VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP 350/2016

CATCHWORDS

BUILDING AND CONSTRUCTION – fire at Lacrosse tower on La Trobe St - aluminium composite panels (ACPs) – compliance with the Building Code of Australia (BCA) – construction of the BCA – International Fire Engineering Guidelines (IFEG) – consultant agreements with building professionals – history and use of ACPs – causes of damage by fire – compliance of ACPs with the BCA – construction of BCA clause C1.12(f) "bonded laminated materials" – construction of BCA clause C2.4 of specification C1.1 "attachments to a wall" – breach of warranties under the *Domestic Building Contracts Act 1995 (Vic)* – role of relevant building surveyor – whether obligations under consultant agreements coextensive with duty to exercise reasonable care – failure by building professionals to exercise reasonable care under construction agreements – whether building surveying a "profession" – *Wrongs Act 1958 (Vic)* s59 peer professional opinion defence – relevant of D&C Contract to construction of consultant agreements – breach of consultant agreements – construction of specification forming part of D&C Contract – meaning of "indicative to" – role of fire engineer – meaning of "full fire engineering assessment" under IFEG – failure to warn of non-compliant ACP – liability of smoker – role of superintendent – liability of owners in relation to items stored on balconies – causation and remoteness in relation to failures of building surveyor, architect and fire engineer to exercise reasonable care – would a warning have avoided harm – proportionate liability – allocation of responsibility between building surveyor, architect, fire engineer and smoker – quantum – sufficiency of evidence establishing loss – reliance on assessments by insurance adjuster – loss associated with increased insurance premiums

APPLICANTS	Owners Corporation No.1 of PS613436T (and others according to the schedule on the Tribunal file entitled "Schedule of Parties as at 8 August 2018")
RESPONDENTS	L.U. Simon Builders Pty Ltd (ACN 006 137 220) (and others according to the schedule on the Tribunal file entitled "Schedule of Parties as at 8 August 2018")
WHERE HELD	Melbourne
BEFORE	His Honour Judge Woodward, Vice President

HEARING TYPE	Hearing
DATE OF HEARING	3 September to 11 October 2018
DATE OF REASONS	28 February 2019
CITATION	Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property) [2019] VCAT 286

APPEARANCES:

For the Applicants:	Mr D Curtain QC with Mr W Thomas of counsel
For the First Respondent:	Mr P Murdoch QC with Mr R Andrew of counsel
For the Second and Third Respondents	Mr J L Evans QC with Ms V Blidman of counsel
For the Fourth Respondent	Mr J Twigg QC with Mr J M Forrest
For the Fifth Respondent	Mr T Margetts QC with Mr J B Waters of counsel
For the Sixth Respondent	No appearance
For the Seventh Respondent	No appearance
For the Eighth Respondent	No appearance

REASONS

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INTRODUCTION

1 At about midnight on Monday 24 November 2014, Jean-Francois Gubitta returned home from work. He was on a working holiday from France and had moved into apartment 805 of the Lacrosse apartment tower at 673-675 La Trobe Street, Docklands about three weeks earlier. The tower sits on La Trobe Street just to the north of the Docklands stadium, overlooking the Southern Cross rail yards to the east. Apartment 805 is a two bedroom apartment on level 8 on the east side of the tower. Mr Gubitta was one of six living in the apartment at the time. He dropped his backpack and jacket on his bed, and then went out to the balcony to check if his clothes were dry and to smoke. He left his cigarette butt in a plastic food container that served as an ashtray, sitting on the timber topped balcony table.

2 At 2.23am, the smoke detector in the hallway just outside the front door to apartment 805 activated and generated an automatic alarm to the Metropolitan Fire Brigade. When the first fire crew arrived on scene at 2.29am, a fire was travelling rapidly up the external wall cladding and spreading onto the balcony on each level. The fire had already climbed to level 14. Six minutes later the fire had reached the roof of the tower above level 21. The rapid fire spread compromised the Emergency Warning and Intercommunications System, forcing fire crews to enter every level of the tower and alert occupants of each apartment to ensure total evacuation. According to the fire call log, it was reported at 2.55am that the fire appeared to be under control.

3 This proceeding concerns the attribution of responsibility to (and among) the eight respondents for the damage caused by the fire. The primary focus is on the selection, approval and installation of the aluminium composite wall cladding that carried the fire. The damage to the Lacrosse tower was extensive. The applicants claim current and anticipated future losses exceeding $12 million. But to the great credit of the fire crews and other first responders (and, it seems, the exceptional performance of the fire sprinkler system), all of the approximately 400 occupants of the building evacuated safely and without injury, including Mr Gubitta and his five flatmates. More recent events show that the safe evacuation of the more than 400 residents of the Lacrosse tower is an outcome that should not go unremarked.

THE PARTIES

APPLICANTS

4 There are 211 applicants ("Owners"). The first three applicants are (respectively) Owners Corporation No 1 PS613436T ("OC 1"), Owners Corporation No 2 PS613436T ("OC 2") and Owners Corporation No 4

PS613436T ("OC 4"). OC 1 is the parent corporation of OC 2 and OC 4. All of the owners of individual lots on Plan of Subdivision 613436T, as well as the owners of residential apartments on level 3 of the Lacrosse tower, are members of OC 1. The members of OC 2 are the owners of retail properties on levels 1 and 2 of the tower. The owners of the apartments on levels 4 to 21 are the members of OC 4. The remaining 209 applicants are the owners of individual apartments that are seeking damages in the proceeding.

RESPONDENTS

5 There are eight respondents, five of whom were represented during the hearing by solicitors and both senior and junior counsel—with second and third respondents sharing representation. These were:

- the first respondent, the builder L U Simon Pty Ltd ("LU Simon");
- the second and third respondent, respectively the building surveyor Stasi Galanos and his employer Gardner Group Pty Ltd ("Gardner Group")—for convenience references in these reasons to Gardner Group include Mr Galanos, unless the context suggests otherwise;
- the fourth respondent, the architects Elenberg Fraser Pty Ltd ("Elenberg Fraser"); and
- the fifth respondent, the fire engineer Tanah Merah Pty Ltd, trading as Thomas Nicolas ("Thomas Nicolas").

6 The sixth respondent is Gyeyoung Kim, the occupier of apartment 805, the seventh respondent is Mr Gubitta and the eighth respondent is the superintendent under the building contract, Property Development Solutions (Vic) Pty Ltd ("PDS"). Neither Gyeyoung Kim nor Mr Gubitta has taken any part in the proceeding, and have been joined for the sole purpose of ensuring they are accounted for in any orders apportioning liability among the respondents. PDS participated in the latter part of the interlocutory stages of the proceeding, but reached a settlement and withdrew from direct involvement shortly before the hearing.

THE RESULT

7 For the reasons that follow, I have found that:

- LU Simon breached the warranties of suitability of materials, compliance with the law and fitness for purpose implied into its Design and Construct Contract dated 14 May 2010 ("D&C Contract") with the developer 675 La Trobe Street Pty Ltd ("developer") by (respectively) s8(b), (c) and (f) of the *Domestic Building Contracts Act 1995* (Vic) ("DBC Act"), and is therefore primarily liable to pay damages to the Owners.

- However, LU Simon did not fail to exercise reasonable care in the construction of the Lacrosse tower by installing combustible aluminium composite panels with a core containing polyethylene ("ACPs") on the east and west façades of the tower.
- Gardner Group breached its Consultant Agreement with the developer executed in January or February 2010 and later novated to LU Simon ("GG Consultant Agreement"), by failing to exercise due care and skill in:
  - issuing on 2 June 2011 the Building Permit for Stage 7 of the construction of the Lacrosse tower ("Stage 7 Building Permit") and, in so doing, approving the Elenberg Fraser's specification of ACPs "indicative to Alucobond" ("Alucobond Specification") in clause 2.5 of the T2 Specification dated 17 April 2008 ("T2 Specification"), which specification did not comply with the Building Code of Australia as in force in 2011 ("BCA"); and
  - failing to notice and query the incomplete description of the cladding systems in the fifth iteration of the Fire Engineering Report prepared by Thomas Nicolas bearing the date November 2010 but finalised on about 9 December 2011 ("Fifth FER").
- In the course of my findings in relation to Gardner Group, I have found that ACPs did not satisfy the "Deemed-to-Satisfy" ("DTS") provisions of the BCA by operation of clause C1.12(f) (or on any other basis), and that the opinions of Mr Galanos and the building surveyor expert witnesses to the contrary were unreasonable. Accordingly, Gardner Group fails in its defence based on "peer professional opinion" under s59 of the *Wrongs Act 1958* (Vic) ("*Wrongs Act*").
- Elenberg Fraser breached its Consultant Agreement with the developer executed on about 4 August 2010 and later novated to LU Simon ("EF Consultant Agreement") by failing to exercise due care and skill in:
  - failing to remedy defects in its design (namely, the Alucobond Specification and design drawings providing for the extensive use of ACPs on the east and west façades of the Lacrosse tower, 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.

- Thomas Nicolas breached its Consultant Agreement with the developer executed on about 9 July 2010 and later novated to LU Simon ("TN Consultant Agreement") by failing to exercise due care and skill in:
  - failing to conduct a full engineering assessment of the Lacrosse tower in accordance with the requisite assessment level dictated within the IFEG and failing to include the results of that assessment in the Fifth FER;
  - failing to recognise that the ACPs proposed for use in the Lacrosse tower 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 these matters in the Fifth FER or otherwise.
- Aspects of the conduct of each of Gardner Group and Thomas Nicolas giving rise to the breaches above, also constituted the making of representations to LU Simon that were misleading and deceptive in contravention of the ACL.
- The evidence of fire spread does not support a finding that the storage of items on the balcony of apartment 805 contributed to the ignition of the Alucobest ACPs or subsequent fire spread. Accordingly, I make no adverse findings concerning the role of the sixth respondent Mr Kim, nor in relation to the allegations that the Owners contributed to the cause of the fire by failing to regulate storage on the balconies.
- Mr Gubitta owed a duty to the Owners to take care in the disposal of his smouldering cigarette and he breached that duty by failing to ensure that his cigarette was fully extinguished before leaving it in the plastic container. However, I agree with the Owners' submission that the extent of Mr Gubitta's responsibility for the loss and damage is minimal, and this is reflected in my findings on apportionment.
- PDS's involvement in the sample approval process was not a failure to exercise reasonable care and the evidence of PDS's conduct is otherwise insufficient for me to make any other findings of breach by PDS.
- 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 its breach of the D&C Contract within the meaning of s51 of the *Wrongs Act* and each is a concurrent wrongdoer within the meaning of s24H of that Act. Further, the damages that LU Simon is obliged to pay to the Owners for its breaches of the D&C Contract, all arose naturally according to the usual course from the breach of the various

Consultant Agreements or were within the reasonable contemplation of the parties to those agreements.

- The damages payable by LU Simon to the Owners are to be apportioned between each of the concurrent wrongdoers pursuant to Part IVAA of the *Wrongs Act* in the following proportions:
  - Gardner Group: 33%
  - Elenberg Fraser: 25%
  - Thomas Nicolas: 39%
  - Mr Gubitta: 3%
- Because Mr Gubitta has not taken part in the proceeding and no party has sought judgment against him (in default of appearance or otherwise), there will be no order directly affecting Mr Gubitta. Thus the effect of my apportionment decision above is that LU Simon will not be reimbursed for 3% of the damages it is liable to pay to the Owners.
- Of the total of at least $12,765,812.94 in damages claimed by the Owners, $4,851,937.19 is agreed. The balance of at least $7,913,875.75 can be divided into three parts:
  - costs of reinstatement of property damaged by the fire that are not agreed totalling $1,243,634.10;
  - additional insurance premiums that are disputed totalling $701,270.16;
  - compliance costs, including the future cost of replacing non-compliant cladding and associated costs totalling $5,968,971.49 that are subject to ongoing negotiations; and
  - unquantified future costs relating to the recladding works, the status of which is unclear.
- Of the costs of reinstatement that are not agreed totalling $1,243,634.10, a proportion of those costs totalling $194,414.01 are not proved to my satisfaction. I invite further submissions from the parties on the loss of rent claims totalling $854,194.16. This means that I award the Owners $195,025.93 in respect of those sums. I award the Owners the full amount of their claim in respect of additional insurance premiums totalling $701,270.16. The amount of the compliance costs sought by the Owners seem generally reasonable, but I make no orders about those sums pending the further negotiations between the parties. I will also hear further submissions from the parties in due course on the Owners' entitlement to the so far unquantified sums.
- In summary, the sum to be paid by LU Simon to the Owners based on my findings today total is $5,748,233.28 and each of Gardner

Group, Elenberg Fraser and Thomas Nicolas will be ordered to reimburse LU Simon in respect of that payment in proportions 33%, 25% and 39% respectively, leaving 3% to be borne by LU Simon. Further sums claimed totalling at least $6,823,165.65 are yet to be resolved. A total of $194,414.01 in claims is disallowed. I should note that it is not clear to me based on the material in relation to the damages claims, whether all of the sums claimed and discussed above are (or should be) net of GST. I invite the parties to clarify this and to check my arithmetic as part of finalising orders.

8 The structure of the balance of these reasons is revealed by the table of contents. In broad terms, after a brief summary of matters concerning the conduct of the hearing, I set out the legislative and compliance regime, with particular emphasis on the provisions of the BCA. I then explain the various contractual arrangements between the parties, before giving a chronological narrative of the construction of the Lacrosse tower. This is followed by a discussion of the history of ACPs and the circumstances of the origin and spread of the fire.

9 I then turn to analyse each of the issues raised for consideration, commencing with issues relevant to claims against all parties, being the cause of the fire and fire spread and the question of whether the ACPs were BCA compliant. The specific claims against the parties are dealt with roughly in respondent order, followed by brief consideration of the claims for contribution against the Owners. My reasons conclude with examination of the issues relevant to determining, apportioning and calculating damages, namely, causation, remoteness, proportionate liability and quantum.

10 Given the widespread interest in many of the issues that have arisen for consideration in this proceeding, these reasons should not be read as a commentary generally on the safety or otherwise of ACPs and their uses. There may well be particular applications (such as for signage or decorative features) where ACPs, even with a 100% polyethylene core, can be compliant, including where made subject to an appropriate performance based solution under the BCA. ACPs with a lower polyethylene content may be suitable for more general applications. That is a matter for regulators and building engineering experts.

11 Further, many of my findings have been informed by the particular contracts between the parties in this case and by events occurring in the course of the Lacrosse project that may or may not be duplicated in other building projects. It should also be noted that my findings concern the particular use of ACPs on the Lacrosse tower. This relevantly involved large scale (approximately 4000 square metres) of contiguous installation of ACPs with a 100% polyethylene core on the external walls of a high rise building, including on unsprinklered balconies. The use of ACPs on balconies will self-evidently bring them

into close contact with potential ignition sources such as smouldering cigarettes, barbecues, items carelessly stored on airconditioner compressor units and the like. Again these particular features may or may not be present in other building projects involving ACPs.

12 I will hear further from the parties on the appropriate form of orders giving effect to my findings to date, on the progress of negotiations to finalise the outstanding loss and damages issues and on any further orders or directions that should be made to bring those issues to finality.

THE HEARING

13 The hearing occupied a total of 22 sitting days, commencing on 3 September and concluding on 11 October 2018, one day shy of the scheduled last day. Keeping the hearing to the six weeks allocated almost a year earlier, was largely made possible by the cooperation of the parties—first, in compiling an agreed daily trial schedule and, second, by working with the Tribunal in monitoring the progress of the hearing against that schedule and making adjustments to keep the hearing on track (including through occasional extensions of sitting hours).

14 The parties also showed commendable cooperation in the management of the documents, and this also led to significant time saving. The original tribunal book ran to 79 volumes, increasing to 91 volumes by the conclusion of the hearing. However, only one hard copy of the tribunal book was created for the hearing, and barely used. Instead, most parties, the Tribunal and witnesses worked from electronic copies of documents in portable document format, accessed by hyperlinked document indices. These indices (and the electronic document set) were compiled and managed by the solicitors for LU Simon, under the terms of a protocol settled by the parties, with input from the Tribunal.

15 During the hearing, documents were displayed for witnesses on a computer screen in the witness box, managed by court staff. The alternative would have involved retrieving the folder containing the relevant hard-copy document from the 91 volume set, delivering the folder open at the correct page to the witness and returning the folder to the set, before repeating the process for the next document. In my estimation, this would have added significantly to the hearing time.

16 The hearing proceeded on the basis that any document referred to in 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. Thus, the onus was on any party wishing to object to any document becoming part of the evidence, to raise that objection at the earliest opportunity after the document was to be treated as tendered in the manner described. While there was some brief debate during the hearing about the status of particular documents,

the parties ultimately agreed on a final list of the documents to be treated as tendered in the hearing. The agreed list of documents was provided to the Tribunal by LU Simon's solicitors and is dated 8 November 2018.

17 The evidence-in-chief of all witnesses was given by written statement or, in the case of the expert witnesses, report. The Owners called three lay witnesses:

- Jeffrey Dawson, the chair of OC 1 and OC 4;[1]
- Paul Mayes, a chartered loss adjuster, formerly with Cunningham Lindsey Australia Pty Ltd, which had been appointed by Chubb Insurance Australia Co Pty Ltd to assess the loss from the fire;[2] and
- Gregory Badrock, a Commander of Operations with the Metropolitan Fire and Emergency Services Board ("MFB"), who was responsible for coordinating the preparation of the MFB Post Incident Analysis Report.[3]

18 The Owners also relied on 56 witness statements by individual apartment owners, but none of these were called to give evidence during the hearing

19 Lay witnesses called by the respondents were as follows:

- LU Simon—Jim Moschoyiannis, a director of LU Simon with overall responsibility for the Lacrosse project;[4]
- Gardner Group—Anastasios (Stasi) Galanos, a director of Gardner Group and (in his capacity as the relevant building surveyor on the Lacrosse project) the third respondent;[5]
- Elenberg Fraser—David Palmer, the project architect on the Lacrosse project from about July 2010,[6] and Callum Fraser, the director of Elenberg Fraser with ultimate responsibility for supervising work on the project;[7] and
- Thomas Nicolas—Con Nicolas, the director of Thomas Nicolas responsible for the fire engineering work on the Lacrosse project,[8] and Neumann Ashkar, a fire safety designer and certifier engaged

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1 F1 – statement dated 10 August 2018
2 F3 – statement dated 15 May 2018; F2 – supplementary statement dated 10 August 2018, F67 – second supplementary statement dated 31 August 2018 and I45 – third supplementary statement dated 5 September 2018
3 F68 – statement dated 31 August 2018
4 F60 – statement dated 18 May 2018; I25 – supplementary statement dated 10 September 2018 and
5 F61 – statement dated 6 August 2018
6 F62 – statement dated 13 June 2018
7 F63 – statement dated 5 July 2018
8 F64 – statement dated 12 June 2018 and I120 – supplementary statement dated 24 September 2018

to provide independent fire certification for the fire detection and suppression systems installed in the Lacrosse tower.[9]

20 The expert witnesses comprised architects, building surveyors, fire engineers, a fire investigator and a materials scientist, more particularly as follows:

- The Owners called Timothy Cousins, a systems failure and disaster recovery consultant and trained fire investigator, and Stuart McLennan, a technical consultant with expertise in building regulation. Mr Cousins provided an early draft report and a then a later report, essentially adopting his earlier draft report with some minor additions[10] and Mr McLennan provided two reports.[11]
- LU Simon called John Franceschini, a materials scientist who provided a report concerning the structure and chemical composition of the Alucobond and Alucobest ACPs,[12] Dr Jonathan Barnett, a fire engineer and fire investigator,[13] Mr Stephen Kip, a fire engineer and building surveyor who provided a report covering both building surveying and fire engineering issues[14] and Mark Bullen, a registered architect.[15]
- Gardner Group called three building surveyors, namely, Shane Leonard,[16] Socrates Capouleas[17] and Greg du Chateau.[18] Gardner Group also called fire engineer Benjamin Hughes-Brown.[19] I refused leave to Gardner Group to file a second report by Mr Hughes-Brown.[20]
- Elenberg Fraser called architect Peter Quigley[21] and fire engineer Stephen Wise.[22]
- Thomas Nicolas called a single expert, fire engineer Dr Paul Clancy.[23]

21 Despite the limited time available when the issue of a conclave or conclaves of experts was raised with the parties at a directions hearing

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9 F65 – statement dated 7 August 2018
10 C1 – final report dated 2 May 2018
11 C4 – report dated 9 June 2016 and C3 – supplementary report dated 2 May 2018
12 C2 – report dated 10 August 2018
13 C10 – report dated 21 June 2018
14 C11 – report dated 27 June 2018
15 C15 – report dated 7 September 2017
16 C5 – report dated 16 July 2018 and C7 – supplementary report dated 10 August 2018
17 C6 – report dated 27 July 2018 and C8 – supplementary report dated 10 August 2018
18 C9 – report dated 10 August 2018
19 C14 – report dated 12 August 2018
20 Owners Corporation No.1 of PS613436T v L.U. Simon Builders Pty Ltd (No 3) (Building and Property) [2018] VCAT 1448
21 C16 – report dated 6 August 2018
22 C12 – report dated 3 July 2018
23 C13 – report dated 10 August 2018

on 24 July 2018, the parties were able to organise a conclave of the five fire engineering expert witnesses. Orders were made for the conclave at a directions hearing on 7 August, including appointing Richard Manly QC as facilitator and settling questions for a joint report by the experts (these were supplemented by further orders made 14 August). The conclave took place on 24 and 27 August 2018 and the joint report was signed by the facilitator and each of the five experts on 27 August 2018 ("Joint Report").[24]

22 Where there was more than one expert in a given discipline, the evidence of the experts was given concurrently. Thus the two architects gave concurrent evidence over the best part of a day. The concurrent evidence of the five fire engineers took two days. And the evidence of the four building surveyors plus Mr McLennan (Mr Kip participated in the concurrent evidence of both the fire engineers and the building surveyors) took one day. In my estimation, had each of these 11 witnesses given evidence separately, it is likely to have occupied at least 10 days of hearing time, and longer still without the benefit of the Joint Report.

23 A view at the Lacrosse tower was conducted in the morning on 14 September 2018.[25] This involved inspecting the exterior of the tower and visiting two apartments. The first was an apartment on a higher level, but otherwise with the same configuration, fittings and aspect as apartment 805. The second was a larger apartment with a different aspect, but one which had part of an Alucobest panel on the balcony removed. This facilitated inspection of the fixing system for the panels and the wall cavity behind the panel. Photographs from the inspection were added to the tribunal book.[26]

BACKGROUND

THE LEGISLATIVE AND COMPLIANCE REGIME

The Legislative Structure

24 The *Building Act 1993* (Vic) ("*Building Act*") provides a comprehensive regime regulating building construction in Victoria. The purposes of the *Building Act* include[27]:

- to regulate building work and building standards;
- to provide for the accreditation of building products, construction methods, building components and building systems;

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24 C17
25 Inspection items list at I71, see T967-8
26 I72 – I109
27 *Building Act* s1(a)-(c)

- to provide an efficient and effective system for issuing building and occupancy permits and administering and enforcing related building and safety matters and resolving building disputes;

25 Section 7 of the *Building Act* is the regulation making power. It provides that the Governor-in-Council may make regulations for or with respect to prohibiting or regulating (among other things) the construction of buildings and any matter relating to the safety of buildings, including by establishing standards and requirements relating to these matters. Section 7 goes on the provide that:

> "(3) The standards established by the regulations may be expressed in terms of performance, types of material, methods of construction or in other terms.
>
> (4) The regulations may provide for buildings constructed with particular materials, designs or methods of construction to be deemed to satisfy the prescribed standards."

26 There are a number of other provisions of the *Building Act* that are relevant to the issues in the proceeding as discussed below, notably those relating to the issue of building permits. These include:

- s16(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 the *Building Act* and the work is carried out in accordance with the Act, the *Building Regulations* and the permit;
- s19(1)—the "relevant building surveyor" must decide an application for a building permit by issuing the permit (with or without conditions) or refusing the permit; and
- s24(1)—the relevant building surveyor must not issue a building permit unless he or she is satisfied that the building work and the building permit will comply with the Act and the *Building Regulations*.

27 Regulation 109 of the *Building Regulations 2006* (Vic) (the "*Building Regulations*") adopts the BCA, such that it "forms part of the Building Regulations", effectively giving the BCA legislative force. References in these reasons to the *Building Act*, the *Building Regulations* and the BCA are to those in force in around 2011, copies of which formed part of the Tribunal Book. In particular, it was common ground that the version of the BCA governing the design and construction of the Lacrosse tower is BCA 2006.[28]

Building Code of Australia

28 The proper construction of the BCA is central to the determination of the issues in this proceeding—particularly the provisions of Section C,

[28] D10 to D11

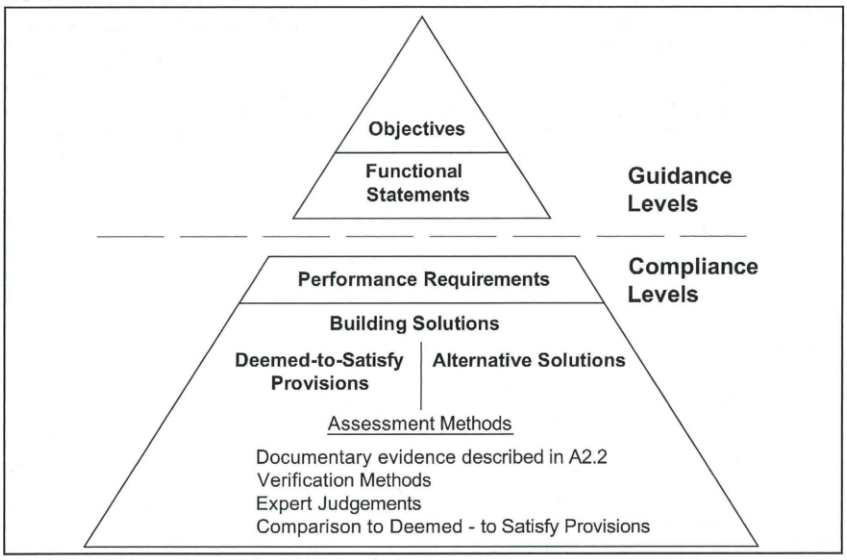
Fire Resistance. But as with the construction of any statutory instrument (indeed, any document), the particular provisions under consideration must be construed in the context of the instrument as a whole. This requires an examination of the introductory provisions and, most notably, the provisions that explain the structure of the BCA. These begin with the provisions in Part A stating the "Goals" and "Format" as follows:

> "GOALS
>
> 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 applied 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.
>
> FORMAT
>
> The BCA is published in two volumes…Both volumes are drafted in a performance format to provide greater flexibility for the use of new and innovative building products, systems and designs. A user may choose to comply with the *Deemed-to-Satisfy Provisions* or may use an *Alternative Solution* that satisfies the *Performance Requirements*."

29 Section A of the BCA contains the "General Provisions" which relevantly include an explanation of the "BCA Structure" and a lengthy list of definitions. These include:

> "**A0.3 BCA Structure**
>
> The structure of the BCA comprises the following as shown in *Figure A0.3*:
>
> (a) The *Objectives*.
>
> (b) The *Functional Statements*.
>
> (c) The *Performance Requirements* with which all *Building Solutions* must comply.
>
> (d) The Building Solutions.

Figure A0.3 — BCA Structure



30 The BCA then explains the structure chart above in more detail as follows:

> "**A0.4 Compliance with the BCA**
>
> A *Building Solution* will comply with the BCA if it satisfies the *Performance Requirements*.
>
> **A0.5 Meeting the Performance Requirements**
>
> Compliance with the *Performance Requirements* can only be achieved by—
>
> (a) complying with the *Deemed-to-Satisfy Provisions*; or
>
> (b) formulating an *Alternative Solution* which—
>
> (i) complies with the *Performance Requirements*; or
>
> (ii) is shown to be at least *equivalent* to the *Deemed-to-Satisfy Provisions*; or
>
> (c) a combination of (a) and (b).
>
> **A0.6 Objectives and Functional Statements**
>
> The *Objectives* and *Functional Statements* may be used as an aid to interpretation.
>
> **A0.7 Deemed-to-Satisfy Provisions**
>
> A *Building Solution* which complies with the *Deemed-to-Satisfy Provisions* is deemed to comply with the *Performance Requirements*."[29]

31 The definitions include:

> "**External wall** means an outer wall of a building which is not a *common wall*.

[29] D11.0005

Combustible means—

(a) Applied to a material − *combustible* as determined by AS1530.1.

(b) Applied to construction or part of a building — constructed wholly or in part of *combustible* materials.

Non-combustible means—

(a) Applied to a material — not deemed *combustible* as determined by AS1530.1 — Combustibility Tests for Materials.

(b) Applied to construction or part of a building —constructed wholly of materials that are not deemed *combustible*.

Sole-occupancy unit means a room or other part of a building for occupation by one or joint owner, lessee, tenant, or other occupier to the exclusion of any other owner, lessee, tenant, or other occupier and includes—

(a) a dwelling; or

…"

32 Part A of the BCA also includes a number of provisions, which are not expressly stated to be "Objectives", "Functional Statements" or "Performance Requirements" but which appear to prescribe overarching obligations in relation to the application of the BCA. These include under "Part A2 Acceptance of Design and Construction", the following:[30]

"**A2.1 Suitability of materials**

Every part of a building must be constructed in an appropriate manner to achieve the requirements of the BCA, using materials that are fit for the purpose for which they are intended.

A2.2 Evidence of suitability

(a) Subject to A2.3 and A2.4, evidence to support that the use of a material, form of construction or design meets a performance Requirement or a Deemed-to-Satisfy Provision may be in the form of one or a combination of the following:

(i) A report issued by a Registered Testing Authority, showing that the material or form of construction has been submitted to the tests listed in the report, and setting out the results of those tests and any other relevant information that demonstrates its suitability for use in the building.

…

(v) A current Product Listing Data Sheet and listing entry in the Register of Fire Protection Equipment, as issued by

[30] D11.0024

Scientific Services Laboratory under its ActivFire Scheme.

(vi) Any other form of documentary evidence that correctly describes the properties and performance of the material or form of construction and adequately demonstrates its suitability for use in the building."

33 A number of provisions of the BCA are subject to detailed consideration as part of the issues analysis below. Most of these are found in Section C of the BCA: "Fire Resistance". The following are important in understanding the context of the provisions of Section C, noting that, "Objectives" and "Functional Statements", "may be used as an aid to interpretation", but "Performance Requirements" are mandatory.[31]

"**OBJECTIVE**

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.

