nevertheless, there is a clear connection between the Davis Report and Pt 4 of the *Civil Liability Act* . In 1996, the Standing Committee of Attorneys-General released draft model provisions which reflected the recommendations of the Davis Report. The draft model provisions were eventually adopted, in substantially the same form, in Pt 4 of the *Civil Liability Act* in New South Wales and by the other States and Territories.

The evident purpose of Pt 4 is to give effect to a legislative policy that, in respect of certain claims such as those for economic loss or property damage, a defendant should be liable only to the extent of his or her responsibility. The court has the task of apportioning that responsibility where the defendant can show that he or she is a ‘concurrent wrongdoer’, which is to say that there are others whose acts or omissions can be said to have caused the damage the plaintiff claims, whether jointly with the defendant's acts or independently of them. If there are other wrongdoers they, together with the defendant, are all concurrent wrongdoers.

> The purpose of Pt 4 is achieved by the limitation on a defendant's liability, effected by s 35(1)(b), which requires that the court award a plaintiff only the sum which represents the defendant's proportionate liability as determined by the court. For that purpose, it is not necessary that orders are able to be made against the other wrongdoers in the proceedings. Section 34 (4) provides that it does not matter, for the purposes of Pt 4 , that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died. Thus under Pt 4 the risk of a failure to recover the whole of the claim is shifted to the plaintiff. [59]

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[58] French CJ, Hayne and Kiefel JJ.

[59] (2013) 247 CLR 613, 626–7 [15]–[17] (citations omitted) ('*Hunt & Hunt*').

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108. When the majority in *Hunt & Hunt* observed that the draft model provisions released by the Standing Committee of Attorneys-General were eventually adopted in substantially the same form in pt IV of the *Civil Liability Act 2002* (NSW) and by the other States and Territories, their Honours footnoted that observation with references to a number of legislative regimes, including pt IVAA of the Victorian *Wrongs Act* .

109. The definition of apportionable claim is directed to a particular class of claims. In order to meet the description of that class, the claim must be a claim which is sustained by findings of fact. It will not be sufficient to simply raise the claim by pleadings. [60]

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[60] *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* (2008) 21 VR 84.

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110. In *Reinhold v NSW Lotteries Corporation [No 2]* ,[61] Barrett J analysed the meanings of 'concurrent wrongdoer' and 'claim' in the NSW equivalent of pt IVAA as follows:

> It seems to me clear that a person will be a 'concurrent wrongdoer' only if the court makes findings about the existence of 'loss or damage' and about which acts or omissions 'caused' the loss or damage. It is only when those findings are made that it is possible to identify, as contemplated by s 34(2) , each person whose acts or omissions, as found, 'caused' the 'loss or damage', as found. At that point, and not before, a person can be seen to be a 'concurrent wrongdoer'.
>
> The relevant 'claim' — that is, the claim in relation to which the identified person is a 'concurrent wrongdoer' — can only be the claim in respect of which the findings concerning loss or damage and causation are made. That claim is, of necessity, a claim already litigated, not a pending or foreshadowed claim. Its

nature and content (and, therefore, its status under s 34(1)) will be discoverable by looking at the findings that cause it to be determined as it is determined. If, on those findings, it is seen that the loss or damage (as established in 'an action for damages') arose from a failure to take reasonable care and did not arise out of personal injury, the case will be within s 34(1)(a); and if it is seen that there was a contravention of s 42 of the *Fair Trading Act* , the case will be within s 34(1)(b). In either such case, the already litigated 'claim' will be an 'apportionable claim' because of s 34(1) and, if, on the findings made, the acts or omissions of several persons 'caused' the 'damage or loss' as found, the persons will be 'concurrent wrongdoers'.

The need to know the outcome of the claim in order to apply Pt 4 is emphasised by s 34A. The operation of that section — and, therefore, the ambit of Pt 4 as a whole — depends on the ability to know, among other things, whether a person 'intended to cause' or 'fraudulently caused' the 'loss or damage … that is the subject of the claim'. These things can be judged only after the loss or damage and its causes have been identified through a process of fact finding and analysis. Viewed in prospect and in its pending state, a claim might allege an intentional or fraudulent act or omission, but it is impossible to say, at that point, whether any loss or damage was caused and, if it was, what caused it — in particular, whether it was intentionally caused or fraudulently caused.

On this basis, the nature of a 'claim', for the purposes of Pt 4 , will be determined by what the court has decided in the case, not by what might be prayed or pleaded in an initiating process or points of claim. In short, 'claim' refers to a claim as proved and established, not a claim as made or advanced. [62]

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[61] (2008) 82 NSWLR 762 ('*Reinhold*').

[62] Ibid 769 [19]–[22] .

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111. In so concluding, his Honour said that this approach accorded with that taken by Middleton J to pt IVAA of the *Wrongs Act* in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* . [63] Barrett J then said:

I respectfully agree [with Middleton J in *Dartberg*] that a claim may properly be regarded as one 'arising from a failure to take reasonable care' if, 'at the end of the trial', the evidence warrants a finding to that effect and regardless of the absence of 'any plea of negligence or a "failure to take reasonable care"'. The nature of the claim, for the purposes of Pt 4 , is to be judged in the light of the findings made and is not determined by the words in which it is framed. [64]

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[63] (2007) 164 FCR 450 (‘*Dartberg*’).

[64] *Reinhold* (2008) 82 NSWLR 762, 771 [30] .

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112. Thomas Nicolas and Elenberg Fraser relied upon *Reinhold* and *Dartberg* to support arguments that the Owners’ claims against LU Simon were apportionable. In our view, however, the plain meaning of the statutory provision requires a claim arising from a failure to take reasonable care. The claim in *Hunt & Hunt* exemplifies such a claim.

> It is not disputed that Mitchell Morgan’s claim against Hunt & Hunt is an ‘apportionable claim’ within the meaning of s 34(1)(a). The claim was based upon Hunt & Hunt’s breach of an implied term of its retainer that it exercise proper skill, diligence and care. Section 34(1A) provides that there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action, whether of the same or a different kind. There is no express limitation on the nature of the claim which might have been brought by the plaintiff against a concurrent wrongdoer, except the requirement of s 34(2) that the acts or omissions of all concurrent wrongdoers have caused the damage in question. [65]

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[65] *Hunt & Hunt* (2013) 247 CLR 613, 627 [18] .

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113. The definition does not extend to a claim ‘involving circumstances arising out of a failure to take reasonable care’. The claim itself must arise from a failure to take reasonable care. Such a construction is consistent with the purpose identified at [16] of *Hunt & Hunt*.

114. Moreover, despite the breadth of the observations of Barrett J in *Reinhold* , in *Perpetual Trustee Company Limited v CTC Group Pty Ltd [No 2]* ,[66] his Honour speaking as a member of the NSW Court of Appeal subsequently said:

> It cannot be suggested (nor do I think it has been suggested in any decided case) that the nature or quality of a ‘claim’ is, for relevant purposes, to be determined solely by looking at the court's decision in relation to it. Nor is the nature or quality of a ‘claim’ to be determined solely by looking at the terms in which it is framed. Rather, it is a combination of the terms in which the claim is framed (or pleaded) and relevant findings of the court in relation to it that must be assessed in order to decide whether it is a claim ‘in an action for damages . . . arising from a failure to take reasonable care’ and has the other attributes of an ‘apportionable claim’ under s 34(1)(a). [67]

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[66] [2013] NSWCA 58 (‘*Perpetual Trustee*’).

[67] Ibid [42] .

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115. **Following paragraph cited by:**

Peck v Eade (Building and Property) (27 January 2023) (Senior Member S. Kirton)

39. Apportionable claims within the meaning of section 24AF of the *Wrongs Act* are relevantly, those claims ‘for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care’. The terms in which the claim is framed are the starting point for deciding whether the claim is apportionable. [10]

via

[10] *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613434T* [2021] VSCA 72 at [115] .

In our view, this passage makes it clear that the terms in which the claim is framed are the starting point for deciding whether the claim is of the kind referred to in s 24AF(1)(a) of the *Wrongs Act* .

116. **Following paragraph cited by:**

Prestage v Barrett (02 July 2021) (Estcourt J)

763. The plaintiffs submit that the requirement that a failure to take reasonable care be a technical element of the cause of action, and not merely a finding that might be made as an incidental matter or in respect of other pleaded causes of action, was recently "determinatively resolved" by the Victorian Court of Appeal in the *Lacrosse Building Fire* litigation *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [2021] VSCA 72. They observe that in a very detailed consideration of the controversy appearing from prior cases, the Court of Appeal at [116] , endorsed the conclusion of MacFarlane JA in an earlier NSW Court of Appeal decision *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 at [23] that:

> "… the application of [*the apportionment regime*] turns not on the facts that happen to be found but on the essential character of the plaintiff's successful cause of action. Subject to cases that are conducted without regard to the pleadings, if negligence is an essential

element of that cause of action, it will have been pleaded in the Statement of Claim. If it is not, it will not have been pleaded. It would be curious indeed if, to attract [*the apportionment regime*], the defendant pleaded and proved his or her own negligence when that was not alleged by the plaintiff. The text of [*the NSW equivalent of s 43 (1)*] does not, in my view, contemplate that occurring. *The natural meaning of the words used indicates that a failure to take reasonable care must be part of, and therefore an element of, the plaintiff's successful cause of action*." [Footnotes omitted.] [Emphasis added.]

In the same case (*Perpetual Trustee*), referring to Barrett J's decision in *Reinhold* (and other first instance decisions referred to in that case), Macfarlan JA observed:

> Unless his Honour was simply saying that it is necessary to examine the court's findings to identify the cause, or causes, of action upon which the plaintiff succeeded, I cannot, with respect, agree with his Honour that the 'nature of the claim, for the purposes of Pt 4 , is to be judged in the light of the findings made and is not determined by the words in which it is framed' ... In my view the application of Part 4 turns not on the facts that happen to be found but on the essential character of the plaintiff's successful cause of action. Subject to cases that are conducted without regard to the pleadings, if negligence is an essential element of that cause of action, it will have been pleaded in the Statement of Claim. If it is not, it will not have been pleaded. It would be curious indeed if, to attract Part 4 of the Act, the defendant pleaded and proved his or her own negligence when that was not alleged by the plaintiff. The text of s 34(1) does not, in my view, contemplate that occurring. The natural meaning of the words used indicates that a failure to take reasonable care must be part of, and therefore an element of, the plaintiff's successful cause of action. [68]

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[68] Ibid [23] .

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117. **Following paragraph cited by:**

Fangyuan v Stockwell (27 November 2024) (Rosengren DCJ)

Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436 [2021] VSCA 72 at [117]

Torette House Pty Ltd v Berkman

Fangyuan v Stockwell (27 November 2024) (Rosengren DCJ)

106. This issue was also considered by the Victorian Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436* . [60] The Court held that it was no longer appropriate to follow the reasoning of Barrett JA in *Reinhold*, in part because it was considered that Barrett JA had qualified his position in *Perpetual.* Further, it was observed that *Godfrey* was "merely obiter dicta". It was held that the correct approach was as set out by Macfarlan JA in *Perpetual* that the "terms in which a claim is framed … are an essential determinant of whether the claim can be said to arise from a failure to take reasonable care.

via

[60] [2021] VSCA 72 at [117] .

Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq) (No 2) (30 September 2024) (Kirk and Stern JJA, Basten AJA)

> This question was also considered by the Victorian Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436* [2021] VSCA 72. The Court held, at [117] , that the correct approach was as set out by Barrett JA in *Per petual v CTC* . In so finding, the Court found that the "terms in which a claim is framed … are an essential determinant of whether the claim can be said to arise from a failure to take reasonable care" (at [120]). The Court concluded at [124] that, having regard to the analysis of Barrett JA in *Perpetual v CTC* , the earlier Victorian case of *Godfrey Spowers*:

Notwithstanding what Barrett J said in *Reinhold* , it seems to us that his Honour's view (as expressed in *Perpetual Trustee*) is now that the terms in which the claim is framed are an essential determinant of whether a claim can be said to arise from a failure to take reasonable care. In our opinion, that is the correct approach.

118. **Following paragraph cited by:**

Prestage v Barrett (02 July 2021) (Estcourt J)

> 765. The plaintiffs submit that intermediate appellate courts should not depart from an interpretation placed on national legislation, in this case the apportionment regime, by other intermediate appellate courts unless convinced the interpretation is plainly wrong (*Allianz Australia Insurance Ltd v Mercer* [2014] TASFC 3, 309 ALR 154, per Porter J at [1 55] .) They say that *Tanah Merah* is plainly correct, and that for the reasons given in that case at [118] , "the view that the nature of the claim itself is irrelevant to the question whether the claim is one 'arising from a failure to take reasonable care' has a series of anomalous consequences."

The view that the nature of the claim itself is irrelevant to the question whether the claim is one 'arising from a failure to take reasonable care' has a series of anomalous consequences.

(1) It would enable a party strictly liable in contract to plead its own negligence as a partial defence to the claim.

(2) It would substantially deprive s 24AI(2) of operative effect.

(3) It would enable the primacy of contract in determining the allocation and extent of risk at common law in certain situations to be displaced. As to which see *Brookfield Multiplex Ltd v Owners — Strata Plan No 61288* . [69]

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[69] (2014) 254 CLR 185, 204 [33], 210 [55], 229 [132], 230–232 [136]–[140] ('*Brookfield*').

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(4) It would subordinate statutory provisions supplementing the law of contract to a rule having the capacity to destroy their purpose. As was said by Crennan, Bell and Keane JJ in *Brookfield* :

> Statutory provisions may supplement the common law of contract by providing for special protection to identified classes of purchasers on the ground, for example, that they may not be expected to be sufficiently astute to protect their own economic interests. Part 2C of the *Home Building Act 1989* (NSW) is an example of such a statutory regime.
>
> By enacting the scheme of statutory warranties, the legislature adopted a policy of consumer protection for those who acquire buildings as dwellings. To observe that the *Home Building Act* does not cover claims by purchasers of serviced apartments is not to assert that the Act contains an implied denial of the duty propounded by the respondent. Rather, it is to recognise that the legislature has made a policy choice to differentiate between consumers and investors in favour of the former. That is not the kind of policy choice with which courts responsible for the incremental development of the common law are familiar; and to the extent that deference to policy considerations of this kind might be seen to be the leitmotif of this Court's decision in *Bryan v Maloney*, the action taken by the New South Wales legislature served to relieve the pressure, in terms of policy, to expand the protection available to consumers. [70]

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[70] Ibid 230 [133]–[134] (citation omitted).

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(5) In the context of the DBC Act which contains statutory provisions of this kind:

- It would enable the builder to substantially avoid liability pursuant to the statutory warranties which do not involve as an element any requirement that the owners establish a failure to take reasonable care.

- This would occur despite the fact that the warranties are not capable of being excluded by contract, the warranties enure for the benefit of successive owners, and the warranties are supported by a statutory scheme of insurance.

- The builder may avoid liability pursuant to the statutory warranties despite the fact that concurrent wrongdoers may be insolvent or under-insured.

Consideration

119. The starting point to the construction of the relevant provisions in pt IVAA is the terms in which those provisions are expressed. As the High Court has stated, the task of statutory construction must begin and end with a consideration of the statutory text. [71] The statutory text must be considered in its context, which includes the general purpose and policy of a provision. [72] We have already set out the relevant statutory text, and discussed its context and purpose.

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[71] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) (‘*Consolidated Media*’). See also, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] ; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (‘*SZTAL*’).

[72] *Consolidated Media* (2012) 250 CLR 503, 519 [39] ; *SZTAL* (2017) 262 CLR 362, 368 [14] .

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120. **Following paragraph cited by:**

Sysfac Pty Ltd v MDP Property Holdings Pty Ltd & Ors (Costs) (Building and Property) (11 November 2021) (Deputy President E Riegler)

19. The Applicant submitted that the Water Act Claim was not an apportionable claim because it did not arise from a failure to take care. The Applicant drew my attention to the Victorian Court of Appeal decision in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* ,[6] where the Court stated:

> We have concluded that the terms in which a claim is framed against a concurrent wrongdoer are an essential determinant of whether the claim can be said to arise from a failure to take reasonable car. [7]
>
> *via*
> [7] Ibid , [120] .

Having considered the statutory text, in context, and having had regard to its purpose, we have concluded that the terms in which a claim is framed against a concurrent wrongdoer are an essential determinant of whether the claim can be said to arise from a failure to take reasonable care. In coming to this conclusion, by necessity, we reject the submissions made by Thomas Nicolas and Elenberg Fraser to the contrary for the reasons given above.

121. As was submitted by counsel for the Owners, the passage in *Dartberg* relied upon by the applicants [73] in this Court was merely obiter dicta. [74] Moreover, acceptance of the correctness of that passage would have the anomalous consequences we have already identified. [75]

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[73] *Dartberg* (2007) 164 FCR 450, 458 [30] .

[74] In *Dartberg* , Middleton J held that pt IVAA had no application in that case because it was not picked up by s 79 of the *Judiciary Act 1903* (Cth) and the relevant Commonwealth legislation which allowed an applicant to recover full compensation from a wrongdoer 'otherwise provide[d]' a regime that was inconsistent with pt IVAA of the *W rongs Act* .

[75] In *Trani v Trani* (2019) 59 VR 362, 369, Forbes J followed the approach of Middleton J in *Dartberg*. It appears from her Honour's judgment, however, that the issue was not the subject of argument in that case.

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122. The same may be said in respect of aspects of the decision in *Godfrey Spowers (Vic) Pty Ltd v Lincolne Scott Australia Pty Ltd* . [76] *Godfrey Spowers* was concerned with the consequences of a settled claim in which the plaintiff had alleged breaches of duty falling within the description of 'arising from a failure to take reasonable care'. The Court held that the key to the operation of pt IVAA of the *Wrongs Act* was the finding of relevant facts and the entry of judgment.

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[76] (2008) 21 VR 84 ('*Godfrey Spowers*').

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123. In the course of his reasons for judgment, Ashley JA[77] expressed his agreement with Barrett J's conclusion in *Reinhold* ,[78] that a claim may properly be regarded as one 'arising from a failure to take reasonable care' if at the end of the trial the evidence warrants a finding to that effect, and regardless of the absence of 'any plea of negligence or a failure to take reasonable care'. [79]

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[77] With whom Nettle and Neave JJA agreed.

[78] (2008) 82 NSWLR 762 .

[79] *Godfrey Spowers* (2008) 21 VR 84, 104–5 [107]–[109] .

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124. Notwithstanding the apparent breadth of these dicta, *Godfrey Spowers* is not authority for the proposition that a claim which does not itself arise from a failure to take reasonable care, can be transformed into an apportionable claim by a defendant establishing that the circumstances upon which the plaintiff relies arose out of a failure to take reasonable care.

125. In oral argument, counsel for Thomas Nicolas sought to rely on two articles (Graeme S Clarke QC, '*Proportionate Liability in Commercial Cases: Principles and Practice*' [80] and Grant Lubofsky, '*A Contractual Path Around Proportionate Liability?*' [81]), in support of his contentions that the Owners' claims against LU Simon were apportionable. It mattered not, so it was submitted, that failing to take reasonable care was not an element of the causes of action pleaded and proved against LU Simon.

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[80] (2019) 93 ALJ 188 ('the Clarke article').

[81] (2018) 34 BCL 5 ('the Lubofsky article'). This is the article that the Tribunal made reference to at Reasons [579] .

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126. Fairly read, neither article supports the contentions for which they were cited. In the Clarke article, in addition to referring to other cases not supportive of Thomas Nicolas' contentions, reference is made to a decision of Rothman J in *Permanent Custodians Ltd v Geagea [No 4]* ,[82] in which his Honour held that a claim for damages for breach of warranty of authority was not an apportionable claim because it was not a claim which arose from a failure to take reasonable care.

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[82] [2016] NSWSC 934 .

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127. In the Lubofsky article, the author expressed the view that a claim for an indemnity or under a strict contractual warranty does not arise from a failure to take reasonable care using those words' ordinary meaning. The author explained his reasoning in this regard in terms with which we agree:

> For causes of action in tort, a failure to take reasonable care is essential (if not sufficient) element of the cause of action. However, a failure to take reasonable care has no relevance at all to a contractual cause of action. It is not an element of that action, it need not be proved for the action to succeed, and nor is due care a defence. A failure to take care is, in fact, entirely irrelevant to liability under a contractual claim and damages awarded under it. A contractual claim cannot logically or semantically be said to therefore 'arise from' a failure to take care.[83]

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[83] See the Lubofsky article (2018) 34 BCL 5, 10–11.

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128. It follows that the Tribunal made no error when it determined that the breach of warranty claims that it had upheld against LU Simon were not apportionable. At best, those claims involved circumstances arising out of failures to take reasonable care by the consultants and Mr Gubitta. The Owners' claims against LU Simon, however, did not themselves arise from any failure to take reasonable care.

129. It remains to deal with Elenberg Fraser's contention that each of the Owners made one apportionable claim against all of the respondents to the primary proceedings — and therefore the Owners' claims against LU Simon were apportionable.

130. Elenberg Fraser's argument was that a proper analysis of the apportionability issue commences with the identification of the loss or damage that is the subject of the claim. [84] The next step is to identify those persons whose acts or omissions caused that loss or damage. [85] The third step was then to identify whether the loss or damage claimed arose from a failure to take reasonable care by any of the persons identified as having committed an act or omission that caused that loss or damage. If the answer to that question was in the affirmative, then the whole of the claim for the relevant loss or damage was apportionable.

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[84] See s 24AH(1) of the *Wrongs Act* .

[85] Ibid .

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131. In making the submissions, Elenberg Fraser placed significant reliance upon a number of passages in *Hunt & Hunt*. [86] It was submitted that the reasoning in *Hunt & Hunt* supported the approach for which Elenberg Fraser contended.

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[86] In Elenberg Fraser's oral submissions in chief, we were taken to paragraphs [7] –[9], [16], [18], [19] and the end of paragraph [21] of *Hunt & Hunt*. In its oral submissions in reply, we were also taken to paragraph [10].

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132. In truth, insofar as Elenberg Fraser's submissions relied upon what the High Court said in *Hunt & Hunt*, those submissions involved a misreading of that decision. *Hunt & Hunt* was not a case which concerned whether a claim was or was not apportionable. It was a case about the identification of loss or damage for the purposes of the New South Wales equivalent of s 24AH(1) of the *Wrongs Act* . [87] As was pointed out by the majority in *Hunt & Hunt* ,[88] it was not disputed in that case that the only relevant claim made in that proceeding was an apportionable claim. [89]

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[87] Section 34(2) of the *Civil Liability Act 2002* (NSW) .

[88] (2013) 247 CLR 613 .

[89] Ibid 627 [18] .

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133. The first two steps of the analysis referred to by Elenberg Fraser (the identification of the loss or damage, followed by the identification of the persons whose acts or omissions caused that loss or damage) are steps to be performed in relation to 'a claim' (as required by s 24AH(1)) — which claim must be a claim to which pt IVAA applies (that is, an apportionable claim). So much is plain from the text of the relevant provisions. [90]

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[90] Cf *Permanent Custodians Ltd v Geagea (No 3)* [2014] NSWSC 1489, [15] .

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134. A fundamental flaw in Elenberg Fraser's contentions is that they require consideration of the question of who is a concurrent wrongdoer in respect of a claim, before considering whether the 'claim' is one to which pt IVAA applies. As the reasoning in *Hunt & Hunt* shows, the correct approach is to determine whether the 'claim' is apportionable, before then determining whether there are any concurrent wrongdoers in relation to that claim.

135. As we have already observed, pt IVAA of the *Wrongs Act* makes provision for cases involving two or more apportionable claims [91] and cases involving both an apportionable claim and a claim that is not an apportionable claim. [92] If Elenberg Fraser's submissions were to be accepted, these provisions would largely be deprived of any substantive operation. When one reads all of the provisions of pt IVAA in their context, it is plain that they operate so as to provide for multiple claims against multiple defendants in relation to the same loss and damage; and while some of those claims may be apportionable, there may be other claims which are not apportionable. Moreover, nothing in pt IVAA suggests that a claim that is not apportionable might be transformed into a claim that is apportionable by a party establishing that the circumstances upon which the claimant relies arose out of a failure to take reasonable care.

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[91] See s 24AF(2) of the *Wrongs Act* .

[92] See s 24AI(2) of the *Wrongs Act* .

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136. It follows from what we have said above that the application for leave to appeal with respect to those proposed grounds of appeal in which it is contended that the Tribunal erred in its treatment of the issue of apportionability must be rejected.

Issue 4: On the proper construction of the T2 Specification and Elenberg Fraser's drawings, was LU Simon directed and/or permitted to select the product Alucobest or any composite metal cladding product that was contrary to the *Building Act 1993* and the *Building Code of Australia*?

137. The Tribunal's determination that Elenberg Fraser breached its obligations to LU Simon under the Elenberg Fraser Agreement, [93] was in part based on its finding that Elenberg Fraser'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. [94]

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[93] Reasons [447] .

[94] Ibid [446] .

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138. Elenberg Fraser contends that the Tribunal erred in its construction of the T2 Specification.

The T2 Specification

139. As we have noted above, Elenberg Fraser issued the T2 Specification on 17 April 2008.

140. On 14 May 2010, LU Simon executed the D&C Contract with the developer and the T2 Specification was incorporated into the D&C Contract.

141. The structure of the T2 Specification is outlined in the opening clauses of 'Section 01–100 — General Requirements'. Divisions 1 and 8 provide general requirements applicable to the work sections in divs 2 to 7. The work sections of divs 2 to 7 provide specific requirements for individual trades or elements of the works.

142. Clause 1.1(B) of Section 01–100 reinforces LU Simon's obligation as the design and construct contractor stating:

> This Specification is Descriptive (D): All sections when read with the Preliminary Design Drawings, indicate the visual intent of the Superintendent with which the Contractor must comply when undertaking the Design Documents. The design responsibility rests with the Contractor who will be responsible for completing the Design Documents, meeting any specified performance criteria and executing the work under the Contract.

143. Section 04–203 addresses metal roof and wall cladding. In relation to ACPs, cl 2.5 provides:

> Composite metal panel wall and soffit cladding system indicative to Alucobond manufactured by Alucobond Australia Pty Ltd.

144. The expression 'indicative to' is defined in cl 1.4 of Section 01–100 as follows:

> 'Indicative to': Where used in relation to a manufacturer and/or product reference, this shall demonstrate the level of quality required. The Contractor shall ensure that all products meet the aesthetic and performance requirements specified before commencing on site.

145. Clause 7.12(A) of Section 01–100 addresses the requirements where proprietary products are specified and states:

> Where proprietary products, systems or items are specified and/or included in the Works, ensure that the method of building, installing, handling, storage, protection, finishing, adjusting and preparation of substrates etc is strictly in accordance with the manufacturers' printed instructions and recommendations and that copies of all such documentation are supplied to the Superintendent prior to commencement of the work under the Contract. All such manufacturers' instructions and recommendations are deemed to be included in the Contract.

146. With respect to selecting products based on the T2 Specification, LU Simon's responsibilities under that document included the final selection of the product.[95]

[95] T2 Specification, Section 01–100 — General Requirements, cls 3.1(B)(12), 3.1(F)(1).

147. The T2 Specification makes clear that the BCA, and other regulations and codes must be complied with stating:

> All materials, components, equipment and workmanship shall comply with all Statutory Authority codes and regulations, Australian Standards, and any other regulations, rules or by-laws applicable to both the design and execution of the Works.[96]

The Elenberg Fraser Agreement

[96] Ibid cl 6.9.

148. Elenberg Fraser was appointed as architect acting as lead consultant for the project. It was initially retained by the developer, having entered into a client and architect agreement dated 12 June 2007. That agreement was novated to LU Simon on or about 4 August 2010.

149. It is relevant to the consideration of Elenberg Fraser's submissions to note that it had, by the Elenberg Fraser Agreement, agreed with LU Simon that it would, in summary and amongst other things:

- remain fully responsible for the services (as defined in the Elenberg Fraser Agreement) carried out by it;[97]
- where appointed as principal design consultant (which it was),[98] be responsible for the proper coordination and integration of the work of all other consultants appointed by LU Simon into the design of the works;[99]
- prepare the contract material (ie documents and materials created or required to be created under the Elenberg Fraser Agreement and to be handed over to LU Simon) so that it was fit for the purposes of the project, having regard to the assumptions that Elenberg Fraser could be reasonably expected to make exercising the knowledge, skill and expertise of an appropriately experienced, competent and qualified architect in accordance with sound professional principles;[100]
- prepare the contract material in a manner consistent with the requirements of the client brief and to satisfy all legislative requirements applicable to the design of the work including,

without limitation, all applicable requirements of the BCA, Australian Standards and Authorities' requirements;[101]

- inspect the works during construction for compliance with the client 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;[102]

- indemnify LU Simon against claims against LU Simon caused by the negligent or wrongful acts or omissions of Elenberg Fraser;[103]

- accept all design risk and liability in all contract material prepared by it, whether prepared before or after the date of the Elenberg Fraser Agreement;[104] and

- be liable to LU Simon with respect to the performance or non-performance of the services, whether such liability arises under the law of contract, tort or otherwise including, without limitation, liability for any defects, including latent defects, in the services (whenever those services were carried out or performed and whether carried out or performed before or after novation).

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[97] Elenberg Fraser Agreement, General Conditions, cl 3(e).

[98] Ibid, Annexure Part D: Services, cl 1.

[99] Ibid cl 3(s).

[100] Ibid cl 3(u).

[101] Ibid cl 3(v).

[102] Ibid cl 3(x).

[103] Ibid cl 9.2.

[104] Ibid cl 17.3(d).

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150. The Tribunal found, [105] and it is undisputed, that the commercial intent of the Elenberg Fraser Agreement was to facilitate the ongoing involvement of Elenberg Fraser in, and its responsibility for, the design and the coordination of its implementation.

Elenberg Fraser's submissions

[105] Reasons [442]–[443] .

151. By its written case, Elenberg Fraser contended that cl 2.5 of the T2 Specification did not prescribe the use of an ACP with 100 per cent polyethylene core and submitted, in summary, that:

- the composition of the ACP had to be derived from a proper reading of the language of the T2 Specification;
- an ACP meeting the description 'indicative to' Alucobond meant that it 'demonstrate the level of quality required', not its material composition;
- the definition of 'indicative to' was consistent with the T2 Specification being descriptive, as indicating visual intent; and
- the builder, LU Simon, was responsible for meeting the performance requirements of the T2 Specification, which expressly required compliance with law. That is, the T2 Specification did not permit departure from the BCA. Read in that way, if an ACP with a polyethylene core was not compliant with law for its intended use, then the T2 Specification did not indicate or prescribe an ACP with 100 per cent polyethylene core.

152. These submissions were refined during the hearing by senior counsel for Elenberg Fraser who did not dispute that the reference to Alucobond manufactured by Alucobond Australia Pty Ltd in the T2 Specification was a reference to an ACP with a polyethylene core. It is the position of Elenberg Fraser, as put by its senior counsel, that notwithstanding such a product is combustible and inappropriate for application to an external wall, the specification of it was not a failure to take care on the part of Elenberg Fraser. Further, and significantly in relation to the proposed ground of appeal underpinning this issue, it was for LU Simon, in the implementation of the T2 Specification, to select materials that complied with applicable legal requirements.

153. The same submission was made, albeit more expansively, to the Tribunal and was summarised in the Reasons as follows:

- it is clear from the language used in the T2 Specification that it required LU Simon to comply with the regulatory requirements in operation at the time, by adopting whichever pathways LU Simon preferred to adopt in order to satisfy the performance requirements of the BCA;

- the T2 Specification included performance requirements with which LU Simon was obliged to comply, including by the provision that: ‘The performance criteria included in the Specification sets the minimum standards with which the Design Documents solutions shall comply’;

- the intention of the reference in cl 1.31, ‘Fire’ of the T2 Specification to ‘non-combustible’ and ‘not easily ignitable with low flame spread characteristics’ was to ensure the LU Simon complied with both AS 1530.1 and AS 1530.3, depending upon the product and its intended use;

- the inclusion by Elenberg Fraser of ACPs in the Preliminary Design Drawings and the T2 Specification as part of the external facade of the Lacrosse building, was not contrary to the BCA because LU Simon was able to select one or another or a combination of the BCA pathways in order to establish compliance with performance requirements of the BCA;

- LU Simon was permitted under the T2 Specification and the D&C Contract, and consistently with the BCA, to select a cladding product in Alucobond’s range of products or a different cladding product *indicative to Alucobond* which met the performance requirements of the BCA by an alternative solution or by the DTS [deemed-to-satisfy] provisions;

- although LU Simon would not have been able to establish compliance with the BCA by the DTS provisions for a 100% polyethylene core product, LU Simon was at liberty to seek an alternative solution for the polyethylene product it had selected and then proceed to comply with the performance requirements of the BCA in liaison with Thomas Nicolas and Gardner Group;

- but whatever product LU Simon selected had to be non-combustible in accordance with AS 1530.1 and the performance requirements of the BCA via one of the permitted pathways; and

- accordingly, the mere fact that Alucobond was referred to in the T2 Specification did not cause Elenberg Fraser’s design to be ‘non-compliant’, because compliance with the BCA was possible — just possibly not by the DTS provisions of the BCA. [106]

Consideration

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[106] Reasons [431] (footnotes omitted; emphasis in original).

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154. The D&C Contract, including the T2 Specification, is to be construed objectively, by reference to its text, context and purpose. [107]

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[107] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [46] (French CJ, Nettle and Gordon JJ).

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155. The Tribunal found that a reference in the T2 Specification to Alucobond encompassed at least the product Alucobond with the 100 per cent polyethylene core. [108] This finding is not disputed by Elenberg Fraser.

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[108] Reasons [188].

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156. Therefore, in our opinion, on a plain reading of the text of cl 2.5, with the definition of 'indicative to' in cl 1.4, a reasonable business person would have understood cl 2.5 to permit the selection of:

- the named proprietary product, Alucobond manufactured by Alucobond Australia Pty Ltd; or
- a product that met the aesthetic and performance requirements of Alucobond,

notwithstanding that such products may comprise a 100 per cent polyethylene core.

157. We reject Elenberg Fraser's submission that, as between it and LU Simon, it was for LU Simon to ensure the product selected by it complied with the BCA. Quite simply, Elenberg Fraser's reliance on the terms and conditions of the D&C Contract (including the T2 Specification) to make good that submission is misplaced. As found by the Tribunal:

> There is no material issue of construction of the EF Consultant Agreement where the terms of the D&C Contract might form part of the relevant surrounding circumstances. [109]

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[109] Ibid [412].

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158. To construe the T2 Specification as submitted by Elenberg Fraser would require us to ignore the obligations expressly imposed on Elenberg Fraser under the Elenberg Fraser Agreement and would have the unreasonable result of absolving Elenberg Fraser of its liability to LU Simon as a consequence of the contractual obligations owed by LU Simon to the developer.

159. As reasoned by the Tribunal:

- the T2 Specification did not regulate the obligations owed by Elenberg Fraser under the Elenberg Fraser Agreement; [110]

- the submissions, to the effect that:

  - the T2 Specification passed all responsibility for the design from Elenberg Fraser to LU Simon such that it was thereafter freed from any liability for decisions on the selection of materials provided for in the T2 Specification; and

  - LU Simon was thereafter solely responsible for selecting BCA compliant ACPs, notwithstanding the Alucobond Specification,

ignore the clear terms of the Elenberg Fraser Agreement and the reality of Elenberg Fraser's ongoing role. [111]

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[110] Ibid [438]–[439].

[111] Ibid [439].

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160. We find no error in that reasoning. Leave to appeal with respect to the proposed ground of appeal raising this issue should be refused.

Issue 5: Did the Tribunal err in finding that Elenberg Fraser was negligent in respect of its inspection and approval of the Alucobest sample?

161. By its fifth proposed ground of appeal, Elenberg Fraser asserts that the Tribunal erred with respect to the proper interpretation of its obligation to inspect samples.

162. Annexure Part D to the Elenberg Fraser Agreement set out the scope of services to be provided by Elenberg Fraser and included an obligation, during the construction phase, to:

> Inspect and approve samples as required in the architectural specification.[112]
>
> ('Sample Approval Obligation')

[112] Construction Phase, Inspections.

163. The reference to the architectural specification is a reference to the T2 Specification. That is not in dispute.

164. The T2 Specification further provided that:

> Samples will be reviewed for their visual characteristics only and where moving or operating elements are involved, the Superintendent shall be given the opportunity to review working samples.[113]
>
> ('T2 Sample Approval Method')

[113] Section 01-100 – General Requirements, Submittals, cl 4.4(B).

165. Under the T2 Specification, the obligation to inspect and approve samples is imposed on the superintendent. At the time it was drafted, Elenberg Fraser was the superintendent. This changed in May 2010 when PDS was appointed superintendent.

166. Elenberg Fraser submitted to the Tribunal that its obligation to inspect and approve samples pursuant to the Elenberg Fraser Agreement should be read as incorporating from the T2 Specification the qualification that they be reviewed for visual characteristics only and did not extend to approving a sample on the basis of its regulatory compliance. [114]

[114] Reasons [432] .

167. The Tribunal rejected Elenberg Fraser's submission [115] and found that:

> Although the issue is not entirely free from doubt, the words 'as required in the architectural specification' in my view qualify 'samples' (that is, it is the samples identified in the architectural specification that must be inspected and approved). They do not import the method of review.

[115] Ibid [444] .

168. The Tribunal went on to determine:

> In this regard, *Elenberg Fraser's inadequate assessment of the Alucobest sample gave rise to two distinct breaches of the EF Consultant Agreement*. First, it breached the express provision for 'Services' in the construction phase requiring Elenberg Fraser to use due skill and care in inspecting and approving samples, and, based on my preferred construction above, not just for visual characteristics.
>
> But *even if I am wrong on that construction*, in my view, Elenberg Fraser's approach to the sample approval was also a breach of its broader obligations as head design consultant. In particular, its approval of a sample of product without assessing it against this apparently important aspect of its design,[[116]] was a failure to coordinate its design intent into the final design. Put another way, the provision of the Alucobest sample to Elenberg Fraser for inspection presented it with a clear opportunity as head design consultant (regardless of Mr Fraser's allegation that it had been sidelined from other aspects of this role), to ensure that its design intent reflected in the Alucobond Specification, was fulfilled.
>
> The evidence concerning the sample approval by Elenberg Fraser outlined above shows clearly that this opportunity was missed. Had Mr Palmer been aware of the importance to Mr Fraser of this element of the design, it is likely that he would have approached the sample approval request very differently. For example, he could at least have given notice that the information provided by LU Simon about the sample was 'ambiguous or inaccurate or is otherwise insufficient to enable [Elenberg Fraser] to carry out the Services'. [117]

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[116] The reference to 'important aspect of the design' is a reference to the Alucobond Specification as identified at [452] of the Reasons.

[117] Reasons [454]–[456] (citations omitted) (emphasis added).

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169. By this proposed ground of appeal, Elenberg Fraser challenges the construction of the Sample Approval Obligation. The proper construction of that obligation is the legal question underpinning the first of the 'two distinct breaches' determined by the Tribunal to flow from Elenberg Fraser's 'inadequate assessment of the Alucobest sample'.

170. Significantly, Elenberg Fraser does not raise any ground of appeal in relation to the second of the two breaches, that is, the breach of its broader obligations as head design consultant. It leaves undisputed the findings underpinning that breach including that:

- Elenberg Fraser was the head design consultant;
- the Alucobond Specification, and Mr Fraser's views as to what it entailed, was an important element of the design; [118]
- the provision of the Alucobest sample for inspection presented Elenberg Fraser with a clear opportunity as head design consultant to ensure that its design intent reflected in the Alucobond Specification was fulfilled; [119] and
- Elenberg Fraser failed to ensure that element of the design was satisfactorily translated into the constructed building. [120]

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[118] Ibid [452].

[119] Ibid [455].

[120] Ibid [452]–[453], [455].

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171. The proposed ground of appeal identified by Elenberg Fraser makes clear that its challenge is directed specifically to the construction of the Sample Approval Obligation. Further, at paragraph [64] of its amended written case it states:

> The reasons in [456] seemed to find that there was an opportunity missed for the Architect to impose Mr Fraser's design intent on the selection process however, Mr Fraser's own design intent is irrelevant to the proper construction of the T2 Specification with respect to the approval of samples.

172. As a consequence, even if we found that the Tribunal erred in its construction of the Sample Approval Obligation, the Tribunal's ultimate conclusion that Elenberg Fraser breached its broader obligation as head design consultant as a result of its inadequate assessment of the Alucobond sample, remains unchallenged.

173. That said, we find no error in the Tribunal's construction of the Sample Approval Obligation.

Elenberg Fraser's submissions

174. By its amended application for leave to appeal, Elenberg Fraser identifies the proposed ground of appeal by reference to the proper interpretation of the Sample Approval Obligation.

175. By its amended written case it refers to the Sample Approval Obligation and the T2 Sample Approval Method and submits that:

> Properly construed, the Architect's obligation to inspect samples *as required* in the T2 Specification is in reference to inspections to be undertaken by the Superintendent because there was no separate requirement under the Specification for an inspection by the Builder's architect. If the intention was to require the Architect to inspect and approve samples for something more than visual characteristic then the words '*in the Architectural specification*' were redundant.

176. Oral submissions on this proposed ground were very limited and directed to the question of whether or not Elenberg Fraser had complied with the Sample Approval Obligation rather than the construction of it. Senior counsel referred, in a summary way, to the evidence of the sample inspection and approval undertaken by Mr Palmer on behalf of Elenberg Fraser. That evidence is referred to in the Tribunal's Reasons [121] and we have summarised it above. [122]

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[121] Ibid [152]–[161] .

[122] See [35]– [38] above.

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177. Against that background senior counsel submitted:

> We received a sample of the material. There is no evidence to say that an inspection of the sample of the material would reveal anything about its properties, and then the second proposition that we raise with respect to that is that the question was asked by Mr Palmer. Mr Palmer asked the question, 'Had you satisfied the specifications?' And his Honour has found that although the response came only with respect to the warranty question his Honour still found that it was an answer to that other question. So we put the proposition what more could an architect have done …

178. The written submissions in relation to the construction of the Sample Approval Obligation were not expanded upon during the hearing of the application for leave to appeal.

Consideration

179. On a plain reading of the Sample Approval Obligation, an obligation to inspect and approve samples was imposed on Elenberg Fraser.

180. Elenberg Fraser then relies on the words 'as required in the architectural specification' to incorporate from the T2 Specification the qualification that samples be reviewed for visual characteristics only. It says that to do otherwise leaves those words no work to do. We do not agree. The T2 Specification does more than identify the scope of inspection. It also identifies the samples required to be provided. For example, and most relevantly, cl 1.6 of 'Section 04-

203 — Metal Roof and Wall Cladding' provides that a sample of each type of wall and roof cladding is to be provided.

181. Therefore, the words 'as required in the architectural specification' operate to identify the samples to be inspected and approved by Elenberg Fraser and/or reference the scope of that obligation.

182. We find no error in the Tribunal's finding that the words 'as required in the architectural specification' qualify the samples that must be inspected and approved.

183. The issue remains whether the words 'as required in the architectural specification' also incorporate from the T2 Specification the qualification that samples be reviewed for visual characteristics only.

184. Having regard to the context of the Sample Approval Obligation we reject that proposition.

185. First, as found by the Tribunal, Elenberg Fraser had an ongoing role in implementing the T2 Specification. Included in that role was the express obligation to inspect the works during construction for compliance with the client 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.

186. Secondly, the Sample Approval Obligation is imposed in the part of the detailed scope of services (set out in Annexure Part D of the Elenberg Fraser Agreement) applicable to the construction phase of the project. It is apparent that the obligations imposed on Elenberg Fraser in the scope of services generally, and that part in particular, are far broader than material aesthetics and extend to checking compliance with project architectural requirements and design intent. Specifically, Annexure Part D commences with a description of General Services to be provided and includes an obligation that:

> The Architect is Head Design Consultant and is responsible for coordination of all design issues into the final design including, but not limited to, client briefing, building services (all disciplines), structural, heritage, interiors, acoustics, building surveyor, fire engineering, and landscaping, and shall also include the review of work by all other consultants and obtaining sign-off confirmation for each element of design from other design consultants.

187. And under the heading 'Construction Phase', 'Inspections': [123]

> Regularly inspect the Project works (including off-site fabrication locations) during construction and observe critical tasks as they are executed to establish that the work is being constructed in compliance with the project architectural requirements, the design intent of all approved Project documents, samples and prototypes and to the specified quality and promptly furnish weekly inspection /defects status reports and a monthly certificate of compliance of Architectural intent as evidence of such compliance in a format approved by the Client.

Undertake inspections and report on products and prototype sections of work to confirm standard of finish, in accordance with or as set out in the Architectural specifications [T2 Specifications] and documents.

Inspect and approve samples as required in the architectural specification.

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[123] Reasons [72] .

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188. Conversely, there is no provision in the Elenberg Fraser Agreement which expressly limits Elenberg Fraser's role in relation to approving samples to a visual inspection of appearance.

189. Viewed against the architect's overall scope of responsibility it makes no commercial sense to construe the Sample Approval Obligation so as to:

- import from the T2 Specification a method of inspection imposed on the superintendent and thereby impose on the head design consultant an identical obligation; and
- limit the scope of the inspection to a review of visual characteristics.