FUNCTIONAL STATEMENTS

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

(d) to adjoining *fire compartments*; and

(e) between buildings.

PERFORMANCE REQUIREMENTS

…

CP2

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

(i) to *exits*; and

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[31] D12.0004-5

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

(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

…

SPECIFICATION C1.1 FIRE-RESISTING CONSTRUCTION

1. SCOPE

This Specification contains requirements for the *fire-resisting construction* of building elements.

…

3. TYPE A FIRE·RESISTING CONSTRUCTION[32]

3.1 **Fire resistance of building elements**

In a building required to be of Type A construction—

…

(b) *external walls*, *common walls* and the flooring and floor framing of lift pits must be *non-combustible*;

…"

How should construction of the BCA be approached?

34 In relation to the general approach to the construction of the BCA, Gardner Group submits that:[33]

> The Tribunal is tasked with construing various provisions of the BCA and it must do so as an exercise of statutory interpretation. The task is complicated because the instrument which is to be interpreted and given the force of regulations, is not drafted in the form of legislation or regulations, or by those experienced in the act of legislative drafting. Perhaps the single issue upon which all experts in the case agreed was that the building scheme (which must include the BCA) is plagued by problems of terminology.[34] It is submitted that the BCA exemplifies the problem at hand. However, the task of interpreting the provisions of the BCA is a matter for the Tribunal and not

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32 D12.0035
33 I160 at [43]
34 T2501-2

> predicated upon the opinion of experts.[35] 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.[36] It is submitted that in undertaking that task, the Tribunal will be aided by reference to dictionaries and technical dictionaries.[37]

35 With the exception of the reference to problems of terminology (which, to me, is somewhat overstated) I agree. In addition to the passages referenced in Gardner Group's submissions, D C Pearce and R S Geddes, *Statutory Interpretation in Australia* also notes that "...Government-related documents that are not legislative in character but which are nevertheless intended to influence decision making, such as sets of standards and guidelines, are commonly designated 'soft law'. Despite the non-legislative nature of such documents, many of the interpretive principles that are discussed in this book are applied in their interpretation."[38]

36 In the decision cited by Gardner Group *The Owners - Strata Plan No 69312 v Rockdale City Council & Anor; Owners of SP 69312 v Allianz Aust Insurance*[39], Lindsay J observed:

> "…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."[40]

37 In considering whether the Code was a legislative instrument that attracted the operation of the *Interpretation Act* 1987 (NSW) or whether it was a 'standards code', His Honour stated that in his opinion "the BCA appears always to have been something of a hybrid."[41] His Honour did not find it necessary to decide whether the Code was a legislative instrument or not.[42] He found that the wording of the clause in question in the Code was sufficiently clear, and the application of statutory interpretation principles supported that position:

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35 *The Owners - Strata Plan No 69312 v Rockdale City Council & Anor; Owners of SP 69312 v Allianz Aust Insurance* [2012] NSWSC 1244 at [108]

36 DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, Eighth edition, LexisNexis Butterworths, p167 to 168.

37 Ibid, p118.

38 Ibid, p2.

39 [2012] NSWSC 1244

40 At [30]. The reference in the final sentence to the EPA Act is to a clause that bears wording similar to that in s109 of the Regulations.

41 At [60].

42 At [59].

> "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. As will become apparent, I have formed the view that the text of the definition of 'effective height' in the Code is clear in its intendment, and the clarity that attaches to it can generally be justified by reference to either a 'literal' or 'grammatical' approach to construction or a 'purposive' one, whether or not recourse is had to ss33-34 [of the Interpretation Act]."[43]

38 As a guideline, His Honour noted that (emphasis added) "[t]he focus of attention is, and should remain, on the text of the BCA. The task of the Court is to construe the definition of 'effective height' according to law, not by reference to what may, or may not, be *the opinion of an expert* or an assumption about the practical operation of the BCA amongst fire control experts."[44] I have been mindful of these considerations in approaching the construction questions below.

Fire Engineering Guidelines

39 In March 1996, the Fire Code Reform Centre Limited published the Fire Engineering Guidelines ("1996 FEG").[45] The 1996 FEG were introduced with the statement that:

> "The following organisations have endorsed this document as describing an appropriate engineering methodology for design and assessment of fire safety in buildings by competent practitioners
>
> • Australian Building Codes Board (ABCB)
>
> • Australian Fire Authorities' Council (AFAC)
>
> • Australian Institute of Building Surveyors (AIBS)
>
> • The Institution of Engineers, Australia (IEAust) - through its Society of Fire Safety".[46]

40 In its introductory section under the heading "Important Note" the 1996 FEG states:

> "This Fire Engineering Guidelines document is not a design Code and does not detail all the engineering technology required for building fire-safety design. It outlines procedures and methodologies for undertaking building fire-safety designs and is intended primarily for use by suitably qualified and competent fire engineering practitioners, who are fully familiar with modelling the capricious nature of fire and

43 At [61].
44 At [111].
45 D18
46 D18.0003

of the behaviour of materials, structures and people when exposed to fire hazards. Fire engineering design activities require the application of professional knowledge, engineering judgments and appropriate understanding of the assumptions, limitations and uncertainties involved."[47]

41 It provided at Chapter 7 that (emphasis added):

> "Before a fire safety engineering assessment of a building can begin it is necessary *to assemble design information on the fabric and structure of the building*, the fire safety systems, the contents, the occupants and the environment. This information affects the likelihood of a fire occurring, how the fire spreads and its potential for causing damage to humans and property.
>
> …
>
> The [Fire Engineering Design Brief] requires that the building designer (e.g. architect) explains to the fire safety engineer the concept and relevant details. These will include details of building usage, activities within rooms, location of circulation spaces in normal use, and the emergency evacuation strategy, if any. During this review it may become clear to the experienced fire safety engineer that there are several fire hazards which represent life-threatening fire scenarios which require in-depth consideration if they cannot be removed by, for instance, the simple addition of a fire barrier or an automatic fire suppression system."[48]

The "fabric and structure of the building" is identified in the 1996 FEG as including the "nature of construction (eg materials forming the frame, walls, partitions, floors, suspended ceilings and roof)".[49]

42 The 1996 FEG (and a subsequent edition published in 2001) were superseded in 2005 by the *International Fire Engineering Guidelines* ("IFEG").[50] This was the document in force throughout the relevant period. Under the heading "Evolution" the IFEG provides as follows:

> "The International Fire Engineering Guidelines (IFEG) represents the third edition of the guidelines and supersedes both the first and second editions published in 1996 and 2001 respectively. The 1996 and 2001 editions are therefore no longer current and should not be used or referred to.
>
> The objectives of the Guidelines are to:
>
> - provide a link between the regulatory system and fire engineering (Part 0);
> - provide guidance for the process of fire engineering (Part 1); and

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47 D18.0003
48 D18.0103
49 D18.0104, clause 7.2.1
50 D19

- provide guidance on available methodologies (Part 2) and data (Part 3).

This document has been written in the form of guidelines rather than in a mandatory or code format to reflect the current state of the art of fire engineering. The use of a mandatory format was discussed at length before the development of both the first and second editions (see below) of these Guidelines. It was concluded that fire engineering lacks the necessary array of validated tools and data to produce such a mandatory document.

Fire engineering designs are complex and generally require the extensive use of engineering judgement. In addition, those required to approve the output of fire engineering designs need an understanding of the fire engineering process and what constitutes an acceptable fire engineering design. Therefore, guidance is required both to improve the standard of application of fire engineering by practitioners and to improve the ability of the Authority Having Jurisdiction (AHJ) to carry out their function of safeguarding the community."[51]

43 According to Mr Kip, the IFEG are:

"…a well-established and recommended methodology for the application of fire safety engineering, including the preparation of fire safety engineering reports".[52]

CONTRACTS WITH THE CONSTRUCTION RESPONDENTS

44 The contracts entered into by each of LU Simon, Gardner Group, Elenberg Fraser and Thomas Nicolas are pivotal in ascribing liability for the various claims in the proceeding. Despite this (or perhaps because of this) each of Elenberg Fraser and Thomas Nicolas sought to deflect attention from their respective Consultant Agreements. In the case of Elenberg Fraser, it did this by seeking to focus attention instead on LU Simon's design responsibility under its D&C Contract with the developer. And Thomas Nicolas argued in substance that its obligation to conduct a "full fire engineering assessment" did not extend to identifying the proposed use of combustible ACPs on the external walls of the Lacrosse tower. In my view, these approaches to the construction of the relevant Consultant Agreements should be rejected.

45 None of the submissions of the parties raise any fine points of contractual construction requiring a detailed examination of the agreements as a whole or (to the extent they may be called in aid), the surrounding circumstances known to both parties. However, it is worth emphasising that these are commercial arrangements between parties who are, without exception, sophisticated professionals with considerable experience in the building industry. Thus the principles of

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51 IFEG D19.0012-0013
52 Mr Kip at 2.6, C11.0015

construction applicable to the contracts in this case are relevantly stated in the decision of the High Court in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* ("*Mount Bruce*").[53]

46 *Mount Bruce* confirms that, in determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract. Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning. Unless a contrary intention is indicated, the court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption that the parties intended to produce a commercial result. Put another way, a commercial contract is to be construed so as to avoid it making commercial nonsense or working commercial inconvenience.

The Builder, LU Simon

47 The D&C Contract between the developer and LU Simon was executed on 14 May 2010 and runs to some 132 pages.[54] It has numerous lengthy annexures[55] and was amended by amendment deeds dated 3 August 2010[56] and 9 January 2012[57]. The annexures relevantly included Annexure Part G, "Existing Design Documents".[58] It was not in dispute that these documents included the T2 Specification,[59] which was thus incorporated into the D&C Contract. Fortunately, with the exception of the T2 Specification, the proper construction of the terms of the D&C Contract was not in contention. Further, the only provisions relied on in the proceeding were essentially:

- the warranties forming part of the D&C Contract by operation of s8 of the DBC Act (relied on by the Owners); and
- the provisions of the D&C Contract imposing design obligations on LU Simon (relied on by Elenberg Fraser).

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53 (2015) 256 CLR 104; [2015] HCA 37, per French CJ, Nettle and Gordon JJ at [46]-[52]
54 B1
55 B2 to B30 (inclusive)
56 B31
57 B32
58 B1.0031
59 B8.0003

48 The Owners submit that LU Simon breached the following warranties in connection with the installation of the Alucobest panels as part of the external cladding of the building:[60]

- that all materials to be supplied by the builder for use in the work would be good and suitable for the purpose for which they were used as required by s8(b) of the DBC Act;
- that the work would be carried out in accordance with, and would comply with, all laws and legal requirements including the *Building Act 1993* (Vic) and the regulations made under that Act (which regulations adopt and incorporate the BCA[61]) as required by s8(c) of the DBC Act; and
- if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, that the work and materials used in carrying out the work would be reasonably fit for the purpose of the building (being a 21 storey residential apartment building), as required by s8(f) of the DBC Act.

49 For the purpose of establishing that the developer relied on LU Simon's skill and judgment as required by s8(f) of the DBC Act, the Owners point to the following further provisions D&C Contract:[62]

- recitals B and C, to the effect that the developer was engaging LU Simon "to design and construct the Works in accordance with the Principal's Project Requirements" and that LU Simon had agreed to "design and construct the Works in accordance with the Contract";[63]
- the definition of "Principal's Project Requirements", which includes "the development of the Residential Apartments for sale to purchasers under Contracts of Sale and their use as private dwellings";[64]
- clause 2.1 of Annexure F, which provides that the developer's objectives include "to develop a prestigious residential apartment and serviced apartment development which is true to the style and quality expected by the target market that is Melbourne Docklands";[65] and

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60 I158 at [20]
61 r109 of the *Building Regulations 2006* (Vic)
62 I158 at [47]
63 B1.0014
64 B1.0035
65 B7.0009

- clause 2.2 of Annexure F, which provides that "work under the Contract must be fit for the purpose of achieving the Principal's Project objectives referred to in Section 2.1 above".[66]

50 The provisions of the D&C Contract highlighted by Elenberg Fraser were those that obliged LU Simon to design and construct the "Works":

- in accordance with the "Principal's Project Requirements";[67]
- in a manner which was fit for the purposes of the "Works identified in the Principal's Project Requirements";[68]and
- so as to ensure compliance with all Approvals and with all applicable laws including without limitation the planning permit, the building legislation (including the BCA) and with the lawful requirements of any government agency.[69]

51 Elenberg Fraser also noted that clauses 7.1 to 7.8 of the D&C Contract impose contractual obligations upon LU Simon with respect to development of the design, with LU Simon assuming "all risk and responsibility with respect to the design of the Works" including all risks with respect to the "adequacy and sufficiency of the Existing Design Documents", the "coordination of further Design Documents with Existing Design Documents" and the "final design for the Works".[70]

52 Elenberg Fraser further noted that[71]:

> "The T2 Specification included performance requirements with which LU Simon was obliged to comply…Further it provided: *Although the Preliminary Design Drawings show considerable detail and dimensions, no warranty or representation is given by the Superintendent as to the accuracy of such dimensions or the adequacy or buildability of such details. Should the Contractor adopt the details or arrangements indicated on the Preliminary Design Drawings it will be deemed that they have checked their buildability and performance in terms of the Specification, all relevant statutory requirements and manufacturers (sic) recommendations for any products referred to.*[72] (emphasis added)"

The Building Surveyor, Gardner Group and Mr Galanos

53 Andrew Gibson of Gardner Group sent a fee proposal dated 5 April 2007 to Pan Urban Pty Ltd offering the provision of building surveying

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66 B7.0010
67 Clause 7.1(a) B1.0052
68 Clause 7.1(b) B1.0052
69 Clause 7.1(c) B1.0052
70 Clause 7.8,B1.055
71 I161 at [40]-[41]
72 G299.0017 clause 5.1C

services for the Lacrosse project.[73] The terms of the fee proposal described Gardner Group's skills and competencies as including "Understanding the facility with using (sic) Risk Assessment techniques in assessing compliance with the performance requirements of the technical aspects of the BCA". The services that Gardner Group agreed to provide under the fee proposal included a: "System based assessment in accordance with the objectives, functional statements and performance requirements of the BCA…Approve fire engineering report…Review architectural, structural and services documentation for compliance with BCA".

54 According to the fee proposal, the staff to work on the project included Andrew Gibson as "Director Responsible" and Stasi Galanos as "Technical Director and Senior Building Surveyor". The fee proposal was accepted by Mr Ciarma of Pan Urban Pty Ltd by letter dated 9 May 2007[74] and Gardner Group started providing services to the Lacrosse project later that month. It was not in dispute that the fee proposal continued to govern the role and responsibilities of Gardner Group in respect of the project until it signed its formal (undated) GG Consultant Agreement[75] in late January or the first half of February 2010.

55 The GG Consultant Agreement took the usual form for contracts of this kind, in that it comprised a covering agreement of a few pages which incorporated (and attached) as part of the contract the "AS4122-2000 Australian Standard Amended Form General Conditions of Contract for Engagement of Consultants" ("AS General Conditions"). In addition to incorporating those AS General Conditions, the covering agreement:

- (in clause 4) engages Gardner Group to perform the "Services" as defined and provides that Gardner Group "agrees that its engagement may be novated by the Principal to…any construction contractor to be engaged by the Principal to undertake the Works";[76] and
- contains a number of general boilerplate provisions, including an "Entire agreement" clause, which provides that it "embodies the entire agreement between the parties with respect to the subject matter of the Contract and supersedes and extinguishes all prior agreements and understandings between the parties with respect to the matters covered by the Contract".[77]

56 The AS General Conditions include the following definitions:

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73 G4
74 G4.0013
75 B33
76 B33.0006
77 Clause 5.5, B33.0005

"'Brief' means the Client's brief as stated in the documents listed in item 1 as may be varied (subject to the Contract) by instruction in writing by the Client from time to time

'Legislative Requirements' includes… Acts, Ordinances, regulations, by-laws, orders, awards and proclamations of the Commonwealth and the State or Territory applicable to the Services

'Services' means all professional services described in or necessary to fulfil the Brief, including without limitation those specified in Annexure Part D, together with such other activities which the Consultant is required to carry out under the Contract.

57 Importantly, clause 2 of the AS General Conditions—"Nature of the Contract"[78]—includes provisions that:

"(c) The Consultant shall 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 and who possesses the knowledge, skill and experience of a Consultant qualified to act in that capacity.

(d) The Consultant has examined the Brief and the Services are suitable, appropriate and adequate for the purpose stated in the Brief, having regard to the assumptions that the Consultant can be reasonably expected to make in accordance with sound professional principles."

58 Under clause 3, "Responsibilities and obligations of the Consultant"[79], the AS General Conditions provide that:

The Consultant shall:

(c) with due expedition and without delay and in accordance with the Program, if any, provided all professional skill and advice required for carrying out the Services;

…

(e) remain fully responsible for the Services carried out by the Consultant or any subconsultant, notwithstanding any review or acceptance of those Services by the Client [developer] or any approval, direction, instruction or information given by or on behalf of the Client;

…

(h) promptly give written notice to the Client if and to the extent of the Consultant becomes aware that any document or other information provided by the Client or another of the Client's consultants is ambiguous or inaccurate or is otherwise insufficient to enable the Consultant to carry out the Services;

…

78 B33.0014
79 B33.0016-17

(l) comply with all Legislative Requirements in carrying out the Services;

…

(u) prepare the Contract Material so that it is fit for the purposes of the Project as stated in the Brief having regard to the assumptions that the Consultant can be reasonably expected to make in accordance with sound professional principles;

…

(v) prepare the Contract Material in a manner consistent with the requirements of the Brief and satisfy all Legislative Requirements applicable to the design of the Work including, without limitation, all applicable requirements of the Building Code of Australia, Australian Standards and Authorities' requirements;

…

(x) inspect the Works during construction for compliance with the Brief, Contract Material and all applicable Legislative Requirements, provide monthly certificates in respect of such inspection to the Client…in the form of Annexure Part F or in such other form approved by the Client".

59 The AS General Conditions include an express indemnity (clause 9.2) pursuant to which Gardner Group agreed to indemnify the "Client" against:

> "claims by any person against the Client in respect of …loss of or damage to any other property, arising out of or in consequence of carrying out the Services by the Consultant but the Consultant's liability to indemnify the Client shall be reduced proportionally to the extent that the act or omission of the Client or the employees, agents or other contractors of the Client contributed to the loss, damage, death or injury."

60 The "Design obligations" of the Consultant include the following (clause 17.3):

> "(d) The Consultant shall accept all design risk and liability in all Contract Material prepared by the Consultant, whether prepared before or after the date of the Contract… .
>
> (e) The Consultant shall be liable for the accuracy and completeness of all Contract Material prepared by the Consultant, whether prepared before or after the date of the Contract…except to the extent caused by error or omission (other than a manifest error or omission) in material prepared by other Consultants of the Client and provided to the Consultant for the purposes of performance of the Services."

61 Novation of the GG Consultant Agreement is dealt with in clause 17.8 of the AS General Conditions, which provides that:

"The Consultant agrees that, at the request of the Client, by notice in writing from the Client to the Consultant, the benefit and burden of the rights and obligations of the Consultant shall be novated from the Client to the construction contractor. At the request of the Client, the Consultant shall immediately execute a deed of novation on or substantially on the terms set out in An extra Part G to effect such novation. The Consultant shall bear and continue to bear full liability and responsibility to the Client and in addition, following novation, to the construction contractor, for the Services… Upon any novation… the construction contractor… will be the Client for the purposes of the Contract…"

62 As noted above, the GG Consultant Agreement defines the "Services" by reference to "Annexure Part D: Services". Unlike the pro-forma style of the "AS General Conditions", the provisions in this part of the agreement are more tailored both to the particular project and the particular consultant. They are set out in a document titled "Scope of Services Building Surveyor for LaCrosse Stage 1 Docklands December 2009 Rev 2". The language in this annexure is less formal and legalistic and does not make consistent use of definitions or defined terms. The "General Scope of Services"[80] provides that:

"The general Scope of services attached hereunder is not intended to be fully detailed or exhaustive. The consultant (sic) is required to provide all services that are normal for this type of project.

…

- Participate in design phases and provide additional advice and review of further design alternatives, cost saving initiatives, etc. Further liaison with reporting authorities and resolution of non-complying items. Provide report for inclusion in building contract and the Principal's Project Requirements

  ….

- Consultant to provide documents that comply with the relevant standards and BCA.

63 In the "Masterplanning Phase",[81] the Services included:

"- Carry out preliminary require (sic) of schematic design/design development design documents to identify levels of compliance with the Building Code of Australia, Building Regulations and Building Act. Prepare a regulatory design report for the use by the project team for design development.

…

- Liaison with MFB including meetings as required.

…

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80 B33.0043
81 B33.0044

- Meetings and consultancy with Fire Engineer on approach and agreement of approval parameters."

64 In the "Concept Design Phase", the Services included:

"- Fully appraise itself of all information and documentation, which the Principal has made available to the Building Surveyor for the purposes of the Project.
- Liaise with Consultants to obtain a clear understanding of Development proposed.
- Advise on all aspects of the statutory and necessary approval requirements

…

- Provision of advice on regulatory compliance of design options including the identification of areas in which alternative regulatory solutions could be adopted to achieve greater project efficiencies.
- Preparation of a Building Code of Australia report detailing relevant technical code provisions and providing recommendations on the most appropriate compliance strategy for the various buildings.

65 In the "Schematic Design Phase",[82] the Services included"

- Review all work and information completed to date and confirm compliance with the BCA and other applicable governing regulations prior to proceeding with further work which is reliant upon any/all existing or prior information.

…

- Further analyse and advise/report on the design brief relative to the BCA.
- Liaise and consult with the Fire Engineering consultant with respect to performance-based design regulatory and Egress requirements for concessions the these (sic) respective areas throughout this phase of the design works.
- Carry out a preliminary regulatory assessment of architectural and all services design and prepare a report advising the design team of non-compliances with all statutory or regulatory requirements.

…

- Review developing documentation for BCA and regulatory compliance and provide ongoing advice to the design team.

…

- Assessment of the overall project with regard to compliance with Building Code requirements.

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[82] B33.0045-46

…

- Preparation of a Building Code of Australia report detailing relevant technical code provisions and providing recommendations on the most appropriate compliance strategy."

66 The "Services" in the "Design Development Phase"[83] largely repeat those set out in the Schematic Design Phase, including provisions for the review of all documentation for compliance with the BCA and preparation of associated reports. These themes are repeated in the final "Construction Documentation Phase",[84] with more specificity in relation to documentation. For example:

"- Ensure all design documentation complies with the requirements of the Fire Authority and obtain all required stamped plan and approval documentation.
- Certify plans and specifications at various stages. Make all due inquiry and receive all necessary reports to ensure compliance with the requirements of the Building Act, the Building Code of Australia and the Building Regulations, and issue Building Permit(s).

…

- Liaise with D & C contractors with respect to the BCA compliance including performance-based alternatives.

…

- Ongoing review of services, architectural and structural documentation in relation to compliance with relevant legislation.

…

- Continued advice to the consultant team in relation to compliance issues and possible alternative strategies for achieving regulatory compliance.
- Coordination of the Fire Engineering design process, liaison with the appointed Fire Engineering Consultant and provision of input into the design as necessary to ensure approval on design completion.
- Assessment and approval of the final fire engineering design."

67 The "Deed of Novation" of the GG Consultant Agreement was executed on about 23 June 2010.[85] The effect of the deed was that, following novation, Gardner Group became liable to LU Simon as if LU Simon was the "Principal" under the GG Consultant Agreement. Notably, the deed provides that Gardner Group shall:

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83 B33.0046-47
84 B33.0047-48
85 Included as "Annexure Part G: Deed of Novation" to the GG Consultant Agreement (see B33.0054, see also B34)

"(i) perform, discharge and carry out for the benefit of the Contractor all of the obligations and liabilities of the Consultant then existing or remaining or which arise thereafter pursuant to and in accordance with the Consultant Agreement including, without limitation, completion of any part of the Services remaining under the Consultant Agreement; and

(ii) be liable to the Contractor 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)."[86]

68 The fee payable to Gardner Group under the GG Consultant Agreement in "Annexure Part E: Fees", was a total of $80,152 (plus GST), including "Post Novation Works" of $56,400.00.[87]

The Architect, Elenberg Fraser

69 Elenberg Fraser was involved from the earliest stages of what became the Lacrosse project. Its engagement was formalised by a "Client & Architect Agreement" with Pan Urban Pty Ltd dated 12 June 2007.[88] This agreement set out in point form the "scope of services" that Elenberg Fraser agreed to provide, broken down into "Master Planning/Predesign", "Sketch Design", "Design Development", "Contract Documentation" and "Construction Services". The fee was fixed at $3,900,000, based on 3% of an "Assumed Construction Cost" of $130,000,000 (noting that, at this time, the project involved two towers). As with Gardner Group, this document set the parameters of Elenberg Fraser's contractual responsibility until it executed the EF Consultant Agreement on around 4 August 2010.[89]

70 The EF Consultant Agreement followed largely the same form as the GG Consultant Agreement, including by incorporating the AS General Conditions, and I will not repeat the key definitions and provisions as set out above. However, matters of particular note in relation to the EF Consultant Agreement are:

- Under "Responsibilities of the Consultant", clause 3(s), which provides that:

  "[the Consultant shall:] where appointed as principal design consultant, be responsible for the proper coordination and

86 B33.0056, clause 4(a)
87 B33.0052
88 G9
89 B35

integration of the work of all other consultants appointed by the Client into the design of the Works".[90]

- The more detailed provision for inspection of the Works in clause 3(x) as follows:

  "[the Consultant shall:] inspect the Works during construction for compliance with the Brief, Contract Material and all Legislative Requirements applicable to the Services, exercising the knowledge, skill and expertise of an appropriately experienced, competent and qualified architect and provide monthly certificates in respect of such inspection to the Client…".[91]

71 As with the GG Consultant Agreement, "Annexure Part D: Services" to the EF Consultant Agreement comprises the specifically tailored document titled "Scope of Services Architect for LaCrosse Stage 1 Docklands December 2009 Rev 7".[92] This commences with the "General Description of Services" as follows:

> "Provide Architectural Consultant Services including the provision of Masterplanning, Schematic Design, Design Development, Contract Documentation and Construction stages for the proposed development of LaCrosse Stage I, 675 Latrobe Street, Melbourne Docklands (the "Project"), in accordance with the following principles.
>
> 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.
>
> The Architect shall comply with the agreed design program (and updated versions thereof as may occur from time to time) and provide other design consultants with sufficient design information in a timely fashion so as to enable other design consultants to comply with the design program.
>
> All Architectural Consultants engaged in the Project shall participate and contribute equally to the overall Architectural design coordination to take all reasonable steps to ensure coherent and seamless interface between the respective consultancy scopes of work. Architectural consultants shall similarly ensure that best industry practices are employed with respect to Architectural and urban design, construction and standardisation of detailing, to deliver a total end product which expresses unity and integrity in all respects."

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90 B35.0016
91 B35.0017
92 B35.0043

72 The Services to be provided by Elenberg Fraser in the various phases of the project included the following:

- In the Schematic & Concept Design Phase:[93]

  "▫ Provide all documentation for all required approvals, permits and licences from all regulatory authorities and organisations and provide all attendances is requested or required.

  ▫ Coordinate and administer the work of all consultants to produce an integrated coordinated and accurate design and documents package which are fit for efficient construction purposes within accepted industry practice and standards."

- In the "Design Development Phase and Marketing" phase:[94]

  "▫ Undertake the detailed design of the project incorporating and coordinating the requirements of consultants and regulatory authorities and fully defining all building elements, finishes, materials, fixtures and finishes.

  ▫ Comment on and make recommendations on all aspects of design development and selection/substitution of materials and systems as appropriate.

  ▫ Following the client's approval of the sample boards and perspectives, develop fully detailed specifications and detailed drawings of all architectural finishes within the approved budget."

- In the "Contract Documentation Stage":[95]

  "Undertake the preparation and coordination of all construction drawings, details, specifications, sketches, schedules and all other information that fully describes the Projects (sic) construction suitable for construction purposes, satisfying all requirements for the obtaining of staged building approvals."

  ▫ Develop drawings from the design development phase including providing necessary drawings to show fully detailed and dimensioned constructional requirements including but not limited to:

  …

  . Full-size and appropriately scaled details of façade components".

  ▫ Prepare Architectural documents and coordinate the consultant's documents required for submission for building permit approval including that required for building referees."

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93 B35.0045
94 B35.0046-47
95 B35.0047-48

- And under "Construction Phase", "Inspections":[96]

  - "▫ 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 and documents.
  - ▫ Inspect and approve samples as required in the architectural specification."

73 The Deed of Novation signed by Elenberg Fraser (also on about 4 August 2010),[97] was in essentially the same terms as that signed by Gardner Group, discussed above. The fee payable to Elenberg Fraser provided for in the EF Consultant Agreement was $2,660,070.79 (plus GST), comprising $1,092,000 identified in the agreement as "Post Novation".

The Fire Engineer, Thomas Nicolas

74 In August 2007 Thomas Nicolas was approached by Karl Engstrom, the Project Architect at Elenberg Fraser. It seems that Mr Engstrom discussed the project and requested that Thomas Nicolas submit a fee proposal to provide fire engineering services for the project. In response, Thomas Nicolas prepared a letter[98] setting out in detail the scope of the "Fire Engineering Consultancy Services" which it offered, and the fee for those services. The letter states:

> "Objective
>
> Our objective is to provide the service to facilitate and compliment design flexibility, cost efficiencies and the public safety required for the functional use of the building within the performance context of the Building Code of Australia.
>
> Consultancy Overview
>
> The consultancy proposed is essentially to undertake the Fire Engineering Design as needed for the development to meet the performance life safety and protection requirements of the nominated

96 B35.0049
97 B35.0054, see also B36
98 G31

provisions of the Building Code of Australia. The design parameters are to be quantified from a fire engineering perspective."