190. Accordingly, we are not persuaded that the Tribunal erred in its construction of the Sample Approval Obligation. Moreover as we have indicated above, even if the Tribunal misconstrued the Sample Approval Obligation this would not vitiate the Tribunal's conclusion that Elenberg Fraser's approach to the sample approval was in breach of its broader obligation as head design consultant.

191. This proposed ground of appeal has no real prospect of success. Leave to appeal should be refused.

Issue 6: Was it reasonably open to the Tribunal to find that the Owners' loss included an increase in insurance premiums?

Background

192. On 27 July 2018, the Owners' insurance broker, Mr Pappa, emailed Mr Dawson in relation to the increases in insurance premiums for the Lacrosse building since the incident in 2014. Mr Dawson is the chairperson of Owners Corporations No 1 and No 4. [124]

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[124] Ibid [17] .

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193. The email stated that the premiums had increased ‘due to a variety of reasons’ including, inter alia, cladding issues. It stated further that ‘cladding at the property [had] accounted for approximately 80 per cent of the increases in premium from year to year’.

194. The Owners made a claim for increases in insurance premiums associated with the unburnt Alucobest cladding remaining on the Lacrosse building until the rectification works were complete. It was not disputed that there had been a significant increase in insurance premiums following the fire.

195. The amounts claimed were:

- $534,270.16 for the period up to 2018/19; and
- $167,000.00 for the period 2019/20.

196. The Tribunal determined that the Owners’ loss included an increase in insurance premiums and awarded $701,270.16 in compensation. [125]

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[125] Ibid [644]–[646] .

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197. Elenberg Fraser submits that:

- the email dated 27 July 2018 was hearsay evidence;
- it was provided for the purpose of the litigation;
- there was no evidence before the Tribunal of the skill and experience of Mr Pappa; and
- there was no explanation provided for the basis for the assertion that 80 per cent of the increase in the insurance premium was caused by the existence of unburnt non-compliant cladding on the Lacrosse building after the fire,

therefore the Tribunal’s acceptance of that evidence was an error of law as no reasonable tribunal could find the claim proved on the basis of the evidence adduced.

Consideration

198. **Following paragraph cited by:**

Keogh & Co Pty Ltd v Pless (16 June 2025) (Gray J)

52. The proposed appeal must be limited to questions of law. The identification of a question of law is not merely a precondition to the exercise of a right to appeal, but the subject matter of the appeal itself. [73] The proposed appeal cannot extend to correction of alleged errors of fact, provided the findings were open on the material and were not reached in breach of the standard of legal reasonableness. [74]

via

[74] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* (2021) 75 VR 1; [2021] VSCA 72, [198] (Beach and Osborn JJA, and Stynes AJA); *Miller v Martin* [2021] VSCA 108, [72] (Tate, Niall and Kennedy JJA); *Heng Yang Developments Pty Ltd v Red Earth Developments (Aust) Pty Ltd* [2022] VSC 231, [40] ; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 362–367 [64]–[76] (Hayne, Kiefel and Bell JJ); [2013] HCA 18 .

VVR (a pseudonym) v Trustee for Ironfish Property Management Melbourne Unit Trust (ABN 73 299 113 275) (27 February 2025) (Quigley J)

58. In order to succeed on this ground of review, the applicant must show that there is 'no evidence' from which the Tribunal could have drawn these findings. His Honour Justice Croft summarises the applicable principles of this ground of review in the recent decision of *The Trust Company Limited v Blue Train Cafe Pty Ltd* [2024] VSC 232 at [60] :

> Whether there was no evidence to support the Tribunal's factual finding … is a question of law. [30] It must be shown that the Tribunal made a finding that was 'simply not open to it', usually requiring a finding that 'there was no evidence on the basis of which the Tribunal could reach that finding, not that there was some evidence tending to a different conclusion.' [31] A finding of fact by the Tribunal cannot be challenged on the 'no evidence' ground where there was some evidence to support it. Nor can a finding of fact be challenged by this Court simply because it forms the view that the finding was made in error or against the weight of the evidence. [32] The question is whether there was any, rather than sufficient, evidence for the Tribunal to arrive at a factual finding. [33] This question is to be determined by reference to the evidence and inferences most favourable to the Respondent. [34]

via

[32] *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207, [248] ; *Karakatsanis v Racing Victoria Ltd* (2013) 42 VR 176, 185–6 [21] ; *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540, 544 [14] ; *Higgins Nine Group Pty Ltd v Ladro Greville St Pty Ltd* [2016] VSC 244, [28], [31] ; *Turkey v Mackie Pty Ltd* [2019] VSC 103, [22] ; *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [2021] VSCA 72, [198] ; *Weber v Carkeek* [2020] VSC 366, [69] .

Akers v RSPCA (23 August 2024) (Judge:gray J)

46. Such an appeal is limited to questions of law. The identification of a question of law is not merely a precondition to the exercise of a right to appeal, but the subject matter of the appeal itself. [13] The appeal does not extend to correction of alleged errors of fact unless VCAT made a finding of fact that was not open to it. [14]

via

[14] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T* [2021] VSCA 72, [198] ; *Miller v Martin* [2021] VSCA 108, [72] ; *Heng Yang Developments Pty Ltd v Red Earth Developments (Aust) Pty Ltd* [2022] VSC 231, [40] .

The Trust Company Limited v Blue Train Cafe Pty Ltd (10 May 2024) (Croft J)

60. Whether there was no evidence to support the Tribunal's factual finding in setting the precondition is a question of law. [112] It must be shown that the Tribunal made a finding that was "simply not open to it", usually requiring a finding that "there was no evidence on the basis of which the Tribunal could reach that finding, not that there was some evidence tending to a different conclusion". [113] A finding of fact by the Tribunal cannot be challenged on the "no evidence" ground where there was some evidence to support it. Nor can a finding of fact be challenged by this Court simply because it forms the view that the finding was made in error or against the weight of the evidence. [114] The question is whether there was any, rather than sufficient, evidence for the Tribunal to arrive at a factual finding. [115] This question is to be determined by reference to the evidence and inferences most favourable to the Respondent. [116]

via

[114] *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207 at [248] ; and see *Karakatsanis v Racing Victoria Ltd* (2013) 42 VR 176 at 185–6 [21] ; *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540 at 544 [14] ; *Higgins Nine Group Pty Ltd v Ladro Greville St Pty Ltd* [2016] VSC 244 at [28], [31] ; *Turkey v Mackie Pty Ltd* [2019] VSC 103 at [22] ; *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [2021] VSCA 72 at [198] ; *Weber v Carkeek* [2020] VSC 366 at [69] .

Doolkoora Pty Ltd v Stumpy Gully Holdings Pty Ltd (29 March 2024) (Gray J)

64. The appeal is limited to questions of law. The identification of a question of law is not merely a precondition to the exercise of a right to appeal, but the subject matter of the appeal itself. [23] The appeal does not extend to correction of alleged errors of fact unless VCAT made a finding of fact that was not open to it. [24] However, the limits of the Court's function in a proceeding under s 148 do not altogether prevent a court from considering mixed questions of fact and law. In some circumstances, it

will be permissible to consider whether VCAT erred in law in reaching conclusions on mixed questions of fact and law. [25] Generally speaking, whether primary facts as found fall within a statutory provision properly construed is a question of law, [26] and the same is true of a legal test arising at common law or in equity. [27]

via

[24] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [2021] VSCA 72, [198] ; *Miller v Martin* [2021] VSCA 108, [72] ; *Heng Yang Developments Pty Ltd v Red Earth Developments (Aust) Pty Ltd* [2022] VSC 231, [40] .

Ahamed v Coles Supermarkets Australia Pty Ltd (12 October 2023) (Macaulay JA; J Forrest AJA)

69. In *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* , this Court (Beach, Osborn JJA and Stynes AJA) said:

> Section 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* allows appeals on a question of law, including whether or not there is any evidence to support a finding of fact. It does not however extend to a mere error of fact unless the Tribunal made a finding that was 'simply not open to it'. For the most part, this requires 'that there was no evidence on the basis of which the Tribunal could reach that finding, not that there was some evidence tending to a different conclusion'. [25]

via

[25] [2021] VSCA 72 , [198] , quoted in *Miller v Martin* [2021] VSCA 108, [72] (Tate, Niall and Kennedy JJA). See also *Hoskin v Greater Bendigo City Council* (2015) 48 VR 715, 720 [10] (Warren CJ, Osborn and Santamaria JJA); [2015] VSCA 350 .

Miller v Martin (30 April 2021) (Tate, Niall and Kennedy JJA)

72. The law on this matter was also summarised recently by Beach, Osborn JJA and Stynes AJA in *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [128] who explained:

> Section 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* allows appeals on a question of law, including whether or not there is any evidence to support a finding of fact. It does not however extend to a mere error of fact unless the Tribunal made a finding that was 'simply not open to it'. For the most part, this requires 'that there was no evidence on the basis of which the Tribunal could reach that finding, not that there was some evidence tending to a different conclusion'. [129]

via

[129] Ibid [198] (citations omitted).

Section 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* allows appeals on a question of law, including whether or not there is any evidence to support a finding of fact. [126] It does not however extend to a mere error of fact unless the Tribunal made a finding that was 'simply not open to it'. [127] For the most part, this requires 'that there was no evidence on the basis of which the Tribunal could reach that finding, not that there was some evidence tending to a different conclusion'. [128]

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[126] *Moorabool Shire Council v Taitapanui* (2006) 14 VR 55, 70 [57] (Ormiston and Ashley JJA); *Transport Accident Commission v Hoffman* [1989] VR 197, 199 (Young CJ and McGarvie J).

[127] *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 90 (Phillips JA).

[128] *Transport Accident Commission v Hoffman* [1989] VR 197, 199 (Young CJ and McGarvie J).

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199. There was evidence before the Tribunal in support of the Owners' claim for an increase in insurance premiums. Specifically, in determining this claim the Tribunal had regard to the evidence of Mr Dawson (both in his witness statements and in oral evidence) and the email from Mr Pappa. [129]

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[129] Reasons [646] .

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200. The issue arises whether the Tribunal erred in having regard to that evidence.

201. The Tribunal is not bound by rules of evidence, may inform itself on any matter as it sees fit and enjoys a discretion to regulate its own procedure. [130]

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[130] *Victorian Civil and Administrative Tribunal Act 1998* s 98 .

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202. The hearing before the Tribunal proceeded on the basis that any document referred to in the written or oral opening submissions, in a witness statement or put to a witness during oral

evidence, would be treated as tendered unless the Tribunal otherwise ordered. [131] This put the onus on a party to object at the earliest opportunity. It is not contended that this procedure involved a lack of procedural fairness. Nor could it be.

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[131] Reasons [16] .

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203. The email from Mr Pappa was attached to the witness statement of Mr Dawson. While the Reasons of the Tribunal record that Elenberg Fraser submitted that the evidence of the insurance broker was insufficient proof, no objection was taken to the tender of that evidence. While it was open to Elenberg Fraser to take steps to secure the attendance of Mr Pappa for cross-examination and/or to lead evidence challenging the reasonableness of the conclusion that 80 per cent of the increase in premium was attributable to the cladding, it did not.

204. Having regard to the powers of the Tribunal noted above and to the fact that the relevant evidence was tendered without objection, we find that it was properly taken into account by the Tribunal and sufficient to support the Owners' claim for damages in respect of increase in insurance premiums.

205. This proposed ground of appeal has no real prospect of success. Leave to appeal should be refused.

Issue 7: Did the Tribunal err in its construction of cl C1.12(f) of the BCA?

The BCA

206. Gardner Group was contracted by LU Simon to ensure that the design and materials used in the construction of the Lacrosse building complied with the BCA.

207. A key preliminary question identified in the Tribunal's Reasons is whether an ACP meeting the relevant contractual specification and proposed for use in June 2011 as a component of an external wall of a building of the type in issue met the requirements of the BCA. [132]

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[132] Ibid [245] .

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208. **Following paragraph cited by:**

Winter v Kingborough Council & South Arm Pipeline Pty Ltd (No.2) (04 November 2024) (F Brimfield, Presiding Member)

174. The proper approach to interpreting the BCA was set out by Justices Beach, Osborne and Stynes in the Victorian Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corporation No. 1 PS631436T* [2021] VSCA 72 at [208] .

Pirmax Pty Ltd v Kingspan Insulation Pty Ltd (14 November 2022) (Snaden J)

10. The BCA is, then, to be construed according to ordinary principles; albeit with recognition that it is a technical document used by building practitioners on a day-to-day basis and, as such, is not drafted in the same way as an act of parliament: *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS631436T* [2021] VSCA 72, [208] (Beach, Osborn JJA and Stynes AJA) .

The answer to that question lies in the construction of a particular 'deemed to satisfy' ('DTS') provision of the BCA upon which Gardner Group relies. Before turning to the terms of the DTS provision, we note that there is no real dispute as to the principles of construction to be applied. The Tribunal accepted: [133]

> The text, context and purpose of the provision to be interpreted ought to be taken into account in the ordinary [way], whilst recognising that what is to be interpreted is a technical document not drafted in the same way as acts of Parliament and is to be applied by those in the construction industry on a daily basis, and not ordinarily by lawyers.[134]

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[133] Ibid [34] (citation in original).

[134] DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 8th edition, LexisNexis Butterworths, 167–8.

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209. **Following paragraph cited by:**

Owners SP 92450 v JKN Para 1 Pty Limited (26 May 2023) (Gleeson, White and Brereton JJA)

107. The performance requirements of the BCA require that the materials used on the external wall of a building either meet a particular test standard to ensure that they are not combustible (AS 1503.1) or are assessed and certified by a fire engineer, certifying authority and the Fire Commissioner, so as to ensure the materials' functional and performance equivalence during a fire. By installing cladding which did not comply with the performance requirements of the BCA, the respondents provided

the Owners Corporation with a building which did not meet the minimum standards for public safety: *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436T* [2021] VSCA 72 at [209] .

Strata Plan 92450 v JKN Para 1 Pty Ltd (19 July 2022) (Black J)

5. The parties accept that the BCA, as it stood in 2013, was applicable to the relevant works. Ms Steele draws attention to, and I bear in mind, the observations of Lindsay J in *Owners of Strata Plan No 69312 v Rockdale City Council* [2012] NSWSC 1244 at [59]-[61] , as subsequently approved by the Court of Appeal of the Supreme Court of Victoria in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS 613436T* [2021] VSCA 72 at [209] , as follows:

> "It is not necessary for the determination of the current proceedings to decide whether the BCA was, or was not, in 2001 (or at some other time) a legislative "instrument" or "statutory rule" so as to engage ss 33 and 34 of the *Interpretation Act*.
>
> As was observed of a different form of "standards code" in a different legislative context, in *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 74 NSWLR 148 at 161 [68] , the BCA appears always to have been something of a hybrid.
>
> Whatever side of the line it might be thought to fall on for the purposes of the definitions of "instrument" and "statutory rule" in the *Interpretation Act*, the task for the court in these proceedings is to construe it as a formal document designed to define standards, for the promotion of public safety, in the construction of buildings. …"

Further, as Lindsay J observed in *The Owners — Strata Plan No 69312 v Rockdale City Council & Anor; Owners of SP 69312 v Allianz Aust Insurance* [135] in respect of the position of the BCA under cognate New South Wales legislation:

> First, the BCA is and was at all material times a publication of the Australian Building Codes Board rather than a form of subordinate legislation in its own right. Secondly, at all material times the BCA had express legislative recognition. Thirdly, regulations under the *Environmental Planning and Assessment Act 1979* made within power have, at all material times, provided for 'the adoption and application' of the BCA.
>
> …
>
> Whatever side of the line it might be thought to fall on for the purposes of the definitions of 'instrument' and 'statutory rule' in the *Interpretation Act*, the task for the Court in these proceedings is to construe it as a formal document designed to define standards, for the promotion of public safety, in the construction of buildings. [136]

[135] [2012] NSWSC 1244 .

[136] Ibid [30], [61] .

210. In Victoria at the time in issue, the BCA was relevantly adopted by, and formed part of, the *Building Regulations 2006* by reason of building regulation 109, which was in turn authorised by s 109 of the *Building Act 2006*.

211. The introduction to the BCA states:

> The goals of the BCA are to enable the achievement and maintenance of acceptable standards of structural sufficiency, safety (including safety from fire), health and amenity for the benefit of the community now and in the future.
>
> These goals are required so that the BCA extends no further than is necessary in the public interest, is cost effective, easily understood, and is not needlessly onerous in its application.[137]

[137] BCA 7.

212. The structure adopted in the BCA is to set out:

- objectives;
- functional statements;
- performance requirements with which all building solutions must comply; and
- building solutions.[138]

[138] BCA cl A0.3.

213. As the introduction to the BCA states, the use of a performance format is intended 'to provide greater flexibility for the use of new and innovative building products, systems and designs'.[139]

[139] BCA 8.

214. The fire resistance provisions of the BCA require the external walls of buildings such as the Lacrosse building (being of type A construction) to be non-combustible in order to achieve the appropriate fire-resistance level ('FRL').[140]

[140] BCA cl 3.1(b).

215. 'Non-combustible' as applied to a material means not deemed combustible as determined by the test in AS 1530.1. 'Non-combustible' as applied to construction or part of a building means constructed wholly of materials that are not deemed combustible.[141]

[141] BCA cl A1.1 'Definitions'.

216. ACPs of the type installed on the Lacrosse building are combustible and would fail the test under AS 1530.1.

217. The requirement for the external walls of buildings of the relevant type gives effect to the following objective of pt C1 of the BCA which deals with 'Fire Resistance and Stability'.

> **C01**
>
> The *Objective* of this Section is to—
>
> (a) safeguard people from illness or injury due to a fire in a building; and
>
> (b) safeguard occupants from illness or injury while evacuating a building during a fire; and
>
> (c) facilitate the activities of emergency services personnel; and
>
> (d) avoid the spread of fire between buildings; and
>
> (e) protect *other property* from physical damage caused by structural failure of a building as a result of fire

218. It further implements a series of functional statements and performance requirements including the following:

FUNCTIONAL STATEMENTS

CF1

A building is to be constructed to maintain structural stability during fire to—

(a) allow occupants time to evacuate safely; and

(b) allow for *fire brigade* intervention; and

(c) avoid damage to *other property*.

CF2

A building is to be provided with safeguards to prevent fire spread—

(a) so that occupants have time to evacuate safely without being overcome by the effects of fire; and

(b) to allow for *fire brigade* intervention; and

(c) to *sole-occupancy* units providing sleeping accommodation; and

Application:

CF2(c) only applies to a Class 2 or 3 building or Class 4 part.

(d) to adjoining *fire compartments*; and

(e) between buildings.[142]

PERFORMANCE REQUIREMENTS

…

CP2

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[142] BCA 76.

(a) A building must have elements which will, to the degree necessary, avoid the spread of fire—

(i) to *exits*; and

(ii) to *sole-occupancy units* and *public corridors*; and

Application:

CP2(a)(ii) only applies to a Class 2 or 3 building or Class 4 part.

(iii) between buildings; and

(iv) in a building.

(b) Avoidance of the spread of fire referred to in (a) must be appropriate to—

(i) the function or use of the building; and

(ii) the *fire load*; and

(iii) the potential *fire intensity*; and

(iv) the *fire hazard*; and

(v) the number of *storeys* in the building; and

(vi) its proximity to *other property*, and

(vii) any active *fire safety systems* installed in the building; and

(viii) the size of any *fire compartment*; and

(ix) *fire brigade* intervention; and

(x) other elements they support; and

(xi) the evacuation time.[143]

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[143] The Lacrosse building contained sole-occupancy units within a Class 2 building.

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219. Nonetheless, the BCA contemplates that the prescription for non-combustible walls to which we have referred may be modified by way of a building solution if either an alternative solution is justified in accordance with the BCA or specific DTS provisions are met. In particular, pt A0.7 provides that a building solution which complies with DTS provisions is deemed to comply with the relevant performance requirements.

220. Gardner Group contends that the ACPs installed on the facade of the building met the DTS provisions contained in cl C1.12(f) of the BCA which provides:

C1.12 Non-combustible materials

The following materials, though *combustible* or containing *combustible* fibres, may be used wherever a *non-combustible* material is *required*:

(a) Plasterboard.

(b) Perforated gypsum lath with a normal paper finish.

(c) Fibrous-plaster sheet.

(d) Fibre-reinforced cement sheeting.

(e) Pre-finished metal sheeting having a *combustible* surface finish not exceeding 1 mm thickness and where the *Spread-of-Flame Index* of the product is not greater than 0.

(f) Bonded laminated materials where—

(i) each laminate is *non-combustible*; and

(ii) each adhesive layer does not exceed 1 mm in thickness; and

(iii) the total thickness of the adhesive layers does not exceed 2 mm; and

(iv) the *Spread-of-Flame Index* and the *Smoke-Developed Index* of the laminated material as a whole does not exceed 0 and 3 respectively.

221. More particularly, in circumstances where it is agreed that the Alucobest ACPs comprised a bonded laminated material, Gardner Group submits that the word 'laminate' where used in cl C1.12(f)(i) does not include the polyethylene core of the ACPs utilised to clad the Lacrosse building and hence such core was not required to be non-combustible. If this construction of the clause is accepted, the ACP complied with the DTS provisions.

222. Evidence before the Tribunal described the ACP as comprising a layer of aluminium sheeting (treated externally with a fluoropolymer coating), a layer of adhesive, a low density polyethylene sheet, a further layer of adhesive and a further sheet of aluminium (again treated externally with a fluoropolymer coating). Gardner Group submitted that the word 'laminate' may have one of three meanings [144] and that, read in context, it must mean an external layer used to cover another material in the process of lamination (being the application of a protective layer to a material), rather than either a single bonded product comprised of layers bonded together, or a description of each of the layers of a bonded product containing multiple layers.

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[144] Reasons [250].

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223. The Tribunal rejected this construction:

> In my view, the phrase 'bonded laminated materials' describes materials that have been through a process of lamination. In that sense, the phrase is synonymous

with Gardner Group's first definition of 'laminate' and the dictionary definitions to which it refers:

> The Oxford Dictionary (relevantly) defines 'laminate', when used as a noun, as '*a laminated structure or material*'. The Macquarie Dictionary defines 'laminate', when used as a noun, as '*a material made by bonding together, usually under pressure, two or more thin layers*'.

The term 'laminate' clearly can be used (depending on context) to mean both the composite product and each of its layered parts. It is therefore unsurprising that the drafter of the provision would use a more comprehensive phrase for the composite product ('bonded laminated materials'), before turning to deal with its component parts (comprising the individual laminates and the bonding agent). Indeed, 'laminated' (the term found in both the chapeau and in clause C1.12(f)(iv), which also refers to the laminated whole) is defined by the Oxford Dictionary as follows:

> Consisting of, arranged in, or furnished with laminae; formed or manufactured in a succession of layers of material, as some metallic objects, etc ... Now common as a designation of various manufactured materials made by lamination, as *lamin ated glass*, a material consisting of two outer layers of plate or sheet glass attached to an inner layer of transparent plastic; *laminated plastic*, a more or less rigid material made by bonding together, usu. by means of heat and pressure, layers of cloth, paper, or the like that have been impregnated or coated with a synthetic resin; *laminated wood*, layers of wood bonded together with the grain in adjacent layers parallel (in contrast to plywood); also *laminated spring*, a leaf spring.

And, for completeness, 'bond' is relevantly defined as follows:

> ... in *Building*: To bind or connect together (bricks, stones, or different parts of a structure) by making one overlap and hold to another, so as to give solidity to the whole; to hold or bind together by bond-stones, clamps, etc

Thus the process of lamination that results in a 'bonded laminated material' involves the binding or connecting together (relevantly, by an adhesive) of a succession (that is, two or more) of layers of one or more materials. Having identified the composite product in those terms, followed by the word 'where' (in the sense of 'in which'), I consider that the immediately following expression 'each laminate' can only refer to each of the bonded layers that together comprise the 'bonded laminated' whole.

It is true that the bonded laminated materials in issue in this case are ACPs that happen to comprise three successive layers (not two, four or more) and that the second or middle of those successive layers is a different material from the first and third. But to contend that these factors alter the character of the middle layer, so that it ceases to be a layer or laminate and becomes a 'core' within an otherwise 'bonded laminated material', to my mind defies both logic and common sense.

…

> Read this way, laminate, laminae and layer are indeed interchangeable. Using ‘laminate’ is to my mind a logical choice, as the singular noun describing the [sic] each of the components that have been ‘laminated’ by being ‘bonded’ to form the ‘bonded laminated material’. The term ‘laminae’ is obscure and not an obvious choice of the singular noun for inclusion in the BCA. And while using ‘layer’ might have left less room for debate, it does not follow that ‘laminate’ must therefore be construed to mean something different. [145]

Consideration

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[145] Ibid [253]–[257], [261] (citations omitted).

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224. We respectfully agree with the Tribunal’s analysis, save that we prefer the view that ‘layer’ is deliberately used within requirements (ii) and (iii) of sub-cl (f) as a component of the phrase ‘adhesive layer’ and as distinct from the structural elements of the material comprising laminates which are bonded together to create the whole.

225. Similarly, the external fluoropolymer layer or any other paint layer would ordinarily be described as a layer and not a laminate.

226. As we read cl C1.12:

- Sub-clauses (a) to (d) refer to types of composite materials used in the building industry described by their names as classes of products.[146]

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[146] The evidence of Mr Galanos was that each of these products had low combustibility.

- Sub-clauses (e) and (f) are described by way of the functional characteristics of their components relevant to fire safety.

- The fact that the BCA adopts both approaches is unsurprising given that it must accommodate changing technology and it explicitly seeks to achieve some flexibility for this purpose by adopting a performance format.

- The concession comprised in sub-cl (f) is directed to ‘bonded laminated materials’, a term which (unlike those described in the preceding sub-clauses) is broad enough to embrace materials of fundamentally different physical composition, eg laminated glass as against laminated timber.

- As Gardner Group submitted, the words ‘bonded’ and ‘laminated’ are adjectives but evoke the past participles of the verbs to bond and to laminate.

- A material will be bonded if it is fixed together by adhesive and/or a physical process such as pressure.

- A material will be bonded and laminated if it is structurally composed of layers which are bonded in a laminated form.

- It is entirely sensible to speak of the adhesive used to bond elements of a laminated structure as comprising a layer between laminates.

- Requirements (ii) and (iii) of sub-cl (f) permit a potentially combustible element within the bonded laminated material but strictly limit its potential dimensions.

- Requirement (iv) of sub-cl (f) operates with respect to characteristics relating to secondary consequences of combustion, namely factors affecting the spread of flames and the development of smoke. It does not limit the critical factor of combustibility as such.[147]

- Requirements (i) to (iv) of sub-cl (f) are intended to operate cumulatively.

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[147] ‘Spread-of-Flame Index’ means the index number for smoke as determined by AS /NZS 1530.3. ‘Smoke-developed Index’ means the index number for smoke as determined by AS/NZS 1530.3. See cl A 1.1 of the BCA.

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227. The construction for which Gardner Group contends leads 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. It leaves open the possibility of further layers within the material which are themselves combustible.

228. The precise limitation of the extent of the use of adhesives would seem pointless in these circumstances. As the Tribunal observed:

Returning to C1.12(f), this sub-clause likewise deals with each of the components of the product and prescribes with precision the quantity of the combustible element (namely, the adhesive) that is permitted. Each adhesive layer must not exceed 1 mm in thickness and the total thickness of the adhesive layers must not exceed 2 mm. The clause says nothing about the thickness of 'each laminate', as these are required to be non-combustible. Like clause C1.12(e), it provides the additional prescription that the product as a whole must have a 'Spread-of Flame Index' not exceeding 0 and adds that it must also have a 'Smoke-Developed Index' not exceeding 3.

These provisions define with millimetre precision the thickness of elements such as surface finishes and adhesives that would otherwise offend the fundamental precept for avoiding fire spread (that is, non-combustibility). In my view, it is untenable to suggest in effect that the provisions would limit individual layers to no more than 1mm and (in the case of adhesives) to a maximum thickness of 2mm, and ignore entirely a highly combustible layer of polyethylene with a thickness (in the case of the range of Alucobond products available in 2010 with the Virgin PE core) anywhere between 3mm and 5mm. [148]

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[148] Reasons [266]–[267] (citation omitted).

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229. The same logic applies to the failure to control the combustibility of core materials more generally if Gardner Group's construction of the clause is correct.

230. In our view, the construction preferred by the Tribunal gives effect to:

(a) the plain meaning of the language of the provision when read as a whole;

(b) the underlying purpose of the section of the BCA containing this provision, which is to provide for effective fire safety in buildings of particular types;

(c) a construction which gives work to each element of the clause; and

(d) a construction which avoids the anomalous consequences of the alternative construction for which Gardner Group contends.

231. For completeness, we record the following matters with respect to subsidiary submissions agitated on behalf of Gardner Group:

(1) So to reason is not to construe the clause with hindsight bias by reference to historical events, but to address the text, context and purpose of the provision.

(2) The fact that a practitioners' textbook took a different view of the construction of the provisions at the time in issue is of little assistance.[149] Whilst we accept that practitioners' views might amplify the understanding of the product descriptions contained in sub-cls (a) to (d) of cl C1.12, we do not with respect see how they can materially assist the understanding of sub-cl (f).

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[149] The *Building Service New South Wales* (Thomson Law Book Company Limited, March 2007) postulated that the BCA did not control the 'core' of a laminated material.

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(3) It is likewise wrong to postulate that sub-cl (f) was intended to embrace particular existing products and hypothesise its meaning by reference to such products.

(4) Similarly, evidence that at the time of the hearing before the Tribunal a change to the BCA provisions had been proposed does not assist in their construction. The change was put forward on the basis that the relevant provision had been misunderstood.

(5) Whilst we accept that caution must be exercised in displacing the ordinary meaning of words by reference to the concept of purpose, [150] in the present case the ordinary meaning of the words, as we read them, accords with the Tribunal's construction. Further, the BCA itself expressly states that it should be interpreted having regard to its purpose, both in its introduction and in the course of its substantive provisions. Clause A.06 of the BCA provides:

> The *Objectives* and *Functional Statement*s may be used as an aide to interpretation.

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[150] *Certain Lloyds Underwriters Subscribing to Contract NO IH00AAQS v Cross* (2012) 248 CLR 378, 389–90 [25]–[26] (French CJ and Hayne J).

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232. Lastly, while the proper construction of cl C1.12(f) is a question of law, the meaning of both 'bonded laminated materials' and 'laminate' involves the application of ordinary English words to the facts of a particular case. In our view, it was plainly open to the Tribunal to reach the conclusion which it did with respect to the meaning of those words as applied to the facts of this case.

233. Accordingly, we would refuse the application for leave to appeal with respect to proposed ground 1 by Gardner Group which raises this issue.

Issue 8: Did the Tribunal err in its conclusion that the 'peer professional opinion' was 'unreasonable' for the purposes of s 59(2) of the *Wrongs Act 1958* ?

234. Section 59 of the *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. Section 59 provides as follows:

> **Standard of care for professionals**
>
> (1) A professional is not negligent in providing a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by a significant number of respected practitioners in the field (**peer professional opinion**) as competent professional practice in the circumstances.
>
> (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court determines that the opinion is unreasonable.
>
> (3) The fact that there are differing peer professional opinions widely accepted in Australia by a significant number of respected practitioners in the field concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
>
> (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.
>
> (5) If, under this section, a court determines peer professional opinion to be unreasonable, it must specify in writing the reasons for that determination.
>
> (6) Subsection (5) does not apply if a jury determines the matter.

235. In the present case, the Tribunal accepted that Gardner Group could bring itself within s 59(1) but further held that the relevant peer professional opinion relied upon did not give rise to a defence by reason of the proviso in s 59(2) . More particularly, the Tribunal held:

> (a) that the practice of building surveying was a profession and the building surveyor acted in the course of providing a professional service; [151]

[151] Reasons [366] .

(b) the relevant 'manner' in which the building surveyor acted and which constituted 'professional practice' for the purpose of s 59 was:

> the issuing of building permits for the use of ACPs such as Alucobond with a polyethylene core and with a certificate under AS1530.3 on external walls not having an FRL in high-rise buildings of type A construction, relying on BCA C1.12(f). [152]

(c) the practice was widely accepted in Australia by a significant number of respected practitioners in the field as competent professional practice in the circumstances. [153]

[152] Which the Tribunal defined as 'Relevant Practice'. See Reasons [356].

[153] Reasons [379] .

236. The Tribunal then went on to hold that the relevant practice was unreasonable within the meaning of s 59(2) of the *Wrongs Act* and in consequence Gardner Group could not rely upon s 59(1) . [154] Gardner Group takes issue with this conclusion and with the process of reasoning leading to it on the basis that s 59(2) is directed to the peer professional opinion underlying the relevant practice and not to the practice itself.

Consideration

[154] Ibid [397] .

237. There are three answers to Gardner Group's proposition.

238. First, 'peer professional opinion' is a term defined by s 59(1) . It is constituted by the acceptance of the relevant practice by a significant number of respected practitioners in the field. It is this 'opinion' as defined that may be the subject of challenge pursuant to s 59(2) . The 'opinion' which is in issue is the acceptance of the relevant practice not the underlying rationale for the practice. It may be that the practice is adopted without any coherent basis in an opinion in the latter sense. Thus, in the present case, the Tribunal recorded its general

impression ‘that otherwise experienced and diligent practitioners were beguiled by a longstanding and widespread (but flawed) practice into giving insufficient scrutiny to the rationale for that practice’. [155]

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[155] Ibid [388] .

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239. **Following paragraph cited by:**

Civil Juries Charge Book (06 May 2025)

> A defendant cannot rely on an accepted practice if that practice is unreasonable. If you decide that although NOD followed a widely accepted practice, that practice is unreasonable, then you will answer yes to question 1(b). You will only answer yes to this question if the plaintiff has proved that the practice was unreasonable. 85
>
> *via*
>
> Note: In most cases it will be sufficient to focus on whether the practice itself is unreasonable. However, in Tanah Merah v Owners Corporation [2021] VSCA 72 at [239] , the Court noted a distinction between unreasonable practices and unreasonable adoption of practices. Judges should consider whether this distinction is relevant in the circumstances of their case.

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> A defendant cannot rely on an accepted practice if that practice is unreasonable. If you decide that although NOD followed a widely accepted practice, that practice is unreasonable, then you will answer yes to question 1(b). You will only answer yes to this question if the plaintiff has proved that the practice was unreasonable. 93
>
> *via*
>
> Note: In most cases it will be sufficient to focus on whether the practice itself is unreasonable. However, in Tanah Merah v Owners Corporation [2021] VSCA 72 at [239] , the Court noted a distinction between unreasonable practices and unreasonable adoption of practices. Judges should consider whether this distinction is relevant in the circumstances of their case.

Secondly, whilst we accept that it was in strictness not correct to ask whether the relevant practice was unreasonable but rather s 59(2) required the Tribunal to ask whether the

acceptance of that practice was unreasonable (ie whether the peer professional opinion as defined was unreasonable), nonetheless a fair reading of the Tribunal's Reasons demonstrates that it directly addressed this issue.

240. Thirdly, the Tribunal found that the relevant practice was unreasonable (and by necessary implication that its acceptance was unreasonable) in the sense that it lacked a logical basis. In so doing it in fact addressed the underlying opinion advanced on behalf of Gardner Group as the rationale for the relevant practice.

241. Before saying more about the Tribunal's reasoning with respect to the facts of this case, it is appropriate to turn our attention to the relevant concept of unreasonableness. The Tribunal referred to case law in the context of medical negligence forming the background to the *Wrongs Act* provisions. In *Bolitho v City and Hackney Health Authority* , Lord Browne-Wilkinson said of the character of the relevant professional opinion in the context of medical negligence:

> The use of these adjectives — responsible, reasonable and respectable — all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter. [156]

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[156] [1998] AC 232, 241–2 .

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242. We interpolate that in *Jones v South Tyneside Health Authority* , Walker LJ expressed the concept of a 'logical basis' supporting a 'defensible conclusion' as a 'rationally defensible basis'. [157] It is in this sense that the Tribunal examined whether the relevant practice had a logical basis.

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[157] [2001] EWCA Civ 1701, [25] .

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243. The Tribunal further referred to the discussion of the irrationality proviso in s 50 of the *Civil Liability Act 2002* (NSW) contained in the decision of Garling J in *King v Western Sydney Local Health Network*. [158] It noted that irrational peer professional opinion may be expected to be rare.

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244. The word ‘unreasonable’ is broader than the term ‘irrational’ used in the New South Wales legislation. In our view, the question whether an opinion is unreasonable is ultimately a question of fact. It is obviously open 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.

245. In the present case, the Tribunal concluded that the basis of the relevant practice did not withstand logical analysis. In so doing it addressed by necessary implication the question whether the acceptance of the relevant practice was unreasonable. The critical passage in the Tribunal’s Reasons is as follows:

> I have set out above how I consider C1.12(f) should be construed. I have also explained why, in my view, a building surveyor is in a good position to question the logic of the putative alternative construction and can generally be expected to take positive steps to clarify any uncertainty. I consider that the contrary position represented by the Relevant Practice is both irrational and unreasonable. There is no evidence of any of the experts, individually or collectively, subjecting the Relevant Practice to robust scrutiny of the kind discussed by Lord Browne-Wilkinson in *Bolitho* and, perhaps for this reason, it does not withstand logical analysis.
>
> For the reasons discussed, it is not logical for a provision to so precisely prescribe the thickness of permitted combustible adhesive and completely ignore another equally combustible element that could be more than twice as thick. At an even more general level, it is not logical for a prescriptive exception to a blanket requirement for non-combustibility, to fail entirely to deal with a highly combustible element comprising at least 50% of the product.
>
> The suggested explanation that this combustible element is addressed by C1.12(f)(iv) (the test under AS1530.3), is also not logical. As discussed above, if that test is sufficient to accommodate the potential combustibility of a polyethylene core and thus justify its omission from C1.12(f), why is it not also sufficient to accommodate the potential combustibility of the adhesive, which is also wholly encapsulated by the aluminium layers? As Mr Kip explained:
>
> > The — the other thing I would say, coming back to clause C1.12, is that the argument that we would have strict controls about glue thickness, but you could ignore the core — to me defies logic. It’s common in the industry for what are called sandwich panels ... to be up to 250 mil thick. It’s certainly very common to have 75 mil or 100 mil thick panels that are polystyrene or polyisocyanurate or polypropylene — all sorts, with a steel cladding system. And to say that because the steel is there — that steel will help that material pass any 1530 part 3 test — but to say that you can ignore a core of any dimension, but that the glue must be no more than one mil thick — to me defies common sense.

> I have suggested above that consulting a fire engineer would have been a reasonable step for a building surveyor to take to confirm or test their reliance on C1.12(f) as a compliance pathway for ACPs. It is worth noting that, had they done so, the evidence is clear about the response they would have received. All of the fire engineers (including Mr Nicolas) considered that ACPs with a 100% polyethylene core did not meet the DTS provisions of the BCA. Even the expert architects disagreed with Mr Galanos and the Gardner Group Experts. Mr Quigley said: 'Well I would've considered [the polyethylene is] one of the laminates, very clearly. I mean you've got three materials all laminated together. It's the core, but it's one of the laminates'.
>
> Gardner Group submits that I should reject any assertion that the opinion of the Gardner Group Experts and Mr Galanos is unreasonable by reason of 'at least' two factors. First, that there is no evidence that they knew ACPs were highly combustible, and it cannot be said that an opinion formed in ignorance of that fact was unreasonable. Second, reasonableness must be assessed in context and ACPs had been used in Australia on high rise buildings for 40 years without incident. Unsurprisingly given my observations above, I reject these submissions.
>
> The evidence of the knowledge of the combustibility of polyethylene among the building surveyors was in fact mixed. Regardless, any failure to ascertain this most basic information about a substantial element of the material under scrutiny, serves to highlight a fundamental deficiency in the process by which the Relevant Practice developed. Similarly, as senior counsel for the Owners submitted, the widespread use of a product over many years without reported serious incident, is hardly a scientific or rational basis for regarding it as safe (citing asbestos as an illustration of this point). Further, as discussed above, the evidence internationally of fire hazards associated with ACPs was developing long before 2010. And concerns over their combustibility were being openly discussed in Australia by then, if not earlier. Even a casual enquiry of fire engineers at around this time is likely to have revealed these concerns. [159]

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[159] Reasons [391]–[396] (citations omitted).

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246. The second and third paragraphs quoted above directly address the logic of the opinion upon which Gardner Group seeks to rely. The balance of the passage quoted addresses the reasonableness of that opinion more generally.

247. The Tribunal concluded for the above reasons that it was satisfied that the relevant practice 'was unreasonable within the meaning of s 59(2) of the *Wrongs Act* .' [160] Whilst, as we have said, we accept that s 59(2) is directed to the question whether the acceptance of the relevant practice (being the 'peer professional opinion' as defined in s 59(1)) was unreasonable, it follows inexorably from the finding that the relevant practice was

unreasonable and the reasons stated for this finding, that the acceptance of that practice was also unreasonable.

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[160] Ibid [397].

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248. There is nothing in this proposed ground and the application for leave to appeal in respect of this ground should be refused.

Issue 9: By issuing the Stage 7 Building Permit did Gardner Group make a representation to LU Simon that was misleading and deceptive?

249. The application for leave to appeal by Gardner Group on ground 4 of its proposed notice of appeal which relates to this issue, is premised upon success with respect to either issue 7 or issue 8. For the reasons we have stated, leave to appeal should not be granted with respect to the proposed grounds of appeal turning on either of these issues. Accordingly, the application for leave to appeal with respect to proposed ground 4 should also be refused.

Issue 10: Was Gardner Group's failure to identify and remedy the omission in the Fifth FER causative of any loss?

250. The Fifth FER prepared by Thomas Nicolas did not describe the cladding system on the Lacrosse building in terms which identified the use of ACPs. The Fifth FER was significant because it formed the basis of an application to the MFB seeking approval pursuant to reg 309 of the *Building Regulations 2006*. The Tribunal described these documents as follows:

> **The Fifth FER**
>
> Mr Nicolas's witness statement confirms that Elenberg Fraser issued him with a set of architectural drawings by email on 26 August 2010, including a number of drawings 'that contained a materials legend noting that various parts of the façade were to be clad with "composite wall cladding — silver aluminium composite sheet"'. Mr Nicolas noted that on 13 September 2010, he attended a meeting with the MFB, along with representatives of LU Simon, Elenberg Fraser (including Mr Palmer), Gardner Group (Mr Galanos) and others to discuss the Regulation 309 application. He said that, at the meeting, the MFB raised a number of fire engineering issues that needed to be clarified in an updated fire engineering design report that would accompany the Regulation 309 application.
>
> Thomas Nicolas's Fifth FER bears the date 'November 2010', although Mr Nicolas's evidence was that this was prepared 'between 6 and 9 December 2010'. It was circulated to the design team by email from Mr Nicolas dated 9 December 2010. This is the version of the FER that was used in support of the MFB Application, a draft of which was sent to the MFB on 9 December 2010.

MFB Application and MFB R 309 Report

By a letter dated 22 February 2011, Thomas Nicolas wrote to the MFB attaching 'an application with respect to consent per Regulation 309 and Notification together with relevant architectural drawings'. Under the heading 'A. BUILDING DESCRIPTION' on the first page of the covering letter, Thomas Nicolas describes the general structure of the building as comprising 'suspended reinforced concrete floor slabs and reinforced concrete load bearing walls. Precast panel wall systems are proposed for external cladding systems'.

The walls were also incompletely described in the MFB handwritten application form which accompanied this letter. It is Mr Nicolas's handwriting. In this document, under 'Details of Construction' the 'Walls' is entered as 'CONC /MASONRY/DRY WALL'. There is no reference to ACPs.

On 29 March 2011, the MFB provided its 'Report of the Chief Officer pursuant to regulation 309 of the *Building Regulations 2006* ' ('MFB R309 Report'). Mr Nicolas's incomplete description of the walls in the handwritten application was carried through into the first page of the report, which states: 'Construction consists of concrete floors, a combination of concrete, masonry and "dry wall" walls, and a concrete/metal roof'. And the incomplete description of the external cladding systems on the first page of the Thomas Nicolas covering letter of 22 February 2010 is repeated on the third page of the MFB R 309 Report. On the other hand, the report attached a set of the current architectural drawings, which incorporated references to 'WP3 Wall Panel Type 3: Composite Panel Cladding' and 'V Composite Wall Cladding — Silver Aluminium Composite Sheet'. [161]

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[161] Reasons [139]–[143] (citations omitted).

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251. When considering whether Gardner Group's response to the Fifth FER was negligent, the Tribunal made the following findings (after referring to the relevant contractual documentation):

> Thus, Gardner Group's obligation under the GG Consultant Agreement to perform 'the Services to that standard of care and skill to be expected of a Consultant who regularly acts in the capacity in which the Consultant is engaged' expressly extended to 'Services' that included liaison with the MFB and the Fire Engineer and 'coordination of the Fire Engineering design process' and 'input into the design process'.
>
> Consistently with those provisions, on 9 December 2010, Mr Nicolas sent an email to various parties attaching the Fifth FER and a draft of his MFB Application. The brief covering email included the following: 'Gerry/Stasi/Tam — can you also review the attached MFB submission and make any necessary comments/changes etc'. Stasi is Mr Galanos and Tam Ho was a Gardner Group

employee assisting Mr Galanos on the Lacrosse project. Mr Galanos agreed in evidence that from 9 December 2010, he was being asked to review and comment on the Fifth FER. Mr Ho responded to this email by email dated 10 December 2010 stating: 'Have reviewed updated Reg 309 submission, no further comments'.