75 The scope of services was then described in detail under the heading "Fire and Life Safety Performance Parameters" and includes the following:

> "(a) Preliminary liaison with the design consultants providing advice in relation to concept designs with the view that such concepts are cost effective, practical and within the context of the performance BCA requirements for the building (ie:- determine the extent of performance fire engineering to be undertaken).
>
> (b) Undertake preliminary (concept) fire engineering design for the building in report form which overviews the necessary works to be undertaken to meet the relevant performance requirements of the BCA.
>
> …
>
> (c) Undertake the performance fire engineering analysis and life safety design for the building generally from a quantifiable basis in accordance with the performance provisions of the BCA and the Fire Engineering Design Guidelines.
>
> The assessment of the quantitative components of the analysis is to include but is not limited to the following fire and life safety sub-systems
>
> …
>
> (iii) Fire Spread and Management.
>
> (d) Issue fire engineering design report for the building.
>
> (e) Liaise with individual consultants as required to optimise the fire engineering design solutions on an as needs basis.
>
> (f) Liaise with and brief the MFB on the performance fire engineering analysis and fire safety matters to assist in obtaining dispensation approvals relating to any Regulation 309 application.
>
> (g) The overview of the commissioning of equipment and essential services sub-systems in conjunction with the relevant engineer and sub-contractor for the purpose of facilitating the construction/installation meets with the performance design criteria."

76 The fee for the services for both towers was $67,000 (plus GST). The reference in the letter to "Fire Engineering Design Guidelines" is likely to be a reference to the 1996 FEG,[99] not the IFEG (the latter would generally be identified using "International" in the name).

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[99] D18

77 Thomas Nicolas sent a second letter to Elenberg Fraser on 23 August 2007,[100] which set out a "snapshot" of areas "that could be addressed utilising the performance (fire engineered) parameters of the BCA". This letter also stated that:

> "It should be noted that this office undertakes fire engineering on a global basis and will address design parameters directly with relevant engineers as appropriate. Furthermore, this office will undertake required discussions with relevant contractors and principle contractor to ensure that the fire engineering design intent is met together with witnessing of the final commissioning process."

78 In November 2007, Thomas Nicolas issued a further letter which was in essentially the same terms as the letter sent to Elenberg Fraser in August 2007, but this one was addressed to the developer's representative Pomeroy Pacific Pty Ltd[101] and had a revised fee totalling $75,000 (plus GST). A third version of this letter was issued by Thomas Nicolas to PDS on 14 September 2009.[102] This was again in essentially the same terms as the August 2007 letter addressed to Elenberg Fraser, except for the fee. This had been adjusted to allow for the decision to proceed only with stage 1 of the Lacrosse project.

79 The TN Consultant Agreement[103] is undated, but appears to have been executed on around 9 July 2010, when the Deed of Novation of the TN Consultant Agreement[104] was also signed. The TN Consultant Agreement and Deed of Novation were in substantially the same terms as the GG Consultant Agreement and Deed of Novation, including each of the provisions set out above. The "Services" were again found in a specifically tailored document comprising "Annexure Part D: Services", titled "Scope of Services-Fire Engineer for Lacrosse Docklands Stage 1 PDSGroup May 2010 Rev 1".[105] This provided (in part) as follows:[106]

> "The Consultant acknowledges that the list is not a definitive description of the Services and that neither the list nor its division (sic) will limit or affect the Consultant's general obligation to provide the Services and to do all things that might reasonably be expected of the Consultant from time to time as necessary or appropriate to secure the proper and timely design, construction and completion of the Project.
>
> …

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100 G32
101 G80
102 G452
103 B37
104 B37.0087, see also B38
105 B37.0082
106 B37.0083

b. Fully appraise itself of all information and documentation, which the Principal has made available to the Fire Engineer for the purpose of the Project.

c. Liaise with the Building Surveyor primarily and other consultants to obtain a clear understanding of the Development proposed.

d. Conduct a full engineering assessment in accordance with the requisite assessment level dictated within the International Fire Engineering Guidelines (2005).

e. Advise on Fire Engineering design and management aspects of the project and necessary approval requirements.

f. Carry out investigations of the specific characteristics of the Site and proposed design in regard to all necessary approval requirements and prepare a management plan.

g. Design and prepare a detailed Fire Engineering Report including options for alternative design solutions.

h. Provide clear confirmation of the Fire safety objectives required by the BCA and provide solutions to each within the Fire Engineering Report.

…

o. Liaise with the architect, structural engineer and services consultants for all required design elements and services to complete the Fire Engineering Report."

80 The fee provided for in the TN Consultant Agreement was a total of $33,500 (plus GST).[107] There was no separate figure allocated to "post novation".

The Superintendent, PDS

81 The formal engagement of PDS by 675 La Trobe Street Pty Ltd as "Superintendent" for the construction of the Lacrosse tower, coincided with the execution of the D&C Contract. Each of the D&C Contract and the "Lacrosse Docklands Stage 1 – Project Management and Superintendent Agreement" ("PDS Agreement"),[108] is dated 14 May 2010. Annexure Part A of the D&C Contract[109] identifies PDS as the "Superintendent" within the meaning of the General Conditions to the D&C Contract. [110] Under the terms of the PDS Agreement, PDS agreed in effect to:

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107 B37.0085
108 G572.
109 B2.0001
110 B1.0037

- exercise the standards of skill, care and diligence expected in the profession of the Project Manager and Superintendent in Australia for projects in the nature of the Lacrosse project;[111]
- use its reasonable endeavours to ensure the Lacrosse tower was constructed in accordance with the D&C Contract;[112]
- manage the project consultants to design the Lacrosse project to comply with (among other things) the D&C Contract, the three Consultant Agreements and the Building Code of Australia;[113]
- provide written information in relation to the suitability for their intended purposes of any material or methods proposed or specified by the project consultants;[114] and
- ensure the progress and quality of the construction carried out by LU Simon.[115]

82 The fee payable to PDS under the PDS Agreement was $885,000 (plus GST).

LACROSSE DESIGN, DEVELOPMENT AND CONSTRUCTION

Design commences

83 Elenberg Fraser first did work on what was then known as the North-east Stadium Precinct or "NESP" in around 2005, as an office building. However, by about April 2007 the developer decided to pursue more of a mixed use development which later became the Lacrosse project. On 2 April 2007, Mr Fraser emailed Mr Ciarma, the managing director of the then developer Pan Urban Pty Ltd, with notes of a meeting earlier that morning broadly outlining the elements of the project as then envisaged.[116] This included two discrete towers: a west tower comprising retail premises and "Quest" serviced apartments and an east tower with retail and recreational levels and apartments. The email concluded: "We will program a team based on information above, giving us nearly 3 weeks to get some consultants involved". Gardner Group was retained by Pan Urban Pty Ltd a few days later pursuant to the fee proposal referred to above.[117]

84 The first design meeting in relation to the Lacrosse project was held on 29 May 2007.[118] The attendees relevantly included Mr Fraser and Karl Engstrom from Elenberg Fraser, Mr Gibson from Gardner Group and

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111 G572.0006, clause 2.2(1)
112 G572.0007, clause 2.2(3)
113 G572.0009, clause 2.7(1)
114 G572.0012, clause 2.10(3)(b)
115 G572.0012, clause 2.10(3)(c)
116 G3
117 [53]
118 Design Meeting Minutes 0001 G6

Mr Ciarma from Pan Urban Pty Ltd. In his witness statement, Mr Fraser described the design intent at around this time as comprising two towers with a futuristic visual appeal incorporating design features such as tensegrity screens. The intention was that the buildings have "a focus on technology" and to be perceived as being buildings for the future.

85 The engagement of Elenberg Fraser was formalised the following month by the Client & Architect Agreement dated 12 June 2007, referred to above.[119] According to Mr Fraser, this agreement reflected that part of Elenberg Fraser's engagement involved assisting Pan Urban Pty Ltd in securing a development agreement with VicUrban (formerly the Docklands Authority), which was a pre-requisite to any development in the Melbourne docklands area.[120] Mr Fraser discussed in his evidence the various stages of drawing development contemplated by the engagement.

86 Among other things, Mr Fraser explained that during the sketch design phase, the developer's ambitions are fleshed out in a series of benchmark documents. The design development phase that follows, is a more complex phase where all of those benchmark documents are rolled into one consistent set of drawings, specifications and images.[121] The next phase is the contract documentation phase, which includes at 4.4 of the Client & Architect Agreement: "Prepare documents for the purposes of tendering".

87 Mr Fraser's evidence was that Elenberg Fraser's recommendation to its clients is to go through the contract documentation phase before they go out to tender with a D&C Contract. However, this did not happen with the Lacrosse project.[122] He said in effect that this was because costs in the construction industry were escalating at about this time and he thought that the developer was fearful that if they proceeded too far with the design, they would be given a construction price that exceeded their available budget, based on pre-sales.[123]

88 Gardner Group prepared its first regulatory review in about mid-June 2007. It is entitled "Preliminary Regulatory Review" and dated July 2007.[124] The report notes that it is based on referenced documents including architectural drawings available as at 12 July 2007. Under the heading "Purpose of the Report" it states:

> "This report has been prepared for Elenberg Fraser and the associated consultants involved in the design of the project.

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119 [69]
120 T1327
121 T1330
122 T1332
123 T1333
124 G15

> It addresses the building regulatory issues as found in the Building Code of Australia, in both prescriptive (Deemed-to-Satisfy) manner and performance-based (alternative solutions) manner. This report will identify areas where it may be feasible for cost-saving purposes to adopt an alternative solution to meet performance provisions of the BCA".[125]

89 In the section of the report headed "Part E-Services & Equipment", the report provides in respect of "Sprinklers" that the "Regulatory Requirement" is found in Clause E1.5 of the BCA and the "Comment/Recommendation" is: "Building required to be fully sprinkler protected. Fire engineers assessment required to permit any deletion of sprinkler installation. Note impact on MFB dispensation applications."[126] This "comment/recommendation" is relevant to the allegations concerning the deletion of sprinklers from the balconies of the Lacrosse tower discussed below.[127]

Town planning permit

90 Gardner Group issued a "Town Planning Report" in respect of the project dated 22 August 2007.[128] The report notes in its conclusion that:

> "The basic design plans have been overviewed and found to be satisfactory from a regulatory point of view.
>
> As the design progresses, items identified as being not in compliance with 'deemed to comply' provisions will either meet the performance requirements of the Building Code or will be brought to conformity with the 'deemed-to-satisfy' provisions of that Code to the extent required."[129]

91 Thomas Nicolas was formally retained as the fire engineer for the project by its fee proposal to Elenberg Fraser dated 23 August 2007, discussed above.[130]

92 On 12 October 2007 Elenberg Fraser issued a set of town planning drawings.[131] Drawing TP400[132] included in these drawings representing the east elevation of the tower, shows in the "Materials Legend" as Item I "lightweight wall infill". Mr Fraser's evidence was that this is a reference to what in due course became the aluminium composite panels, although he was unable to locate where the item was

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125 G15.0002
126 G15.0013
127 [505]-[508]
128 G62
129 G42.0006
130 [74]
131 G41
132 G41.0022

found in the body of the drawing from the version displayed during his evidence.[133] In his witness statement, Mr Fraser said:

> "The Planning Permit application was submitted on 23 October 2007. The design for the building at this time included: light weight infill wall panels (the final material had still to be selected); infinity field screens (a design feature attached to the outside face of the building made from stainless steel rod and cable); precast concrete panel walls to the ends; and metallic silver glazing and in-fill wall panels."[134]

ACPs first proposed

93 On 19 December 2007 Elenberg Fraser prepared a document titled "Exterior Selections_2007-12-19_Actual Samples" , which at item 2 included "Aluminium composite panel. Source unknown".[135] This appears to be the first express reference in any of the design documents to the use of ACPs in the façade of the Lacrosse tower. Mr Fraser agreed in his evidence that this document confirmed that Elenberg Fraser had identified that the panels that were to be used on the east and west façades of the tower were going to be ACPs.[136] In his witness statement,[137] Mr Fraser further noted that the first material board labels were produced on 20 December 2007 and that the image of the labels reflect that an aluminium composite panel was included on the first materials board.[138] On 21 December 2007 Elenberg Fraser prepared Sketch Design drawings, including drawing SD400, the east elevation, which shows "metallic silver infill panels".[139]

94 One month later, the project was moving into the Design Development phase. Elenberg Fraser's "Materials Fixtures and Fittings Schedule" apparently dated 21 January 2008 includes under the headings "External Areas" and "Towers", the item: "Infill Panels", with the description: "full height composite panel over lightweight framing".[140] Mr Fraser again confirmed in his evidence that this was a reference to ACPs.[141] On 23 Janurary 2008, Paul Chiodo of Pomeroy Pacific Pty Ltd ("Pomeroy") (which by this time had assumed the role of development manager) sent an email to Mr Engstrom and other design team members[142] attaching an agenda[143] for a design meeting the following day. The email described the meeting as "our first consultant meeting for the commencement of the Design Development of the

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133 T1384-5
134 F63 at [18]
135 G90
136 T1395
137 F63 at [25]
138 G89
139 G94.0035
140 G97.0003
141 T1399
142 G98
143 G99

LaCrosse Docklands project". The minutes of that meeting[144] show that it was attended (relevantly) by Mr Engstrom for Elenberg Fraser, Mr Gibson for Gardner Group and Mr Nicolas for Thomas Nicolas. The minutes state that:

- Mr Chiodo "noted that a builder will be on board for the design development process in approx one month";
- under "Design Development Drawing Set" that "[Mr Engstrom] noted that a design development drawing set will be issued to the design team by the 29/1 for review along with a list of changes from the town planning submission set";
- under "Façade Design" that "[Mr Engstrom] noted that discussions with Vipac and MEL are ongoing, more detailed design will be required. [Mr Engstrom] to finalise the scope of works while remaining within the cost plan constraints";
- under the heading "Fire Engineering", that: "[Con Nicolas] to provide first cut design brief prior to next design meeting for review and comment". This item was noted as "due" on 31 January 2008; and
- under "Program" that: "Contract with builder to be signed by the 30/6/08.

Fire Engineering Design Brief

95 Consistently with the minutes, on 30 January 2008 Mr Nicolas sent an email[145] to the design team stating: "Please find attached draft fire engineering design brief (FEDB) for review and comment. This is the precursor to the main report (FEDR) to be issued separately". The document attached was titled "Preliminary Draft Fire Engineering Design Brief FD07.141.1" ("FEDB").[146] This document included as part of the "Introduction":

- a table identifying: "Other matters to be reviewed within the fire engineering design report include the rationalisation of various sub-systems including the following". Item 'e' in the table was: "External sprinkler protection to overhang and balconies etc not required";
- A description of the "premises", including: "The general structure of the building comprises suspended reinforced concrete floor slabs and reinforced concrete loadbearing walls. Precast panel wall systems are proposed for external cladding systems";

144 G102
145 G112
146 G103

- "The desired approach to a performance based design is to use the parameters of the "Fire Engineering Guidelines" prepared by the Fire Code Reform Centre (FCRC). The first stage in this process is to prepare a Fire Engineering Design Brief (FEDB)";
- "The draft FEDB at this time is based on architectural documentation which is appurtenant to town planning and contains information which is understood to be subject to design change. The FEDB will be amended upon receipt of the updated architectural documentation."

96 The "design references" listed at the conclusion of the FEDB included the "FCRC Fire Engineering Guidelines (1st Edition) – March 1996", but made no reference to the IFEG. By the time Mr Nicolas produced the FEDB, the 1996 FEG had been superseded by both the 2001 edition and the IFEG. Further, as noted above,[147] the IFEG stated expressly that "The 1996 and 2001 editions are therefore no longer current and should not be used or referred to".

97 Mr Nicolas's evidence was to the effect that he became aware during the course of his engagement that ACPs were proposed to be used in the east and west external façades of the Lacrosse tower, but could not recall an exact date.[148] He said he "would've seen them on the documents that were provided to us for the purposes of referencing in our report". It would appear from the paragraphs of the FEDB extracted above that Mr Nicolas had the "architectural documentation which is appurtenant to town planning" when he was preparing the FEDB. In my view, it is safe to assume that this would have at least included the town planning drawings issued by Elenberg Fraser on 12 October 2007 discussed above, [149] which included the reference to "lightweight wall infill" in the materials legend of drawing TP400, discussed above.

98 The brief description of the general structure of the building extracted above refers to the proposed external cladding as "precast panel wall systems". There is no reference here or elsewhere in the FEDB to "lightweight wall infill". Mr Nicolas accepted in evidence that the FEDB did not "take into account the east and west façades", adding that: "It wasn't identified as a DTS deviation".[150] In his witness statement, Mr Nicolas had explained that the FEDB was based on the "Summary of Fire Engineering Issues" that were to be reviewed by

147 [42]
148 T1677
149 [92]
150 T1693

Thomas Nicolas with respect to alternative solutions, included in Gardner Group's Preliminary Regulatory Review dated July 2007.[151]

99 Although the FEDB was described as "Preliminary Draft" and referred to amendments being made upon receipt of updated architectural documents, no further or completed version of the design brief was ever produced by Thomas Nicolas. This is somewhat surprising, particularly given that the project later evolved from the two tower project then under contemplation, to a single tower option some time in 2009. The design brief is a precursor document to the preparation of the Fire Engineering Report, as described in both the 1996 FEG and the IFEG.

100 I note in passing that this same brief description of the "general structure" of the building in essentially identical terms (that is, identifying external cladding as "precast panel wall systems" and omitting any reference to ACPs) appeared in all drafts and the final versions of the Fire Engineering Report ("FER")[152] and in the Thomas Nicolas letter dated 22 February 2011 comprising the Regulation 309 application to the MFB ("MFB Application").[153] Thus there was no updating of the description of the "general structure", despite the evolving description of the external cladding in the architectural drawings and despite Mr Nicolas becoming aware during the course of his engagement that ACPs were proposed to be used in the east and west external façades of the Lacrosse tower. Mr Nicolas acknowledged in evidence in relation to the summary of the general structure of the building in the MFB Application, that this was an "incomplete statement" of the description of the façade.[154]

Commencing preparation of tender documents

101 Minutes for "Design Meeting 002" on 31 January 2008[155] include the entry: "CN issued the fire engineering design brief on the 30/2 (sic), design team to review and comment", with a due date of 7 February 2008. The meeting was attended (relevantly) by Mr Nicolas, Mr Engstrom from Elenberg Fraser and Mr Gibson from Gardner Group. In his witness statement, Mr Nicolas noted that: "The design team did not offer any substantive comments with respect to the external wall system".[156] In evidence, Mr Nicolas confirmed that he did not recall anybody raising anything about the façades of the building and that if the façades had been raised, he would probably remember it or have some record of it through an amendment to the FER.[157]

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151 F64 [18]-[19]
152 See, for example, I21.0008
153 G919.1
154 T1714
155 G113.0003
156 F64 at [22]-[23]
157 T1693-4

102 The next design meeting was on 21 February 2008. This was again attended (relevantly) by Mr Engstrom, Mr Gibson and Mr Nicolas. The minutes of the meeting[158] record that Mr Chiodo of Pomeroy reported that marketing had commenced internationally and "pre sales have been achieved". According to Mr Fraser, this meant that a sufficient number of units had been sold off the plan to give the project financial viability to move forward.[159] This also marked the point where Aivars Kristens of Elenberg Fraser took over supervision of the Lacrosse project from Mr Fraser.[160]

103 The minutes of "Design Meeting 003" also record that Mr Chiodo noted a revision to the design program and that key dates included completion of "D&C tender documentation" by 21 March 2008 and completion of the tender process during April and May 2008. Mr Fraser gave evidence to the effect that the process of preparing "Design Development" documents for the tender in April was conducted in something of a rush due to rising construction costs,[161] and he gave advice to the developer about the dangers of proceeding to tender with incomplete documents.[162]

104 Mr Fraser explained in his evidence that drawings of wall types are released early in the drawings set for coordination and information, so the other consultants on the project can give input into the wall types.[163] An early example of a wall types drawing produced by Elenberg Fraser is sketch 57, dated 25 February 2008.[164] This sketch includes a detail for wall type 6. Mr Fraser accepted that this was the wall type that evolved into wall type F6, which was part of the drawings that formed part of the Stage 7 Building Permit.[165] Mr Fraser agreed that the reference in this sketch against wall type 6 to "composite panel" was a reference to aluminium composite panels.[166]

105 On 28 February 2008, Mr Gibson sent an email to Mr Engstrom,[167] with an attachment entitled "BCA Clauses Relevant to Acrylic Attachments to Balconies" and comprising extracts from the BCA relevant to the use of combustible materials as a finish, lining or other attachment to a wall, roof or other building element.[168] This concerned a proposal (later abandoned) for a division wall between balconies made of an acrylic

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158 G127
159 T1410
160 F63 at [14] and [70]; T1410
161 T1332-3; T1413-4
162 T1415
163 T1417
164 G128
165 G1225; T1417
166 T1417
167 G132
168 G133

composite product called "Marblo".[169] Mr Gibson requested in the email that that Mr Engstrom obtain "relevant properties from the manufacturer". In his witness statement, Mr Galanos explained that: "This is a standard request Gardner Group undertakes whenever we are asked to consider a material or product for compliance against the BCA, unless it is a product we are already familiar with".[170] He agreed in evidence that the email and attachment was the kind of advice that Gardner Group was required to provide under its fee proposal.[171]

First draft FER

106 On 4 March 2008 Thomas Nicolas sent an email[172] to Mr Chiodo at Pomeroy, copied to members of the design team (including Andrew Gibson and Karl Engstrom) attaching the first draft of the FER titled "Preliminary Draft – Volume 1 - Fire Engineering Concept Design Report - Residential-Hotel Commercial and Carpark Development - LaCrosse Docklands".[173] In his witness statement, Mr Nicolas stated that this draft of the report was based on preliminary architectural drawings supplied to Thomas Nicolas by Pan Urban Pty Ltd, including elevation drawings DD400, DD401, DD402 and DD403, "which showed that it was proposed to construct the residential balconies primarily from tapered concrete wall panels".[174] The version of drawing DD400 in evidence predating this draft FER,[175] does refer in the "materials legend" to "tapered concrete wall panels (off white)" as item "J", but the immediately preceding item "I" is "lightweight wall infill". It is not clear from this drawing where either items "J" or "I" are located on the building.

107 It appears that at about the same time, Thomas Nicolas also prepared a cover sheet and annexures for volume 2 of the FER.[176] The evidence was that volume 2 contained records of computer modelling and some handwritten calculations. Mr Nicolas gave evidence that volume 2 was in part preparation in March 2008. However, no version of volume 2 of the FER was in evidence before the tribunal. Mr Nicolas maintained that Thomas Nicolas had been unable to find the version of volume 2 of the FER that was in part preparation in March 2008, nor the final version that was produced in May 2011 with the final version of volume 1.[177]

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169 T1404; T1423
170 F61 at [14]
171 T850
172 G138
173 G137
174 F64 at [24]-[26]
175 G149
176 G136
177 T1699

108 Volume 1 of the FER issued in early March 2008 and all later versions of the FER included the following, under the heading "General Overview":[178]

> "The life safety and fire protection requirements of the building have been designed on a performance fire engineering basis with cognizance given to the relevant provisions of the Fire Engineering Guidelines and the performance provisions of the Building Code of Australia (2006). It is not the intent of this design to emulate or "benchmark" the equivalency of the arbitrary prescriptive (deemed to satisfy) requirements of the BCA…
>
> The intent of the report is to meet the objectives and the nominated performance Clauses of Parts C, D and E of the BCA. The analysis is undertaken on a performance basis and demonstrates that fire and smoke spread is effectively contained for the purposes of occupant evacuation. Details of the analysis are given in the Appendices contained in Volume 2 of this report. The means by which compliance with the BCA has been established is on an equivalence basis pursuant to Clause A0.5… Equivalence or better is therefore established on a comparative probabilistic basis."

109 It was put to Mr Nicolas in cross-examination that this part of the FER suggests that the FER "covers the building as a whole from the fire engineering analysis, rather than merely a number of discrete alternative solutions". Mr Nicolas disagreed. He said that: "The intention of this report is to review the DTS departures".[179] As discussed above, the FER, like the FEDB, describes the "general structure" as including "precast panel wall systems" for the "external cladding systems".[180] There is no reference in the FER to "lightweight wall infill". Table 1.4.2 – "Fire Suppression System" states in item 6: "Sprinkler spacing arrangement to ensure full floor coverage is maintained through the building as required. Unless otherwise noted, external areas (e.g. balconies, eaves, overhangs etc.) which comprise non-combustible construction, need not be sprinklered".

110 Minutes for "Design Meeting 005" on 6 March 2008 show both Mr Gibson and Mr Nicolas in attendance. Mr Engstrom was an apology.[181] The minutes record that the FER: "Has been issued for review, consultants to review and advise of any issues". Mr Galanos agreed in evidence that Mr Gibson was one of the people who would review and advise on any issues in respect of the fire engineering report that existed as at that meeting.[182] There is no evidence that any of the design team raised any questions or concerns at any time about the fact that none of

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178 G137.0005
179 T1702; T1706
180 G137.0006
181 G142
182 T855

the various iterations of the FER referred to infill wall panels or otherwise referenced the ACPs proposed for use on the east and west façades of the tower. Mr Galanos explained in evidence in substance that, although the FER did not identify every aspect of the external wall, this is not relevant because the FER is always read in conjunction with the other design documentation including the architectural drawings.[183]

T1 documentation

111 On 11 March 2008 Elenberg Fraser issued a Materials, Fixtures and Fittings Schedule, which identified the "INFILL PANELS" as "FULL HEIGHT COMPOSITE PANEL OVER LIGHTWEIGHT FRAMING".[184] The minutes for "Design Meeting 006" on 13 March 2008 (relevantly attended by Mr Engstrom, Mr Nicolas and Mr Gibson) notes in the "Architect" section that the "Draft T1 Drawings" were set to be issued that day and that "[material] schedule due today PM, spec next week". Under "Fire Engineering" the minutes record in respect of the FER that "Minimal updating required. Intent will not change. Current report is suitable for T1, and additional calculations will be included in T2".

112 Elenberg Fraser duly issued a revised materials schedule on 14 March 2008[185] in which, according the Mr Fraser, the description of the "infill walling" was expanded to include "4mm composite panel (full height) over light weight wall framing" and "Services Riser Cladding – 4mm composite panel (full height)".[186] Part of this wording appears to be obscured in the version of the schedule in the evidence,[187] I presume because the document was originally a spreadsheet and part of the relevant cell was not revealed when the document was converted to pdf format.

113 In around mid-March 2008, Elenberg Fraser engaged Casper Dekker of Davis Langdon to prepare the architectural specification for the project. Mr Fraser said in evidence that Davis Langdon is an expert building consultancy specialising in (among other things) building material and specifications.[188] In his witness statement, Mr Fraser said that he decided to engage Mr Dekker for the Lacrosse project "as he was considered a renowned industry leader in drafting specifications".[189] On 18 March 2008 Mr Dekker sent an email to Mr Engstrom requesting "some pdf files of the plans, elevations, sections of your Docklands

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183 T865
184 G155.0003
185 G163
186 F63 at [51]
187 G163.0005
188 T1436
189 F63 at [52]

project" so he could prepare a fee proposal for the preparation of a specification.[190]

114 Gardner Group's "T1 Regulatory Review" was dated 19 March 2008.[191] It made no reference to any compliance or safety issue or risks regarding the proposal to use composite panels on the external façade of the tower. It was prepared to form part of the material to be provided to tendering builders, along with Elenberg Fraser's "Specification Brief Revision T1" dated 20 March 2008[192] and Thomas Nicolas's second draft FER.[193] Mr Nicolas described this as having been prepared "between 13 and 20 March 2008…to accompany the T1 tender document set". He added that there were no relevant substantive changes from the first draft FER.[194]

115 Elenberg Fraser's Specification Brief Revision T1 described the "Apartment External wall" in the following terms:

> "- Infill was constructed from glav. (sic) Stud framing spanning slab to slab – refer Structural Engineers documentation.
>
> - Wall lining to be constructed from 4mm composite panels supported on 32mm galvanised furring channels fixed over wall framing.
>
> - Walls to incorporate Sarking & R2.5 insulation.
>
> - Wall systems to incorporate all seals, gaskets, bedding materials recommended by cladding manufacturers, to form, a weatherproof wall system.
>
> - Panels to span slab to slab, between PFC, with vertical joints/fixings (concealed)
>
> - Composite panel finish as scheduled"[195]

116 In his witness statement, Mr Fraser said that the reference to "32mm galvanised furring channels" was a reference to "a standard Alucobond detail that I believe would have been conveyed by Dekker to Engstrom".[196]

117 In his second witness statement dated 24 September 2018,[197] Mr Nicolas confirmed that, contrary to his first witness statement,[198] he had received the Elenberg Fraser "Materials, Fixtures & Fittings Schedule Version T1" dated 20 March 2008.[199] This document provides for

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190 G166
191 G196
192 G184
193 G170
194 F64 at [30]-[31]
195 G184.0014
196 F63 at [55]
197 I120
198 F64 at [106]
199 G171; this bears the Thomas Nicolas discovery number TN.00.347

"infill walling - 4mm composite panel (full height), over light weight wall framing".

118 It is not clear whether Mr Nicolas also received Elenberg Fraser's Specification Brief Revision T1. It is not among the list of documents that he says he did not receive.[200] Given the various reports, drawings and schedules circulating among the design team at this time, it would be surprising if a copy of this was not shared with Thomas Nicolas. In any event, it seems likely from at least the materials schedule and architectural drawings that Thomas Nicolas had been given at this time, that Mr Nicolas's knowledge of the proposed use of 4mm ACPs on the external façades of the Lacrosse tower[201] dates from about March or April 2008 at the latest, and I so infer.

119 Also on 20 March 2008 a meeting was held at the offices of the MFB. The meeting was attended by three MFB officers, Mr Gibson from Gardner Group and Mr Nicolas and Mr Thomas from Thomas Nicolas. The minutes of that meeting[202] record that its purpose was to "discuss the proposed works and various items relating to a future submission for report and consent pursuant to Regulation 309 of the Building Regulations 2006". They also record that Mr Gibson "provided a brief overview of the development", which included references to the location and proposed functional uses of the premises (at this point still comprising the two towers) and some discrete matters relating to fire services infrastructure. There is no reference to the general structure or fabric of the buildings (and, in particular, no reference to any proposed use of composite panels in the external façades). The minutes do note that "deletion of sprinklers to external soffit areas" would "form part of the notification items to the MFB under the report and consent submission".

120 Mr Engstrom sent Mr Dekker a copy of the Specification Brief Revision T1 and the T1 materials schedule on 20 March 2008,[203] the day they were completed. On the same day, Mr Dekker sent Elenberg Fraser a fee proposal letter.[204] The letter stated that: "The specification will be formatted to reflect a Design & Construct contract up to novation, including Preliminaries and the normal architectural/building trade sections". It also provided that: "Your office will prepare all schedules (finishes, doors, door hardware, signage, colours etc.)" and: "Your office will make the design decisions and select all materials and

200 F64 at [106]
201 [97]
202 G169
203 G187
204 G192

finishes". The fee proposal was accepted by Elenberg Fraser on 25 March 2008.[205]

121 According to Mr Fraser, on 2 April 2008, Pomeroy "issued the invitation to tender (T1) for the design and construction, under a design and construct contract, for the Lacrosse building. The invitation was issued to LU Simon and two other builders".[206] Mr Gibson of Gardner Group revised the T1 Regulatory Review on 9 April 2008. Mr Galanos explained in his witness statement that: "The purpose of such a report at this stage of a building project is to identify potential building regulatory issues based on the BCA, specifically based upon available design documents at the time. Such a report is necessarily a work in progress based on the current level of design available".[207]

T2 Specification

122 On 10 April 2008, Mr Engstrom sent an email invitation to Mr Dekker for a meeting to be held on 15 April 2008 at 8.00 am.[208] On 14 April 2008 Mr Dekker sent an email to Mr Engstrom attaching an incomplete draft of the specification and referring to a meeting the next morning.[209] The draft specification attached to that email included at item 2.4 "Aluminium Cladding", with the specification: "Aluminium sheet cladding in selected finish. Concealed fixings to subframe system. Refer to the External Finishes Schedule and Preliminary Design Drawings for details and extent". There is no reference in the draft specification to Alucobond.[210] Mr Fraser said in evidence that he did not read this document, but he was briefed on it by Mr Engstrom and that Mr Engstrom asked Mr Fraser a few questions about important issues.[211] Although there are no notes or other record of a meeting between Mr Dekker and Mr Engstrom on 15 April 2008 as planned, it seems likely that the meeting did take place.

123 On 16 April 2008 Mr Dekker sent an email[212] to Mr Engstrom attaching a copy of the T2 Specification dated 17 April 2008.[213] It is not clear why the document is dated the day after it appears to have been finalised, but nothing of substance turns on this. The T2 Specification is a key document in the proceeding. It effectively dictated the choice of ACPs for the east and west façades of the Lacrosse tower and later formed part of the D&C Contract between LU Simon and the developer.

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205 G195
206 F64 at [63]
207 F61 at [12]
208 I119
209 G288
210 G289.0094
211 T1472
212 G295
213 G299

124 The overall structure and approach of the T2 Specification is set out in "**SECTION 01-001 – GENERAL REQUIREMENTS**", which includes the following:

> "**1.1 Specification Format**
>
> A. Divisions 1 and 8 of this Specification provide general requirements applicable to the work sections in Divisions 2 to 7. The work sections in Divisions 2 to 7 provide specific requirements for individual trades or elements of the Works.
>
> B. 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."[214]

125 It was not in dispute that, at the time the T2 Specification was issued, the term Superintendent referred to Elenberg Fraser. What is less clear is whether, at the time the T2 Specification came to form part of the D&C Contract, the term referred to the eighth respondent, PDS. Clause 1.4 A. of the T2 Specifications sets out the definitions. These include:

> " '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.
>
> 'Inspection': Inspection carried out by the Superintendent of any part of the work under the Contract. Such inspection shall be limited to an inspection of the visual appearance only and not to the selection of materials or the Design Documents or construction of components and equipment, which remained the sole responsibility of the Contractor."[215]

126 There were a number of provisions of the T2 Specification referred to by the parties during argument as relevant to the construction of the Alucobond Specification and the issues in the proceeding more generally. These included the following:

> 3. **DETAILS OF CONTRACTOR'S RESPONSIBILITIES**
>
> 3.1 **Descriptive Elements of the Works**
>
> A. Take responsibility for the Contractor Design part or parts of the work under the Contract as defined within the work sections.

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214 G299.0005
215 G299.0007

B. Contractor's Responsibility:

1. Undertake the Design Documents maintaining the function, visual requirements, performance and intent of the Preliminary Design.

…

12. Be responsible for the final selection of products and associated components, which shall be used solely for the purpose intended by the manufacturer and will satisfy the requirements of the Contract.

…

F. Material Preferences:

1. Where a particular product or supplier is specified in the Specification, these are an indication of the type of product/system used by the Superintendent in developing the Preliminary Design. The final selection of products/systems shall be the responsibility of the Contractor, who shall then complete the Design Documents and installation using the agreed product, or such other confirmed as acceptable by the Superintendent in writing, while remaining fully responsible for the Design Documents of work under the Contract to provide a safe, secure and warranted installation.

2. Where the Specification identifies preferred materials, these must be confirmed as being suitable and fit for their specified and intended purpose with the Tender return. If no such specific confirmation is received, then the submission of the Tender return itself will constitute such a confirmation. If the preferred materials are considered unsuitable, advise at the time of Tender.

…

4. SUBMITTALS

…

4.4 Samples Generally

…

B. Samples will be reviewed for the visual characteristics only and where moving or operating elements are involved, the Superintendent shall be given the opportunity to review working samples.

…

5. PERFORMANCE REQUIREMENTS AND DATA

5.1 Performance Requirements

…

B. The performance criteria included in the Specification sets the minimum standards with which the Design Documents solutions shall comply and the means by which compliance shall be checked and controlled prior to completion.

C. Although the Preliminary Design Drawings show considerable detail and dimensions, no warranty or representation is given by the Superintendent as to the accuracy of such dimensions or the adequacy or buildability of such details. Should the Contractor adopt the details or arrangements indicated on the Preliminary Design Drawings it will be deemed that they have checked their buildability and performance in terms of the Specification, all relevant statutory requirements and manufacturers recommendations for any products referred to.

D. Minimum Requirements: where there is in existence a relevant Australian Standard, BS code of practice, draft BS, German DIN Standard, ISO Standard, European Standard applicable to the design, execution or performance of work under the Contract or any part thereof, the recommendations and requirements of such documents shall be considered a minimum standard for the work described and must be complied with.

…

5.14 Fire Protection

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

6. QUALITY CONTROL

...

6.9 Building Codes and Regulations

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.

…

7. GENERAL MATERIALS AND WORKMANSHIP REQUIREMENTS

…

7.12 Manufacturer's Instructions[216]

A. 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 the copies of all such documentation are supplied to the Superintendent prior to commencement of works under the Contract. All such manufacturers' instructions and recommendations are deemed to be included in the Contract.

…

SECTION 04-202 -- FIBRE CEMENT WALL CLADDING

…

2.2 Fibre Cement Cladding[217]

A. Indicative to James Hardie Exo Tec Façade Panel System and D3-1000 Fixing System.

B. Panel shall be fixed to JH Top Hat and JH Intermediate Top Hat sections, strictly in accordance with the manufacturer's instructions.

C. 10mm wide open expressed joints as per the Preliminary Design Drawings with JH Backing Strips to horizontal joints and JH Gasket Snap Strips to vertical joints.

…

2.4 Composite Panel Cladding

A. Indicative to 9 mm thick Vitrapanel pre-finished compressed fibre cement cladding or acceptable equivalent.

…

C. Panels shall be fixed to Top Hat and Intermediate Top Hat sections, strictly in accordance with the manufacturer's instructions.

127 The provisions directly relating to the ACPs are as follows (notably clause 2.5 below):

"SECTION 04-203 -- METAL ROOF AND WALL CLADDING[218]

1. GENERAL

…

1.6 Contract Samples

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216 G299.0030
217 G299.0085
218 G299.0091

A. In accordance with Section 01-100 of the Specification provide contract samples of the following:

1. 300mm x 300mm samples of each type of wall and roof cladding specified illustrating surface finish and jointing details.
2. Sub-framing members and fixing methods.
3. Various extrusions, fastenings and the like being a minimum of 300mm in length.
4. Fastening devices and anchors.
5. Insulation types 300mm x 300mm minimum size.

…

1.12 Warranties

A. Prior to Practical Completion a written warranty shall be submitted to the Superintendent for the following;

…

3. Metal wall cladding: 15 years

…

1.31 Fire[219]

A. All elements shall be non-combustible or not easily ignitable with low flame spread characteristics and shall not produce excessive quantities of smoke or toxic gases.

B. Surface spread of flame:

1. External areas, where necessary, shall meet unprotected limitations of the BCA.
2. All materials used internally and externally (excluding sealants and gaskets) shall have a Class 0 surface spread of flame classification (unless otherwise specified) when tested in accordance with AS 1530.

2.5 Composite Metal Wall Cladding[220]

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

B. Refer to Preliminary Design Drawings for panel joint layout and extent.

C. Folded panels shall be to profiles as detailed on the Preliminary Design Drawings.

D. System shall come complete with sub-framing as required back to structural substrate.

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219 G299.0093
220 G299.0094

E. Colour: from the manufacturer's standard product range and as confirmed by the Superintendent."

128 It is far from clear who was responsible for the Alucobond Specification. Neither Mr Engstrom nor Mr Dekker was called to give evidence and Mr Fraser's evidence on the issue was (at best) equivocal. In his witness statement, Mr Fraser appeared to attribute the decision to Mr Dekker:

> "I believe Alucobond was nominated in the specification by Dekker as a protection because Alucobond was a well-recognised cladding system that was used extensively in good quality projects. The specification required the builder to use a product indicative to Alucobond, because it was a top of the range product that had a reliably warranted installation system. At that time, composite panels were approved for use on buildings, including high rise buildings like the Lacrosse buildings via the alternative pathway provided for in the BCA under C1.12. A particular Alucobond product was not specified because different Alucobond products are appropriate for different installations."[221]

129 However, in his oral evidence, Mr Fraser seemed to want to make the point (quite forcefully) that he played a critical role in the choice of product. That evidence is set out below, as part of the consideration of the claims against Elenberg Fraser.[222] The effect of the evidence is that it was Mr Fraser who directed that the T2 Specification specify the Alucobond brand. However, he was not aware that the T2 Specification would state "indicative to" Alucobond. He said: "I thought we were going to get an Alucobond system with all of its proprietary details and technical data".[223]

The project stalls and then revives

130 The T2 tender package was issued by Pomeroy on 22 April 2008 and tenders closed on 16 May 2008.[224] The project then went into something of a hiatus for about a year. In his witness statement, Mr Fraser said: "The project stalled after the global financial crisis because Quest who were to own the West Tower could not provide the financial guarantees required for project financing… Staging meetings commenced on 15 July 2009 and during the fifth of such meetings on 5 August 2009 Pan Urban instructed EF to split the project into two stages. The east tower was to be built in stage one and the west tower was to be constructed in stage 2."[225] In the meantime, Mr Galanos had

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221 F63 at [58]
222 [419]-[424]
223 T1596-7
224 F63 at [66]
225 F63 at [72]

become actively involved in the Lacrosse project. His evidence was that this occurred in about October 2008.[226]

131 Thomas Nicolas provided an updated fee proposal dated 14 September 2009.[227] In his witness statement, Mr Nicolas explained that:

> "When the developer made the decision to proceed with Stage 1 I was asked by PDS Group to revise the fee letter to encompass the East Tower only and capture fees already paid and confirm remaining owed for East Tower. I was also told by PDS Group that LU Simon wanted some certainty about its novated design consultant costs prior to finalising its tender for the D&C Contract."[228]

132 LU Simon provided the developer with a tender for Stage 1 in the sum of $82,455,428 on 17 September 2009.[229] It provided further tenders on 12 October and 26 October 2009.[230] PDS responded to the last of those tenders on behalf of the developer 675 La Trobe Street Pty Ltd, by letter dated 4 November 2009.[231]

133 It is likely that the GG Consultant Agreement was signed in late January or the first half of February 2010. Gardner Group submits that:

> "[I]t is clear that the Gardner Group Agreement was distributed in or around January 2010 as the date of the cover letter with which copies of the agreement were sent for execution to Gardner Group is dated 20 January 2010[232] and the document bears a "received" stamp dated 25 January 2010. The Scope of Services at Annexure Part D of the Agreement[233] is dated December 2009 – again consistent with the distribution of the document in January 2010. Mr Galanos' evidence is that he returned signed copies of the agreement to PDS on 19 February 2010[234]".[235]

134 On 28 April 2010 Chris Old of PDS emailed a draft of the TN Consultant Agreement to Mr Nicolas for his review.[236] On 10 May 2010, Mr Old sent a follow up email about the draft, concluding that "I am under a lot of pressure to finalize all agreements".[237] Mr Nicolas responded later that day, with a number of comments on the draft agreement, including requests for amendments to provisions of the "Scope of Services" document that formed part of the TN Consultant

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226 F61 at [16]
227 G452
228 F64 at [36]
229 G459
230 G471; G473
231 G475
232 G409.
233 B33.0042.
234 G536, incorrectly dated 19 February 2009, rather than 2010.
235 I160 at [15]
236 G658.004
237 G658.004

Agreement.[238] Mr Old replied, noting the changes he had made to the draft agreement in response to Mr Nicolas's requests. Mr Nicolas agreed in evidence that the Scope of Services document forming part of the TN Consultant Agreement was in the form he negotiated with Mr Old.[239] The signed TN Consultant Agreement is undated, but Mr Nicolas's evidence was that it was signed "shortly after 9 July 2010", when the Deed of Novation of the TN Consultant Agreement was also signed.[240]

135 Gardner Group's "Notification of Appointment as Private Building Surveyor" pursuant to s80 of the *Building Act* is dated 13 May 2010. [241] Mr Galanos agreed in evidence that this means he must have accepted appointment no more than seven days earlier (that is, on about 6 May 2010). LU Simon submits that the s80 notification document does not comply with s80 of the *Building Act*, first, because it was not lodged by Mr Galanos and, secondly, because it does not state which of the practitioners listed was the relevant building surveyor.[242]

136 LU Simon executed the D&C Contract (including the T2 Specification) on or about 14 May 2010.[243] Also on or about 14 May 2010, PDS was formally retained by 675 La Trobe Street Pty Ltd to provide project management and superintendent services pursuant the PDS Agreement.[244]

137 Mr Nicolas noted in his witness statement that PDS convened "Design Development Meeting No. 1" on 18 May 2010 "so that the design consultants could recommence their work on the project following the award of the D&C Contract to LU Simon".[245] Mr Nicolas said that he informed the meeting that Thomas Nicolas "would need to re-brief the MFB if the drawings had changed, bearing in mind that the original FEDB was based on two towers".

138 On 21 May 2010, Mr Galanos issued the stage 1 building permit, which related to non-structural excavation and inground early works.[246] 675 La Trobe Street Pty Ltd, LU Simon and Gardner Group executed the GG Novation Deed on about 23 June 2010.[247] Thomas Nicolas circulated further drafts of the FER on 24 June 2010,[248] and on 14 July

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238 G568.0002; See also B37.82
239 T1711
240 F64 at [14]
241 G570. A further s80 notification (G576) was sent on 19 May 2010 with an updated project name and address.
242 I159 at [80]
243 B1
244 G572
245 F64 at [40], see also G574
246 F61 at [20]; G581
247 B34; the date is confirmed in the submissions of both LU Simon and Gardner Group
248 G618 and I16

2014.[249] As indicated above, the TN Novation Deed was executed shortly after 9 July 2010. According to Mr Fraser,[250] on 4 August 2010, Elenberg Fraser "entered into a consultant agreement with 675 Latrobe Street Pty Ltd[251] and at the same time the agreement was novated to LU Simon".[252]

The Fifth FER

139 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'".[253] 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.[254]

140 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".[255] It was circulated to the design team by email from Mr Nicolas dated 9 December 2010.[256] 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.[257]

MFB Application and MFB R309 Report

141 By a letter dated 22 February 2011,[258] 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".

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249 G648 and 650
250 F63 at [80]
251 The EF Consultant Agreement at B35
252 The EF Novation Deed at B36
253 F64 at [57]
254 F64 at [58]
255 F64 at [62]; G837
256 G836
257 G838
258 G920

142 The walls were also incompletely described in the MFB handwritten application form which accompanied this letter.[259] 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.

143 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").[260] 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 R309 Report.[261] 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".[262]

144 The MFB R309 Report includes under the heading "MFB Comments Relative to Alternative Solutions", the statement that: "The apartment balconies are not to be used for storage. These measures are to be included in the Essential Safety Measures for the building and are to be maintained to the satisfaction of the building surveyor".[263] LU Simon submits that this imposed on Gardner Group an obligation under r1203 of the *Building Regulations* to include in the occupancy permit a condition listing all of the essential safety measures for the building.[264]

Stage 7 Building Permit

145 LU Simon observed in its submissions that: "In early 2011 the design team was working towards the procurement of the Building Permit for Stage 7, which was to be the largest stage, and which included the construction of the external walls of the building." In a number of respects, the designs and specifications for the relevant external walls compiled at this time were essentially unchanged from early 2008.

146 For example, Elenberg Fraser's revision of the Specification Brief dated 8 April 2011 titled Stage 1 Revision 2, provided details for the external walls,[265] which essentially repeated the details in the Specification Brief

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259 G920.0007
260 G1017; I23
261 G1017.0003, second bullet point
262 I23.0017
263 G1017.0009
264 I159 at [161]
265 G1038.0014

Revision T1 dated 20 March 2008, extracted above.[266] The Materials, Fittings and Fixtures Schedule dated 8 April 2011 refers to 'INFILL WALLING - 4mm COMPOSITE PANEL (FULL HEIGHT), OVER LIGHT WEIGHT STUD FRAMING'.[267] The "Wall Types" drawing that began life as wall type 6 in sketch 57,[268] had evolved into drawing A639, revision 4 "For Construction", wall type detail F6,[269] issued on 21 March 2011.

147 LU Simon lodged its application[270] for the Stage 7 Building Permit on 15 April 2011. The documents lodged with that application are listed on the permit, and include drawing A639, revision 4. On 5 May 2011 Tam Ho of Gardner Group issued a Regulatory Review[271] stating: "We wish to advise that we have reviewed updated architectural drawings received to date and the following items remains outstanding and is required to be addressed or clarified prior to the issue of building permit". As with the earlier Gardner Group Regulatory Reviews, there was no issue raised about the proposed use of aluminium composite panels or the wall type F6.

148 Thomas Nicolas prepared a revised version of the Fifth FER on 18 May 2011.[272] Mr Nicolas explained in his witness statement that this revised version was issued in response to issues raised by Gardner Group concerning the doors in the retail area and the width of two stairways.[273] The minutes of design development meeting 49 on 18 May 2011 records that "TN had responded to all items on GG checklist. LUS to follow up permits".[274] This was the version of the FER that was approved as part of the Stage 7 Building Permit.

149 On 2 June 2011 Gardner Group issued the Stage 7 Building Permit, signed by Mr Galanos.[275] Mr Galanos agreed that when he was considering issuing the Stage 7 Building Permit, he knew that he was giving approval for LU Simon to construct the building using aluminium composite panels with a polyethylene core as part of the external walls of the building.[276] And it is not in dispute that the documents approved under this building permit specifically refer to the use of ACPs as part of the external walls of the Lacrosse building. Mr Galanos listed in his witness statement the documents that he was provided with and relied on in order to issue the Stage 7 Building

266 [115]
267 G1037.0006
268 G128
269 G1225
270 G1049
271 G1073
272 I21
273 F64 at [95]-[96]
274 G1102.4
275 G1207
276 T779

Permit "insofar as the installation of ACP on the external façade was concerned".[277] These included, most notably, the T2 Specification.

150 Mr Galanos went on in his witness statement to state that:

> "In issuing the stage 7 building permit, I formed the view that the use of a composite metal panel wall and soffit cladding system manufactured by Alucobond as external cladding for the building, and as specified in the drawings referred to above, was BCA compliant. I relied on section C1.12(f) of the BCA which I considered deemed a bonded laminated material non-combustible.
>
> …
>
> Applying the criteria in C1.12(f) to an aluminium composite panel. I considered:
>
> - "Each laminate" to be the external aluminium layers, which I know to be a non- combustible material. In any event, the aluminium layer would be deemed non-combustible by virtue of C1.12(e), as it is essentially a pre-fabricated metal sheet - meeting the requirement in C1.12(f)(i).
> - The "adhesive layer" to be the glue or bonding agent which stuck the outer aluminium layer to the core. The adhesive layer in Alucobond is negligible. In circumstances where the total thickness of the material was 4mm, and the aluminium sheets made up 1mm (0.5mm each), and the core was 3mm, I was satisfied the thickness of the adhesive layers would not exceed 2mm - meeting the requirements in C1.12(f)(ii) and (iii).
> - The AS1530.3 certificates issued in relation to the Alucobond range of aluminium composite panels, which I knew to have determined that the smoke-developed index and spread-of-flame index was 0 and 0-1 respectively - meeting the requirement in C1.12(f)(iv).
>
> …
>
> No one informed me that LU Simon had decided to use a substitute product, Alucobest, for the aluminium composite cladding. Had I been informed that LU Simon was intending to use Alucobest, I would not have issued the stage 7 building permit".[278]

151 Mr Galanos said in his oral evidence that BCA clause C1.12(f) was the only 'pathway' that he considered in deciding whether to issue the permit.[279]. Mr Galanos said in his witness statement that when he issued the Stage 7 Building Permit he had no reason to doubt the safety of aluminium composite panels. He continued:

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277 F61 at [36]
278 F61 at [39], [40] and [61]
279 T970-971

> "ACPs were marketed as innovative, safe and cost-effective. I had no reason to think otherwise. ACPs were being used regularly and marketed for use in high-rise construction. In my eyes, this was a material fully encapsulated within non-combustible aluminium and which passed all Australian Standards in relation to smoke-developed index and spread-of-flame index."[280]

Alucobest sample approval

152 Early on 24 May 2011, Mr Vasilakis (LU Simon's contracts administrator) sent an email to Mr Palmer[281] stating: "I am about to courier a sample of the proposed metal cladding for the East Tower to you along with our sample submission form as discussed with Dino yesterday". This was followed by a letter from LU Simon sent by courier enclosing the Alucobest sample:[282]. The letter stated:

> "Further to your conversation with Dino yesterday afternoon, please find enclosed sample of proposed Composite Panel with metallic silver finish, and Sample Submission Form for sign off by you if satisfied with the sample. Please note that it is a 4mm thick sample as discussed yesterday.
>
> If you could return these to us by return courier it would be greatly appreciated. Otherwise, please bring them with you to our Design Meeting tomorrow. Thank you in anticipation, and should you have any queries please do not hesitate to contact us."

153 The letter also enclosed an LU Simon form titled "Sample Submission Form". Gardner Group submitted that LU Simon issued the sample submission form for the Alucobest product as an "alternative" product. However the Sample Submission Form as sent by LU Simon (and referenced in Mr Galanos's submissions)[283] does not in fact have either of the options on the form (being "AS SPECIFIED" and "ALTERNATIVE") circled.

154 Mr Palmer said in evidence that he had no actual memory of these events; he was relying on the documents.[284] In his witness statement he said that he "probably compared the sample on the 'sample board' that was kept in the back room of Eleberg Fraser's offices", and compared the colour of the sample with the specified colour on the board.[285]

155 Later in the morning of 24 May 2011, Mr Palmer sent an email[286] to LU Simon confirming receipt of the sample and stating that:

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280 F61 at [56]
281 G1127
282 G1130
283 G1120
284 T1264-5
285 F62 at [26]
286 G1124

> "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."

156 By reference to this email, Mr Palmer agreed in evidence that he was concerned about the colour, and that he was also concerned about the warranty and that he asked about the "other requirements of the specification".[287] LU Simon submits that:

> "Importantly, Mr Palmer agreed that when he sent this email at 11.42am he was not prepared to approve the sample, even though the colour was acceptable.[288] That means that Mr Palmer was not confining his approval to colour. So much is no more obvious now than it must have been to LU Simon in 2011". [289]

157 Shortly after receiving the email, Mr ChunJiang Wu of LU Simon contacted Ms Doris Zhang of Shanghai Huayuan New Composite Materials Co. Ltd to ask whether Alucobest had a 15-year warranty. Ms Zhang later confirmed by email the company's reference to a 10-year warranty was a mistake and that Alucobest had a 15-year warranty.[290] Thomas Nicolas observed in submissions that Mr Moschoyiannis described this in evidence as a "one page email",[291] but was "evasive and offered no plausible explanation" for the subject line containing numerous "RE"s and "FW"s, suggestive of it being part of a number of earlier email exchanges.

158 In the mid-afternoon, Mr Vasilakis of LU Simon sent an email to Mr Palmer, stating: "David, Just received Alucobest's Warranty terms which are 15 years in accordance with the specs and Head Contract". Mr Palmer agreed that, in essence, this email was confirming to him that the Alucobest composite panels met the warranty and other requirements of the specification.[292]

159 Mr Palmer then signed the LU Simon Sample Submission Form and prepared an Elenberg Fraser "Architects Advice" number AA061, dated 24 May 2011 and identified as being "TO" Mr Vasilakis and three other LU Simon employees.[293] The advice included a note from Mr Palmer to Mr Vasilakis that: "Alucobest sample provided is approved as per the attached approval". The "attached approval" was the LU Simon Sample Submission Form as originally sent by Mr Vasilakis, now bearing, in addition to Mr Palmer's signature, the date and the

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287 T1265
288 T1265
289 I159 at [248]
290 I26
291 T681
292 T1266
293 G1125

annotation "CONFIRMING 15 YEAR WARRANTY IN LINE WITH SPEC – AS ADVISED". The options of "AS SPECIFIED" and "ALTERNATIVE" were still not circled or otherwise marked.

160 Design Development Meeting 50 was held on 25 May 2011. The minutes of that meeting record that: "EF signed off on sample of Composite Panel for Tower (Alucobest – silver). PDS to review and sign off for approval".[294] There is a third version of the LU Simon Sample Submission Form, with handwriting added to the versions signed and annotated by Mr Palmer.[295] It was not in dispute that this was the version signed and dated 25 May 2011 on behalf of PDS in the "CLIENT" section.

161 It appears from the version in the evidence, that the person signing for PDS (the signature is illegible) also entered "LUS" as the "SUB-CONTRACTOR", circled the "ALTERNATIVE" option (thus identifying the sample as an "alternative" product), and also circled options to identify that the "review" was requested by the "ARCHITECT" and the "CLIENT", but not the "CONSULTANT". No witness from PDS was called to shed any light on this.

The occupancy permit

162 LU Simon constructed the external walls in the second half of 2011 and into 2012. Progress of the works is recorded in the LU Simon PCG Reports. PCG Report No 16 for the period to 7 October 2011 shows a photograph of the walls under construction.[296] This is one of a number of photos of the works at around this time referred to during the evidence, that show the ACPs panels shortly after installation on the tower. Each panel bears the name "Alucobest" in prominent blue lettering on a white background above the words "Aluminium Composite Panel".

163 It is hard to imagine how anyone attending the site at this time could have overlooked this signage plastered all over the building. LU Simon submits that both Gardner Group and Elenberg Fraser conducted inspections of the work during construction when the presence of Alucobest was obvious.[297] Mr Palmer agreed in evidence that he would have noticed during his inspections that the ACPs being installed were Alucobest, and that this would not have caused him any concern, because he had approved Alucobest. Mr Palmer also agreed that the Alucobest labelling was visible to anyone who was walking by the building, to anyone who cared to look.[298]

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294 G1142.0003
295 G1119
296 G1417.0013
297 I159 at [37]
298 T1278-9

164 In relation to Gardner Group, LU Simon has submits that Mr Galanos inspected the works during construction and that he "must have seen the Alucobest". When he was shown photographs of the building under construction in evidence, he accepted that the Alucobest name was prominent. However, his evidence was that he did not see it at the time.[299] LU Simon submits that Mr Galanos was "not able to give any proper excuse for failing to notice Alucobest being installed". But if he had noticed it, there is no reason why he would have been reluctant to question it with LU Simon or Elenberg Fraser. The fact that he did not do so, supports his evidence that he did not see it. I accept that evidence.

165 Mr Galanos said in his witness statement that on 13 June 2012, he undertook the final inspection of the building and issued occupancy permit numbered 14166F6a.[300] LU Simon submits that r1203 of the *Building Regulations* provided to the effect that an occupancy permit issued under the *Building Act* in respect of a building must include a condition that lists all the essential safety measures pertaining to that building and specify for each essential safety measure listed, the level of performance determined by the relevant building surveyor to enable the essential safety measure to fulfil its purpose.[301] As noted above,[302] the MFB R309 Report required that the essential safety measures for the Lacrosse building were to include a condition that "apartment balconies are not to be used for storage".

166 LU Simon further submits that the occupancy permit:

> "[F]ailed to include as an essential safety measure a condition that apartment balconies are not to be used for storage, and failed to specify the level of performance to enable the essential safety measure to fulfil its purpose … Because the balcony of unit 805 was used for storage, the fire which ignited on it spread to combustible material stored nearby, including a cardboard box on top of the air-conditioner, causing the fire to spread to the external cladding of the building, and thereby causing the Applicants to suffer loss and damage."[303]

167 In his witness statement, Mr Galanos responded to this issue by noting that annexure A to the occupancy permit contains the essential safety measures to be inspected or tested in relation to the building, set out in table format. He said that this table contains numerous references to the MFB R309 Report, including under the heading "Fire Fighting Services and Equipment". His evidence was that: "I considered that by referring to the MFB R309 Report within the essential safety measures, I had appropriately incorporated the recommendations made by the

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299 T1053
300 G1657; F61 at [65]
301 I159 at [161]
302 [144]
303 I159 at [167]

MFB into the essential safety measures for the building and that those responsible for implementing the essential safety measures would necessarily have had reference to the MFB R309 Report".[304]

THE CLADDING

The history of Alucobond and ACPs

168 In his witness statement, Mr Moschoyiannis explained that ACPs were already well established in the building industry when he graduated 35 years ago. He said Alucobond was the only supplier of ACPs at that time and that they were then much more expensive per square metre than alternatives such as concrete or masonry. ACPs became much less expensive after the patents ran out and other manufacturers were able to compete.[305] He explained that in the years leading up to 2012, other brands of ACPs were being marketed and sold in Australia for use as cladding, including[306] Alpolic (marketed by Mitsubishi Plastics), Vitrabond (marketed by Fairview Architectural) and Alucobest (marketed by Shanghai Huayuan New Composite Materials).

169 Alucobond in fact had its origins in Germany in the 1960s. A history of the product is contained in the document *Alucobond – 40 Years of Excellence – from a Pioneer to the Synonym* (Alcan Singen GmbH, Germany, 2009).[307] The title of the publication refers to the claim that "ALUCOBOND® became the synonym for aluminium composite panels all over the world".[308] It appears that the very first idea for the use of Alucobond was for "bed mattress support panels", but alternative uses for the product were soon identified.