It follows from this evidence that by about 9 December 2010, Gardner Group had:

- the opportunity to review both the FER and the MFB Application;
- an express contractual obligation to coordinate and provide input on the former document and been expressly asked to review the latter document and provide necessary comments/changes; and
- in fact reviewed both documents.

It is therefore clear that by 9 December 2010 at the latest, Gardner Group read and was aware of the incomplete description of the external cladding systems in both these documents, namely: 'Precast panel wall systems are proposed for external cladding systems', as discussed above.

In my view, as the consultant with contractual responsibility for 'liaison with the MFB', 'coordination of the Fire Engineering design process' and the other 'Services' referred to above, it is reasonable to expect that Gardner Group would both notice and query this incomplete description. This is particularly so in circumstances where it knew that the ACPs were a significant component of the cladding system and, unlike a 'pre-cast panel', could only be approved for use (on its interpretation of the BCA) by the application of a concession to the requirement under the BCA that external walls must be non-combustible. It is difficult to imagine a more important element of 'Building Description' for a fire engineer to be identifying and describing, particularly in a document for submission to the MFB. [162]

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[162] Ibid [401]–[405] (citations omitted).

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252. It can be seen that the negligence identified by the Tribunal related to the failure to query the reference to pre-cast panel wall systems when the use of ACPs was proposed. This failure related both to deficiencies in the Fifth FER and the MFB Application.

253. In addressing the question of causation, however, the Tribunal made findings only with respect to the Fifth FER.

Similarly, I am satisfied that Gardner Group's failure to identify deficiencies in the Fifth FER was a necessary condition of the relevant harm, although one with considerably less force than the issue of the Stage 7 Building

> Permit. Had Gardner Group queried with Thomas Nicolas its incomplete description of the cladding system, I consider it is more likely than not that this would have led to an exchange, probably between Mr Galanos and Mr Nicolas, that would have led the latter to share his view that ACPs did not satisfy the DTS provisions of the BCA. This in turn would have led Thomas Nicolas to amend the Fifth FER or otherwise notify the other parties that the proposed use of ACPs required an alternative solution or revision to the T2 Specification and architectural drawings. [163]

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[163] Ibid [565].

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254. Gardner Group submits that the counter-factual reasoning postulated by the Tribunal when ascribing causal significance to the negligence it had previously identified, is inconsistent with the Tribunal's findings elsewhere in its Reasons that Thomas Nicolas was aware that ACPs were proposed as cladding by March or April 2008.

255. The Tribunal hypothesised that Gardner Group could have queried the failure to refer to ACPs in the Fifth FER and the reference to the use of pre-cast wall panels. As Gardner Group submits however, the Tribunal makes clear in its Reasons that Thomas Nicolas was already aware that ACPs were proposed to be used. [164] In these circumstances it cannot be correct that, had Gardner Group queried with Thomas Nicolas its incomplete description of the cladding system simply by identifying the failure to refer to ACPs, it is more likely than not that this would have led to an exchange, probably between Mr Galanos and Mr Nicolas that would have led Mr Nicolas 'to share his view that ACPs did not satisfy the DTS provisions of the BCA'. Moreover, as the Tribunal's findings as a whole make clear, the evidence of Mr Nicolas was that he had assumed that a compliant form of ACPs would be utilised. [165]

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[164] See ibid [118], [482]–[483], and [489]–[494].

[165] Ibid [489].

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256. The Tribunal rejected any such assumption as unreasonable.

> In my view, the likelihood is that Mr Nicolas in fact gave little or no attention to the proposed use of ACPs referred to in the documents considered by him. The explanation for this is found in his evidence referred to above of how he characterised his role. Put simply, he did not consider the implications of the proposed use of ACPs because he was not asked to do so. This is borne out by his consistent failure to mention them in his description of the building in the FERs (including the Fifth FER) and the MFB Application. But whether he turned his mind to the question or not, any

assumption by him that the ACPs proposed were non-combustible, was unjustified and unsound. [166]

Nonetheless it also stands in the way of the simple counter-factual which the Tribunal hypothesises.

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[166] Ibid [494] .

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257. LU Simon did not directly address or attempt to resolve the causation issue raised by Gardner Group, either in its written case or oral submissions.

258. In our view, Gardner Group has established the deficiency in the Tribunal's reasoning for which it contends.

259. Accordingly, leave to appeal should be granted with respect to Gardner Group's proposed ground 3 of appeal and that ground succeeds.

Issue 11: Did the Tribunal fail to consider the degree of departure by Gardner Group from the relevant standard of care in making apportionment findings?

260. Gardner Group submits that in determining the relative culpability of the consultants found by the Tribunal to be liable to LU Simon, the Tribunal was required to assess the departure from the standard of care by the negligent parties as a relevant factor. It is further submitted that the Tribunal should have had regard to the fact that Gardner Group acted in a manner which was consistent with a widely accepted practice amongst building surveyors but that the Tribunal failed to have regard to this factor.

261. A fair reading of the Tribunal's Reasons demonstrates that the Tribunal did have regard to Gardner Group's submissions concerning this issue.

262. **Following paragraph cited by:**

Wadren Pty Ltd v Probuild Constructions (Aust) Pty Ltd (21 November 2024) (Delany J)

118. In reply, the Co-Owners submitted:

(a) concerning the criticism that the Second Level Questions are insufficiently certain because, at the time those submissions were made, those questions were the subject of disagreement and were yet to be determined by the Court:

(i) they agree the Second Level Questions are deliberately referrable to questions to be put to the Structural Engineering

Experts as part of the conclave process because the Co-Owners intend the Staging Applications to 'cause the early and final resolution of all the structural engineering related matters';

(ii) the fact there is disagreement on the questions is not a reason to prevent staging. The draft list of questions to be provided to the experts for the Structural Engineering Fourth Conclave are to be determined as part of the present hearing; and

(iii) simply because the questions cannot be precisely articulated should not be an impediment to ordering a trial of separate questions now, noting that it is the ordinary course for lists of questions to be refined prior to a trial of separate questions.

(b) criticisms about the pleading references made by Probuild are an 'unduly technical complaint';

(c) in response to submissions and evidence about the extent of lay evidence anticipated to be required for a preliminary trial of the Stage 1 Issues:

(i) those assertions are 'significantly overstated'; and

(ii) regarding the evidence the Engineering Defendants say is required to prove the reasonableness of their conduct:

(1) the design either complies with applicable codes and standards or it does not. What is required is an objective assessment;

(2) although some of the facts concerning design preparation may require limited lay evidence (including the nature of the site or the instructions given to relevant professionals), most of that evidence is documentary and has been identified by the experts; and

(3) the evidence of the Engineering Defendants' solicitor Mr Brennan about the estimated number of witnesses and duration of trial should be rejected. It is not supported by analysis notwithstanding many of the facts relevant to informing decisions to call witnesses are already known;

(d) regarding the evidence the Engineering Defendants say is required to prove the extent of construction defects:

(i) Mr Brennan whose evidence is relied on has no apparent expertise to identify construction defects. Little weight should be given to his evidence concerning that issue;

(ii) in any case Mr Brennan's evidence ignores that a complete audit to ascertain the extent of construction defects has already been

undertaken by MPN (a firm of structural engineering consultants engaged by the Co-Owners);

(iii) MPN have already undertaken extensive site investigations, including destructive testing;

(iv) all documents relevant to whether the construction accorded with design should have already been disclosed pursuant to the 28 June Orders which required any party who relies on a document to demonstrate that construction did not accord with the final design, to disclose that document; and

(v) the experts have will been briefed with MPN Reports and CMET Reports (a firm engaged by the Co-Owners to undertake concrete testing and investigations). The experts have not reported that further material is required for them to consider the as-built status of the Stage 7 Buildings;

(e) regarding the evidence the Engineering Defendants say is required to prove the reasonableness of rectification works:

(i) the only question among the First Level Questions regarding rectification works is whether the structural design of any rectification works was reasonable and necessary to rectify identified defects;

(ii) accordingly:

(1) the preliminary trial will concern what rectification is required; and

(2) the subsequent trial will deal with all issues of which party is liable and causation and quantum, relying on other expert disciplines and the findings of the Structural Engineering Experts concerning the Stage 1 Issues. As a result, the proposal does not offend the principle in *Tanah Merah Vic Pty Ltd & Ors v Owners Corporation No 1 of PS613436T & Ors* [21] as cited by the Engineering Defendants; and

(iii) the reasonableness and necessity of rectification works does not require consideration of any individual defendant's liability or quantum.

(f) in response to the Engineering Defendants' submissions that 'significant' issues of credit will arise in both stages, and Probuild's submission that it is too soon to tell whether issues of credit will arise in both stages:

(i) Mr Brennan has not deposed to the likely nature and extent of evidence from any potential witness expected to be called by the Engineering Defendants;

(ii) although Mr Brennan contends that lay evidence will be required in respect of future proofing and reliance on Calibre's monthly reports and the Engineering Defendants' representations, the Engineering Defendants have not identified any lay evidence required to instruct the Structural Engineering Experts. Questions of reliance will form part of any subsequent trial which follows determination of the Stage 1 Issues; and

(iii) while Mr Cesarello may be called to give evidence in both stages, any evidence given by him at the preliminary trial is not likely to range beyond his account of the oral instructions the Engineering Defendants allege they received regarding the appropriate sub-soil classification; and

(g) in relation to the assertion that the prospect of an appeal from a determination of the proposed separate trial creates rather than reduces delay, the leave to appeal requirement lessens the chance of the Proceedings becoming fragmented as a result of staging.

via

[21] [2021] VSCA 72 [262] (Beach and Osborn JJA, Stynes AJA) .

Whitaker v F.P & H.S Keogh Pty Ltd (Building and Property) (25 July 2024) (C Edquist, Senior Member)

231. In *Tanah Merah*, [144] the Court Appeal observed that Woodward J's articulation of the approach to be taken to the task of apportionment was not challenged by the parties during the appeal. The two stage approach articulated by the High Court was embraced by the Court of Appeal when it dealt with the apportionment of responsibility as between the building surveyor, the architect and the fire engineer.

via

[144] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T* [2021] VSCA 72 ('Appeal Reasons'), [262] .

Melbourne Water Corporation v Vaughan Constructions Pty Ltd (10 November 2022) (Sifris, Kennedy and Walker JJA)

90. Although, as the applicant highlights, *Podrebersek* was concerned with contributory negligence, there is no reason why the reference to 'responsibility' in s 157(4)(b) should be read in a different way to that considered in *Podrebersek*. [52] The legislature is to be taken to have been aware of this position taken by the High Court. Further, consistent with the dictionary definitions, above, the decision suggests that the concept of apportioning 'responsibility' will be concerned with much

more than factual causation. More particularly, it suggests that, in assessing comparative 'responsibility', the relevant persons will also be liable so that their 'culpability' may be taken into account.

via

[52] See also *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 PS613436T* [2021] VSCA 72, [262] (Beach and Osborn JJA and Stynes AJA) , where the approach in *Podrebersek* was applied under the *Wrongs Act* Part IVAA regime.

Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) (07 June 2022) (The Honourable Justice Delany, Acting Member)

72. That approach was said by Vaughan to be consistent with the well-established approach to apportioning responsibility in other contexts, which is predicated upon the establishment of a legal liability of the parties the subject of the apportionment. [45] In *Podrebersek v Australian Iron & Steel Pty Ltd* ,[46] the High Court explained that such an exercise involves consideration of those parties' departure from the standard of care: [47]

> The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, i.e. of *the degree of departure from the standard of care of the reasonable man* and of the relative importance of the acts of the parties in causing the damage. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance.

via

[45] See *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 PS613436T* [2021] VSCA 72, [262] (Beach, Osborn JJA and Stynes AJA) .

Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) (08 March 2022) (Member C Edquist)

242. In *Tanah Merah,* the Court Appeal observed that Woodward J's articulation of the approach to be taken to the task of apportionment was not challenged by the parties during the appeal. [121]

via

[121] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T* [2021] VSCA 72 ('Appeal Reasons'), [262] .

In dealing with the question of apportionment, the Tribunal first set out the relevant principles in terms to which there is no challenge: [167]

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[167] Ibid [582]–[583] (citations in original).

Once it has been established that a claim is apportionable, the Tribunal must engage in an 'exercise of the same kind of judgment as the court exercises in apportioning responsibility as between a defendant sued in tort for negligence and a plaintiff who, by his or her own negligence, has been partly responsible for the injury'. [168] The principles to be followed when conducting that exercise are set out in *Podrebersek v Australian Iron & Steel Pty Ltd*: [169]

> The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, i.e. of the degree of departure from the standard of care of the reasonable man ... and of the relative importance of the acts of the parties in causing the damage ... It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance.

As Elenberg Fraser noted in its written closing submissions, [170] the High Court in *Podrebersek* [171] referred to *Smith v McIntyre* [172] . In that case, the court identified considerations that might influence a finding of apportionment, including who created the hazard which ultimately caused the injury, the age, role and position of the person causing the damage and failing to take an obvious and available last opportunity to avoid the damage. The court emphasised the need for a broad discretionary assessment of all the circumstances: [173]

> We think the true view is that there is no dichotomy between culpability and causation. A comparison of degrees of fault between two negligent actors requires an examination of the whole conduct of each in relation to the circumstances of the accident. The degree of departure from the standard of the reasonable man on the part of either should not be assessed without considering the extent to which that departure was a contributing cause of the accident. A variety of factors may enter into a judicial determination as to which party has the greater share in the responsibility for the accident. There is no single touchstone of responsibility.

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[168] *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463, [93]–[94] .

[169] [1985] HCA 34; (1985) 59 ALJR 492, 494.

[170] I161 at [209].

[171] [1985] HCA 34; (1985) 59 ALJR 492, 494.

[172] [1958] TASStRp 11; [1958] Tas SR 36 .

[173] Ibid 46.

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263. Reference was then made to cases in which these principles have been applied. [174]

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[174] Reasons [584]–[586] .

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264. The Tribunal then set out verbatim the submission of Gardner Group:

> To the extent that it is found that [Gardner Group and Mr Galanos] failed to exercise reasonable care and skill, such a departure must be viewed as a minor one, predicated upon a mistaken construction of the BCA, in circumstances where the relevant provisions of the BCA were poorly drafted and open to alternative interpretations. That each of the Gardner Group experts, made the same 'error' in interpretation indicates that the departure from the standard of care could not have been substantial, given it must have been an error repeated by a number of the leading building surveyors in Victoria. In light of the respective roles of the professional respondents on the project, it is submitted that Mr Galanos and Gardner Group have minimal responsibility for any loss suffered by the Applicants. By contrast, for the reasons that follow, each of the other respondents should be fixed with a significantly higher liability for loss caused. [175]

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[175] Ibid [587] .

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265. After further setting out Gardner Group's submissions with respect to the roles of the architect and the fire engineer, the Tribunal responded to Gardner Group's submissions in the following terms:

> In my view, there is considerable force in Garnder [sic] Group's submissions concerning the role of each of Elenberg Fraser and Thomas Nicolas. Its summary

above largely accords with my findings of breach in respect of those parties. But its characterisation of its departure from the standard of reasonable care as 'minor', is less persuasive. In particular, in my view, it overlooks:

- the extent to which Gardner Group failed critically and robustly to examine the application of clause C1.12(f) of the BCA to the proposed use of ACPs in the design of the Lacrosse tower; and

- the significance of what Elenberg Fraser described as Gardner Group's 'gatekeeper' role.

By accepting the role of relevant building surveyor, Gardner Group (specifically, Mr Galanos) assumed a special responsibility to ensure that the design and materials complied with the BCA. In that sense, it was engaged by LU Simon under the terms of the GG Consultant Agreement specifically for the purpose of guarding against non-compliance. Its decision to approve the extensive use of ACPs with a 100% polyethylene core, based primarily on a history of similar approvals and without even making the most straightforward inquiry of Thomas Nicolas, points to significant culpability. The fact that this decision manifested in the issuing of the Stage 7 Building Permit and thus the construction of the Lacrosse tower incorporating the ACPs in reliance on that permit, also gives Gardner Group's role particular causal potency. [176]

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[176] Ibid [592]–[593].

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266. The Reasons addressed both the culpability and causal potency of Gardner Group's negligence.

267. The Tribunal proceeded by responding to the submissions of Gardner Group, and most importantly in the present context, by identifying matters which those submissions 'overlooked'. The identification of matters 'overlooked' necessarily implies that the Tribunal had regard to the matters stated in the submissions including the factor of common mistake by other building surveyors upon which Gardner Group relies.

268. The structure of the Tribunal's Reasons shows that it did not fail to have regard to Gardner Group's submissions. Further, paragraph [593] of the Reasons specifically refers to a history of similar approvals as a relevant circumstance.

269. Gardner Group's real complaint is that the Tribunal failed to accord the weight it should have to the factor of common mistake. Such a complaint is one with respect to the discretionary weighing of elements of a multifactorial complex. It does not give rise to a question of law unless the ultimate exercise of the discretion was not open to the discretion maker. In *Podrebersek v Australian Iron and Steel Pty Ltd*, the High Court said:

> 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*. [177]

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[177] (1985) 59 ALJR 492, 494 [8] (emphasis added) (citations omitted).

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270. It is presumably because of the difficulties in sustaining such a proposition having regard to the matters identified in paragraphs [592] and [593] of the Reasons, that Gardner Group's case on this issue is put on the basis that the Tribunal simply failed to have regard to a relevant factor.

271. For the reasons we have explained however, this challenge must fail and the application for leave to appeal on Gardner Group's proposed ground 5 should be refused.

Conclusion

272. None of the proposed grounds of appeal argued by Thomas Nicolas or Elenberg Fraser have any real prospect of success. Their applications for leave to appeal must, accordingly, be refused.

273. We have come to the same conclusion with respect to Gardner Group's proposed grounds of appeal, save for proposed ground 3. We would grant Gardner Group leave to appeal with respect to proposed ground 3, and allow the appeal on that ground alone.

274. We will hear the parties in relation to consequential orders and costs.

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Cited by:

Bahl Enterprises Pty Ltd v Sikandar [2025] VSC 394 (03 July 2025) (Osborn JA)

> 103. I accept this submission as far as it goes. The attribution of fault for defective building work may be a complex question. [47]

via

[47] See eg *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* (2021) 75 VR 1; [2021] VSCA 72 .

Keogh & Co Pty Ltd v Pless [2025] VSC 341 (16 June 2025) (Gray J)

52. The proposed appeal must be limited to questions of law. The identification of a question of law is not merely a precondition to the exercise of a right to appeal, but the subject matter of the appeal itself. [73] The proposed appeal cannot extend to correction of alleged errors of fact, provided the findings were open on the material and were not reached in breach of the standard of legal reasonableness. [74]

via

[74] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* (2021) 75 VR 1; [2021] VSCA 72, [198] (Beach and Osborn JJA, and Stynes AJA); *Miller v Martin* [2021] VSCA 108, [72] (Tate, Niall and Kennedy JJA); *Heng Yang Developments Pty Ltd v Red Earth Developments (Aust) Pty Ltd* [2022] VSC 231, [40] ; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 362–367 [64]–[76] (Hayne, Kiefel and Bell JJ); [2013] HCA 18 .

Live Fish Tasmania Pty Ltd v Northern Midlands Council [2025] TASCAT 113 (02 June 2025) (Rm Grueber – Deputy P)

46. In Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T [2021] VSCA 72 the Court of Appeal of the Supreme Court of Victoria considered the proper approach to the Building Code of Australia. At [209] the Court applied comments made by Lindsay J in the Supreme Court of New South Wales:

> 209 Further, as Lindsay J observed in The Owners — Strata Plan No 69312 v Rockdale City Council & Anor; Owners of SP 69312 v Allianz Aust Insurance [2012] NSWSC 1244 in respect of the position of the BCA under cognate New South Wales legislation:
>
> First, the BCA is and was at all material times a publication of the Australian Building Codes Board rather than a form of subordinate legislation in its own right. Secondly, at all material times the BCA had express legislative recognition. Thirdly, regulations under the Environmental Planning and Assessment Act 1979 made within power have, at all material times, provided for 'the adoption and application' of the BCA. [At 30]
>
> ...
>
> Whatever side of the line it might be thought to fall on for the purposes of the definitions of 'instrument' and 'statutory rule' in the Interpretation Act, the task for the Court in these proceedings is to construe it as a formal document designed to define standards, for the promotion of public safety, in the construction of buildings. [At 61]

Civil Juries Charge Book [2023] JCV Civil_Juries_Charge_Book (06 May 2025)

A defendant cannot rely on an accepted practice if that practice is unreasonable. If you decide that although NOD followed a widely accepted practice, that practice is unreasonable, then you will answer yes to question 1(b). You will only answer yes to this question if the plaintiff has proved that the practice was unreasonable. 93

Civil Juries Charge Book [2023] JCV Civil_Juries_Charge_Book (06 May 2025)

A defendant cannot rely on an accepted practice if that practice is unreasonable. If you decide that although NOD followed a widely accepted practice, that practice is unreasonable, then you will answer yes to question 1(b). You will only answer yes to this question if the plaintiff has proved that the practice was unreasonable. 85

via

Note: In most cases it will be sufficient to focus on whether the practice itself is unreasonable. However, in Tanah Merah v Owners Corporation [2021] VSCA 72 at [239] , the Court noted a distinction between unreasonable practices and unreasonable adoption of practices. Judges should consider whether this distinction is relevant in the circumstances of their case.

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VVR (a pseudonym) v Trustee for Ironfish Property Management Melbourne Unit Trust (ABN 73 299 113 275) [2025] VSC 64 (27 February 2025) (Quigley J)

58. In order to succeed on this ground of review, the applicant must show that there is 'no evidence' from which the Tribunal could have drawn these findings. His Honour Justice Croft summarises the applicable principles of this ground of review in the recent decision of *The Trust Company Limited v Blue Train Cafe Pty Ltd* [2024] VSC 232 at [60] :

> Whether there was no evidence to support the Tribunal's factual finding ... is a question of law. [30] It must be shown that the Tribunal made a finding that was 'simply not open to it', usually requiring a finding that 'there was no evidence on the basis of which the Tribunal could reach that finding, not that there was some evidence tending to a different conclusion.' [31] A finding of fact by the Tribunal cannot be challenged on the 'no evidence' ground where there was some evidence to support it. Nor can a finding of fact be challenged by this Court simply because it forms the view that the finding was made in error or against the weight of the evidence. [32] The question is whether there was any, rather than sufficient, evidence for the Tribunal to arrive at a factual finding. [33] This question is to be determined by reference to the evidence and inferences most favourable to the Respondent. [34]

via

[31] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [2021] VSCA 72 ; *Miller v Martin* [2021] VSCA 108, [72] .