170 The publication suggests that concerns about the flammability of the core material were identified as early as 1968: "Fire protection regulations became an increasingly important topic during this time…the research and development team worked on core material alternatives with different flammability properties, to the plastics used until then".[309] In respect of the period 1978-79, the publication states that changes in fire regulations, particularly in Germany, "increasingly demanded the implementation of flame retardant products for specific architectural applications". This apparently led to the production of a new range of products launched in Europe and the USA during 1979.[310]

171 The publication also discusses how in 1989, challenges presented by the growing demand in Europe and Southeast Asia "with the regard to

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304 F61 at [67]
305 F60 at [40] ff
306 F60 at [37]-[43]
307 D20
308 D20.0073
309 D20.0014
310 D20.0036

the products' fire classification", led to the development of "a non-combustible panel, namely, A2".[311] This is followed by discussion of how the development of "non-combustible ALUCOBOND® A2" created opportunities which, due to "special fire regulation requirements", could otherwise not have been realised with ACPs.[312]

172 In Australia, Alucobond was first imported in the late 1970s for use as part of an exhibition and display system. By the early 1980s, the product was being specifically marketed to architects to be used as part of the facade of buildings, both new and refurbished.[313] Sales grew through the 1980s and into the 1990s. The publication identifies a number of substantial projects incorporating Alucobond panels in the period to 1998 and then describes the expansion of the Australian business after a 1998 restructuring. Sales of Alucobond in Australia increased from 100,000m^2 in 1998 to in excess of 500,000m^2 in 2008.[314]

173 It seems that fire risks associated with ACPs had been identified in Australia not long after sales of Alucobond began to accelerate in the late 1990s. For example, in 2000 the Fire Code Research Reform Program published a report titled *Fire Performance of Exterior Claddings* FCRC PR 00-03.[315] The report is identified in IFEG as a reference work available from the Australian Building Codes Board ("ABCB") website.[316] According to its preface, the report followed an investigation of fire performance and test methods for regulating the fire safety performance of exterior claddings in Australia.[317] The report was intended for "regulatory authorities, fire researchers, fire engineers and manufacturers of external cladding materials and systems".[318] The abstract of the report is as follows:

> "This report discusses external vertical fire spread in multi-storey buildings with particular regard to the contribution made by combustible cladding systems. The historical fire record is reviewed with some examples presented, international research is discussed, various test methods described as well as an indication given of the performance of materials in a selected range of fire tests. Building regulations in Australia and in other countries are also reviewed and recommendations are made with respect to appropriate 'Deemed to Satisfy' requirements, with a recommendation that the 'Vertical Channel Test' developed in Canada be considered for use in Australia."[319]

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311 D20.0091
312 D20.0108
313 D20.0046
314 D20.0048-9
315 D32
316 D19.0067
317 D32.0004
318 D32.0004
319 D32.0005

174 The report notes, under the heading Historical Fire Record:

> "There are relatively few documented cases of extensive external vertical fire spread involving combustible claddings, and there are even fewer cases where such spread has significantly compromised life safety. Part of the reason for this could be due to the historical use of non-combustible materials on facades as is required by many building codes around the world, so the small number of documented examples should not be taken to mean combustible claddings present insignificant risk. Furthermore, there have been a number of very serious examples of external vertical fire spread where a combustible cladding has not been involved, but where window configurations and combustible linings and contents located near windows have contributed significantly to 'leap-frogging' up the external façade."[320]

175 One of the documented cases referred to in the report was a fire in Te Papa (Museum of New Zealand), Wellington. The report explains:

> "This was a large multi-level national museum building under construction. The exterior cladding used comprised a thin aluminium-faced panel with a polyethylene core, mounted over extruded foam polystyrene insulation board and building paper. A worker, heat welding a roofing membrane, ignited the building paper and this quickly spread up the exterior façade involving the polystyrene and cladding panel. There were no deaths or injuries associated with the fire."[321]

176 Minutes of a meeting of State and Territory Administrations of the ABCB held in Canberra on 12 October 2010[322] reveal that the ABCB was by then actively considering whether ACPs complied with the DTS provisions of the BCA, including in relation to combustibility. Under the heading "Information on Alucobond – ACT", those minutes record that:[323]

> "The ACT representative advised members a meeting had taken place between his Administration, manufacturers and a local fire engineer and they are now satisfied that the product in question does not comply with the BCA DTS requirements for combustibility. The NSW fire brigade also now believe a problem existed and he advised jurisdictions to be aware the approval problems encountered in his jurisdiction may spread. The Tasmanian representative requested the advisory note be forwarded as soon as it was available."

177 Further, an action item from an earlier meeting annexed to the minutes has the heading "Fire Resistance of Composite Panel Wall Facing" and includes reference to the development of a "National Advisory Note on a generic product advising on the requirements of the BCA relating to

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320 D32.0010
321 D32.0018
322 G1821
323 G1821.0015

Fire Resistance including how to interpret if the element is part of the external wall".[324]

178 In what appears to be a related development,[325] in late 2010 Mr Stephen Wise of Defire was engaged by the distributor of Alucobond in Australia, Halifax Vogel Group Pty Ltd, to produce a report titled "Proposal for Change". Mr Wise was a fire engineering expert witness in the hearing. The Executive Summary of Mr Wise's 2011 report commences:[326]

> "Aluminium composite panels (ACPs) are widely used for external cladding throughout Australia and the world. Concerns have been raised in the Australian Capital Territory (ACT) regarding whether the material complies with the deemed-to-satisfy (DTS) provisions of the Building Code of Australia 2010 (BCA). Given the economic, social and environmental impacts that have emerged from this issue it is important that the matter be readily resolved."

179 The executive summary goes on to propose that a further sub-clause be added to C1.12 of the BCA as C1.12(g) with a series of prescriptive requirements for the use of ACPs as an external wall lining including: "The mineral filled core contains not less than 70% non-combustible materials". It appears that the ABCB did not take up Mr Wise's suggestion on amendments to clause C1.12 of the BCA and nor did it ultimately proceed with the development of an "Advisory Note" on external wall cladding systems discussed in the annexure to the October 2010 minutes referred to above.

180 In relation to the latter, an email from Mr Newhouse, Manger, ABCB dated 23 September 2011,[327] notes that the "Victorian Administration" had been working on an advisory note relating to external wall cladding systems, but the ABCB office had "formed the view that it would not be appropriate for the document to be issued by the ABCB". Instead, individual jurisdictions were invited to use the draft of the note attached to the email as a basis for advice to be issued within their jurisdictions.

181 Assuming (as seems likely) that this is the same advisory note referred to in the action item annexed to the 12 October 2010 minutes discussed above, it seems that the emphasis of the note had shifted away from fire resistance and was focussed more on promoting weatherproof construction methods. On the other hand, the draft advisory note does expressly identify ACPs as an example of "non DTS cladding systems"

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[324] G1821.0018
[325] Given the reference in the minute at g1821.0015 to the ACT representative meeting with manufacturers
[326] G881.0003
[327] G1820

and refers to the need for practitioners to reference "all Performance Requirements relating to fire-resistance and combustibility".[328]

182 The Victorian Building Commission duly issued a "fact sheet" substantially in the form of the draft advisory note in around October 2011.[329] There is no evidence that any of the parties was aware of this fact sheet or the deliberations of the ABCB concerning ACPs. I also note that the fact sheet was published some five months or more after the issue of the Stage 7 Building Permit in June 2011.

The Alucobond range in 2009

183 Both Elenberg Fraser and LU Simon produced from their records a sales brochure distributed by "Alucobond Architectural a division of Halifax Vogel Group Pty Ltd" titled "*Alucobond – Vision Materialised*".[330] The brochure is undated, but it was common ground that it had been published in around 2009. Mr Fraser explained in his witness statement that:

> "Older brochures are difficult to locate because representatives of Halifax Vogel…removed the old brochures when they supplied us with new products. In the brochure I have found there are pictures of high rise buildings, clad with Alucobond composite panels. Under the heading 'High Rise' the brochure states: 'Cladding a new building or refurbishing an old one; there is no doubt that the long-lasting appeal of the contemporary finish, unparalleled durability and flexibility of application makes ALUCOBOND the means for creating an outstanding landmark in any location regardless of aspect or challenging environmental factors'".[331]

184 This sales brochure describes the product in detail and specifically includes reference to the product for 'High Rise' and 'Residential' applications, and states under the heading 'Fire Behaviour' the following: "The non-combustible aluminium cover sheets protect the PE core". Next to this statement is a stylised image showing flames spreading over a depiction of an ACP.

185 Details of the product range are set out in the brochure in a series of charts.[332] The first is for "ALUCOBOND®". It comes in in 3mm, 4mm and 6mm thickness and contains a "Virgin PE core". The next chart is for "ALUCOBOND® plus" which comes only in a 4mm thickness. It has a "mineral filled core (hardly inflammable according to EN13501-1)". This is followed by the chart for "ALUCOBOND® A2". It comes in 3mm and 4mm thicknesses and has a "mineral core (non-combustible according to

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328 G1820.0003
329 I147
330 D21
331 F63 at [31], D21.0006
332 D21.0014

EN13501-1)". For all these products the outer aluminium sheets are "0.5mm corrosion resistant aluminium alloy".

186 The final charts in the range descriptions are headed "Specialities". The first of these (the second is a photovoltaic product) is "ALUCORE® aluminium honeycomb composite panel". The thicknesses for this product are 6mm (footnoted as "on request"), 10mm, 15mm, 16mm and 25mm and it has an "aluminium honeycomb core". In his witness statement, Mr Nicolas referred to this product as "one ACP product that met the DTS criteria pursuant to Clause C1.12 of the BCA".[333] There was some debate in the evidence about this (it was unclear whether it had a certificate under AS1530.1),[334] and about whether it was in fact an "ACP" properly described.

187 LU Simon submits that it was not until 2013 that Alucobond began referring to the first product in the range as "Alucobond PE":

> "The change of name to Alucobond PE coincided with the registration on 12 July 2013, for the first time, of Alucobond products under the CodeMark Scheme operated by the Australian Building Codes Board. Alucobond obtained a Certificate of Conformity for 'Alucobond PE' on this date, ie 12 July 2013.[335] Prior to this date, no aluminium composite panels were certified under the CodeMark scheme."[336]

188 I accept this submission. It was supported by the evidence of at least Mr Moschoyiannis,[337] Mr Galanos,[338] Mr Kip[339] and Mr Leonard.[340] Indeed that latter corroborated the evidence of Mr Moschoyiannis,[341] saying in substance "Alucobond" was to ACPs what "Biro" was to ballpoint pens. Thus, in my view, there can be no doubt that the reference in the T2 Specification to "Alucobond, manufactured by Alucobond Australia Pty Ltd" encompassed at least the product "ALUCOBOND®" with the "Virgin PE core". Whether it also encompassed "ALUCOBOND® plus" and "ALUCOBOND® A2" is less clear. But on no view did it encompass "ALUCORE® aluminium honeycomb composite panel", and no-one appeared to contend otherwise.[342]

Alucobond and Alucobest

189 In his witness statement, Mr Moschoyiannis responded to media reports to the effect that the Alucobest panels manufactured in China and

333 F64 at [101]
334 Galanos at T1157
335 D22
336 I111 at [20]
337 F60 at [45]
338 T895
339 T2545
340 T2440
341 F60 at [40]
342 See for example T1735 cf Elenberg Fraser's submissions at

chosen by LU Simon were "cheap substitutions",[343] and this issue featured in the evidence of a number of witnesses (including the experts) and in submissions. In particular, Gardner Group was critical of aspects of the expert evidence of Mr Franceschini,[344] arguing that it did not support LU Simon's submission that Alucobond PE and the Alucobest panels are of equivalent quality. They submit that "there is no basis for the Tribunal to conclude that the 2 products, as they existed in 2011, were in fact equivalent and would have behaved in the same way in the event of a fire".[345]

190 In support of that submission, they rely first on an argument that the provenance of the samples provided to Mr Franceschini by LU Simon's lawyers is wholly unknown and then point to the fact that:

> "[T]here was no AS1530.3 test certificate available for the Alucobest product in June 2011. The only AS1530.3 test certificate which has been produced for a panel of the descriptor "Alucobest" is dated 2 February 2015[346] and that certificate does not identify the aluminium type used in the panel. Nor is there any information before the Tribunal to confirm that between 2011 and 2015 (or 2017 in the case of the 'sample' provided to Mr Franceschini), the composition of the Alucobest panels remained consistent."[347]

191 I accept that there was no AS1530.3 test certificate for Alucobest in June 2011. However, the comparative quality of the Alucobond over Alucobest (including the absence of the AS1530.1 certificate) is ultimately not relevant unless it can be shown that any difference in quality contributed to the fire. Put another way, the choice of Alucobest over Alucobond (with the polyethylene core), is only relevant if that choice was a necessary condition for the ignition of the Alucobest panel on the balcony of apartment 805 or the subsequent spread of the fire.

192 As discussed below,[348] despite Gardner Group's submissions to the contrary, there is no evidence that would support a finding that the aluminium in the Alucobest panels may have become affected by the fire any earlier or more profoundly than that in an Alucobond panel. Thus in my view 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% polyethylene core, not the choice of the Alucobest product over Alucobond PE (as it came to be known).

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343 F60 at [44]
344 C2
345 I160 at [33]
346 G1.
347 I160 at [35]
348 [219]

193 Subject to this qualification, I accept the Owners' submission that the Alucobest panels used as part of the external walls of Lacrosse were combustible within the meaning of the BCA and, more particularly, in accordance with the test prescribed in AS1530.1.[349] The polyethylene core has a calorific value of 44 MJ/kg, which is similar to petrol, diesel and propane.[350] Similarly, for the reasons discussed below, I accept the Owners' submission that the use of an ACP with a 100% polyethylene core as part of the external walls of the Lacrosse tower was primarily responsible for causing the spread of fire up the side of the building.

194 It follows, as the Owners submit,[351] that the external cladding of the building, including an ACP with a 100% polyethylene core, did not meet the performance requirement in clause CP2(a)(iv) of the BCA, because it did not, to the necessary degree, avoid the spread of fire in the building.

THE ORIGIN AND SPREAD OF THE FIRE

The sources of the evidence

195 The evidence as to the origin and spread of the fire is primarily contained in the MFB Post Incident Analysis Report, issued in about May 2015 ("MFB PIA Report")[352] and the expert report of Mr Tim Cousins.[353] Mr Cousins was a witness for the Owners. The MFB also produced what appears to be a pre-cursor report to the MFB PIA Report, entitled "Fire Investigation & Analysis" ("MFB FIA Report").[354] Most (but not all) of the MFB FIA Report is reproduced in the MFB PIA Report. In particular, the former report includes some photos that are not in the latter.

196 Mr Badrock, a Commander of Operations in the MFB, was responsible for coordinating the preparation of the MFB PIA Report and gave evidence during the hearing. However, beyond observing areas affected by the fire (including the balcony of apartment 805) on the day after the fire, he did not take part in the process of fire investigation. His evidence therefore did not add anything of substance to what is found in the MFB PIA Report itself. The MFB officers responsible for the fire investigation were not called to give evidence. Mr Cousins gave evidence expanding on aspects of the findings in his report.

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349 I158at [24], referring to G1740.0092
350 I158at [24], referring to D19.0383-84 – IFEG section 3.3.2; C17.0004-5 – Joint Expert Report and C1.0043 – expert report of Tim Cousins
351 I158at [24]
352 G1740
353 C1
354 G1713

197 In addition, the fire engineering experts expressed opinions in their Joint Report on matters relevant to the spread of the fire.[355] While that report and the experts' oral evidence about those matters was generally helpful, it is important to note that, with one exception, none of the fire engineering experts professed more than limited qualifications or experience with respect to fire investigation and the manner of fire spread.[356] The exception was Dr Barnett, who gave evidence that:

> "I used to teach a post-graduate subject in the topic including NFBA 921, which is basically the international standard these days on fire investigation, and as part of 9/11, I was part of the Air CE FEMA Team that conducted that investigation and I personally reported to Congress on our findings about the fire, so I have some experience of fire investigation."[357]

The MFB PIA Report

198 The conclusion stated in the MFB PIA Report was as follows:[358]

> "With the above information and the exclusion of all other ignition sources, I conclude that this fire was started by a cigarette butt disposed of in a plastic container located on top of a timber topped outdoor table, positioned towards the southern end of Apartment 805 balcony
>
> The fire on the table has developed from the plastic container and extended to involve the timber table. The timber from the table top and the plastic from the container caught combustible material located nearby alight, including the A/C unit and cardboard on top of the A/C unit.
>
> This developing fire has impinged onto the Alucobest façade of the wall and the join between the two panels fixed to the wall. The Alucobest panels and combustible material located within the wall structure has added to a rapidly spreading fire up the vertical wall and involving the balconies located above. During the developing fire on Level 8, embers and fire residue has fallen onto the balcony of Apartment 605 which has started a fire around the A/C compressor unit.
>
> I classify the fire as Accidental."

199 Earlier, the MFB PIA Report stated:[359]

> "The extremely vertical nature of the burn patterns to the exterior face of the wall suggest that the Alucobest aluminium cladding, along with the foam lagging and the PVC pipe of the building wall, contributed to

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355 C17
356 T2320-4
357 T2320
358 G1740.0020
359 G1740.0017

the fire load and the rapid spread of the fire up the vertical face of the building to the floors and balcony areas located above.

Located in front of the southern wall, were the remains of a split system air conditioner compressor unit. Fire damage to the A/C unit was more severe to the eastern end towards the balustrade. This section of the unit had been severely damaged by fire with all plastic components being consumed.

A 'V' pattern on the A/C unit emanating from floor level and extended (sic) onto the unit approximately 150 mm at the eastern end could be seen. Fire damage to the A/C unit was severe, the copper pipes and aluminium fins in the unit had been severely affected by the heat of the fire. The copper pipes and aluminium fins located at the eastern end of the unit had collapsed or were very brittle and broke away when examined."

200 The MFB PIA Report also identified a number of items at the southern end of the balcony in addition to the table and AC unit, that were involved in the fire.[360] These were:

- Some cardboard on top of the AC unit.
- A wire basket approximately 600mm high, with a base of approximately 300mm in diameter and a top of approximately 400mm in diameter. The report adds: "The remains of severely fire affected items were located at the base and appeared to be of plastic or rubber material".
- Two vacuum cleaners, located between the table and the wall, closer to the internal window than the balustrade. These were described as being "severely affected by the fire; these were not plugged into any power outlet at the time of the fire". Both vacuum cleaners had all plastic components consumed by the fire.
- Two outdoor chairs made of a metal frame and plastic seat and back. The plastic was wholly consumed in the fire.

201 The MFB PIA Report does not make any comments or findings that bear directly on the question of what path the fire took from the table to the Alucobest panels, such as by seeking to identify when in the overall conflagration the various items on the balcony referred to above were consumed. Importantly, nor does the report include any comment or finding on the manner in which the fire impinged on the Alucobest panels and ignited the polyethylene core. Subject to these matters, I accept the conclusion and findings of the MFB PIA Report set out above.

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[360] Identified in the photos and descriptions at G1740.0017-18

Mr Cousins' report

202 Mr Cousins is a an electrical, electronic and computer systems failure analyst and disaster recovery consultant with 25 years' experience. He holds a Graduate Certificate in Fire Investigation and is certified by the National Association of Fire Investigators as a Fire & Explosion Investigator and as a Fire Investigation Instructor. Mr Cousins' extensive CV explains that the majority of his work has involved investigating electronic and electrical engineering system failures, many of which result in fire.[361]

203 Mr Cousins' report was first prepared as a draft dated 21 May 2015, and then supplemented and finalised by a further report dated 30 April 2018.[362] The supplementation is for the most part a discussion of the Australian Standards AS1530.1 and AS1530.3 and their application to the Alucobest panels.

204 Mr Cousins' report attaches a lengthy investigation report undertaken by Quantum Corp on the instructions of Chubb Insurance.[363] This report comprises summaries and transcripts of records of interview with tenants of the Lacrosse tower, annotated sketches of the apartment 805 balcony by three of its tenants, copy police statements of particular tenants, photographs and other material recording events on the night of the fire. The statements and sketches of three of the tenants of apartment 805 were referenced and relied upon by Mr Cousins in his report.

205 Mr Cousins' evidence was that he did not have the MFB PIA Report when he prepared his report, but that he had read it since. He said that reading the MFB's report did not lead him to want to change any of the conclusions in his report.[364] The conclusions reached by Mr Cousins in his expert report, which largely accord with the conclusions in the MFB PIA Report, are conveniently summarised in the closing submissions of the Owners, as follows:

> The origin of the fire was towards the southern end of the balcony on level 8. Mr Cousins eliminated level 6 as the origin of the fire due to the relatively minor damage and the lack of a flame transfer path to upper levels, concluding that level 6 was ignited by flaming debris falling from levels above.[365]
>
> The point of origin was a plastic food container which had been used as an ashtray. The container contained aluminium foil with a small

361 I130.0002
362 C1.0052
363 C1.0065
364 T1820-1
365 C1.0035

plant, some organic seeds and cigarette butts. Mr Cousins examined the destroyed AC units and excluded them as the cause of the fire.[366]

The ignition source was an incompletely extinguished cigarette butt, which transitioned to flaming when it came into contact with a combustible material such as the packet of seeds.[367] Mr Cousins reached this conclusions (sic) based on witness statements taken from residents of apartment 805.

The fire spread from the combustible material (presumed to be the seed packets) to the plastic container (ashtray) and from there to the table.[368]

The rapid spread of the fire up the side of the building was facilitated by the Alucobest panels used in the southern wall of the balcony.[369] The placement of the Alucobest sheeting provided a vertical fuel load for the fire to extend rapidly vertically upwards.[370]

206 The sketches of all three witnesses referred to by Mr Cousins identify that the wire washing basket was on top of the table where the fire started.[371] Mr Gubitta's record of interview and sketch both indicate that the basket was half full of clothes at the time of the fire.[372] He also refers to there being a folded blanket or light doona on top of the AC unit.[373] There is no trace of this referred to in the MFB PIA Report.

207 It is clear from this evidence, coupled with the evidence from the MFB PIA Report about the items on the balcony of apartment 805 consumed by the fire, that there was a significant fuel load at the southern end of that balcony. But like the MFB PIA Report, Mr Cousins' report does not make any comments or findings concerning the manner and means by which the fire travelled from the outdoor table to the Alucobest panels. However, he was cross-examined on this question as discussed below.[374]

208 On the other hand, Mr Cousins' report does discuss issues relevant to the process by which the Alucobest panels were ignited and consumed by the fire. In his May 2015 report he observed that (emphasis added):[375]

"I am unsure if a fire rating was required for the panelling at the southern end of the balcony but the presence of the polyethelyne appears to have contributed significantly to the fire spread. Please

366 C1.0036-7
367 C1.0040
368 C1.0040
369 C1.0049
370 C1.0046
371 Mr Woo does not expressly identify the washing basket, but has drawn a circle on the table and noted "sock & T-shirts" – see C1.0188
372 C1.0119; C1.0197
373 C1.0117; C1.0197
374 [211]-[214]
375 C1.0045

bear in mind that the combustion process requires sufficient heat to vaporise the polypropylene (sic[376]), and the aluminium skin must first be breached in order to (sic) for the vapours to combine with atmospheric oxygen in order to burn. So the initiating temperatures must exceed that required to degrade the aluminium skins to allow the polypropylene to burn. This is about 470°C which is *easily achieved within the flame zone*. Where the Alucobest is severely degraded we can safely assume that is (sic) was within the flame zone at some point in the sequence of events."

209 And in his April 2018 supplementation, he added:[377]

"The Alucobest panels are 'Combustible' and rely on the integrity of the panel surfaces and sealed edges at temperatures between 108°C and 450°C to contain the molten PE core and to exclude Oxygen. The integrity of the panel surface cannot be maintained within the flame zone where the flame temperatures exceed 450°C. Liquid PE can be thought of as being equivalent to Diesel fuel and this should be borne in mind when reviewing any video footage of the Lacrosse Apartments fire in progress. I note that the fire ascended increasingly rapidly from the 8th floor to the 21st floor in 11 minutes, an average of 50 seconds per floor. I consider this to be the direct result of the combustion behaviour of the installed Alucobest cladding."

210 In relation to the significance of the Alucobest panel being "within the flame zone", Mr Cousins observed that (emphasis added):[378]

"I also note that a study involving fires in a warehouse storage rack geometry, Ingason (1994) found an average solid-flame temperature of 870°C. While the average temperature at the flame tips was less at 450 °C but the range was large, covering 300~600°C. I believe this to be typical of most compartment / semi-open fires which essentially means that *in real life situations the Alucobest panelling will not survive direct flame attack*. It may, however, resist lower temperature radiant heat such as is used in AS/NZS 1530.3:1999."

Mr Cousins' evidence

211 In relation to overall fire behaviour, Mr Cousins made several important observations in the course of his evidence about what conclusions could be drawn and what was "pure speculation". For example, when asked about the charring evident on the timber from the outdoor table, he said:

"Again, I'm speculating but there would have been a fire that fully involved the wooden table… I don't know whether it burnt lying on the ground or it was still above ground when it burnt so there are two things to consider to give it any particular significance other than it

376 Mr Cousins confirmed in evidence that all references in his report to "polypropylene" should be to "polyethylene", see T1770
377 C1.0063
378 C1.0061

was fully involved so would have had probably quite a large fire in that location which then gives rise to a couple of possibilities. One is…we can get hot gasses rising from the table, hitting the floor above and spreading so it can involve the metal sheet with hot gasses at the top or we can get glowing char and embers, depending on what was on the table, being caught in the column and being distributed and deposited on other material which then can subsequently catch fire."[379]

212 Mr Cousins later said that fire involving wood from the table in close proximity to the AC unit could be significant to the Alucobest panels, possibly at the junction between the underneath of the balcony above and the top of the panel, "as a result of hot gasses hitting the roof and spreading horizontally". He said that such a fire would have the power to degrade the aluminium and expose the polyethylene.[380] He also agreed that if the material in the washing basket was added to the mix of the table and the plastic in the AC unit, that would be "providing a significant fire" from the perspective of damage to the wall.[381] But when he was then asked about the vacuums he observed:

"…just bear in mind there is a time component and geometry… So if they all went at once… that would be quite - very serious. [If they] went sequentially, then of course, we've got a different problem - it's reduced. So I don't - I don't have any time - idea of the time sequence of these events."[382]

213 He went on to agree with the proposition that it would be "pure speculation" as to how the fire developed and what went first, second and third, or if they all went at once. On a worst case scenario, where all of the items identified were engulfed at one, Mr Cousins said that he would expect temperatures of 600°C at the junction of the roof of the balcony and the cladding, depending on the soot content of the gases.[383] He agreed that the conclusion in the MFB PIA Report that "the developing fire has impinged onto the Alucobest façade of the wall and the join between the two panels to the wall" was a possible point of impingement. He added that where the roof of the balcony met the panel could be another point of impingement. He said:

"Ultimately…, I need flame impingement on the panel that will create its own holes and will develop from there. So if I get flame impingement on the panel,…then there's a mechanism which will degrade the panels… If I can attack it with a flame, I can degrade the

379 T1800
380 T1801-2
381 T1802
382 T1803
383 T1804

aluminium within the flame zone, and I've got all the temperatures I need…to ignite the polyethylene."[384]

214 But in terms of any concluded view on the manner or means of impingement, Mr Cousins was clear: "I am unable to take it really from beyond the table…I don't disagree with [the explanation in the MFB PIA Report]. But I'm not going to endorse it because I can only take it to the edge of the table". He said he was not able to express any views as to the relative merits of alternative hypotheses as to the method by which the ACP ignited on the southern wall.[385] And asked if he believed that the fire would not have spread from the table to the wall but for the items such as the vacuum cleaners and the doona, he said: "I can't say".[386]

Evidence of the fire engineers

215 For the purposes of preparing their Joint Report, the fire engineers were asked "Question 10" as follows:

> "What were the factors contributing to the spread of the fire?
>
> Without in any way limiting the factors the experts may wish to identify in answering this question, they are invited to consider the possible contribution of:
>
> a) the design of the exterior walls (including the balcony walls) of the Lacrosse building;
>
> b) the use of aluminium composite panels as part of the exterior walls (including the balcony walls) of the Lacrosse building;
>
> c) the selection of Alucobest over other aluminium composite panel products available in or around 2011 that met the description: "composite metal panel indicative to Alucobond" (disregarding for this purpose whether Alucobest also met that description);
>
> d) the method of the fixing of the aluminium composite panels on the exterior walls (including the balcony walls) of the Lacrosse building; and
>
> e) the fuel load on the balconies."

216 The response to the question in the Joint Report was:[387]

> "All Experts agree the following answer to Question 10. The factors that contributed to the spread of the fire included items (a), (b) and (e) as well as the deletion of sprinklers from the balconies and the fuel source that was in close proximity to the balcony walls. All Experts agree that items (c) and (d) are not relevant.

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384 T1809-10
385 T1856-7
386 T1868
387 C17.0007

> For item (c), this is because the material properties of the products nominated (ie: Alucobest and Alucobond) are considered by all Experts to be equivalent. Although Alucobond had a fire test report confirming compliance with AS1530.3-1999 and Alucobest had no such test report, all Experts agree that their combustibility characteristics were fundamentally the same.
>
> For item (d), this is because the fixings did not contribute to the spread of the fire."

217 The issue of fire spread was explored further with the fire engineers during their concurrent evidence, and primarily with Dr Barnett. Importantly, none of the fire engineers resiled from the unanimous opinions expressed in the Joint Report in response to question 10, as set out above. The first issue in this context raised with the fire engineers was the temperature at which aluminium commences to oxidize and then melts. Dr Barnett explained:

> "There is an uncertainty range in all of these numbers because you have to know the specific alloy. And so I don't believe that Alucobest was tested, so this is all speculation - what the melting point is and the oxidisation point is, and the change of strength is. It could be anywhere from - let's say 450 to 490 For the oxidisation, 500 maybe. All right, it could be a melting point - it could be - depending on the alloy, it could be as low as 610, 620, as high as 700. So I think that we have to be very careful when we have precise numbers. So if you want to say around 500 oxidisation, around 650 for melting, then I think we'd be comfortable. I would be comfortable."[388]

218 Dr Barnett's evidence about the "specific alloy" invites reference to an issue that had a brief airing during the trial. It is clear that the aluminium alloy in the Alucobest panels differed slightly from that of the Alucobond equivalent (that is, the Alucobond product with the 100% polyethylene core). In his report, Mr Franceschini described the Alucobest aluminium (being primarily alloyed with manganese) as "consistent with 3005 Grade Aluminium" and the Alucobond aluminium (being primarily alloyed with magnesium) as "consistent with 5005A Grade Aluminium".[389] There was also some tentative evidence that the Alucobest aluminium was a lower grade of alloy.[390] However, there was no evidence that it would have performed differently in a fire.

219 In particular, Gardner Group's submission that it had "a melting temperature which is around 100 degrees Celsius lower than an aluminium/magnesium alloy" is not supported by the transcript references relied on,[391] or elsewhere in the evidence. The extract above

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388 T2341
389 C2.0005
390 T1888 L23 - T1889 L2.
391 Being T2600 L3-18; T2341 L8-11; T1888 L23 - T1889 L2.

from Dr Barnett's evidence,[392] is a reference to the potential range of variation depending on the type of alloy – he does not say where in that range Alucobest may sit. Thus there is no evidence that would support a finding that the aluminium in the Alucobest panels may have become affected by the fire any earlier or more profoundly than that in an Alucobond panel.

220 In relation to the question of fire spread once the fire left the outdoor table, Dr Barnett in substance said that there was insufficient detail in the MFB PIA Report and insufficient time to closely examine the witness accounts, for him to add anything to Mr Cousins' evidence. Thus he too was unwilling to speculate about the potential process of fire spread (including the process of impingement of the panels) beyond the edge of the outdoor table.[393]

221 Mr Hughes-Brown agreed that: "we don't know exactly the sequence of events, the intensity, and connecting the dots from one product to the next". He said, however, it was evident that the panel would have been subjected to radiant heat followed by direct flame impingement.[394] And Mr Wise observed that: "It's not unusual in a fire to have temperatures well in excess of 600 degrees in that – under the ceiling, under the slab above, whether it oxidised, whether it melted to expose the surface, or whether it got through those gaps, I have no opinion on that. The reality though is the fire was hot enough to cause the – the ACP to ignite as well".[395]

Origin and spread conclusions

222 The conclusions that I draw from this accumulation of evidence and expert analysis are as follows:

- the ignition source was an incompletely extinguished cigarette butt, left by Mr Gubitta in a plastic food container which had been used as an ashtray and contained aluminium foil with a small plant, some seeds and cigarette butts;
- the cigarette butt transitioned to flaming when it came into contact with a combustible material such as the packet of seeds and the fire spread to the plastic container and from there to the timber table top;
- the timber from the table top and the plastic from the container caught combustible material located nearby alight, probably including the washing basket of clothes and the A/C unit;

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392 At T2341
393 T2345-6
394 T2348
395 T2349

- at some point, the vacuum cleaners on the balcony have also become involved in the fire and there has been direct flame impingement on Alucobest panel in the vicinity of the A/C unit;
- it is not possible to determine on the evidence when in the sequence of events the direct flame impingement on the Alucobest panel first occurred, including whether this was before, after or at the same time as one or more of the items beyond the table;
- the direct flame impingement on the Alucobest panel was sufficient to degrade the outer 0.5mm aluminium sheet and expose the polyethylene core, leading to further degradation of the aluminium and increasing fire spread;
- the aluminium could also have been breached by the intense heat likely to have been experienced at the junction of the southern wall and roof of the balcony of apartment 805, or by flame impingement at the join between the two panels fixed to the wall (or both);
- there was no evidence that the aluminium alloy used in the Alucobest panel would have performed differently in the fire from the alloy used in the Alucobond panel;
- the Alucobest panels and combustible material located within the wall structure has added to a rapidly spreading fire up the vertical wall and involving the balconies located above;
- during the developing fire on the balcony of apartment 805, embers and fire residue has fallen onto the balcony of apartment 605 which has started a fire around the A/C compressor unit; and
- the rapid spread of the fire up the side of the building was facilitated by the Alucobest panels used on the southern wall of the balcony, by providing a vertical fuel load for the fire.

Selection of Alucobond Plus or A2

223 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.

224 Gardner Group has submitted that "[t]he use of either a material other than an ACP, or an ACP with a 70% mineral core (such as Alucobond Plus) or 90% mineral core (such as Alucobond A2) would have

prevented the fire from escaping Apartment 805 prior to the fire being extinguished".[396] In support of the submission, Gardner Group referenced the report of Mr Hughes-Brown,[397] and then noted:

> "Mr Hughes-Brown was not cross-examined on the contents of his report. The other fire engineering experts were each asked this question. Mr Kip was unwilling to express an opinion due to his not having been briefed with sufficient information, while agreeing that the use of an ACP with a 70% mineral core (such as Alucobond Plus) or 90% mineral core (such as Alucobond A2) would have slowed the spread of fire: T2350 L10-T2351 L17. Dr Barnett's and Mr Wise's answers were to the same effect: T2351 L18-T2352 L10. Dr Clancy said that he was 90% confident that the use of an ACP with a 90% mineral core would have prevented the escape of the fire from Apartment 805: T2352 L11- T2353 L5."

225 I have found that the T2 Specification expressly encompassed the selection by LU Simon of a product "indicative to" the Alucobond product with the 100% polyethylene core, for installation as part of the external walls of the Lacrosse tower.[398] Thus, in my view, any assertion that a party with knowledge of the T2 Specification expected or assumed that Alucobond Plus or A2 would be used, is not sustainable. It follows that it is unnecessary for me to reach a concluded view as to whether selection of one of those products would have led to a different outcome.

226 For completeness, however, I am satisfied (consistently with the evidence of Mr Kip) that the use of either of these products would have slowed the spread of the fire. Beyond that, I am not satisfied that the evidence establishes that the use of either of these products would have prevented the fire from spreading beyond the balcony of apartment 805. Nor is it possible to say with any confidence on the evidence at what point on or from that balcony the fire spread might have been halted had the external walls been constructed using Alucobond Plus or A2.

227 For example, in the case of Alucobond Plus, the effect of Mr Hughes-Brown's conclusion was that, with a total calorific value of 18.5 Mj/kg for the wall system as a whole, it still had the potential to contribute to the spread of the fire, depending on the other characteristics of the wall system.[399] Thus how far on or beyond the balcony of apartment 805 the fire may have spread if Alucobond Plus had been used, is otherwise entirely speculative.

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396 I160 at [76].
397 C14.0030-0031 at [48]-[51]
398 [433]-[440]
399 C14.0030-31 – report at [48]-[51]

The smoke detector

228 The smoke detector that sent an automatic alarm to the MFB at 2.23am on 25 November 2014 was in the hallway just outside the front door to apartment 805. There was also a single smoke detector in the apartment, mounted on the ceiling of the living area. This was an ionisation-type detector that was not wired into any system connected to the MFB. If it had activated, it would have sounded a loud alarm that is likely to have woken all of the residents of the apartment. However, the evidence is that it did not activate at any time before about 2.10am, when the residents of apartment 805 became aware of the fire on the balcony. The evidence also is that the smoke detector had been covered with aluminium foil and it is not clear whether it activated at all during the fire event. The fire engineering experts all agreed that covering an ionising smoke detector with foil would interfere with its ordinary operation. [400]

229 Gardner Group submits that the disabling of the smoke alarm in apartment 805 contributed to the spread of fire.[401] In support of this submission it asserts that: "Each of Mr Wise, Dr Clancy and Mr Hughes-Brown agreed that it was more likely than not that if the smoke alarm had not been covered with foil, it would have activated prior to Mr Woo waking". It then sets out a summary of the facts relating to the MFB response times and continues:

> "On the basis of this logical sequence, it is reasonable to conclude that if the smoke alarm had activated before 2.05am, then the fire would not have escaped Level 8 before being extinguished. Nor would the sprinkler system have activated; it was this activation which caused the apartments to become heavily water-damaged. It is open to the Tribunal to conclude that the covering of the smoke alarm with foil by the tenants of Apartment 805, including Mr Gubitta was in fact the, rather than a, cause of the whole of the damage caused by the fire, beyond that on the balcony of Apartment 805 itself."[402]

230 The evidence on which Gardner Group relies in support of this submission,[403] was at best equivocal. All of the fire engineering experts agreed that they did not have enough information to express an opinion as to whether an uncovered smoke detector would have activated at about 1.30am when (according to his statement) the tenant Mr Ghaghda reported smelling burning plastic.[404] In his answer, Mr Kip discussed the difficulties with relying on witness statements about these matters. Senior counsel for Gardner Group then asked whether the expert witnesses "had the same view in respect of whether or not the smoke

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400 T2362
401 I160 at [77]
402 I160 at [81]
403 T2367-8
404 T2365-6; Mr Cousin's evidence on this was to the same effect: T1862

alarm was likely to have activated before 2.10am, which was when Jack woke up and saw the fire. And he has identified that he was woken by the smell".[405]

231 Dr Barnett's answer was in substance that its more likely that the smoke detector (if not covered by foil) would have activated at 2.10pm when Mr Woo woke up, than at around 1.30am.[406] Mr Wise's initial answer seemed to be saying no more that Dr Barnett's, but he then agreed with the proposition that it was more likely than not that an uncovered smoke detector would have activated by 2.10am. Mr Clancy and Mr Hughes-Brown agreed with Mr Wise, but Mr Kip said: "I'm not sure if I understand the question, but obviously, a smoke alarm covered with foil is less likely to activate than one that isn't…But the other variables I'm not clear about".[407]

232 The issue was revisited by senior counsel for the Owners, when all the experts seemed to agree that they meant more likely at 2.10am than 1.30am, rather than more likely than not.[408] Gardner Group submits that the questioning by senior counsel for the Owners directed to this issue was "unclear". In my view, it is more accurate to say that the evidence of the fire engineers on this issue generally was unclear. In particular, I am not satisfied that Mr Wise, Mr Clancy and Mr Hughes-Brown clearly understood the question when they gave their initial answers to senior counsel for Gardner Group. But even if they did, I prefer the evidence of Mr Cousins, Dr Barnett and Mr Kip to the effect that there was not enough evidence to express any opinion.[409]

233 In any event, as Gardner Group concedes:

> "[N]o expert was willing to proffer a view as to how much earlier the smoke alarm would have activated in circumstances where the level of smoke which had "diffused" through the exhaust system into the apartment between 1.30am and 2.10am is unclear, and unknowable."[410]

Thus, even at its highest, the initial answer by Mr Wise, Mr Clancy and Mr Hughes-Brown does not support Gardner Group's hypothesis. On that answer, a finding on the evidence that the smoke alarm would have activated at or before 2.05am, is no more (or less) open than a finding that it would have activated at 1.31am or 2.09am, or any time in between. As the Owners submit, it is entirely speculative.[411]

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405 T2366
406 T2367
407 T2368
408 T2411-12
409 T1864; T2367-8 and T2411-3
410 I160 at [82]
411 I158 at [71]

234 I am also not persuaded that activation of the smoke detector in apartment 805 five or even ten minutes earlier than around 2.10am, would have resulted in the fire being contained to the balcony of apartment 805. In my view, contrary to Gardner Group's submissions, it is not reasonable (or, indeed, possible) to conclude on the evidence what effect (if any) a time difference of five or ten minutes would have had on:

- the reactions of the residents on seeing the fire;
- the effectiveness or duration of their efforts to extinguish the fire;
- how the MFB were first alerted to the fire (whether by a phone call from a resident or the smoke detector in the hall);
- the extent of the vertical spread of the fire by the time the MFB arrived and were in a position to commence suppression efforts;
- what effect on the vertical spread those suppression efforts may have had; and
- the activation of the sprinkler system.

The unsealed penetrations

235 Gardner Group has also submitted that the existence of the unsealed penetrations in the Alucobest panels on the southern wall of apartment 805 were a factor that "contributed negatively to the extent of the spread of the fire beyond the table".[412] It later submitted that the "unsealed penetrations in the wall were a likely contributor to the fire spreading more rapidly than it would otherwise have done, although the degree to which they did so was clearly uncertain".[413] But again, in my view, the evidence is not sufficient to support even that apparently tentative submission.

236 Mr Cousins said he was not able to comment on Gardner Group's hypothesis that the ignition of the ACPs was exacerbated and accelerated by the penetrations.[414] He did, however, draw attention to a photograph[415] which showed that a penetration in one of the Alucobest panels affected by fire on the balcony of apartment 605 was still intact.[416] He also discussed in his evidence the potential difficulty of getting a flame to ignite the polyethylene between two intact sheets of aluminium because of the "quenching distance" involved.[417]

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412 I160 at [75]
413 I160 at [77]
414 T1864-5
415 C1.0012
416 T1865-7
417 T1828-9

237 Dr Barnett considered that having a flame in the area of the penetrations would lead to localised melting and the fire would grow but "not much would happen until you had a large section of the aluminium coming off and then more of the PE core being exposed to the flame and becoming involved".[418] His view as to each of the hypotheses as to the method of first ignition was that he would "rank flame impingement on the aluminium as being most likely".[419] Apart from Mr Hughes-Brown, each of the other fire engineers had nothing to add to Dr Barnett's evidence on this issue.

238 Mr Hughes-Brown had earlier observed that the penetrations would have had a contributing effect by allowing hot air into the cavity space behind the Alucobest panels.[420] And in response to Dr Barnett's evidence about flame impingement he said that testing in which he was involved showed that "penetrations…sort of changes the dynamics of the…panel" when it is subjected to a substantial amount of radiation heat. However, "because we don't know the scale of the fire…I mean there were a lot of low lying objects which means that there's a likelihood of a sort of low lying fire…it is hard to quantify directly."[421]

239 Mr Hughes-Brown's evidence on this issue was both abstract and heavily qualified. It is far from clear whether it can be said to support any finding on the role played by the penetrations in fire spread. But to the extent that there is any inconsistency, I prefer the evidence of Mr Cousins and the other fire engineering experts. In my view, it is likely that there was both direct and sustained flame impact on the Alucobest panels, at least sufficient to degrade the aluminium sheets and expose the polyethylene core, regardless of the penetrations. And there is no evidence that the penetrations were a factor in either ignition or fire spread (and some evidence suggesting they may not have been). Thus, I am not satisfied that the penetrations through the Alucobest panels were a "likely contributor" to the fire spreading more rapidly than it would otherwise have done.

Mr Gubitta

240 As noted above, Mr Gubitta was named as a party to the proceeding, but has not otherwise played any part in the proceeding. Thus his transcript of interview with investigators and his statement to police comprise the only evidence of his role in the fire. That material was not called into question by any party in the proceeding. In Mr Gubitta's transcript of interview with investigators, he describes the plastic container he was using as an ashtray as containing "plenty of cigarette

418 T2371
419 T2372
420 T2350
421 T2372-3

butt (sic) and water and dirty stuff".[422] He later describes butting out the cigarette and hearing a "psh" sound "because there's water".[423] He made similar observations in his statement to police.[424] There is no evidence that Mr Gubitta knew or ought to have known that the external walls on the south wall of the balcony were combustible.

ISSUES ANALYSIS

WHAT CAUSED THE DAMAGE?

241 In summary, my findings above on this issue are:

- the source of the ignition of the fire was an incompletely extinguished cigarette butt, left by Mr Gubitta in a plastic food container which caught fire and then spread to the plastic container and from there to the timber table top;
- this led to direct flame impingement on the Alucobest panel, but it is not possible to determine on the evidence when in the sequence of events that direct flame impingement first occurred, including whether this was before, after or at the same time as one or more of the items beyond the table;
- the direct flame impingement on the Alucobest panel was sufficient to degrade the outer 0.5mm aluminium sheet and expose the polyethylene core, leading to further degradation of the aluminium and the rapid spread of fire up the vertical south-facing balcony wall; and
- none of the choice of the Alucobest product over Alucobond PE (as it came to be known), the covering of the smoke detector in apartment 805 nor the unsealed penetrations in the Alucobest panels on the southern wall of apartment 805, had a material effect on the ignition of the ACPs or the subsequent rapid spread of the fire.

242 I have also found that, while the selection of Alucobond Plus or A2 would have slowed the spread of the fire, the evidence does not support any concluded finding as to the likely extent of the slowed fire spread. In any event, there is no basis for any party with knowledge of the T2 Specification to have expected these products would have been selected by LU Simon.

243 I would add that, in my view, the evidence and analysis of fire spread discussed above also does not support a finding that the storage of items on the balcony contributed to the ignition of the Alucobest panels or the subsequent fire spread. None of the parties submitted that the timber

422 C1.0112
423 C1.0115
424 C1.0193-4

top table and plastic chairs should not have been present on the balcony and the A/C unit is a fixture. The effect of the evidence is that these items alone could have led to direct flame impingement on the Alucobest panel sufficient to expose the polyethylene core. In relation to the items that could be reasonably described as having been "stored" (namely, the two vacuums, the doona, the cardboard and perhaps the washing), the timing and extent (if any) of their role in the ignition of the ACP was entirely speculative.

244 Thus, putting aside for the moment the deletion of sprinklers from the balconies discussed below, in my judgment there were only two necessary conditions in the sense contemplated by s51 of the *Wrongs Act*, for the ignition of the fire, the ignition of the ACPs, the subsequent rapid spread of the fire on the south facing balcony walls on the east side of the Lacrosse tower and the harm that ensued, being:

- the failure by Mr Gubitta to fully extinguish his cigarette; and
- the installation of an ACP with a 100% polyethylene core on the external walls of the Lacrosse tower.

WERE THE ACPS BCA COMPLIANT?

245 Before turning to the liability of individual respondents, it is appropriate that I deal with a key preliminary question in resolving aspects of that liability. While it is a question that most directly affects the potential liability of Gardner Group, it is also relevant to the claims against LU Simon, Elenberg Fraser and (to a lesser extent) PDS. The question is this. Did an ACP that met the Alucobond Specification and was proposed for use in around June 2011 as an external wall[425] of a Type A construction, meet the DTS provisions of the BCA?

246 The argument that it did was most conveniently and comprehensively set out in Gardner Group's written submissions.[426] These begin by confirming several issues that it submits (and I agree) were uncontroversial, as follows:

- there was no alternative solution for the installation of ACPs on the Lacrosse tower and therefore the compliance of the specified panels must be assessed by reference to the DTS provisions of the BCA;
- external walls of type A construction were required to be non-combustible;[427]

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425 Being an external wall within the meaning of the BCA that had no designated fire resistance level under the BCA

426 I160, commencing at [86]

427 Clauses C1.1 at D12.0009 and Specification C1.1 (3.1) at D12.0023

- non-combustible means not deemed combustible as determined by the test in AS1530.1;[428]
- all ACPs (ignoring Alucore) are combustible (in that they would fail the test under AS1530.1); and
- it follows that, for ACPs to be used in an external wall of Type A construction and comply with the BCA, a DTS concession as to non-combustibility must be found.

247 Gardner Group submits that there were two DTS concessions as to non-combustibility which, in the opinions of each of the building surveyor experts called by Gardner Group, provided an available and appropriate pathway for approval of the ACPs at the time the Stage 7 building permit was issued in June 2011. These are C1.12(f), and C2.4 of Specification C1.1. [429] Gardner Group further submit that, although Mr Galanos did not rely on C2.4, if that clause provided a pathway to compliance, then Mr Galanos can have no liability for issuing a building permit authorising the Alucobond Specification.[430]

How should BCA C1.12(f) be construed?

248 The full text of C1.12 is as follows:

> **"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

428 Clause A.1 at D11.0017
429 I160 at [89]
430 I160 at [99]

(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.

249 I have set out above what I consider to be the proper approach to the construction of the BCA.[431] Gardner Group's submission on the construction of C1.12(f) is set out under three headings—textual analysis, contextual analysis and purposive analysis. The section on textual analysis commences: "The construction of C1.12(f) turns upon a construction of the word 'laminate'".[432] While, in one sense, this is so, I consider that making this the starting point of the analysis distorts the proper construction of the provision. As explained below, the appropriate starting point is the whole of the phrase comprising the chapeau to the provision: "Bonded laminated materials".

250 Gardner Group next submits that, as a matter of grammar, "laminate" in C1.12(f)(i) is a noun. It then posits three possible meanings for "laminate" as a noun—

- a single product which is comprised of layers bonded together;
- as a synonym for each of the layers of the bonded product containing many layers; and
- the external layer used to cover another material in the process of lamination (being the application of a protective layer to a material).[433]

251 Gardner Group's submissions reject the first meaning before proceeding to examine each of the second and third meanings, submitting that the third must be preferred. Notably, in rejecting the first meaning, Gardner Group submits:

> "In fact, any reading of C1.12(f) shows that the First Meaning of 'laminate' is what is in fact contained within the composite phrase 'bonded laminated material' in clause C1.12(f). It follows that where 'laminate' is used in C1.12(f), it could only be given either the Second or Third Meaning."[434]

252 I agree that "laminate" in C1.12(f)(i) cannot, as a matter of construction, mean the same thing as "bonded laminated materials"—the part ("laminate") must be something less that the whole ("bonded laminated materials"). But by treating the expression "bonded laminated material" as relevant only to excluding one possible alternative construction of "laminate" in C1.12(f)(i), Gardner Group have inverted the importance of the phrase "bonded laminated

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431 [34]-[38]
432 I160 at [90]
433 I160 at [90]
434 I160 at [92]

materials" in more broadly informing the proper construction of all of the sub-paragraphs of C1.12(f), including C1.12(f)(i).

253 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"*.[435]

254 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 *laminated 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."[436]

255 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"[437]

256 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

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435 I160 at [92]
436 The Oxford English Dictionary, 2nd Ed, Vol VIII, Clarendon Press, Oxford
437 The Oxford English Dictionary, 2nd Ed, Vol II, Clarendon Press, Oxford

that the immediately following expression "each laminate" can *only* refer to each of the bonded layers that together comprise the "bonded laminated" whole.

257 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.

258 Turning to each of the bases on which Gardner Group contend that its "Third Meaning" is to be preferred, it first points to the example sentences in the Oxford English Dictionary definition of "laminate" and notes that: "Those examples clearly indicate the use of the term "laminate" in a manner consistent with either the first or third meaning, but not once in a manner consistent with the second".

259 In my view, most of these examples do no more than confirm that "laminate" can, and often does, refer to an outer or surface layer or veneer applied to, for example, furniture. And it does not follow from the example: "*Deck construction includes either balsa wood or plywood sandwiched between fiberglass laminates*", that the balsa wood or plywood cannot also be described as a "laminate" within the product as a whole.

260 The same point can be made concerning the references to Mr Kip's evidence and the Standards Australia Glossary of Building Terms.[438] The Glossary's definition of laminate[439] as "a product comprising layers of material bonded together with an adhesive" again is synonymous with the phrase "bonded laminated materials". Having used this more comprehensive phrase, it is unsurprising that sub-clause (i) uses "where each laminate" to refer to each of the layers making up the laminated product.

261 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 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.

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438 I167
439 I167.0161

262 Further, in my judgment, any room for doubt that might be said to arise on a textual analysis alone, evaporates entirely once the contextual and purposive analyses are engaged. I agree with Gardner Group's submission that there is substantial overlap in the contextual and purposive analysis of C1.12(f),[440] and I therefore deal with them together. As Gardner Group submits:

> "C1.12 is found in Section C of the BCA which relates to Fire Resistance. Each of the Objectives of the section relate to life safety, facilitation of activities of emergency responders, avoiding the spread of fire between buildings and protection of *other property* (ie property other than the subject property) from structural failure".[441]

263 Gardner Group also submits that: "Notably, the avoidance of property damage by fire to the building itself is not an Objective of section C".[442] While this is so, it does not follow that the BCA is unconcerned with damage by fire to the building itself, particularly where such damage threatens the occupants or the activities of emergency responders. For example, the Functional Statements and Performance Requirements in Section C of the BCA include:

- "A building is to be constructed to maintain structural stability during fire to… allow occupants time to evacuate safely; and allow for fire brigade intervention";[443]
- "A building is to be provided with safeguards to prevent fire spread… to sole occupancy units providing sleeping accommodation";[444] and
- "A building must have elements which will, to the degree necessary, avoid the spread of fire… to sole occupancy units and public corridors; and… in a building".[445]

264 Against that background, Gardner Group's criticism of Mr Kip's evidence that C1.12 allows use of "limited combustibility materials",[446] is unwarranted. Mr Kip is not using the expression "limited combustibility" as a term of art. Rather, in my view, he is merely identifying that clause C1.12 operates as a concession allowing the use of particular products that, though strictly combustible under the test in AS1530.1, are combustible only to a limited extent.

265 And, importantly, the extent of that combustibility is defined in clause C12.1 either by an industry standard description of the product or by

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440 I160 at [96]
441 I160 at [95(a)], citing D12.0004 and T2480, Mr Leonard's explanation as to the principles of the BCA and the balance of risks it sets out to achieve
442 I160 at [95]
443 CF1 at D12.0004
444 CF2 at D12.0004
445 CP2 at D12.0005
446 I160 at [95(b)]

unpacking the product into its component parts and prescribing precise limits to the combustible components. Thus in the case of a combustible surface finish on pre-finished metal sheeting, C12.1(e) provides that the surface finish must not exceed 1 mm thickness and the product as a whole must have a "Spread-of-Flame Index" not greater than 0.

266 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.

267 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 2 mm, 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.[447]

268 Gardner Group contends that this can be explained by the two additional controls upon the use of bonded laminated materials, being the *Spread-of-Flame Index* and the *Smoke-Developed Index* of the material as a whole:

> "Contextually, it is reasonable to infer that by the imposition of these additional tests, the materials contemplated by C1.12(f) may pose a greater fire safety risk than any other product nominated in C1.12 and that the tests nominated by C1.12(f)(iv) were included as the express means by which that risk was intended to be addressed."[448]

269 There are two difficulties with this argument. First, C12.1(e) also incorporates at least one of those controls. Second, if these two additional controls were considered sufficient to address the combustibility of the product as a whole, there would have been no need to make express and precise allowance for the permitted thickness of adhesive. This too is encased entirely within the two aluminium outside layers or sheets. If the existence of these purportedly non-

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447 D21.0014
448 I160 at [95(c)]

combustible outside sheets is sufficient to justify relying only on the *Spread-of-Flame Index* and the *Smoke-Developed Index* to regulate the combustibility of the "core material", why is it also not sufficient to regulate the combustibility of the adhesive? Why is there a 2mm permissible maximum thickness for the adhesive encapsulated by the aluminium sheets, but no provision regulating the thickness of a combustible polyethylene core of up to 5mm thickness?

270 In summary, a "bonded laminated material" can be expected to comprise a bonding material (adhesive) and two or more laminates. C12.1(f) is plainly seeking to deal in express and precise terms with the potential combustibility of each of these elements. Combustible adhesive is permitted up to a maximum thickness of 2mm. But each of the laminates (including the polyethylene laminate) must be non-combustible. I deal below with the question whether the construction urged by Gardner Group is unreasonable for the purposes of s59(2) of the *Wrongs Act*, including the evidence suggesting that C1.12(f) was introduced to deal with a product such as Alucobond.

How should C2.4 of Specification C1.1 of the BCA be construed?

271 Clause C2.4 of Specification C1.1 of the BCA relevantly provides as follows:

> **"2.4 Attachments not to impair fire-resistance**
>
> (a) A *combustible* material may be used as a finish or lining to a wall or roof, or in a sign, sunscreen or blind, awning, or other attachment to a building element which has the *required* FRL if—
>
> (i) the material…complies with the fire hazard properties prescribed in…Clause 2 of Specification C1.10…; and
>
> …
>
> (iii) it does not otherwise constitute an undue risk of fire spread via the façade of the building.
>
> (b) The attachment of a facing of finish…to a part of a building *required* to have an FRL must not impair the *required* FRL of that part."

272 As Gardner Group submits,[449] C2.4 of Specification C1.1 is a DTS provision, by operation of C1.0(a)(i) and C1.1(a) of the BCA. Gardner Group submissions go on to analyse at some length the various elements of C2.4. In particular, it submits that:[450]

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449 I160 at [100]
450 I160 at [101]-[107]

- if an ACP can be described as a "finish" to a "wall" or as an "other attachment to a building element which has the *required* FRL", it will be deemed to comply with the BCA if it also meets the criteria in (relevantly) (i) and (iii) of 2.4(a);
- the reference to the "required FRL" only applies to a "sign, sunscreen or blind, awning, or other attachment to a building element";
- in the context of clause 2.4, the word "finish"[451] must mean the material which displays the "finish", not the finish itself;
- clause 2.4(b) does not require consideration of the question of impairment of fire resistance in a wall that does not require an FRL (it was common ground that the FRL of the south facing balcony walls of the Lacrosse tower was designated as "-/-/-", which meant there was no requirement for an FRL under the BCA[452]);
- the effect of the test prescribed under clause 2.4(a)(i), is that an ACP with a 100% polyethylene core can only satisfy this part of the clause if it is a "finish" or an "attachment", because, as a "lining", it would not meet the test criteria in C1.10a (clause 3);
- "C2.4(a)(iii) is an odd provision, in that it imports an obviously subjective consideration (although it might be argued that the interpretation of undefined terms such as "wall" or "attachment" also involve a degree of subjective consideration) into a DTS provision"; and
- the BCA definition of "external wall" between 2006 and 2012 does not assist in determining whether there is a distinction able to be drawn between a "wall" and a "finish" to a wall, or an "attachment" to a wall.

273 Gardner Group then essentially repeat parts of their submissions on contextual and purposive construction from their discussion of clause C1.12(f), and submit that:

> "…the Tribunal ought to conclude that under the BCA, a "finish" to a "wall" under C2.4 of Specification C1.1 could include the use of an external panel (with an external "finish" in the defined sense) providing the outer layer of such a wall, and with that "finish" not being part of the "wall" or *external wall* itself."

274 After next asserting that the Tribunal ought to find that the Alucobond Specification did satisfy the requirements of C2.4(a)(i), surprisingly (given the time devoted to this issue in evidence—including expert

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451 Gardner Group asserts at I160 at [102] that "finish" is defined by the BCA. Despite my searches, I have been unable to locate a BCA definition of that term. I note that Mr Leonard states that "finish" and "lining" are not defined by the BCA – see C5.0010

452 D11.0015, see the "Note" to the definition of FRL

evidence—and submissions), Gardner Group then appear to abandon their argument based on BCA C2.4 of Specification 1.1. They state that "with hindsight and despite the subjective element in C2.4(a)(iii)" the Alucobond Specification clearly did constitute an "undue risk of fire via the façade of the building" and that:

> "It follows that C2.4 of Specification C1.1 did not provide, in fact, a pathway for the use of Alucobond (PE) in 2011 as complying with the BCA – although the knowledge of undue risk of spread of fire through the use of the product may have been unknown to a large majority of building surveyors in Victoria at the relevant time."

275 Despite this, both for completeness and in case I have misunderstood the intent of this submission, I will state briefly my views of the evidence on C2.4 of Specification 1.1. I consider that the analysis of the building surveyor experts called by Gardner Group on this issue was generally superficial and unconvincing. They referred generically to "finish or lining", without drawing any distinction between the terms. In particular (unlike Gardner Group's submissions[453]), they failed to identify that a wall "lining" comprising an ACP with a 100% polyethylene core would not meet the test criteria in C1.10a (clause 3).