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via

[32] *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207, [248] ; *Karakatsanis v Racing Victoria Ltd* (2013) 42 VR 176, 185–6 [21] ; *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540, 544 [14] ; *Higgins Nine Group Pty Ltd v Ladro Greville St Pty Ltd* [2016] VSC 244, [28], [31] ; *Turkey v Mackie Pty Ltd* [2019] VSC 103, [22] ; *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [2021] VSCA 72, [198] ; *Weber v Carkeek* [2020] VSC 366, [69] .

Fish v Kurmond Homes Pty Ltd; Kurmond Homes Pty Ltd v Polycrete Australia Pty Ltd [2025] NSWCATCD 6 (31 January 2025) (Dr K M George, Senior Member)

144. These findings were not disturbed by the Court of Appeal (*Tanah Merah Vic Pty Ltd (ACN 098 935 490) v Owners Corporation No 1 of PS613436T and Ors* [2021] VSCA 72) and have been applied elsewhere (e.g. *Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property)* [2022] VCAT 1499 *; The Owners Strata Plan No 92888 v Taylor Construction Group Pty Ltd and Frasers Putney Pty Ltd* [2019] NSWCATCD 63).

Naqebullah v State of Victoria [2024] VSCA 307 (11 December 2024) (McLeish, Niall and Lyons JJA)

41. When financial assistance is paid, s 137F(2) provides for the respondent's subrogation to all rights and remedies held by the owner 'in relation to the installation or use of any non-compliant or non-conforming' cladding or other building work that required the cladding rectification work to be undertaken. The rights or remedies falling within this provision would include actions against a builder who installed the cladding but also other persons or

entities associated with the installation or use. It may extend, for example, to an architect who specified the use of the cladding, or an engineer or surveyor. [28] The relevant rights or remedies might also arise from actions against officers and directors where, for example, a primary remedy against the builder under statute also gives rise to accessorial liability against those who are knowingly concerned in the contravening conduct.

via

[28] See *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1* [2021] VSCA 72 .

Fangyuan v Stockwell [2024] QDC 200 (27 November 2024) (Rosengren DCJ)
Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436 [2021] VSCA 72 at [117]
Torette House Pty Ltd v Berkman

Fangyuan v Stockwell [2024] QDC 200 (27 November 2024) (Rosengren DCJ)

106. This issue was also considered by the Victorian Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436* . [60] The Court held that it was no longer appropriate to follow the reasoning of Barrett JA in *Reinhold,* in part because it was considered that Barrett JA had qualified his position in *Perpetual.* Further, it was observed that *Godfrey* was "merely obiter dicta". It was held that the correct approach was as set out by Macfarlan JA in *Perpetual* that the "terms in which a claim is framed ... are an essential determinant of whether the claim can be said to arise from a failure to take reasonable care.

Fangyuan v Stockwell [2024] QDC 200 (27 November 2024) (Rosengren DCJ)

106. This issue was also considered by the Victorian Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436* . [60] The Court held that it was no longer appropriate to follow the reasoning of Barrett JA in *Reinhold,* in part because it was considered that Barrett JA had qualified his position in *Perpetual.* Further, it was observed that *Godfrey* was "merely obiter dicta". It was held that the correct approach was as set out by Macfarlan JA in *Perpetual* that the "terms in which a claim is framed ... are an essential determinant of whether the claim can be said to arise from a failure to take reasonable care.

via

[60] [2021] VSCA 72 at [117] .

Wadren Pty Ltd v Probuild Constructions (Aust) Pty Ltd [2024] VSC 724 (21 November 2024) (Delany J)

118. In reply, the Co-Owners submitted:

> (a) concerning the criticism that the Second Level Questions are insufficiently certain because, at the time those submissions were made, those questions were the subject of disagreement and were yet to be determined by the Court:
>
> > (i) they agree the Second Level Questions are deliberately referrable to questions to be put to the Structural Engineering Experts as part of the conclave process because the Co-Owners intend the Staging Applications to 'cause the early and final resolution of all the structural engineering related matters';
> >
> > (ii) the fact there is disagreement on the questions is not a reason to prevent staging. The draft list of questions to be provided

to the experts for the Structural Engineering Fourth Conclave are to be determined as part of the present hearing; and

(iii) simply because the questions cannot be precisely articulated should not be an impediment to ordering a trial of separate questions now, noting that it is the ordinary course for lists of questions to be refined prior to a trial of separate questions.

(b) criticisms about the pleading references made by Probuild are an 'unduly technical complaint';

(c) in response to submissions and evidence about the extent of lay evidence anticipated to be required for a preliminary trial of the Stage 1 Issues:

(i) those assertions are 'significantly overstated'; and

(ii) regarding the evidence the Engineering Defendants say is required to prove the reasonableness of their conduct:

(1) the design either complies with applicable codes and standards or it does not. What is required is an objective assessment;

(2) although some of the facts concerning design preparation may require limited lay evidence (including the nature of the site or the instructions given to relevant professionals), most of that evidence is documentary and has been identified by the experts; and

(3) the evidence of the Engineering Defendants' solicitor Mr Brennan about the estimated number of witnesses and duration of trial should be rejected. It is not supported by analysis notwithstanding many of the facts relevant to informing decisions to call witnesses are already known;

(d) regarding the evidence the Engineering Defendants say is required to prove the extent of construction defects:

(i) Mr Brennan whose evidence is relied on has no apparent expertise to identify construction defects. Little weight should be given to his evidence concerning that issue;

(ii) in any case Mr Brennan's evidence ignores that a complete audit to ascertain the extent of construction defects has already been undertaken by MPN (a firm of structural engineering consultants engaged by the Co-Owners);

(iii) MPN have already undertaken extensive site investigations, including destructive testing;

(iv) all documents relevant to whether the construction accorded with design should have already been disclosed pursuant to the 28 June Orders which required any party who relies on a document to demonstrate that construction did not accord with the final design, to disclose that document; and

(v) the experts have will been briefed with MPN Reports and CMET Reports (a firm engaged by the Co-Owners to undertake concrete testing and investigations). The experts have not reported that further material is required for them to consider the as-built status of the Stage 7 Buildings;

(e) regarding the evidence the Engineering Defendants say is required to prove the reasonableness of rectification works:

(i) the only question among the First Level Questions regarding rectification works is whether the structural design of any rectification works was reasonable and necessary to rectify identified defects;

(ii) accordingly:

(1) the preliminary trial will concern what rectification is required; and

(2) the subsequent trial will deal with all issues of which party is liable and causation and quantum, relying on other expert disciplines and the findings of the Structural Engineering Experts concerning the Stage 1 Issues. As a result, the proposal does not offend the principle in *Tanah Merah Vic Pty Ltd & Ors v Owners Corporation No 1 of PS613436T & Ors* [21] as cited by the Engineering Defendants; and

(iii) the reasonableness and necessity of rectification works does not require consideration of any individual defendant's liability or quantum.

(f) in response to the Engineering Defendants' submissions that 'significant' issues of credit will arise in both stages, and Probuild's submission that it is too soon to tell whether issues of credit will arise in both stages:

(i) Mr Brennan has not deposed to the likely nature and extent of evidence from any potential witness expected to be called by the Engineering Defendants;

(ii) although Mr Brennan contends that lay evidence will be required in respect of future proofing and reliance on Calibre's monthly reports and the Engineering Defendants' representations, the Engineering Defendants have not identified any lay evidence required to instruct the Structural Engineering Experts. Questions of reliance will form part of any subsequent trial which follows determination of the Stage 1 Issues; and

(iii) while Mr Cesarello may be called to give evidence in both stages, any evidence given by him at the preliminary trial is not likely to range beyond his account of the oral instructions the Engineering Defendants allege they received regarding the appropriate sub-soil classification; and

(g) in relation to the assertion that the prospect of an appeal from a determination of the proposed separate trial creates rather than reduces delay, the leave to appeal requirement lessens the chance of the Proceedings becoming fragmented as a result of staging.

Wadren Pty Ltd v Probuild Constructions (Aust) Pty Ltd [2024] VSC 724 (21 November 2024) (Delany J)

118. In reply, the Co-Owners submitted:

(a) concerning the criticism that the Second Level Questions are insufficiently certain because, at the time those submissions were made, those questions were the subject of disagreement and were yet to be determined by the Court:

(i) they agree the Second Level Questions are deliberately referrable to questions to be put to the Structural Engineering Experts as part of the conclave process because the Co-Owners intend the Staging Applications to 'cause the early and final resolution of all the structural engineering related matters';

(ii) the fact there is disagreement on the questions is not a reason to prevent staging. The draft list of questions to be provided to the experts for the Structural Engineering Fourth Conclave are to be determined as part of the present hearing; and

(iii) simply because the questions cannot be precisely articulated should not be an impediment to ordering a trial of separate questions now, noting that it is the ordinary course for lists of questions to be refined prior to a trial of separate questions.

(b) criticisms about the pleading references made by Probuild are an 'unduly technical complaint';

(c) in response to submissions and evidence about the extent of lay evidence anticipated to be required for a preliminary trial of the Stage 1 Issues:

(i) those assertions are 'significantly overstated'; and

(ii) regarding the evidence the Engineering Defendants say is required to prove the reasonableness of their conduct:

(1) the design either complies with applicable codes and standards or it does not. What is required is an objective assessment;

(2) although some of the facts concerning design preparation may require limited lay evidence (including the nature of the site or the instructions given to relevant professionals), most of that evidence is documentary and has been identified by the experts; and

(3) the evidence of the Engineering Defendants' solicitor Mr Brennan about the estimated number of witnesses and duration of trial should be rejected. It is

not supported by analysis notwithstanding many of the facts relevant to informing decisions to call witnesses are already known;

(d) regarding the evidence the Engineering Defendants say is required to prove the extent of construction defects:

(i) Mr Brennan whose evidence is relied on has no apparent expertise to identify construction defects. Little weight should be given to his evidence concerning that issue;

(ii) in any case Mr Brennan's evidence ignores that a complete audit to ascertain the extent of construction defects has already been undertaken by MPN (a firm of structural engineering consultants engaged by the Co-Owners);

(iii) MPN have already undertaken extensive site investigations, including destructive testing;

(iv) all documents relevant to whether the construction accorded with design should have already been disclosed pursuant to the 28 June Orders which required any party who relies on a document to demonstrate that construction did not accord with the final design, to disclose that document; and

(v) the experts have will been briefed with MPN Reports and CMET Reports (a firm engaged by the Co-Owners to undertake concrete testing and investigations). The experts have not reported that further material is required for them to consider the as-built status of the Stage 7 Buildings;

(e) regarding the evidence the Engineering Defendants say is required to prove the reasonableness of rectification works:

(i) the only question among the First Level Questions regarding rectification works is whether the structural design of any rectification works was reasonable and necessary to rectify identified defects;

(ii) accordingly:

(1) the preliminary trial will concern what rectification is required; and

(2) the subsequent trial will deal with all issues of which party is liable and causation and quantum, relying on other expert disciplines and the findings of the Structural Engineering Experts concerning the Stage 1 Issues. As a result, the proposal does not offend the principle in *Tanah Merah Vic Pty Ltd & Ors v Owners Corporation No 1 of PS613436T & Ors* [21] as cited by the Engineering Defendants; and

(iii) the reasonableness and necessity of rectification works does not require consideration of any individual defendant's liability or quantum.

(f) in response to the Engineering Defendants' submissions that 'significant' issues of credit will arise in both stages, and Probuild's submission that it is too soon to tell whether issues of credit will arise in both stages:

(i) Mr Brennan has not deposed to the likely nature and extent of evidence from any potential witness expected to be called by the Engineering Defendants;

(ii) although Mr Brennan contends that lay evidence will be required in respect of future proofing and reliance on Calibre's monthly reports and the Engineering Defendants' representations, the Engineering Defendants have not identified any lay evidence required to instruct the Structural Engineering Experts. Questions of reliance will form part of any subsequent trial which follows determination of the Stage 1 Issues; and

(iii) while Mr Cesarello may be called to give evidence in both stages, any evidence given by him at the preliminary trial is not likely to range beyond his account of the oral instructions the Engineering Defendants allege they received regarding the appropriate sub-soil classification; and

(g) in relation to the assertion that the prospect of an appeal from a determination of the proposed separate trial creates rather than reduces delay, the leave to appeal requirement lessens the chance of the Proceedings becoming fragmented as a result of staging.

via

[21] [2021] VSCA 72 [262] (Beach and Osborn JJA, Stynes AJA) .

Winter v Kingborough Council & South Arm Pipeline Pty Ltd (No.2) [2024] TASCAT 201 (04 November 2024) (F Brimfield, Presiding Member)

174. The proper approach to interpreting the BCA was set out by Justices Beach, Osborne and Stynes in the Victorian Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corporation No. 1 PS631436T* [2021] VSCA 72 at [208] .

Winter v Kingborough Council & South Arm Pipeline Pty Ltd (No.2) [2024] TASCAT 201 (04 November 2024) (F Brimfield, Presiding Member)

Cases Cited: *Gillard v Launceston City Council* [2024] TASSC 37, *Hall v Hobart City Council* [2024] TASCAT 155, *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council* [2022] TASFC 5, *Gamble v Kingborough Council* [2020] TASFC 7, *Calvary Healthcare Tasmania v Hobart City Council* [2006] TASSC 10, *Raff Angus Pty Ltd v Resource Management and Planning Appeal Tribunal* [2018] TASSC 60, *Tarkine National Coalition Inc v West Coast Council and Venture Minerals Limited* [2013] TASRMPAT 103, *Jacobs v Hobart City Council* [2024] TASSC 38, *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277, *CMK Architects v West Tamar Council* [2019] TASRMPAT 18, *Tanah Merah Vic Pty Ltd v Owners Corporation No. 1 PS631436T* [2021] VSCA 72 , *Minister for Immigration v SCJGV* (2009) 238 CLR 642, *Gibson v RMPAT* [2019] TASSC 72, *Bade v Huon Valley Council* [2024] TASCAT 15, *Tomaszewski v Hobart City Council (No 2)* [2021] TASSC 15, *Ventura Pty Ltd v Valuer-General* [2005] TASSC 99, *Christies Sands Pty Ltd v City of Tea Tree Gully* (1975) 37 LGERA 325, *Kuligowski v Metrobus* [2004] HCA 34; 220 CLR 363, *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948, *ASIC v Wilson (3)* [2023] FCA 1009, *Metasite Pty Ltd v Northern Midlands Council* [2019] TASRMPAT 13, *Drury v Hobart City*

Council [2017] TASRMPAT 9, *Lenna Motor-Inn Proprietary Limited v Hobart City Council* [2021] TASRMPAT 26, *Segal v Waverly Council* [2005] NSWCA 310 , *Shire of Perth v O'Keefe* [1964] HCA 37; (1964) 110 CLR 529; *Ryan v Circular Head Council (No 4)* [2023] TASCAT 217

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

> 64 A recent decision of the New South Wales Court of Appeal highlights the tension referred to by Team Building. *Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq) (No 2)* [38] (*Gerrard Toltz*) was handed down after the parties filed their submissions in the present matter. The NSW Court of Appeal criticised the Victorian Court of Appeal's decision in *Tanah Merah* . The NSW Court held: [39]
>
> In March 2021, the Victorian Court of Appeal addressed the apportionment provisions of the Victorian *Wrongs Act* in *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T*. In the Court's assessment, it was no longer appropriate to follow the reasoning of Middleton J in *Dartberg*, nor that of Barrett J in *Reinhold* , in part because Barrett JA in *CTC Group* appeared to have qualified his position so as to clarify that "the terms in which the claim is framed are the starting point for deciding whether the claim is of the kind referred to in [the equivalent of s 34(1)(a) of the *Civil Liability Act*]": at [115]. Then, having referred to Macfarlan JA in *CTC Group* , the Court opined that:
>
> > Notwithstanding what Barrett J said in *Reinhold* , it seems to us that his Honour's view (as expressed in *Perpetual Trustee*) is now that the terms in which the claim is framed are an essential determinant of whether a claim can be said to arise from a failure to take reasonable care. In our opinion, that is the correct approach.
>
> The phrase, "an essential determinant" is ambiguous; in the following paragraph the Court took issue with the view that "the nature of the claim itself is irrelevant to the question whether the claim is one 'arising from a failure to take reasonable care'" and has a number of anomalous consequences. With respect, there would appear to be an alternative reading (that adopted by Barrett JA in *CTC Group*) which permits both the pleading of the claim and the findings made by the trial court, to be given weight in determining the issue.

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

> 30 The decision of the Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436* ,[16] (*Tanah Merah*) makes it clear that the warranties at sections 8(b) , (c) and (e) of the DB C Act do not give rise to apportionable claims under the *Wrongs Act* . The Court emphasised that the plain meaning of s 24AF(1)(a) of the *Wrongs Act* requires a claim arising from a failure to take reasonable care, and this does not extend to a claim 'involving circumstances arising out of a failure to take reasonable care'. [17]

via

[17] Ibid , 34 – 35 [112] - [113] .

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

60 The OC also relied upon and repeated paragraphs 117, 121, 122 and 124 of *Tanah Merah* .

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

48 Team Building contended that the better view is that the Court in *Tanah Merah* simply emphasised that the parties' pleadings are an essential consideration in determining whether a claim is apportionable [29] but that the Court's actual findings following a trial are still relevant. [30]

via

[29] *Tanah Merah* (n 16) 37-38 [120].

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

46 Team Building then turned their attention to the OC's contention that the Court of Appeal in *Tanah Merah* overturned the above authorities. Counsel submitted that such a conclusion is not borne out on a careful reading of the judgment. Counsel's submissions set out the following relevant parts of the *Tanah Merah* judgment: [26]

Thomas Nicolas and Elenberg Fraser relied upon *Reinhold* and *Dartberg* to support arguments that the Owners' claims against LU Simon were apportionable. In our view, however, the plain meaning of the statutory provision requires a claim arising from a failure to take reasonable care. The claim in *Hunt & Hunt* exemplifies such a claim.

> It is not disputed that Mitchell Morgan's claim against Hunt & Hunt is an 'apportionable claim' within the meaning of s 34(1)(a) . The claim was based upon Hunt & Hunt's breach of an implied term of its retainer that it exercise proper skill, diligence and care. Section 34(1A) provides that there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action, whether of the same or a different kind. There is no express limitation on the nature of the claim which might have been brought by the plaintiff against a concurrent wrongdoer, except the requirement of s 34(2) that the acts or omissions of all concurrent wrongdoers have caused the damage in question. [27]

The definition does not extend to a claim 'involving circumstances arising out of a failure to take reasonable care'. The claim itself must arise from a failure to take reasonable care. Such a construction is consistent with the purpose identified at [16] of *Hunt & Hunt* .

Moreover, despite the breadth of the observations of Barrett J in Reinhold, in *Perpetual Trustee Company Limited v CTC Group Pty Ltd [No 2]* ,[28] his Honour speaking as a member of the NSW Court of Appeal subsequently said:

> It cannot be suggested (nor do I think it has been suggested in any decided case) that the nature or quality of a 'claim' is, for

relevant purposes, to be determined solely by looking at the court's decision in relation to it. Nor is the nature or quality of a 'claim' to be determined solely by looking at the terms in which it is framed. Rather, it is a combination of the terms in which the claim is framed (or pleaded) and relevant findings of the court in relation to it that must be assessed in order to decide whether it is a claim 'in an action for damages . . . arising from a failure to take reasonable care' and has the other attributes of an 'apportionable claim' under s 34(1)(a) .

In our view, this passage makes it clear that the terms in which the claim is framed are the **starting point** for deciding whether the claim is of the kind referred to in s 24AF(1)(a) of the *Wrongs Act* .

...

Notwithstanding what Barrett J said in *Reinhold* , it seems to us that his Honour' s view (as expressed in *Perpetual Trustee*) is now that the terms in which the claim is framed are an essential determinant of whether a claim can be said to arise from a failure to take reasonable care. In our opinion, that is the correct approach.

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

30 The decision of the Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436* ,[16] (*Tanah Merah*) makes it clear that the warranties at sections 8(b) , (c) and (e) of the DB C Act do not give rise to apportionable claims under the *Wrongs Act* . The Court emphasised that the plain meaning of s 24AF(1)(a) of the *Wrongs Act* requires a claim arising from a failure to take reasonable care, and this does not extend to a claim 'involving circumstances arising out of a failure to take reasonable care'. [17]

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

62 In the latter case, the Court of Appeal referred to its earlier decision of *GodfreySpowers* , and acknowledged the breadth of the dicta. The Court then stated that the decision 'is not authority for the proposition that a claim which does not itself arise from a failure to take reasonable care, can be transformed into an apportionable claim by a defendant establishing that the circumstances upon which the plaintiff relies arose out of a failure to take reasonable care'. [37]

via

[37] *Tanah Merah* (n 16), 39 [124].

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

30 The decision of the Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436* , [16] (*Tanah Merah*) makes it clear that the warranties at sections 8(b) , (c) and (e) of the D BC Act do not give rise to apportionable claims under the *Wrongs Act* . The Court emphasised that the plain meaning of s 24AF(1)(a) of the *Wrongs Act* requires a claim arising from a failure to take reasonable care, and this does not extend to a claim 'involving circumstances arising out of a failure to take reasonable care'. [17]

via

[16] [2021] VSCA 72 (' *Tanah Merah*').

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

46 Team Building then turned their attention to the OC's contention that the Court of Appeal in *Tanah Merah* overturned the above authorities. Counsel submitted that such a conclusion is not borne out on a careful reading of the judgment. Counsel's submissions set out the following relevant parts of the *Tanah Merah* judgment: [26]

Thomas Nicolas and Elenberg Fraser relied upon *Reinhold* and *Dartberg* to support arguments that the Owners' claims against LU Simon were apportionable. In our view, however, the plain meaning of the statutory provision requires a claim arising from a failure to take reasonable care. The claim in *Hunt & Hunt* exemplifies such a claim.

> It is not disputed that Mitchell Morgan's claim against Hunt & Hunt is an 'apportionable claim' within the meaning of s 34(1)(a). The claim was based upon Hunt & Hunt's breach of an implied term of its retainer that it exercise proper skill, diligence and care. Section 34(1A) provides that there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action, whether of the same or a different kind. There is no express limitation on the nature of the claim which might have been brought by the plaintiff against a concurrent wrongdoer, except the requirement of s 34(2) that the acts or omissions of all concurrent wrongdoers have caused the damage in question. [27]

The definition does not extend to a claim 'involving circumstances arising out of a failure to take reasonable care'. The claim itself must arise from a failure to take reasonable care. Such a construction is consistent with the purpose identified at [16] of *Hunt & Hunt*.