276 Mr Leonard did include a reference to definitions of these terms, but without noting the source of the definitions. He said:

> "A **finish** is defined as "the surface appearance of a manufactured material or object" and a **lining** is defined as "a layer of different material covering the inside surface of something".[454]

Mr Leonard does not explain how, on his definition, the term "lining" extended to a layer of different material covering the *outside* surface of something.

277 And none of the reports descends to any analysis as to how the term "finish" could be construed to include an ACP. A cursory review of the BCA shows that the term "finish" is generally used consistently with the use in, for example, BCA C1.10(c)(viii)[455]—"a paint, varnish, lacquer or *similar finish*…" (emphasis added). It is far from clear to me how a product with the structure, composition and dimensions of an ACP that is affixed using studwork and provides both weatherproofing and acoustic benefits, can be described as a "finish".

278 Further, each of the building surveyors asserts to the effect that C2.4 was commonly interpreted to include finishes and linings which formed part of the external wall,[456] without any real analysis of how or why this approach was justified. As a matter of construction, I prefer the views

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453 I160 at [104]
454 C5.0010
455 D12.0012
456 See, for example, Mr Leonard at C5.0010 and Mr Capouleas at C8.0005

on this issue expressed by Mr Quigley,[457] Mr Bullen[458] and Mr Kip[459] (the latter also having been endorsed by Dr Barnett).[460] In the circumstances, I reject any submission that C2.4 of Specification 1.1 provided an available and appropriate pathway for approval of the ACPs at the time the Stage 7 building permit was issued in June 2011.

LU SIMON'S LIABILITY

What are the claims against LU Simon?

279 The Owners' claim against LU Simon in the proceeding was ultimately both confined and straight-forward. They allege in their closing submissions that LU Simon breached particular warranties implied into the D&C Contract by s8 of the DBC Act. They disclaim any reliance on the warranty in s8(a) of the DBC Act that the work on the Lacrosse tower be carried out in a proper and workmanlike manner.[461] They do not rely on the warranty in s8(d) of the DBC Act that the work will be carried out with reasonable care and skill.

280 The Owners allege that the warranties on which they *do* rely are absolute and not qualified by any obligation to take reasonable care, with the result that the Owners' claims against LU Simon are not apportionable. The Owners argue, in the alternative, that if their claims against LU Simon are apportionable, they adopt LU Simon's claims against each of Gardner Group, Elenberg Fraser and Thomas Nicolas. They say that if LU Simon is successful in shifting liability to any of those parties, then those parties are liable to the Owners to the extent of that shift.

281 Each of Gardner Group, Elenberg Fraser and Thomas Nicolas, in their turn, seek to shift liability back to LU Simon, relying on principles of proportionate liability.[462] They allege that LU Simon failed to take reasonable care (including by failing to ensure compliance with the BCA) in selecting and installing the Alucobest panels. They further allege in substance that LU Simon should bear the lion's share of any responsibility for the damage suffered by the Owners.

Did LU Simon breach the implied warranties?

282 The warranties implied into the D&C Contract by s8 of the DBC Act and relied on by the Owners are summarised above.[463] They are, in substance, warranties as to:

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457 T2068-9
458 T2070
459 T2283-4
460 T2290
461 I158 at fn 19
462 *Wrongs Act* Part IVAA
463 [48]

- suitability of materials (DBC Act s8(b));
- compliance with the law (including the BCA) (DBC Act s8(c)); and
- fitness for purpose (DBC Act s8(f))

283 LU Simon admitted that the warranties in s8 of the DBC Act were incorporated into the contract for the construction of the building. It also admitted that the warranties run with the building and that the Owners may take proceedings against LU Simon for breach of those warranties, as if they were parties to the D&C Contract.[464] It denied breaching the warranties, but has not advanced any argument in support of that denial. Further, when asked about the Owners' submission that the warranties are absolute in nature and not qualified by or limited to an obligation to use reasonable care and skill, senior counsel for LU Simon said: "we don't have firm submissions to make on that behalf".[465]

284 It is not surprising that LU Simon has not sought to mount a substantive defence to these claims. In my view, there is none.

285 In *Barton v Stiff*,[466] Hargrave J (as he then was) confirmed the principle that a builder's liability for design and construction was not merely an obligation to use reasonable care. In particular, the warranty of fitness for purpose was absolute.[467] His Honour added that: "the absolute warranty of fitness for purpose relates to the purpose as properly identified". That is, the obligation of the builder must be measured by reference to the purpose for which the building was required under the conditions likely to be encountered at the land.[468]

286 Thus I accept the Owners' submission that the warranties are "not qualified or limited to an obligation to use reasonable care and skill" and that:

> "[T]herefore, it is irrelevant whether LU Simon reasonably relied (as it asserts) upon the 'experts in the design team' (that is, the other respondents) for advice as to the compliance of the Alucobest panels with the BCA; or that it was not made aware of any concerns regarding the use of ACP as an external cladding material; or that ACP had been used to clad other high-rise buildings in Melbourne, such that personnel within LU Simon may have believed that it was suitable for that purpose."[469]

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464 DBC Act s9
465 T2828
466 [2006] VSC 307
467 *Barton v Stiff* [2006] VSC 307 at [33] and [37]
468 *Barton v Stiff* [2006] VSC 307 at [36] and [39]
469 I158 at [32]

287 Consistently with the discussion in *Barton v Stiff*[470], the starting point in the analysis in respect of both the warranty as to suitability of materials and the warranty of fitness for purpose, is to determine the purpose for which the building (and thus the relevant materials) was required. The purpose of Lacrosse tower was as a multi-storey residential apartment building. What this means for the selection and fitness of materials might be said to be a matter of common sense, but it is convenient to draw on the provisions of the BCA.

288 As the objective in clause CO1 of the BCA indicates, fire has the potential to result in injury to people, physical damage to property and structural failure of a building. For this reason, the BCA requires, by clause CP2(a), that a building have elements which will avoid the spread of fire to the degree necessary to achieve the objective. The BCA places particular emphasis upon the suitability of materials used in high-rise residential buildings. It requires that such buildings be of "Type A construction", being the most fire-resistant type of construction, and specifically provides that their external walls must be non-combustible.

289 The evidence was clear that the Alucobest panels were combustible within the meaning of the BCA. The CSIRO testing established unequivocally (and dramatically) that the Alucobest panel was deemed combustible according to the test criteria specified in clause 3.4 of AS1530.1.[471] No party sought to contend otherwise. Further, the expert evidence as discussed above was unanimously to the effect that the use of Alucobest panels as part of the external walls of the Lacrosse tower caused the rapid spread of the fire beyond the balcony of apartment 805 and up the east face of the building.

290 Against that background, I agree with the Owners' submission that the Alucobest panels were obviously not good or suitable for the purpose of being used in the external walls of a high-rise residential building such as Lacrosse,[472] and thus breached the warranty in s8(b) of the DBC Act. I also agree that this same evidence establishes that the Alucobest panels installed by LU Simon were not fit for purpose in breach of the warranty in s8(f) of the DBC Act. And in my view, the "reliance" prerequisite to a breach under that section is amply demonstrated by the provisions of the D&C Contract concerning the "Principal's Project Requirements" and objectives, set out above.[473]

291 Turning to the warranty of compliance with the law (DBC Act s8(c)), I have concluded above in substance that no ACP with a polyethylene core complied with the BCA. In particular, I am satisfied that ACPs

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470 [2006] VSC 307
471 G1740.0092 – CSIRO Notice of Advice, appendix 3 to the MFB PIA Report
472 I158 at [40]
473 [49]

with a polyethylene core did not comply with the DTS provisions of the BCA by any pathway, including C1.12(f). The position in respect of the Alucobest panels is perhaps even clearer, given that it did not have a test certificate under AS1530.3 which specifically addressed the criteria in C1.12(f)(iv), at the time of installation. On this basis, I am satisfied that LU Simon was also in breach of the warranty in s8(c) of the DBC Act.

292 LU Simon has not cavilled with the Owners' submissions as to their entitlement to an award of damages for breach of the warranties under the principles for damages at common law for breach of contract. Again, this is unsurprising. In my view, that entitlement is unarguable. The only issue is the calculation of the quantum of that damage, which is dealt with in the final section of these reasons.

Did LU Simon fail to take reasonable care?

293 The elements of the claims against LU Simon for failure to take reasonable care are somewhat elusive on the pleadings. Particulars of the claims generally refer to other paragraphs of that party's or another party's pleadings, which in turn tend to focus on LU Simon's contractual obligations under the D&C Contract. Subject to that reservation, the claims in closing submissions seemed to boil down to failure by LU Simon to exercise reasonable care in relation to:

- 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 provisions of the BCA, which failure gave rise to a breach by LU Simon of s16 of the *Building Act*.

294 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.

295 The question whether LU Simon's installation of non-compliant ACP's was a failure to exercise reasonable care, is less straightforward.

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 s16 of the *Building Act* to construct buildings that comply with the building permit and which comply with the *Building Act*, *Building Regulations* and the BCA. It continues:[474]

> "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."

296 Similarly, Elenberg Fraser submits that:[475]

> "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[476]]. 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] 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."

297 Thomas Nicolas's submissions refer primarily to matters relating to the selection of Alucobest, but observe that:[477]

> "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."

298 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

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474 I160 at [165]
475 I161 at [186]-[189]
476 T2583
477 T162 at [94]

brochure, the risk of fire of the PE was protected by the aluminium laminate covers".[478]

299 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:[479]

> "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."

300 Dealing first with Thomas Nicolas's submission urging caution in considering Mr Moschoyiannis's evidence, that evidence was summarised in LU Simon's submissions as follows:[480]

> "Like many other people, Mr Moschoyiannis did not know that polyethylene was a flammable material: [T613 L7]. 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: [G1811]. See also the Alucobond brochure 'Alucobond - 40 years of excellence - From a Pioneer to the Synonym': [D20]. Similar comforting statements were made in the Alucobest brochure at [G1806], 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."

301 In my view, LU Simon's summary accurately encapsulates Mr Moschoyiannis's evidence and I accept that evidence as truthful. The evidence in the proceeding generally clearly demonstrates that, with the exception of fire engineers, there was in 2011 a poor understanding among building professionals (at least in Australia) of the fire risks associated with ACPs. And in the overall cohort of building professionals, there is no reason to expect that building firms would

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478 T162 at [96]
479 I158 at [57]-[58]
480 I159 at [24]-[25]

have a superior understanding to, for example, that of architects and building surveyors. In fact, the reverse is probably true. Given their level of qualifications and the nature of their responsibilities, it would be fair to expect fire engineers, building surveyors and architects (in that order) to have a better grasp than building practitioners of fire risks and the application of the BCA to those risks.

302 LU Simon's construction of the Lacrosse tower using non-compliant ACPs was clearly an error. Further, as I have found, that error gave rise to a breach of warranty by LU Simon under the DBC Act and renders it liable to compensate the Owners for breach of that warranty. But, consistently with the Owners' submissions, it is trite that not every error is negligent. According to Bray CJ in *Jennings v Zilahi-Kiss*,[481] a professional person "is only liable for the use of ordinary care and skill" and "is not bound to guarantee against all mistakes or omissions".

303 LU Simon submits in substance that, despite any breach of its obligation to comply with the BCA, it acted reasonably in constructing the Lacrosse tower using combustible ACPs because it did so:

- unaware of the fire risks associated with ACPs (and I accept this is so, as explained above);
- in furtherance of its obligations under the D&C Contract; and
- relying on Elenberg Fraser, Gardner Group and Thomas Nicolas to ensure compliance with the BCA.

304 Expanding on this submission, LU Simon observes that it was not responsible for including ACPs into the design. That was Elenberg Fraser. Further, LU Simon had no role in the inclusion of the words "indicative to Alucobond" in the T2 Specification. That too was Elenberg Fraser.[482] LU Simon also points out that it was obliged under the D&C Contract to comply with the "Critical Design Requirements", which included the T2 Specification.[483] Given that it was unaware that the installation of ACPs in accordance with the D&C Contract posed a fire risk and failed to comply with the BCA, I agree with LU Simon that "the obvious thing for a builder to do in 2010 or 2011 was to use a product that was indicative to Alucobond".[484] As LU Simon submits, it also sought and obtained approval for the use of Alucobest from Elenberg Fraser.[485]

305 Turning to Gardner Group, LU Simon submits that: "it must be remembered that compliance of both designs and proposed construction

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481 [1972] 2 SASR 493, 512, cited with approval in *Goddard Elliot v Fritsch* [2012] VSC 87, per Bell J at [411]
482 I159 at [12]
483 I159 at [18]
484 I159 at [22]
485 I159 at [29], referencing T610

with the BCA is the responsibility of the building surveyor, especially when assessing whether to issue a building permit". It argues that, in this case, 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.[486] And finally, as to Thomas Nicolas:

> "It must also be remembered that Thomas Nicolas had issued a number of fire engineering reports, none of which identified any problem with the use of aluminium composite panels as part of the external walls of the building. The failure of Thomas Nicolas to identify any issue with the use of aluminium composite panels is critical. As Mr Moschoyiannis said, silence or absence of an alternative solution in the fire engineering report indicates compliance on a deemed-to-satisfy basis."[487]

306 I accept these submissions. In my view, there is 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. Among other things, as LU Simon has noted, there is no expert opinion 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. Further, I agree that an important aspect of LU Simon's acquittal of its obligation to exercise reasonable care, was its engagement of each of Elenberg Fraser, Gardner Group and Thomas Nicolas under the various Consultant Agreements.

307 Each of the building professionals engaged in the process of construction of the Lacrosse tower was an important link in the chain of assurance and compliance with the BCA. Each seeks to point to the others as having the responsibility to have taken steps that would have avoided loss. In my view, the builder sits in a different category to the other building professionals. Certainly LU Simon bears front-line responsibility to the developer and owner. But 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. I agree with LU Simon's senior counsel that:

> "The other respondents appear to submit that LU Simon was capable of second-guessing the advice and performance of those experts who had been contracted to provide that advice and performance and who are in breach of their contracts for failing to provide it."[488]

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486 I159 at [31]
487 I159 at [33], referring to T721
488 T2809

308 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 (SA) Pty Ltd*,[489] Hasluck J rejected the architect's allegation of contributory negligence, finding that the client developer was dependent on the architect's professional skills.

GARDNER GROUP'S LIABILITY

What are the claims against Gardner Group?

309 The Owners claim that, by reason of his appointment as the relevant building surveyor[490] for the Lacrosse project, Mr Galanos owed them a duty to exercise reasonable care. The basis of the duty of a building surveyor to current owners was recognised in *Moorabool Shire Council & Anor v Taitapanui*[491] and is not in dispute.[492] Gardner Group submit that:

> "The duty of a building surveyor was described by the majority in *Taitapanui* as: "a duty to exercise reasonable care in the giving of a building permit in respect of building work the subject of an application for the permit" [*Taitapanui* at [160] per Ashley and Ormiston JJA]. The scope of the duty is to be considered by reference to the specific statutory functions of a relevant building surveyor who is a private building surveyor under, in particular, sections 19, 24, 76, 79 and 81 of the *Building Act*." [493]

310 The Owners allege that Mr Galanos breached that duty by issuing the Stage 7 Building Permit in circumstances where the design documentation approved by Mr Galanos:

- provided for cladding that did not, to the degree necessary, avoid the spread of fire in the building and thus failed to meet the requirements of CP2(a)(iv) the BCA; and/or

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489 (2008) 28 WAR 1 at [569]
490 Within the meaning of the *Building Act*
491 *Moorabool Shire Council & Anor v Taitapanui & Ors* (2006) 14 VR 55
492 I159 [160] and I160 [46]
493 I160 at [47]

- did not contain sufficient information to assess whether the cladding was compliant with the BCA.

The Owners further allege that Gardner Group is vicariously liable for any breach of duty by Mr Galanos. Gardner Group admit that allegation.[494]

311 LU Simon likewise pleads Gardner Group's duty to the Owners,[495] but the facts it relies on as giving rise to alleged breaches of that duty are far more expansive than those advanced by the Owners. It refers at length to Gardner Group's involvement in the various design phases of the Lacrosse project between 2007 and 2012 and alleges numerous breaches by Gardner Group of its duties to the Owners in failing to provide any advice or warning during those phases that ACPs were non-compliant and not fit for purpose under the BCA, or otherwise advise or warn concerning the risks associated with ACPs.[496]

312 LU Simon also claims that Gardner Group breached its duty of care to the Owners by issuing an Occupancy Permit that failed to include a condition that apartment balconies were not to be used for storage.[497] It pleads that: "If the balcony of unit 805 had not been used for storage, then the external cladding of the building would not have ignited and caused the fire to spread beyond the balcony".[498] I have found above that the evidence of fire spread does not support a finding to that effect.[499] It is therefore unnecessary for me to say any more about that claim.

313 LU Simon's claims directly against Gardner Group are based primarily on alleged breaches of GG Consultant Agreement. These allegations of breach are also expansive, but can be distilled for the purposes of analysis into the following:

- issuing the Stage 7 Building Permit in circumstances where the ACPs approved by the permit for use on the façade of the Lacrosse tower failed to comply with the BCA in that they did not meet the DTS provisions of the BCA and were not fit for purpose;
- failing to identify deficiencies in the Fifth FER; and
- failing to properly inspect the work during construction for compliance with the BCA.

314 LU Simon makes additional claims directly against Gardner Group under the ACL. It alleges in substance that:

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494 I160 at [8]
495 A11 at [9]
496 See, in particular, A11 at [10], [18.3] and [31.1]
497 A11 at [43]-[51]
498 A11 at [50]
499 [243]

- by issuing the Stage 7 Building Permit and the Occupancy Permit, Gardner Group represented that the design for the Lacrosse tower incorporating ACPs complied with the BCA and that the Lacrosse tower was suitable for occupation; and
- the representations were misleading or deceptive or likely to mislead and deceive in contravention of s18 of the ACL.

Were breaches of GG Consultant Agreement a failure to act with care?

315 There is an important threshold question in relation to the nature and extent of Gardner Group's obligations under the GG Consultant Agreement. It is important because the same question arises in respect of all three of the Consultant Agreements in issue in the proceeding and it impacts on certain of the claims and defences advanced by Gardner Group, Elenberg Fraser and Thomas Nicolas under the *Wrongs Act*. The question is this: Are any of the relevant obligations under the Consultant Agreements absolute, or does a breach of those obligations arise only if the consultant is shown to have acted without due care and skill?

316 Gardner Group submits that the GG Consultant Agreement does not contain any provision which imposes on Gardner Group an obligation to perform its services other than in accordance with a standard of reasonable care and skill. It says this is made expressly clear by clause 2(b) of the GG Consultant Agreement, which (in substance) obliges the consultant to perform the "Services" to that standard. It concludes:

> "In other words, the Gardner Group Agreement did not require Gardner Group to guarantee that the design documentation considered by it was BCA-compliant, but rather that they have exercised reasonable skill and care in assessing that the design documentation is BCA-compliant (or non-compliant). Any imposition of strict liability on Gardner Group, without legal fault on its behalf in providing the Services, would have had to be expressly stated in Gardner Group Agreement; there is no such term."[500]

317 In respect of a submission to the same effect in Gardner Group's opening submissions, LU Simon submits that: "There is no legal authority to support that proposition. But even assuming Gardner Group's obligations under the consultant agreement were so confined, it is clear that Gardner Group failed to perform its services in a competent manner".[501] LU Simon does not otherwise engage with this issue in its written submissions and largely critiques Gardner Group's conduct against the standard of a reasonably competent building surveyor.[502]

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500 I160 at [18]
501 I159 at [46]
502 See, for example, I159 at [96], [109] and [124]

318 However, in oral closing submissions, senior counsel for LU Simon appeared to reprise the submission that Gardner Group (and the other respondents) had an absolute obligation under the Consultant Agreements to ensure compliance with the BCA. He submitted that it cannot be thought that satisfaction of the obligation that the consultant perform "Services" in accordance with the Consultant Agreement was somehow "watered down" by the provision regarding the standard of care and skill to be expected of a consultant.[503] Counsel later argued that:

> "The [GG Consultant Agreement] required that the consultant prepare the contract materials thus including the building permit to comply with the BCA. In our submission, Your Honour, that was an absolute obligation and not just something in respect of which it had to exercise a duty of care".[504]

319 It is not correct to say that Gardner Group do not cite authority in support of their contrary argument. Later in their written closing submissions, they submit that that:

> "The contractual obligations of a professional which is a party to a contract to use reasonable care in the performance of contractual services are, in the absence of an express contractual provision to the contrary, co-extensive with the common law duty to exercise reasonable care in the provision of professional services. [citing s46 of the *Wrongs Act* and *Midland Bank PLC v Messrs Cox McQueen (A Firm)* [1999] P.N.L.R. 593, pg 602 and 603]. Thus, the question of Gardner Group's obligations to LU Simon, and to the Applicants, and whether they have been negligent, should be considered by reference to the requirements of Part X of the *Wrongs Act* [citing in particular s44 of the Wrongs Act]."[505]

320 But in my view, the authority does not go as far as Gardner Group contends. At most, it might support the proposition that any imposition of absolute liability on members of a profession must be stated in clear terms. Thus it leaves open the argument that particular provisions of the GG Consultant Agreement are in sufficiently clear terms to impose an absolute liability. And while s46 of the *Wrongs Act* allows for contracting out of Part X of the Act, it does not follow that a contract lacking an express contracting out provision, necessarily engages all the provisions of that Part.

321 Part X of the *Wrongs Act* applies to "any claim for damages resulting from negligence, regardless of whether the claim is brought…in contract".[506] Again, it is clearly arguable that certain of the provisions of the GG Consultant Agreement can be breached by Gardner Group in

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503 At T2808, referring to the obligations in clauses 2(a) and 2(c) of the GG Consultant Agreement
504 T2823, apparently referring to clauses 3(u) and (v) of the GG Consultant Agreement
505 I160 at [45]
506 *Wrongs Act* s44

circumstances not involving negligence. The issue is finely balanced, but I would favour the construction urged by Gardner Group. To my mind, the better view is that the provisions of clause 3 (particularly those that refer to the defined term "Services") are to be read as subordinate to, and thus qualified by, the overarching provisions of clause 2 (including clause 2(c)) which appear under the heading "Nature of Contract".[507]

322 Having said this, I am otherwise spared the need to engage with the complex question of whether a finding that conduct arose from a failure to take reasonable care, involves a factual or legal inquiry.[508] I prefer the view that the decisions of Middleton J in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd*[509] and Barrett J in *Reinhold v New South Wales Lotteries Corporation (No 2)*[510] and *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)*[511] state the correct position on the law in Victoria (largely because it found favour with the Court of Appeal in *Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd*[512]). But in this case the factual and legal inquiry align and, in my view, Part X of the *Wrongs Act* is engaged.

323 I am satisfied that the evidence establishes in fact that the particular breaches relied on resulted from a failure to exercise reasonable care by Gardner Group (and by Elenberg Fraser and Thomas Nicolas). More particularly, I am satisfied that all of the breaches of the Consultant Agreements found against each of those parties in fact involved "a failure to exercise reasonable care".[513] This is to be contrasted with the position of LU Simon, which I have found was in breach of contractual warranties owed to the Owners, but without negligence. Further, both the contract and the pleadings support substantive claims that expressly rely on a failure to exercise reasonable care. Thus the failure to exercise reasonable care is an element of the cause of action upon which LU Simon has succeeded.[514]

324 It follows from this that I agree with Gardner Group that their duties and obligations under the GG Consultant Agreement are, on the facts, co-extensive with their duties at common law to exercise reasonable care. I therefore propose to consider the claims against Gardner Group based on the grouping of facts supporting the claims, rather than the

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507 B33.0014-15
508 See *"A Contractual Path Around Proportionate Liability?",* Grant Lubofski, (2018) 34 BCL 5
509 (2007) 164 FCR 450 at [30]
510 [2008] NSWSC 187 at [30].
511 [2013] NSWCA 58.
512 [2008] VSCA 208 at [108]-[109]
513 *Wrongs Act* s43 – "***negligence*** means failure to exercise reasonable care"
514 *Perpetual Trustee Co Ltd v CTC Group Pty Ltd (No 2)* [2013] NSWCA 58, per Macfarlan JA at [22]-[23]

legal underpinning of the claims. I will then briefly address the ACL claims.

Was Gardner Group in breach by approving the Alucobond Specification?

325 As noted above, LU Simon's claims are considerably more expansive than the allegation that Gardner Group failed to exercise reasonable care in issuing the Stage 7 Building Permit, thus approving the Alucobond Specification. However, for the most part, those claims are a distraction. In particular, in my view, the extensive allegations and evidence concerning Gardner Group's involvement in the design phase of the Lacrosse project, even if they were established, are subsumed in Gardner Group's approval of the Alucobond Specification.

326 It is not in dispute that Gardner Group was aware of the Alucobond Specification and the proposed use of the ACPs on the southern wall of the balcony of apartment 805, at the time Mr Galanos issued the Stage 7 Building Permit.[515] If the Alucobond Specification met the DTS requirements of the BCA and the ACPs were fit for purpose at that point in time, there is no basis for criticising any involvement by Gardner Group in the selection and use of ACPs as part of the design process, in the period leading up to that point. The same can be said if Gardner Group succeeded in establishing a peer professional opinion defence.

327 If (as I have found) the contrary position is established, it adds nothing to the claims that are thereby made out against Gardner Group, to show that their lack of care similarly infected earlier aspects of their role. The position might have been different if Gardner Group were seeking to assert despite their early involvement in the Lacrosse project that they were not given sufficient information about the ACPs and their proposed use, but they have expressly disclaimed any such assertion.[516]

328 In any event, I accept Gardner Group's submissions to the effect that the giving of advice as to whether aspects of a design prepared by the architect would be BCA compliant, is not design work. Rather, it is advance confirmation that the design will be capable of satisfying the requirements of the BCA.[517] It is common ground that design decisions leading to the selection of ACPs for the external façade of the Lacrosse project, were directed by Elenberg Fraser. The evidence shows that Gardner Group's role was essentially to provide feedback on this and other design decisions, and thus was generally reactive rather than proactive.

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515 I160 at [30]
516 I160 at [136]
517 I160 at [12]-[14]

329 But it is also clear that Gardner Group saw no difficulty with this particular design decision "from a BCA-compliance perspective", from early on in the design process. I accept that this is apparent both from the Gardner Group T1 Regulatory Review and from the fact that they "had approved the use of an ACP on the Watergate project, undertaken in conjunction with Elenberg Fraser, not long before the Lacrosse project".[518] In this way, Gardner Group's views concerning the compliance of ACPs (including Alucobond with a 100% PE core) that ultimately manifested in their issue of the Stage 7 Building Permit, were being consistently demonstrated throughout the project development.

330 For the reasons discussed above, I am satisfied that the Alucobond Specification failed to meet the DTS provisions of the BCA.[519] Gardner Group submits that even if the Tribunal favours an alternative interpretation of clause C1.12(f) to that adopted by Gardner Group, the Tribunal ought not find Gardner Group liable for issuing the Stage 7 Building Permit.[520] They rely on two separate but related grounds. First, that Gardner Group's wrong interpretation of C1.12(f) was not the product of a failure to exercise reasonable care. And, second, that Gardner Group has a defence under s59 of the *Wrongs Act* based on peer professional opinion.

Did Gardner Group fail to exercise reasonable care in interpreting the BCA?

331 I have extracted above[521] the passages from Mr Galanos's witness statement where he set out his rationale for relying on BCA C1.12(f) to conclude that the Alucobond Specification ACPs were BCA compliant. Mr Galanos's statement also describes at some length his knowledge of ACPs at the time he issued the Stage 7 Building Permit, both from his involvement in other projects where ACPs had been specified and from associated investigations. Mr Galanos referred to his "usual practice", when considering a product for the first time, of discussing informally with colleagues their experience with the product and considering available literature, including manufacturer's specifications and test reports. He goes on to identify a number of projects he had worked on or was working on in around July 2011 that had ACPs as part of their design, and that there were then a further five projects where Gardner Group had approved the use of ACPs.

332 Read as a whole, it is far from clear from this part of Mr Galanos's statement[522] what his evidence is about the work he did in around July

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518 I160 at [14]
519 [245]-[278]
520 I160 at [115]
521 [150]
522 F61 at [39] to [56]

2011 to satisfy himself that the Alucobond Specification was BCA compliant. For example, he begins by positively asserting that he considered particular matters about the Alucobond Specification in issuing the Stage 7 Building Permit, as though he had a specific recollection of doing so. However, he later appears to be suggesting that this was his "usual practice" and he is unlikely to have departed from it on this occasion. It is also not clear whether that "usual practice" was to conduct investigations only when he encountered a product for the first time, or whether it was to conduct "similar investigations" on each subsequent encounter.

333 Further, the discussion of his involvement in other projects using ACPs, combined with his assertion that "ACPs were being used regularly and marketed for use in high rise constructions", compounds the uncertainty. On one view, it reads as a justification for not repeating an investigation and approval process in relation to the Alucobond Specification that has been performed both by Mr Galanos and others on many previous occasions. Mr Galanos's oral evidence did nothing to clarify this uncertainty. But before explaining why this is so, I should say something generally about Mr Galanos's evidence.

334 LU Simon submits that Mr Galanos was a "very unimpressive witness"[523] and that his evidence was "wholly unsatisfactory".[524] It cites a number of passages of evidence that it asserts support these submissions, including aspects of his oral evidence concerning his consideration of C1.12 of the BCA. In my view, for the most part LU Simon's criticisms of Mr Galanos's evidence are unwarranted, essentially for the reasons set out in senior counsel for Gardner Group's oral closing submissions.[525]

335 In my assessment, Mr Galanos was an honest witness. Unsurprisingly for someone whose professionalism and competence were under attack, his answers were sometimes argumentative or abstruse. In particular, he had a tendency to proffer an unsolicited (sometimes lengthy) explanation about what he surmised was the point of the question, rather than answer the question directly.[526] However, this did not strike me as a conscious attempt to deflect or dissemble and I am satisfied that, with some exceptions, Mr Galanos was genuinely seeking to assist the Tribunal.

336 The principal relevant exception concerns his oral evidence about what steps he took to satisfy himself that the Alucobond Specification was BCA compliant. This evidence was shifting and unconvincing. As discussed further below, it became clear during the course of his cross-

523 I159 at [109]
524 I159 at [384]
525 T2726-27
526 See, for example, T975

examination that, despite positive assertions in his witness statement and oral evidence suggesting otherwise, Mr Galanos in fact had no actual recollection of those steps. This was apparent both from Mr Galanos's express concessions as well as his frequent references to what "would" have occurred and what he "would" have done.