Moreover, despite the breadth of the observations of Barrett J in Reinhold, in *Perpetual Trustee Company Limited v CTC Group Pty Ltd [No 2]*, [28] his Honour speaking as a member of the NSW Court of Appeal subsequently said:

> It cannot be suggested (nor do I think it has been suggested in any decided case) that the nature or quality of a 'claim' is, for relevant purposes, to be determined solely by looking at the court's decision in relation to it. Nor is the nature or quality of a 'claim' to be determined solely by looking at the terms in which it is framed. Rather, it is a combination of the terms in which the claim is framed (or pleaded) and relevant findings of the court in relation to it that must be assessed in order to decide whether it is a claim 'in an action for damages . . . arising from a failure to take reasonable care' and has the other attributes of an 'apportionable claim' under s 34(1)(a).

In our view, this passage makes it clear that the terms in which the claim is framed are the **starting point** for deciding whether the claim is of the kind referred to in s 24AF(1)(a) of the *Wrongs Act*.

...

> Notwithstanding what Barrett J said in *Reinhold* , it seems to us that his Honour' s view (as expressed in *Perpetual Trustee*) is now that the terms in which the claim is framed are an essential determinant of whether a claim can be said to arise from a failure to take reasonable care. In our opinion, that is the correct approach.

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

> 61 I accept Team Building's submission that there is an unresolved tension between the decisions in *Dartberg, Reinhold, Perpetual Trustee* and *G odfreySpowers* on the one hand, and *Shangri-La Construction* and *Tanah Merah* on the other hand.

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

> 47 Team Building then submitted that there is at first blush a tension between what the Court of Appeal said in *Godfrey-Spowers* and its later reasoning in *Tanah Merah* . On the one hand, *Godfrey -Spowers* (and *Reinhold* and *Dartberg*) are saying that the findings made at trial are of critical importance. On the other hand, *Tanah Merah* is saying that the terms in which the claims are framed are an essential determinant.

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

> 48 Team Building contended that the better view is that the Court in *Tanah Merah* simply emphasised that the parties' pleadings are an essential consideration in determining whether a claim is apportionable [29] but that the Court's actual findings following a trial are still relevant. [30]

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

> 47 Team Building then submitted that there is at first blush a tension between what the Court of Appeal said in *Godfrey-Spowers* and its later reasoning in *Tanah Merah* . On the one hand, *Godfrey -Spowers* (and *Reinhold* and *Dartberg*) are saying that the findings made at trial are of critical importance. On the other hand, *Tanah Merah* is saying that the terms in which the claims are framed are an essential determinant.

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

> 51 Team Building concluded its submissions by saying that all the Court has to be satisfied of is that the apportionment defences are not futile. They say that to so find at this interlocutory stage would mean the Court would have to find that the superior court and intermediate-appellate decisions of *Dartberg*, *Reinhold, Godfrey-Spowers* and *Perpetual Trustee* were wrong. They repeat that this is something that the Court of Appeal did not expressly do in *Tanah Merah* .

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

> 38 However, Team Building contends this is not the complete answer to their application. It says that what the Court of Appeal did not do in *Tanah Merah* was reject as incorrect all of the

previous jurisprudence which came before it which was to the effect that a party's pleaded claims are not the be-all and end-all of determining whether or not the claims are apportionable.

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

Cases Cited: *Aon Risk Services Australia v Australian National University* (2009) 239 CLR 175; *Namberry Craft Pty Ltd v Watson* [2011] VSC 136; *ABL Nominees Pty Ltd v MacKenzie* (No. 2) [2014] VSC 529 ; *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98; *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corporation Limited* (Ruling No 6) [2012] VSC 70 ; *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27; *Ottedin Investments Pty Ltd v Portbury Developments Co Pty Ltd* (2011) 35 VR 1; *APN Funds Management Ltd v Australian Property Investments Strategic Pty Ltd* [2011] VSC 555; *Uniting Church in Australia Property Trust (Vic) v Ian Hartley Architects Pty Ltd & Ors* [2022] VSC 233; *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436* [2021] VSCA 72 ; *Peck v Eade* [2023] VCAT 80; *Bellini v Meldan (Vic) Pty Ltd* [2021] VCAT 833; *Upton v Hartman Construction & Development Pty Ltd* [2022] VCAT 224; *Owners Corporation PS623721 v Shangri-La Construction Pty Ltd* [2022] VCAT 1499; *Kettyle v E. Cheong Garden Pty Ltd & Ors* [2012] VCAT 1097; *LU Simon Builders Pty Ltd v Allianz Australia Insurance Ltd & Ors* [2013] VCAT 468; *Owners Corporation No 1 of BS613436T v LU Simon Builders Pty Ltd* [2019] VCAT 286; *Jinalea Pty Ltd v Mace* [2019] VCAT 1732; *Mazzeo v Camilleri* [2021] VCAT 150; *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216; *Reinhold v New South Wales Lotteries Corporation (No 2)* [2008] NSWSC 187; *Godfrey-Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd* [2008] VSCA 208; *Hunt & Hunt* (2013) 247 CLR 613; *Perpetual Trustee Company Limited v CTC Group Pty Ltd [No 2]* [2013] NSWCA 58; *Owners Corporation 1 Plan No. PS 640567Y v Shangri-La Construction Pty Ltd* [2020] VCAT 1157; *Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq) (No 2)* [2024] NSWCA 232; *Pafburn Pty Limited (ACN 003 485 505) & Anor v The Owners - Strata Plan No 84674; Solak v Bank of Western Australia* [2009] VSC 82; *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24 ; *Main Road Property Group Pty & Ors v Pelligra & Sons Pty Ltd & Ors* [2010] VSC 5;

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

49 Such an interpretation is consistent with what Barrett J later said in *Perpetual Trustee Company Limited v CTC Group Pty Ltd [No 2]* [31] *(Perpetual Trustee),* that it is a combination of the findings made following a trial together with the pleadings that determine whether claims are apportionable or not. It would also allow the Court of Appeal's two decisions in *Tanah Merah* and *Godfrey-Spowers* to be read together and to happily coexist. In other words, a plaintiff's pleaded claims must be considered in determining whether the claims are ultimately apportionable, but that determination will also depend upon the ultimate findings of fact following the evidence.

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

> 46 Team Building then turned their attention to the OC's contention that the Court of Appeal in *Tanah Merah* overturned the above authorities. Counsel submitted that such a conclusion is not borne out on a careful reading of the judgment. Counsel's submissions set out the following relevant parts of the *Tanah Merah* judgment: [26]
>
> Thomas Nicolas and Elenberg Fraser relied upon *Reinhold* and *Dartberg* to support arguments that the Owners' claims against LU Simon were apportionable. In our view, however, the plain meaning of the statutory provision requires a claim arising from a failure to take reasonable care. The claim in *Hunt & Hunt* exemplifies such a claim.
>
> > It is not disputed that Mitchell Morgan's claim against Hunt & Hunt is an 'apportionable claim' within the meaning of s 34(1)

(a) . The claim was based upon Hunt & Hunt's breach of an implied term of its retainer that it exercise proper skill, diligence and care. Section 34(1A) provides that there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action, whether of the same or a different kind. There is no express limitation on the nature of the claim which might have been brought by the plaintiff against a concurrent wrongdoer, except the requirement of s 34(2) that the acts or omissions of all concurrent wrongdoers have caused the damage in question. [27]

The definition does not extend to a claim 'involving circumstances arising out of a failure to take reasonable care'. The claim itself must arise from a failure to take reasonable care. Such a construction is consistent with the purpose identified at [16] of *Hunt & Hunt* .

Moreover, despite the breadth of the observations of Barrett J in Reinhold, in *Perpetual Trustee Company Limited v CTC Group Pty Ltd [No 2]* ,[28] his Honour speaking as a member of the NSW Court of Appeal subsequently said:

> It cannot be suggested (nor do I think it has been suggested in any decided case) that the nature or quality of a 'claim' is, for relevant purposes, to be determined solely by looking at the court's decision in relation to it. Nor is the nature or quality of a 'claim' to be determined solely by looking at the terms in which it is framed. Rather, it is a combination of the terms in which the claim is framed (or pleaded) and relevant findings of the court in relation to it that must be assessed in order to decide whether it is a claim 'in an action for damages . . . arising from a failure to take reasonable care' and has the other attributes of an 'apportionable claim' under s 34(1)(a) .

In our view, this passage makes it clear that the terms in which the claim is framed are the **starting point** for deciding whether the claim is of the kind referred to in s 24AF(1)(a) of the *Wrongs Act* .

...

Notwithstanding what Barrett J said in *Reinhold* , it seems to us that his Honour's view (as expressed in *Perpetual Trustee*) is now that the terms in which the claim is framed are an essential determinant of whether a claim can be said to arise from a failure to take reasonable care. In our opinion, that is the correct approach.

via

[26] *Tanah Merah* (n 16) 34-36 [112]-[117] (emphasis added).

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

> 37 Team Building acknowledges the correctness of the OC's summary of *Tanah Merah* , at least insofar as the finding that the warranties at ss 8(b) , (c) and 8(e) of the DBC Act are not apportionable. Team Building also acknowledges the distinction within the two limbs of the s 8(a) warranty, and the lack of binding authority surrounding that

subsection. It also concedes that the OC has pleaded only the so called 'non-apportionable' warranties, namely, the second limb of s 8(a), and s 8(b) , (c) and (e).

Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd [2024] VCC 1633 (22 October 2024) (Kirton J)

30 The decision of the Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436* , [16] (*Tanah Merah*) makes it clear that the warranties at sections 8(b) , (c) and (e) of the D BC Act do not give rise to apportionable claims under the *Wrongs Act* . The Court emphasised that the plain meaning of s 24AF(1)(a) of the *Wrongs Act* requires a claim arising from a failure to take reasonable care, and this does not extend to a claim 'involving circumstances arising out of a failure to take reasonable care'. [17]

Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq) (No 2) [2024] NSWCA 232 (30 September 2024) (Kirk and Stern JJA, Basten AJA)

27. [2021] VSCA 72 (Beach and Osborn JJA, Stynes AJA) .

Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq) (No 2) [2024] NSWCA 232 (30 September 2024) (Kirk and Stern JJA, Basten AJA)

Reinhold v NSW Lotteries Corporation (No 2) (2008) 82 NSWLR 762; [2008] NSWSC 187; *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58; *Rahme; Herridge Parties v Electricity Networks Corp t/as Western Power* (2021) 59 WAR 69; [2021] WASCA 111; *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436* [2021] VSCA 72 , considered.

Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq) (No 2) [2024] NSWCA 232 (30 September 2024) (Kirk and Stern JJA, Basten AJA)

This question was also considered by the Victorian Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436* [2021] VSCA 72. The Court held, at [117] , that the correct approach was as set out by Barrett JA in *Perpetual v CTC* . In so finding, the Court found that the "terms in which a claim is framed … are an essential determinant of whether the claim can be said to arise from a failure to take reasonable care" (at [120]). The Court concluded at [124] that, having regard to the analysis of Barrett JA in *Perpetual v CTC* , the earlier Victorian case of *Godfrey Spowers*:

Akers v RSPCA [2024] VSC 489 (23 August 2024) (Judge:gray J)

46. Such an appeal is limited to questions of law. The identification of a question of law is not merely a precondition to the exercise of a right to appeal, but the subject matter of the appeal itself. [13] The appeal does not extend to correction of alleged errors of fact unless VCAT made a finding of fact that was not open to it. [14]

via

[14] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T* [2021] VSCA 72, [198] ; *Miller v Martin* [2021] VSCA 108, [72] ; *Heng Yang Developments Pty Ltd v Red Earth Developments (Aust) Pty Ltd* [2022] VSC 231, [40] .

State of Victoria v L.U. Simon Builders Pty Ltd and Ors (Ruling) [2024] VCC 1075 (26 July 2024) (Wise J)

8 This was described by his Honour Judge Macnamara in *Owners Corporation 1 Plan No PS 707553K and Ors v Shangri-La Construction Pty Ltd (ACN 130 534 244) and Anor* [1] as follows: [2]

"1 According to the Court of Appeal:

'Shortly before 2:23 am on 24 November 2014, a fire broke out on the balcony of apartment 805 of the 21 storey Lacrosse apartment tower in Latrobe Street, Docklands. The source of the ignition of the fire was an incompletely extinguished cigarette butt left in a plastic container by a person staying in the apartment, Jean-François Gubitta. The plastic container was sitting on a table with a timber top on the balcony of the apartment. The fire spread from the plastic container to the table and then to the nearby external cladding of the building.' (*Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T and Ors* [2021] VSCA 72, [1])

2 This conflagration generated complex litigation dealt with in the Victorian Civil and Administrative Tribunal in its Domestic Building List by Vice President Judge Woodward (as he then was) ([2019] VCAT 286), ending in the Court of Appeal, with the joint judgment from which I have just quoted. It attracted international attention, and triggered an upheaval in the State's building regulatory regime.

The reverberations of the Lacrosse conflagration continue to this day. Almost six years after the fire, the Minister for Energy, Environment and Climate Change, introducing a bill to amend the *Building Act* 1993 , said:

> 'The Victorian Government is committed to removing the scourge of combustible cladding from our communities. The safety of building occupants is our top priority.
>
> As the Victorian Cladding Taskforce detailed in its final report in July 2019, rectification of combustible cladding on buildings is complex and difficult. Different solutions will be required for different buildings. It will also take time—in large part due to the size and number of affected buildings and the nature of the building works to be carried out.
>
> In the years that followed Melbourne's Lacrosse Fire in 2014 and the tragic Grenfell fire in the United Kingdom, it's become clear that often owners corporations are not adequately governed and resourced to deal with complex, large-scale building matters like cladding rectification.
>
> Taking note of the advice of the Cladding Taskforce, the Government decided it needed to intervene to support owners of buildings assessed as higher-risk to rectify their combustible cladding. This support includes funding, but also a critical role for the Government in helping to advise and guide owners and owners corporations through the process of rectification. This is why the Government has established Cladding Safety Victoria.' (Hansard Legislative Assembly, 4 September 2020, 2124)

3 The Minister concluded, saying:

> 'The Cladding Safety Victoria Bill is a Bill to make our community safer. For the owners who are concerned about a cladding fire that might put their families at risk. For the young couple renting an apartment who now feel afraid because they were told they couldn't have a barbecue on their balcony. For the elderly couple who fear a fire evacuation in their high-risk building because they are not stable on their feet'. (*Ibid, 2126*)"

Whitaker v F.P & H.S Keogh Pty Ltd (Building and Property) [2024] VCAT 708 (25 July 2024) (C Edquist, Senior Member)

215. In *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd* [129] ('*Lacrosse*', because the case concerned the Lacrosse building in Docklands) Judge Woodward (as His Honour then was), sitting as a vice president of the Tribunal, ruled that the three warranties implied into the building contract by s 8 of *DBC Act* relied on by the owners ss 8(b) , (c) and (f) were absolute. [130] This finding was not disturbed by the Court of Appeal when *Lacrosse* was appealed in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436* [131] ('*Tanah Merah*'). However, *Tanah Merah* left open the prospect that other warranties created by s 8 of the *DBC Act* might be apportionable.

via

[131] [2021] VSCA 72 at [107] (Beach, Osborn JJA and Stynes AJA) .

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231. In *Tanah Merah,* [144] the Court Appeal observed that Woodward J's articulation of the approach to be taken to the task of apportionment was not challenged by the parties during the appeal. The two stage approach articulated by the High Court was embraced by the Court of Appeal when it dealt with the apportionment of responsibility as between the building surveyor, the architect and the fire engineer.

via

[144] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T* [2021] VSCA 72 ('Appeal Reasons'), [262] .

The Trust Company Limited v Blue Train Cafe Pty Ltd [2024] VSC 232 (10 May 2024) (Croft J)

60. Whether there was no evidence to support the Tribunal's factual finding in setting the precondition is a question of law. [112] It must be shown that the Tribunal made a finding that was "simply not open to it", usually requiring a finding that "there was no evidence on the basis of which the Tribunal could reach that finding, not that there was some evidence tending to a different conclusion". [113] A finding of fact by the Tribunal cannot be challenged on the "no evidence" ground where there was some evidence to support it. Nor can a finding of fact be challenged by this Court simply because it forms the view that the finding was made in error or against the weight of the evidence. [114] The question is whether there was any, rather than sufficient, evidence for the Tribunal to arrive at a factual finding. [115] This question is to be determined by reference to the evidence and inferences most favourable to the Respondent. [116]

via

[113] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [2021] VSCA 72 ; *Miller v Martin* [2021] VSCA 108 at [72] .

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via

[114] *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207 at [248] ; and see *Karakatsanis v Racing Victoria Ltd* (2013) 42 VR 176 at 185–6 [21] ; *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540 at 544 [14] ; *Higgins Nine Group Pty Ltd v Ladro Greville St Pty Ltd* [2016] VSC 244 at [28], [31] ; *Turkey v Mackie Pty Ltd* [2019] VSC 103 at [22] ; *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [2021] VSCA 72 at [198] ; *Weber v Carkeek* [2020] VSC 366 at [69] .

Doolkoora Pty Ltd v Stumpy Gully Holdings Pty Ltd [2024] VSC 155 (29 March 2024) (Gray J)

64. The appeal is limited to questions of law. The identification of a question of law is not merely a precondition to the exercise of a right to appeal, but the subject matter of the appeal itself. [23] The appeal does not extend to correction of alleged errors of fact unless VCAT made a finding of fact that was not open to it. [24] However, the limits of the Court's function in a proceeding under s 148 do not altogether prevent a court from considering mixed questions of fact and law. In some circumstances, it will be permissible to consider whether VCAT erred in law in reaching conclusions on mixed questions of fact and law. [25] Generally speaking, whether primary facts as found fall within a statutory provision properly construed is a question of law, [26] and the same is true of a legal test arising at common law or in equity. [27]

via

[24] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [2021] VSCA 72, [198] ; *Miller v Martin* [2021] VSCA 108, [72] ; *Heng Yang Developments Pty Ltd v Red Earth Developments (Aust) Pty Ltd* [2022] VSC 231, [40] .

Australian Pacific Airports (Melbourne) Pty Ltd v CPB Contractors Pty Ltd and Anor (Ruling) [2024] VCC 357 (26 March 2024) (Kirton J)

Cases Cited: *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 ; *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98; *McClafferty v Greg Smith Pty Ltd* (Building and Property) [2019] VCAT 299 ; *Tanah Merah Vic Pty Ltd (ACN 098 935 490) v Owners Corporation No 1 of PS613436T & Ors* [2021] VSCA 72 ; *Melbourne Water Corporation v Vaughan Constructions Pty Ltd* [2022] VSCA 241 ; *Woodhouse v Fitzgerald* [2021] NSWCA 54; 104 NSWLR 475 ; *Equal 54 Pty Ltd v Dennis Galimberti* [2016] VSC 588 ; *Cosmetic Laser Clinic Pty Ltd v Pirintji* [2015] NSWSC 983 ; *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* [2014] FCA 880; 224 FCR 519; *St*

George Bank Ltd v Quinerts Pty Ltd [2009] VSCA 245; *ABL Nominees Pty Ltd v MacKenzie (No. 2)* [2014] VSC 529.

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VSCA 72 at [132] (*Tanah Merah*).

VM Romano v BCG [2023] VSCA 312 (01 December 2023) (Niall and Whelan JJA)

22. Thirdly, it was said that the judge had been wrong to proceed on the basis that the prospects in the proceeding were 'neutral'. It was submitted that it was highly likely that the owners corporations would succeed against the applicant, and that the applicant would succeed against the defendants in the County Court proceeding. In this respect particular reliance was placed upon this Court's judgment in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* ('*Tanah v Owners Corporation*'). [5]

VM Romano v BCG [2023] VSCA 312 (01 December 2023) (Niall and Whelan JJA)

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; *Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1; *Black Hill Residents Group Inc v Marist Youth Care Ltd* (2021) 250 LGERA 379; *House v The King* (1936) 55 CLR 499; *Impex Pty Ltd v Crowner Products Ltd* (1994) 13 ACSR 440; *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* [2021] VSCA 72 .

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26. Finally, in my opinion, there was no relevant error by the judge in her description of the prospects in the litigation. I have considered the decision in *Tanah v Owners Corporation* , [8] which is the basis upon which it was contended that it is very likely that the applicant will succeed against the defendants. The judge did, in the course of submissions, use the expression 'neutral', but what she said in her ruling was that it was 'not an inevitability' that the applicant would succeed. Whilst the position between the owners corporations and the applicant might be said to be tolerably clear (I express no

view on that), the position between the applicant and the defendants is not clear. The potential outcomes in terms of apportionment are uncertain and, as counsel for IND pointed out, there was no glazing subcontractor who was a party to the claims in *Tanah v Owners Corporation* .

via

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Ahamed v Coles Supermarkets Australia Pty Ltd [2023] VSCA 239 (12 October 2023) (Macaulay JA; J Forrest AJA)

69. In *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* , this Court (Beach, Osborn JJA and Stynes AJA) said:

> Section 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* allows appeals on a question of law, including whether or not there is any evidence to support a finding of fact. It does not however extend to a mere error of fact unless the Tribunal made a finding that was 'simply not open to it'. For the most part, this requires 'that there was no evidence on the basis of which the Tribunal could reach that finding, not that there was some evidence tending to a different conclusion'. [25]

via

[25] [2021] VSCA 72 , [198] , quoted in *Miller v Martin* [2021] VSCA 108, [72] (Tate, Niall and Kennedy JJA). See also *Hoskin v Greater Bendigo City Council* (2015) 48 VR 715, 720 [10] (Warren CJ, Osborn and Santamaria JJA); [2015] VSCA 350 .

Ahamed v Coles Supermarkets Australia Pty Ltd [2023] VSCA 239 (12 October 2023) (Macaulay JA; J Forrest AJA)

69. In *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* , this Court (Beach, Osborn JJA and Stynes AJA) said:

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Owners Corporation 1 Plan No PS 707553K v Shangri-La Construction Pty Ltd (ACN 130 534 244) [2023] VCC 1473 (24 August 2023) (Macnamara J)

Cases Cited: *Tanah Merah Vic Pty Ltd (ACN 098 935 490) v Owners Corporation No 1 of PS613436T and Ors* [2021] VSCA 72 ; *Owners Corporation 1 Plan No. PS707553K v Shangri-La Construction Pty Ltd (No 3) (Building and Property)* [2022] VCAT 1385; *Maxwell v Murphy* (1957) 96 CLR 261; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; *R S Howard & Sons Limited v Brunton* (1916) 21 CLR 366; *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1; *Nicholas v Commissioner for Corporate Affairs* [1988] VR 289; *Rich v The Australian Securities & Investments Commission* [2003] NSWCA 342; *Natural Forests Pty Ltd v Turner* [2004] TASSC 34; *Doro v Victorian Railways Commissioners* [1960] VR 84; *Jacobs v London County Council* [1950] AC 361; *Wilde v Australian Trade Equipment Co Pty Ltd* (1981) 145 CLR 590; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435; *Travel Compensation Fund v Dunn* (2 December 1992, BC9203833); *Yorke v Lucas* (1985) 158 CLR 661; *Australian Building and Construction Commissioner v Parker* [2017] FCA 564; *Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56; *Spotlight Pty Ltd v NCON Australia Ltd* (2012) 46 VR 1; *Keys Consulting Pty Ltd and Anor v CAT Enterprises Pty Ltd and Ors* [2019] VSCA 136; *Jones v Dunkel* (1959) 101 CLR 298

Owners Corporation 1 Plan No PS 707553K v Shangri-La Construction Pty Ltd (ACN 130 534 244) [2023] VCC 1473 (24 August 2023) (Macnamara J)

1 According to the Court of Appeal:

> "Shortly before 2:23 am on 24 November 2014, a fire broke out on the balcony of apartment 805 of the 21 storey Lacrosse apartment tower in Latrobe Street, Docklands. The source of the ignition of the fire was an incompletely extinguished cigarette butt left in a plastic container by a person staying in the apartment, Jean-François Gubitta. The plastic container was sitting on a table with a timber top on the balcony of the apartment. The fire spread from the plastic container to the table and then to the nearby external cladding of the building." (*Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T and Ors* [2021] VSCA 72, [1])

Owners SP 92450 v JKN Para 1 Pty Limited [2023] NSWCA 114 (26 May 2023) (Gleeson, White and Brereton JJA)

107. The performance requirements of the BCA require that the materials used on the external wall of a building either meet a particular test standard to ensure that they are not combustible (AS 1503.1) or are assessed and certified by a fire engineer, certifying authority and the Fire Commissioner, so as to ensure the materials' functional and performance

equivalence during a fire. By installing cladding which did not comply with the performance requirements of the BCA, the respondents provided the Owners Corporation with a building which did not meet the minimum standards for public safety: *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436T* [2021] VSCA 72 at [209] .

Owners Corporation v Shangri-La Construction [2023] VCC 222 (22 February 2023) (His Honour Judge Anderson)

41 Adopting the Court of Appeal's reasoning in *Tanah Merah* , a building surveyor's failure to identify and remedy deficiencies in a fire engineering report may have no causative link. The fire engineering parties were already aware that Shangri-La intended to use EPS combustible cladding. This matter equally applies to Shangri-La's reliance upon breaches of statutory duty to find a claim for apportionment against the building surveyor parties and Mr Kromidellis.

Owners Corporation v Shangri-La Construction [2023] VCC 222 (22 February 2023) (His Honour Judge Anderson)

37 In *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [2021] VSCA 72 (*"Tanah Merah")*, the Court of Appeal upheld the Tribunal's decision and found that the builder was not negligent under the *Wrongs Act* 1958 (Vic) , as was argued by the builder and building surveyor, architect and fire engineer. This was notwithstanding that the Court agreed that the builder had breached the implied warranty under the *Domestic Building Contracts Act* 1995 (Vic) and the *Building Act* 1993 (Vic) by constructing a building that did not comply with the Building Code of Australia (BCA).

Peck v Eade (Building and Property) [2023] VCAT 80 (27 January 2023) (Senior Member S. Kirton)

39. Apportionable claims within the meaning of section 24AF of the *Wrongs Act* are relevantly, those claims 'for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care'. The terms in which the claim is framed are the starting point for deciding whether the claim is apportionable. [10]

via

[10] *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613434T* [2021] VSCA 72 at [115] .

Pirmax Pty Ltd v Kingspan Insulation Pty Ltd [2022] FCA 1340 (14 November 2022) (Snaden J)

10. The BCA is, then, to be construed according to ordinary principles; albeit with recognition that it is a technical document used by building practitioners on a day-to-day basis and, as such, is not drafted in the same way as an act of parliament: *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS631436T* [2021] VSCA 72, [208] (Beach, Osborn JJA and Stynes AJA) .

Melbourne Water Corporation v Vaughan Constructions Pty Ltd [2022] VSCA 241 (10 November 2022) (Sifris, Kennedy and Walker JJA)

90. Although, as the applicant highlights, *Podrebersek* was concerned with contributory negligence, there is no reason why the reference to 'responsibility' in s 157(4)(b) should be read in a different way to that considered in *Podrebersek*. [52] The legislature is to be taken to have been aware of this position taken by the High Court. Further, consistent with the dictionary definitions, above, the decision suggests that the concept of apportioning 'responsibility' will be concerned with much more than factual causation. More particularly, it suggests that, in assessing comparative 'responsibility', the relevant persons will also be liable so that their 'culpability' may be taken into account.

via

[52] See also *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 PS613436T* [2021] VSCA 72, [262] (Beach and Osborn JJA and Stynes AJA) , where the approach in *Podrebersek* was applied under the *Wrongs Act* Part IVAA regime.

Oberin v Brandrick [2022] VCC 1829 (28 October 2022) (Her Honour Judge Burchell)

49 Both parties relied on the Court of Appeal decision in *Tanah Merah v Owners Corporation* [5] (*"Tanah Merah"*). The second defendant relied on the Court's observations that s 24AI(2) of the *Wrongs Act* *"specifically contemplates that a proceeding may involve both an apportionable claim and a claim that is not an apportionable claim"*. [6] Their Honours also said that, by applying well settled rules of construction, the word "claim" in each of these provisions (ss24AF, 24AH and 24AI) is to be given the same meaning. [7] Further, unless a contrary intention appears, words in the singular include the plural. [8] However, *Tanah Merah* did not consider the effect of s 24AJ and 23B .

via

[7] Ibid at [106] .

Oberin v Brandrick [2022] VCC 1829 (28 October 2022) (Her Honour Judge Burchell)

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[5] *Tanah Merah Vic Pty Ltd (ACN 098 935 490) v Owners Corporation No 1 of PS613436T* [2021] VSCA 72 (*" Tanah Merah"*).

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via

[6] Ibid at [105] .

Oberin v Brandrick [2022] VCC 1829 (28 October 2022) (Her Honour Judge Burchell)

Cases Cited: *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27; *Kayteal Pty Ltd v John Joseph Dignan & Ors* [2011] NSWSC 197; *Tanah Merah Vic Pty Ltd (ACN 098 935 490) v Owners Corporation No 1 of PS613436T* [2021] VSCA 72 ; *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors* (2008) 21 VR 84; *Reinhold v New South Wales Lotteries Corporation (No 2)* (2008) 82 NSWLR 762; *Extension Builders Australia Pty Ltd v Bowman* [2020] VCAT 1311; *Gandel v Krongold Constructions Pty Ltd* [2014] VCC 650.

Strata Plan 92450 v JKN Para 1 Pty Ltd [2022] NSWSC 958 (19 July 2022) (Black J)

5. The parties accept that the BCA, as it stood in 2013, was applicable to the relevant works. Ms Steele draws attention to, and I bear in mind, the observations of Lindsay J in *Owners of Strata Plan No 69312 v Rockdale City Council* [2012] NSWSC 1244 at [59]-[61] , as subsequently approved by the Court of Appeal of the Supreme Court of Victoria in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS 613436T* [2021] VSCA 72 at [209] , as follows:

> "It is not necessary for the determination of the current proceedings to decide whether the BCA was, or was not, in 2001 (or at some other time) a legislative "instrument" or "statutory rule" so as to engage ss 33 and 34 of the *Interpretation Act*.
>
> As was observed of a different form of "standards code" in a different legislative context, in *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 74 NSWLR 148 at 161 [68] , the BCA appears always to have been something of a hybrid.
>
> Whatever side of the line it might be thought to fall on for the purposes of the definitions of "instrument" and "statutory rule" in the *Interpretation Act*, the task for the court in these proceedings is to construe it as a formal document designed to define standards, for the promotion of public safety, in the construction of buildings. ..."

Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property) (Corrected) [2022] VCAT 633 (07 June 2022) (The Honourable Justice Delany, Acting Member)

72. That approach was said by Vaughan to be consistent with the well-established approach to apportioning responsibility in other contexts, which is predicated upon the establishment of a legal liability of the parties the subject of the apportionment. [45] In *Podrebersek v Australian Iron & Steel Pty Ltd* ,[46] the High Court explained that such an exercise involves consideration of those parties' departure from the standard of care: [47]

> The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, i.e. of *the degree of departure from the standard of care of the reasonable man* and of the relative importance of the acts of the parties in causing the damage. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance.

via

[45] See *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 PS613436T* [2021] VSCA 72, [262] (Beach, Osborn JJA and Stynes AJA) .

Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) [2022] VCAT 1499 (08 March 2022) (Member C Edquist)

140. The warranty arising under s 8(e) - that the home will be suitable for occupation at the time the work is completed - was not relied on by the owners in *Lacrosse*, and accordingly was not the subject of Woodward J's decision. Nor did the Court of Appeal have to consider it on the appeal in *Tanah Merah* .

Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) [2022] VCAT 1499 (08 March 2022) (Member C Edquist)

129. The purpose of the statutory scheme was outlined by the majority of the High Court in *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* ,[57] (in a passage cited with approval by the Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436* [58] (***Tanah Merah***) in the context of the Victorian legislation), as follows:

Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) [2022] VCAT 1499 (08 March 2022) (Member C Edquist)

129. The purpose of the statutory scheme was outlined by the majority of the High Court in *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* ,[57] (in a passage cited with approval by the Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436* [58] (***Tanah Merah***) in the context of the Victorian legislation), as follows:

Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) [2022] VCAT 1499 (08 March 2022) (Member C Edquist)

788. Woodward J then went on to discuss the two stage test established by *Podrebersek* [534] and applied in a number of following cases, as discussed above. [535] The test was embraced by the Court of Appeal in *Tanah Merah* , in its second decision in which it reviewed the apportionment of responsibility as between the building surveyor, the fire engineer and the architect. It is convenient to quote the Court of Appeal's articulation of the principle, which is as follows:

> In any apportionment between concurrent wrongdoers, the matters that need to be considered are: first, the degree of departure by each wrongdoer from the standard of care reasonably expected of that wrongdoer; and secondly, the causal potency of each wrongdoer's negligent acts or omissions. The judgment required involved a synthesis having regard to the whole of the conduct of each wrongdoer. [536]

Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) [2022] VCAT 1499 (08 March 2022) (Member C Edquist)

242. In *Tanah Merah,* the Court Appeal observed that Woodward J's articulation of the approach to be taken to the task of apportionment was not challenged by the parties during the appeal. [121]

via

[121] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T* [2021] VSCA 72 ('Appeal Reasons'), [262] .

Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) [2022] VCAT 1499 (08 March 2022) (Member C Edquist)

246. The two stage approach articulated by the High Court was also embraced by the Court of Appeal in *Tanah Merah* when the Court dealt with the apportionment of responsibility as between the building surveyor, the architect and the fire engineer, where it held: [128]

Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) [2022] VCAT 1499 (08 March 2022) (Member C Edquist)

129. The purpose of the statutory scheme was outlined by the majority of the High Court in *Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd* ,[57] (in a passage cited with approval by the Court of Appeal in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436* [58] (***Tanah Merah***) in the context of the Victorian legislation), as follows:

via

[58] [2021] VSCA 72 at [107] (Beach, Osbourn JJA and Stynes AJA) (***Tanah Merah***).

Owners Corporation PS623721 v Shangri- La Construction Pty Ltd (Building and Property) [2022] VCAT 1499 (08 March 2022) (Member C Edquist)

139. In *Lacrosse*, the applicant owners had carefully pleaded their case, and did not rely on either the warranty contained in s8(a) nor the warranty in s8(d). They relied only on the warranties contained in s 8(b)-suitability of materials, s8(c) - compliance with the law including the BCA and s 8(f)-fitness for purpose. The owners in *Lacrosse* contended that those warranties were absolute and not qualified by any obligation to take reasonable care and were therefore not apportionable. This contention was expressly challenged by each of the three respondent consultants in the case, namely the building surveyor, the architect and the fire engineer. In the event, Woodward J ruled that the three warranties relied on by the owners were absolute. [64] This finding was not disturbed by the Court of Appeal when *Lacrosse* was appealed in *Tanah Merah* and accordingly I proceed on the basis that the issue is settled insofar as the warranties contained in ss 8(b) , (c) and (f) are concerned.

Sysfac Pty Ltd v MDP Property Holdings Pty Ltd & Ors (Costs) (Building and Property) [2021] VCAT 1339 (11 November 2021) (Deputy President E Riegler)

19. The Applicant submitted that the Water Act Claim was not an apportionable claim because it did not arise from a failure to take care. The Applicant drew my attention to the Victorian Court of Appeal decision in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* , [6] where the Court stated:

> We have concluded that the terms in which a claim is framed against a concurrent wrongdoer are an essential determinant of whether the claim can be said to arise from a failure to take reasonable car. [7]

Sysfac Pty Ltd v MDP Property Holdings Pty Ltd & Ors (Costs) (Building and Property) [2021] VCAT 1339 (11 November 2021) (Deputy President E Riegler)

19. The Applicant submitted that the Water Act Claim was not an apportionable claim because it did not arise from a failure to take care. The Applicant drew my attention to the Victorian Court of Appeal decision in *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* , [6] where the Court stated:

> We have concluded that the terms in which a claim is framed against a concurrent wrongdoer are an essential determinant of whether the claim can be said to arise from a failure to take reasonable car. [7]

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[6] [2021] VSCA 72 .

Sysfac Pty Ltd v MDP Property Holdings Pty Ltd & Ors (Costs) (Building and Property) [2021] VCAT 1339 (11 November 2021) (Deputy President E Riegler)

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> We have concluded that the terms in which a claim is framed against a concurrent wrongdoer are an essential determinant of whether the claim can be said to arise from a failure to take reasonable car. [7]

via

[7] Ibid , [120] .

U Bellini & A Bellini v Meldan (Vic) Pty Ltd (Costs) (Building and Property) [2021] VCAT 1072 (14 September 2021) (Senior Member R Walker)

17. Mr Phillpott submitted that, in the present case, it would be fair to order the Builder to pay the Owners' costs for the following reasons:

    (a) The relative strengths of the parties' cases – s. 109(3)(c)

    He said that it was clear from the experts' reports that they agreed there was defective work and only disagreed on the scope and cost of rectification.

    (b) The nature and complexity of the case - Section 109(3)(d)

    He said that, given the complex nature of the defective works alleged, the Tribunal was assisted by the legal representatives throughout the course of the proceeding, including in the lead up to the final hearing where the legal representatives were able to agree upon a Statement of Facts and conduct the final hearing in half a day, rather than the three days originally allocated. He also pointed out that the Builder's apportionment defence under Part IVAA of the Wrongs Act was sufficiently complex to justify legal representation, since it was one of the first cases since the decision in *Tanah Merah (Vic) Pty Ltd v Owners Corporation No 1 of PS613436T and Ors* [2021] VSCA 72 to apply the principles from that decision.

U Bellini & A Bellini v Meldan (Vic) Pty Ltd (Costs) (Building and Property) [2021] VCAT 1072 (14 September 2021) (Senior Member R Walker)

25. In regard to liability, the Owners' claim was unanswerable, except to the extent that the concurrent wrongdoer defence succeeded. That defence was arguable, but faced the difficulty of the *Tanah Merah* decision, and ultimately failed, However, even if it had succeeded, it was never going to be more than a partial defence.

Bellini v Meldan (Vic) Pty Ltd (Building and Property) [2021] VCAT 833 (29 July 2021) (Senior Member R Walker)

16. For guidance as to the manner in which the legislative scheme operates, Mr Phillpott referred me to the recent Court of Appeal decision in *Tanah Merah (Vic) Pty Ltd v Owners*

Corporation No.1 of PS613436T & ors. [2021] VSCA 72 . In that case, this Tribunal had found at first instance that a claim against a builder was not apportionable, even though other contractors involved in the construction had failed to use reasonable care. That finding was upheld by the Court of Appeal. The following three passages from the judgment are pertinent (*citations omitted*):

> "94 Having found for the Owners against LU Simon on the only claims made by them against LU Simon, the Tribunal then proceeded on the basis that those claims were not apportionable within the meaning of pt IVAA of the *Wrongs Act* . It did so because the breach of warranty claims which it upheld did not 'aris[e] from a failure to take reasonable care' by LU Simon. The Tribunal then proceeded to determine LU Simon's claims for contribution against the consultants (and Mr Gubitta) — all of which claims were apportionable within the meaning of pt IVAA.
>
> .....
>
> "117 Notwithstanding what Barrett J said in Reinhold, it seems to us that his Honour's view (as expressed in Perpetual Trustee) is now that the terms in which the claim is framed are an essential determinant of whether a claim can be said to arise from a failure to take reasonable care. In our opinion, that is the correct approach."
>
> .....
>
> "128 It follows that the Tribunal made no error when it determined that the breach of warranty claims that it had upheld against LU Simon were not apportionable. At best, those claims involved circumstances arising out of failures to take reasonable care by the consultants and Mr Gubitta. The Owners' claims against LU Simon, however, did not themselves arise from any failure to take reasonable care."

Prestage v Barrett [2021] TASSC 27 (02 July 2021) (Estcourt J)

767. I accept the plaintiffs' submissions on this issue, in particular because, as *Tanah Merah* noted, the result ensures consistency with other provisions in the apportionment regime, and in particular (in Tasmanian terms) s 43B . That is, if a given head of loss (claim) is recoverable both upon a cause of action that arises from a failure to take reasonable care, and upon another cause of action that does not require such a failure, then the defendant remains liable under the second cause of action for the whole of the loss on the traditional solidary basis. The practical consequence is that the liability is not apportionable.

Prestage v Barrett [2021] TASSC 27 (02 July 2021) (Estcourt J)

763. The plaintiffs submit that the requirement that a failure to take reasonable care be a technical element of the cause of action, and not merely a finding that might be made as an incidental matter or in respect of other pleaded causes of action, was recently "determinatively resolved" by the Victorian Court of Appeal in the *Lacrosse Building Fire* litigation *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [2021] VSCA 72. They observe that in a very detailed consideration of the controversy appearing from prior cases, the Court of Appeal at [116] , endorsed the conclusion of MacFarlane JA in an earlier NSW Court of Appeal decision *Perpetual Trustee Company Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 at [23] that:

> "... the application of [*the apportionment regime*] turns not on the facts that happen to be found but on the essential character of the plaintiff's successful cause of action. Subject to cases that are conducted without regard to the pleadings, if negligence is an essential element of that cause of action, it will have been pleaded in the Statement of Claim. If it is not, it will not have been pleaded. It would be curious indeed if, to attract [*the apportionment regime*], the defendant pleaded and proved his or her own negligence when that was not

alleged by the plaintiff. The text of [*the NSW equivalent of s 43(1)*] does not, in my view, contemplate that occurring. *The natural meaning of the words used indicates that a failure to take reasonable care must be part of, and therefore an element of, the plaintiff's successful cause of action*." [Footnotes omitted.] [Emphasis added.]

Prestage v Barrett [2021] TASSC 27 (02 July 2021) (Estcourt J)

765. The plaintiffs submit that intermediate appellate courts should not depart from an interpretation placed on national legislation, in this case the apportionment regime, by other intermediate appellate courts unless convinced the interpretation is plainly wrong (*Allianz Australia Insurance Ltd v Mercer* [2014] TASFC 3, 309 ALR 154, per Porter J at [155] .) They say that *Tanah Merah* is plainly correct, and that for the reasons given in that case at [118] , "the view that the nature of the claim itself is irrelevant to the question whether the claim is one 'arising from a failure to take reasonable care' has a series of anomalous consequences."

Prestage v Barrett [2021] TASSC 27 (02 July 2021) (Estcourt J)

766. Further, the plaintiffs submit, the result in *Tanah Merah* was also suggested by and is consistent with analogous High Court authority. The position concerning the candidate circumstance of a claim under federal (or, by parity of reasoning, State or Territory Fair Trading) legislation for contravention of s 18 of the *Australian Consumer Law* was resolved by the High Court in *Selig v Wealthsure Pty Ltd* [2015] HCA 18, 255 CLR 661 at [37] . That case held that a claim under one statutory provision having as one element a requirement of misleading conduct (*Corporations Act* s 1041H) was apportionable, but claims under other provisions were not, even though the causes of action under the other provisions also required an element of misleading conduct.

Prestage v Barrett [2021] TASSC 27 (02 July 2021) (Estcourt J)

768. I agree, with respect, that their Honours' reasoning in *Tanah Merah* is compelling and I would not presume to depart from it.

Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T [No 3] [2021] VSCA 155 (07 June 2021) (Beach and Osborn JJA; Stynes AJA)

1. On 26 March 2021, the Court published reasons in the applications for leave to appeal brought by Thomas Nicolas, Gardner Group and Elenberg Fraser against orders that had been made in the Victorian Civil and Administrative Tribunal ('VCAT') in relation to a fire that occurred on 24 November 2014 in the Lacrosse apartment tower. [1] In those reasons, we rejected all of the grounds of appeal advanced by Thomas Nicolas and Elenberg Fraser, and all but one of the grounds of appeal advanced by Gardner Group (ground 3). In relation to ground 3, we accepted Gardner Group's submission that the judge's finding, of a causal link [2] in respect of the second of two bases upon which the judge found that Gardner Group had breached the Gardner Group Agreement, had to be overturned.

via

[1] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T* [2021] VSCA 72 ('Appeal Reasons'). We shall use the same abbreviations in these reasons as in the Appeal Reasons.

Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T [No 2] [2021] VSCA 122 (12 May 2021) (Beach and Osborn JJA; Stynes AJA)

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via

[1] *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T* [2021] VSCA 72 ('Appeal Reasons'). We shall use the same abbreviations in these reasons as in the Appeal Reasons.

Miller v Martin [2021] VSCA 108 (30 April 2021) (Tate, Niall and Kennedy JJA)

72. The law on this matter was also summarised recently by Beach, Osborn JJA and Stynes AJA in *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS631436T* [128] who explained:

> Section 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* allo ws appeals on a question of law, including whether or not there is any evidence to support a finding of fact. It does not however extend to a mere error of fact unless the Tribunal made a finding that was 'simply not open to it'. For the most part, this requires 'that there was no evidence on the basis of which the Tribunal could reach that finding, not that there was some evidence tending to a different conclusion'. [129]

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[129] Ibid [198] (citations omitted).

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via

[128] [2021] VSCA 72 .