337 Mr Galanos agreed that in 2010 he had no knowledge of the calorific value of polyethylene.[527] He later also agreed that it would have taken no time for him to enquire about the calorific value of polyethylene, including by referring to a table setting out the calorific value of various materials in IFEG, a copy of which was in Gardner Group's office. When it was then put to him that he made no such enquiry, he responded: "There was no need to".[528] This evidence was followed by a lengthy exchange concerning whether or not Mr Galanos accepted that polyethylene was highly combustible or highly flammable. But, relevantly, he agreed that in 2010 and 2011, he was not aware that polyethylene was highly combustible,[529] highly flammable[530] or that it was a plastic.[531]

338 It was then put to Mr Galanos in substance that he knew that external walls in type A buildings were required by the BCA to be constructed of non-combustible materials and yet he issued the Stage 7 Building Permit in ignorance that polyethylene was highly flammable. He responded:

> "I don't agree with that, that statement. I've issued a building permit on the basis of a product, not a component of that product. Therefore my – my understanding was that the product that you're referring to, composite panel containing PE, as a product complies with the BCA evidence of suitability A2.2."[532]

339 When Mr Galanos was first taken in cross-examination to the provisions of BCA C1.12, he explained that he referred to the clause as a "concession", allowing departure from the prohibition against the use of combustible materials in external walls, "in certain circumstances…for certain materials". He agreed that those materials were known within the industry to be very low combustibility.[533] He also agreed:

- that a building surveyor only looks to C1.12 if they know they are dealing with a material that did not satisfy the AS1530.1 test for

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527 T900
528 T901
529 T905
530 T907
531 T906
532 T908, the reference to A2.2, is to clause A2.2 of Part A of the BCA, "Evidence of Suitability", at D11.0024
533 T937

combustibility[534] (although, after the three day break referred to below, he twice resiled from that agreement[535] before apparently reaffirming it[536]); and

- that C1.12 was "very prescriptive and very limiting in what it's permitting builders to use on external walls".[537]

340 The cross-examination of Mr Galanos concerning BCA C1.12 continued after a three day break. This essentially began with Mr Galanos positively asserting (as he had in his witness statement) that he gave consideration to the clause when assessing the application for the issue of the Stage 7 Building Permit.[538] He said that the words in his witness statement that ACPs were "a material fully encapsulated within non-combustible aluminium", was a "deeply considered observation and opinion based on [C1.12(f)]".[539] When asked what scientific material he relied on in 2010 or 2011 to form the view that the aluminium sheets used in Alucobond were non-combustible, he identified only the AWTA test certificate under AS1530.3 ("AWTA test certificate").[540]

341 However, in later evidence, Mr Galanos:

- appeared to assert that the apparently mistaken reference in the AWTA test certificate to polyurethane (instead of polyethylene) "would have been read" (presumably by him) at the time he issued the Stage 7 Building Permit, but he could not recall when he noticed it,[541]
- asserted that he "would have had" the AWTA test certificate as part of his deep consideration of whether to approve the Alucobond ACPs, but did not actually recall having it in front of him,[542] and the fact that it mistakenly referred to polyurethane would not have caused him a problem;[543]
- was unable to provide a coherent explanation of the basis for the evidence in his witness statement that "the aluminium layer would be deemed non-combustible by virtue of C1.12(e) as it is a pre-fabricated metal sheet",[544] (a basis which I would in any event reject – on no view can the use of the undefined term "metal

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534 T940
535 T970, T996
536 T997
537 T943
538 907-1
539 T971
540 G446
541 T973, T978
542 T973-4
543 T978
544 T985, referring to the passage in Mr Galanos's witness statement at F61 [40.1],extracted above,

sheeting" in a provision of the BCA "deem" every pre-fabricated metal sheet to be non-combustible);

- conceded that he did not refer to any scientific document or other reference material to satisfy himself in 2010 or 2011 that the individual aluminium sheets in the ACPs were non-combustible,[545] accepted that the only way to determine this was with a test certificate under AS1530.1 and agreed that he had no such certificate;[546]
- agreed that he was aware before the fire that aluminium melts at 660 degrees Celsius and that fires that occur in sole occupancy units once they take hold can quickly reach 1000 degrees Celsius;[547]
- could not recall whether he considered before issuing the Stage 7 Building Permit that penetrations in the ACPs exposing the polyethylene core might be an issue, despite his evidence that he was satisfied that the product would be safe because the combustible core was "fully encapsulated within non-combustible aluminium sheets";[548]
- had a poor recollection of instances of other building permits he had issued before issuing the Stage 7 Building Permit that had approved the use of ACPs as part of the external walls of a type A or type B building;[549]
- said that he did not have a document as to the nature and composition of the adhesive layers in Alucobond ACPs, but nevertheless asserted that he did know in 2011 that Alucobond ACPs contained adhesive: "Through previous experience, reading the literature and…I think it's also mentioned in the AWTA certificate";
- was unable satisfactorily to explain what that previous experience or other knowledge was and accepted that the AWTA test certificate made no reference to adhesive layers;[550]
- could not recall giving consideration before issuing the Stage 7 Building Permit to the strict limits on adhesive layers in BCA C1.12(f);[551]

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545 T975-6
546 T986-7
547 T1080
548 T980
549 T991-993
550 T989-90
551 T995

- nevertheless continued to assert that he "would have considered" the adhesive layers in 2011 and again referred to the AWTA test certificate to support this belief, despite earlier conceding that the AWTA test certificate did not have any information about adhesives;[552]
- accepted that BCA C1.12(f) was written so that the concession under the clause was permitting the use of bonded laminated materials where there were two components, being the laminates, which must be non-combustible, and the adhesive, which cannot exceed 2mm;[553]
- further accepted that the adhesive was combustible, and that was why the Building Authority included bonded laminated materials as part of the concession in C1.12;[554]
- conceded that he could not recall what was going through his mind about the existence of the 3mm layer of combustible polyethylene in the ACP, but asserted that he "would have considered it against each of the criteria" in C1.12(f)(i) to (iv), before agreeing that he had no recollection of doing that[555] and later conceding that none of those criteria addresses specifically the 3mm combustible PE core;[556] and
- accepted that he gave approval in the Stage 7 Building Permit for the use of an ACP as part of the external walls of the Lacrosse tower when he was "ignorant of the fire characteristics of the three millimetre thick PE core".[557]

342 Mr Galanos also made several references in his evidence to the effect that C1.12(f) "does not require the building surveyor to consider each of the homogenous materials in [an] ACP".[558] His evidence was that there were two homogenous materials in Alucobond PE, being the "aluminium skins and the polyurethane (sic) core".[559] However, BCA C1.12(f)(i) expressly requires that each laminate is non-combustible. Thus, as a minimum, C1.12(f) calls for discrete consideration of each laminate (even on Mr Galanos's understanding of the meaning of that term). Further, in the absence of other suitable evidence, such consideration might include testing of the "homogenous material" constituting each laminate under AS1530.1.

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552 T998
553 T995
554 T997
555 T999-1000
556 T1003
557 T1005
558 T1035-6, see also T907 and T974
559 T974

343 Finally, I do not overlook Mr Galanos's apparent reliance on BCA A2.2 "evidence of suitability",[560] to explain his decision to approve the Alucobond Specification.[561] The substance of this evidence appeared to be that A2.2 was a "critical pathway"[562] for determining compliance, and was satisfied in this case by the AWTA test certificate. And further, that fitness for purpose under A2.1 was established by any one of the items listed in A2.2(a) (including the AWTA test certificate).[563] In my view, this reliance was misplaced and I note that it was not pressed in either the written or oral closing submissions on behalf of Gardner Group.

344 It is evident from the terms of A2.2 itself that it is not intended to operate as a fixed checklist of pre-requisites to compliance, where satisfaction of any one them effectively guarantees approval. It is not a DTS Provision under the BCA.[564] Rather it is a non-exhaustive list of the items that a building surveyor "may"[565] rely on as part of the process of satisfying him or herself of the suitability of particular materials. A bonded laminated material is a good example, where (as discussed above) a test under AS1530.3 will satisfy the requirement in C1.12(f)(iv), but will not establish that each laminate is non-combustible as required by C1.12(f)(i). This would be ordinarily be established by a test under AS1530.1, but A2.2 might give a building surveyor the option to rely instead on, for example, a Product Listing Data Sheet (A2.2(a)(v)) or "any other form of documentary evidence that correctly describes the properties and performance of the material" (A2.2(a)(vi)).[566]

345 Conversely, in an appropriate case, a building surveyor may need to go further than the information about the material provided by one or more of the documents identified in A2.2(a). For example, there may be features of the material or aspects of its proposed installation that would lead a building surveyor to conclude that a test certificate based on a small test specimen of the material is not sufficient to justify approval. Indeed, even the criteria for the AS1530.1 furnace test for combustibility states that: "The test results relate only to the behaviour of the test specimen of the material under the particular conditions of the test, and are not intended to be the sole criteria for assessing the potential fire hazard of the material in use".[567]

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560 D11.0024

561 For example, at T1006-7, see also T892, T908, T926-8 and T973 (the reference to "clause TT.2" should be 2.2)

562 T1006

563 T928

564 BCA A.05(a), D11.0005

565 Mr Kip at T2592

566 See, for example, the discussion by Mr du Chateau of materials that would not generally require evidence of fire hazard properties and use of industry knowledge: C9.0033 at [8.73]-[8.75]

567 D2.0007, see also the evidence of Mr Kip at T2463

346 This is reinforced by professional literature widely available (including to building surveyors[568]) long before 2010, being in particular, the Fire Code Research Reform Program Project Report FCRC PR00-03 dated April 2000, which states:

> "The existing AS 1530.3 requirements may also not be able to adequately evaluate the performance of full-scale cladding systems in their end-use installation."[569]

347 Similarly, Mr Capouleas's first report describes the choice of compliance pathway as being "dependent on the circumstances at hand ((i.e. product, test reports, *location and extent of use*)"[570] (emphasis added). This part of Mr Capouleas's first report also discusses the role of s24 of the *Building Act* in reinforcing a building surveyor's overarching obligation to be "satisfied that several heads of consideration have been complied with",[571] and exercise their discretion accordingly.

348 Thus, whether or not just one of the items listed in A2.2(a) is sufficient evidence in a particular case requires the exercise of professional judgment of the building surveyor,[572] guided by the broader Objectives and Functional Statements[573] applicable to the relevant BCA provision. In this sense, ACPs with "evidence of suitability" under A2.2, will not necessarily be "fit for the purpose for which they are intended" under A2.1. In the case of the Alucobond Specification, in my view, fitness for purpose required (in addition to the AWTA test certificate) not only discrete consideration of the combustibility of each laminate (consistently with C1.12(f)(i)), but also matters such as whether the risk of "fire spread…to sole occupancy units providing sleeping accommodation"[574] might be materially increased by, for example:

- the continuous vertical placement of the ACPs as part of and/or adjacent to unsprinklered balconies likely to be in regular use by occupants of the sole occupancy units; and
- any penetrations proposed as part of the installation.

349 Considering this evidence as a whole, I am satisfied that Mr Galanos failed to give adequate or reasonable consideration to the compliance and suitability under the BCA of the Alucobond Specification and proposed use of the ACPs as disclosed in the architectural drawings,

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568 Mr Kip at T2463 and Mr Leonard and Mr du Chateau at T2469
569 D32.0013
570 C6.0010, at [4.2.1.4], see also Mr du Chateau's report at C9.0033 at [8.77]
571 C6.0011 at [4.4.2.1]-[4.4.3.6], see also Mr Capouleas's observations in his second report, C8.0010 to 11 at [26.3(f)]
572 As discussed in the evidence of Mr du Chateau at T591-2 and Mr Kip at T2592-3; see also Mr du Chateau's report at C9.0014[6.20]-[6.23]
573 BCA A0.5, D11.0005
574 BCA Functional Statement at CF2(c), D12.0004

before issuing the Stage 7 Building Permit. More particularly, in my view, in issuing the Stage 7 Building Permit, Mr Galanos:

- probably held a genuine belief that ACPs with a polyethylene core were BCA compliant by operation of C1.12(f) of the BCA, but had not previously undertaken a robust or critical analysis, investigation or enquiry as to whether that view was reasonably open on a proper reading of the provision in the context of the BCA as a whole;
- adopted an unreasonable construction of the meaning and operation of BCA A2.2 and C1.12(f) in the context of the BCA as a whole;[575]
- is likely to have given only superficial consideration to the proposed use of the ACPs for the Lacrosse tower (including the Alucobond Specification), relying instead on his and Gardner Group's prior experience with ACPs in other projects as well as his knowledge of their widespread use at the time, as referred to in his evidence;
- may have checked on the existence of a test certificate under AS1530.3 or asked a Gardner Group employee to do so (most likely the latter), but is unlikely to have read it in any detail (or noticed the mistaken reference to polyurethane);
- gave no consideration directly to, nor sought documentary evidence of suitability in respect of, the question whether those parts of the ACPs that he considered to be the laminates (namely, the 0.5mm aluminium sheets) were non-combustible as required by the BCA;
- failed to identify, in applying C1.12(f), that the precise and prescriptive limits imposed on combustible components in BCA C1.12(e) (up to 1mm surface finish) and (f) (up to 2mm in adhesive layers, with no single layer more than 1mm) warranted consideration by him of the implications of the presence in the ACPs of a 3mm layer of highly combustible polyethylene;[576]
- failed to conduct even the most rudimentary investigation of what polyethylene was (such as by a phone call to Mr Nicolas or by ascertaining its calorific value by reference to the copy of IFEG held in Gardner Group's offices) and how it was regulated under BCA C1.12(f);
- wrongly relied on the AWTA test certificate alone as a sufficient basis for determining that the Alucobond Specification was suitable under BCA A2.2, in circumstances where the Alucobond Specification and architectural drawings contemplated that the

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575 This finding relies on the analysis on the construction of BCA C1.12(f) above and on peer professional opinion below

576 Contrast the evidence of Mr Kip at T2464

ACPs were intended for use (among other things) in a continuous vertical run as part of and/or adjacent to unsprinklered balconies that were likely to be in regular use by occupants and be subjected to penetrations as part of the installation; and

- failed to identify that the "fit for the purpose" requirement in BCA A2.1 operated as an overarching requirement and was not necessarily satisfied by a single item of "evidence of suitability" under A2.2 and failed to identify that ACP's were not fit for the purpose for which they were intended as contemplated by the Alucobond Specification and the architectural drawings.

350 As I have said before in proceedings involving allegations of professional negligence, I do not say that Mr Galanos was deliberately and knowingly embellishing his evidence contrary to these findings. His competence and professionalism have been under close scrutiny since the fire, both in this proceeding and as a result of investigations by the Victorian Building Authority. It is understandable that a person in that position, who lacks both contemporaneous notes and a clear memory, would persuade themselves over time of the truth of a narrative that was consistent with their view of what they believe they "would have done" as an experienced and competent practitioner. In that sense, I accept that Mr Galanos genuinely believed the statements made as part of his evidence. What I do not accept is that his evidence truly reflects what occurred at the time he issued the Stage 7 Building Permit.

351 For the sake of completeness, I note that in making the findings above, I have had regard to Gardner Group's written and oral submissions. I have also had regard to the expert reports and oral evidence of each of Messrs Leonard, Capouleas and du Chateau ("Gardner Group Experts") effectively endorsing Gardner Group's decision in June 2011 to issue the Stage 7 Building Permit. In particular, I accept that at the time Mr Galanos issued the Stage 7 Building Permit he (like each of the Gardner Group Experts) probably "held an opinion as to the meaning and construction of C1.12(f)".[577] However, my finding is to the effect that that opinion was not formed as a result of any reasoned analysis, investigation or inquiry, was not reasonably based and was probably not revisited by Mr Galanos at the time he issued the Stage 7 Building Permit.

352 Further, I do not accept Gardner Group's submissions that that the task of correctly interpreting BCA C1.12(f) was "not straightforward" or difficult for a competent professional building surveyor. Nor do I accept that expecting a correct interpretation from a competent professional building surveyor amounts to "imposing a counsel of

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[577] I160 at [117]

perfection". Indeed, a competent professional with experience in the building industry and a comprehensive understanding of the Objectives and Functional Statements in the BCA, was probably in the best position to land on the correct construction, without the need for "concentrated legal analysis based on statutory interpretation principles".[578]

353 In my judgment, such a professional is precisely the kind of person who should have appreciated that BCA C1.12(f) could not have been intended to give a concession to a product incorporating a layer of highly combustible polyethylene that:

- constituted at least 50% (and probably closer to 75%) of the assembled product;
- failed to rate any mention in the provision (including by way of regulating thickness); and
- was sandwiched between two paper thin sheets of aluminium, that were likely to degrade when subjected to temperatures produced by direct flame contact.

354 As I discuss below in rejecting the peer professional opinion defence, I am satisfied that the contrary view defies both logic and common sense.

Can Gardner Group rely on the defence of peer professional opinion?

355 Section 59 of the *Wrongs Act* is relevantly as follows:

> "(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."

356 Section 57 of the *Wrongs Act* defines "professional" as "an individual practising a profession". Adopting (in part) Gardner Group's

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[578] I160 at [118]-[120]

submission, [579] in my view, the relevant "manner" and "practice" for the purpose of s59 here, is the issuing of building permits for the use of ACPs such as Alucobond with a polyethylene core and with a test 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) ("Relevant Practice").

357 Section 60 of the *Wrongs Act* provides an exception to s59 in circumstances of a failure to warn. It is headed "Duty to warn of risk" and states:

> "Section 59 does not apply to a liability arising in connection with the giving of (or the failure to give) a warning or other information in respect of a risk or other matter to a person if the giving of the warning or information in respect of a risk or other matter to a person if the giving of the warning or information is associated with the provision by a professional of a professional service."

358 The issues for determination under this heading can be shortly stated as:

- Is the practice of building surveying a "profession" for the purpose of ss57 and 59 of the *Wrongs Act*?
- If so, was the Relevant Practice widely accepted in Australia by a significant number of respected building surveyors as competent professional practice in the circumstances?
- If so, was the Relevant Practice unreasonable?
- If not, did Gardner Group's liability arise in connection with the giving or failure to give a warning under s60 of the *Wrongs Act*?

359 LU Simon submits that Gardner Group adduced no evidence to establish that building surveying is (or was) a profession within the meaning of the *Wrongs Act*.[580] They rely on:

- the test for determining whether an occupation is a profession, as stated by du Parq LJ in *Carr v Inland Revenue Commissioners* ("*Carr's case*")[1944] 2 All ER 166 [581](albeit incorrectly referencing the earlier decision of *Currie v Inland Revenue Commissioners*,[582] cited in *Carr's case*);
- a 2007 seminar paper by Professor Zillante, a Life Fellow of the Australian Institute of Building Surveyors which observes: "In the Australian context, the Building Surveyor still has some way to go before he/she is accepted by his/her peers as a true profession (sic)"

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579 I160 at [124]
580 I159 at [142]
581 *Carr v Inland Revenue Commissioners* [1944] 2 All ER 166 at p166-7
582 *Currie v Inland Revenue Commissioners* [1921] 2 KB 322

and that: "the fact that the majority of its members are not University trained has made it difficult for Building Surveying to be taken seriously and the profession can best be described as immature";[583] and

- a chapter in the 2002 edition of *Professional Liability in Australia* on "building professionals", noting that it omits any reference to building surveyors.[584]

360 These latter two references are of limited (if any) assistance. Professor Zillante's paper is primarily focussed on identifying those matters that would improve and consolidate building surveying as a profession, not altogether denying that status. And the current (2016) edition of *Professional Liability in Australia* now has extensive references to building surveyors.[585] More relevantly, earlier versions of these references also appeared in the edition current as at 2011 (namely, the 2007 edition).[586]

361 "Profession" is not defined in the *Wrongs Act* and I have been unable to locate any decisions dealing directly with whether the term extends to building surveyors. Dictionary definitions do not take the issue much further. For example, The *New Shorter Oxford English Dictionary* defines "Profession" (among other things) as:[587]

> "**3** A vocation, a calling, *esp*. one requiring advanced knowledge or training in some branch of learning or science, *spec*. law, theology, or medicine; *gen*. any occupation as a means of earning a living… **b** The body of people engaged in a profession"

362 Returning to the test in *Carr's case*, the passage from that decision extracted in LU Simon's submissions sits in a broader context as follows:

> "It seems to me to be dangerous to try to define the word 'profession'…I think everybody would agree that, before one can say that a man is carrying on a profession, one must see that he has some special skill or ability, or some special qualifications derived from training or experience. Even there one has to be very careful, because there are many people whose work demands great skill and ability and long experience and many qualifications who would not be said by anyone to be carrying on a profession. Ultimately one has to answer this question: Would the ordinary man, the ordinary reasonable man--the man, if you like to refer to an old friend, on the Clapham omnibus-

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583 I139: *Zillante, Building Surveyors of the Future: A Professional Conundrum?, AIBS Seminar 2007*
584 *Walmsley et al, Professional Liability in Australia, Law Book Company, Sydney, 2002*
585 *Walmsley et al, Professional Liability in Australia, Thomson Reuters, Sydney, 2016*, for example, at [6.30], [6.70], [6.110]
586 *Walmsley et al, Professional Liability in Australia, Law Book Company, Sydney, 2007* at [6.30] and [6.70]
587 *The New Shorter Oxford English Dictionary (1993 Edition: Clarendon Press): 2368*

-say now, in the time in which we live, of any particular occupation, that it is properly described as a profession?...Times have changed. There are professions today which nobody would have considered to be professions in time past. Our forefathers restricted the professions to a very small number; the work of the surgeon used to be carried on by the barber, whom nobody would have considered a professional man. The profession of the chartered accountant has grown up in comparatively recent times, and other trades or vocations, I care not what word you use in relation to them, may in future years acquire the status of professions."[588]

363 Similarly, French J (as he then was) in *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd*,[589] discussed the concept of a "profession", to determine whether there was anything about that concept that excluded it from the scope of the term "trade or commerce". His Honour said (omitting citations) that:

> "The word "profession" is descriptive of a class of occupations. The membership of that class is not rigid or static but shifts with general community perceptions…Whether a person carries on a profession in a given case is a question of degree and always of fact… It has been said that the word involves the idea of an occupation requiring either purely intellectual skill or else manual skill controlled, as is painting and sculpture or surgery, by the intellectual skill of the operator as distinct from an occupation which is substantially the production or sale or arrangement for the production or sale of commodities."[590]

364 There is a useful list of "characteristics which distinguish professions from trades and other occupations" in *Halsbury's Laws of Australia*.[591] While the list does not appear to have been derived from any particular authority or series of authorities,[592] I would gratefully adopt it as a convenient summary of the indicia emerging from my own research, while adding that they should be understood as neither prescriptive nor exhaustive. The characteristics are:

> "(1) Professionals apply a specialised skill which enables them to offer a specialised service.
>
> (2) The skill has been acquired by intellectual and practical training in a well-defined area of study.
>
> (3) The service provided by a professional calls for a high degree of detachment and integrity on the part of the professional in exercising personal judgment on behalf of a client.

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588 *Carr v Inland Revenue Commissioners* [1944] 2 All ER 166 at p166-7

589 *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215

590 *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215 at 219

591 *LexisNexis, Halsbury's Laws of Australia, 340 Professions and Trade, 'Introduction to the Meaning of Profession and Trade' [340-1] at (5 January 2012)*

592 The two authorities cited in the preceding paragraph (which include *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215) do not descend to statements at this level of detail

(4) The service involves direct, personal and fiduciary relations with the client.

(5) The practitioners in a particular profession collectively have a particular sense of responsibility for maintaining the competence and integrity of the occupation as a whole.

(6) Professionals tend, or are required, to avoid certain methods of attracting business.

(7) Professionals are organised into bodies which, with or without legislative intervention, provide machinery for testing competence and regulating standards of competence and conduct within the particular profession."

365 I have been unable to locate any authorities discussing expressly the scope of the term "profession" as used in the *Wrongs Act*, but there is no reason to conclude that different considerations would apply to those discussing the term in other contexts, and none has been suggested in submissions. Nor have I located any authorities considering directly whether building surveying is a profession. However, in *Chubb Insurance Company of Australia Limited v Robinson*,[593] the Full Court of the Federal Court indirectly identified "surveying" as being among the list of building industry professions. In the course of deciding that project management was not generally regarded as a profession in 2010 or 2011 as part of construing an exclusion in a "Directors & Officers" insurance policy, the Full Court held that "*the obvious purpose of the exclusion was to exclude activities that are* ***truly professional in nature****, such as architectural design, engineering,* ***surveying*** *and quantity surveying"* (emphasis added).[594]

366 In my view, by 2010 and 2011 building surveying as a vocation had comfortably reached the point where the ordinary reasonable person or "community perception" would view it as a profession. Indeed, the change in treatment in *Professional Liability in Australia* in the period since the first edition in 2002 discussed above, may well be indicative of the very development in community perceptions that du Parq LJ discussed in *Carr's case*. With the possible exception of giving rise to a fiduciary relationship with the client (a doubt that would probably extend to all building professionals, among others), I am satisfied that by 2010, building surveying had all of the characteristics identified in the *Halsbury's Laws of Australia* list. This included having both the professional body that had Professor Zillante as a Life Fellow (namely, the Australian Institute of Building Surveyors), as well as the Building Practitioners Board as its regulating authority. It is also worth noting

593 (2016) 239 FCR 300

594 *Chubb Insurance Company Australia Ltd v Robinson* (2016) 239 FCR 300, per Foster, Robertson and Davies JJ at [152]

that a number of the other items in the list are (in substance) prescribed or recognised by provisions of the *Building Act*.[595]

367 Given what I consider to be the clear application of the term "profession" to building surveying by 2010, it is unnecessary for me to resort to extrinsic material. However, I am reinforced in my view by that material, including as referred to in Gardner Group's submissions.[596] In particular, although that material generally confirms that the principal focus of the 2003 *Wrongs Act* amendments was on the medical profession, I note that:

- the second reading speech refers to parliament having engaged with a number of building industry professional associations (albeit, not including the Australian Institute of Building Surveyors); and[597]
- as part of the package of measures accompanying the amendments, the 2003 Building Practitioners Insurance Ministerial Order issued pursuant to s135 of the *Building Act 1993 (Vic)* mandated that building surveyors hold professional indemnity insurance.[598]

368 The position in relation to the second issue under this heading (namely, whether the Relevant Practice was widely accepted in Australia) is less clear, for two reasons. First, there is some evidence that the Relevant Practice was not so accepted. Second, there is something of a disconnect between the Relevant Practice as endorsed by the expert witnesses called by Gardner Group and what Gardner Group in fact did (or, more relevantly, failed to do) in approving the Stage 7 Building Permit. Before expanding further on these matters (and before moving to the next issue), I should make some general observations about the evidence of the expert building surveyors. As explained above, the Gardner Group Experts were all called by Gardner Group and gave their evidence concurrently, along with Mr McLennan (for the Owners) and Mr Kip (for LU Simon).

369 The Gardner Group Experts each had considerable expertise and experience and were senior and respected practitioners in their field. Further, there was no doubt that their experience included appointment as relevant building surveyor in numerous high rise type A construction projects. Their evidence was considered and forthright and I accept that the views they expressed in both their reports and oral evidence were genuinely held. While in a sense it goes without saying for expert witness called to prove peer professional opinion, it is nevertheless

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595 See, for example, ss170, 172, 136 and 179-181

596 I160 at [57]

597 *Victoria, Parliamentary Debates, Legislative Council, the Professional Standards Bill, 25 November 2003 at [1736, paras 8 – 12]*

598 I160 at [57]; see also *Victoria, Parliamentary Debates, Legislative Council, 26 November 2003 - Wrongs and Other Acts (Law of Negligence) Bill)* at [1853] paras 6 and 10

appropriate to acknowledge that their endorsement of the Relevant Practice was informed and influenced by the fact that they each had each given approval to the use of ACPs in circumstances similar to those facing Gardner Group in 2011. To that limited extent, their evidence might be fairly described as self-serving.

370 Mr Kip was also an impressive witness. His deep knowledge of the history and application of the BCA and related regulations and practices was no doubt attributable to his long experience as an academic. But I do not accept (as Gardner Group appears to suggest[599]) that his academic background disqualified him from giving important evidence on the issues currently under consideration. In particular, while he may not have had the same level of hands-on experience as the Gardner Group Experts as a relevant building surveyor on construction projects for type A projects, he clearly had relevant practical experience, as well as wide exposure to practices in the building surveying profession.

371 Gardner Group also submit that Mr Kip's joint qualification as a fire engineer influenced his assessment of the BCA. This may be so, but in my view, that additional qualification would at most have obviated the need for him to make further independent investigations and enquiries when faced with doubts about the application of particular provisions of the BCA (and notably the provisions of Section C). It seems to me that a building surveyor with such doubts who lacked Mr Kip's additional qualifications, should at least have had the insight to undertake appropriate investigations or enquiries in an endeavour to assuage those doubts. This might include consulting a better qualified professional such as (in the case of doubts about aspects of Section C of the BCA) a fire engineer.

372 Mr McLennan was also very knowledgeable on the history and operation of the BCA, but readily accepted that he lacked the practical experience to qualify him to give meaningful evidence about industry practice.

373 One final matter I should mention by way of preamble to my consideration of the balance of this issue, is that I do not propose to comment on the extensive expert evidence on the application of BCA C2.4 of Specification C1.1. First, as discussed above, Gardner Group effectively abandoned reliance on that provision in their written closing submissions.[600] Second, and in any event, it was not the pathway relied on by Gardner Group and thus does not form part of the Relevant Practice. That said, Gardner Group's abandonment of the argument based on BCA C2.4 of Specification C1.1 despite the unqualified endorsement of all three of its experts, does demonstrate that genuine

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599 I160 at [128]
600 [274]

and forthright expert opinions sometimes do not withstand close scrutiny.

374 Turning to the first of the two reasons why the second issue under this heading (namely, whether the Relevant Practice was widely accepted in Australia) is less clear, s59 of the *Wrongs Act* expressly allows for differing peer professional opinions being "widely accepted in Australia by a significant number of respected practitioners" (s59(3)) and also makes clear that "widely accepted" does not mean universally accepted (s59(4). Further, as Gardner Group submits, Young CJ in *Vella v Permanent Mortgages Pty Ltd*[601], held to the effect that evidence of peer professional practice in Australia rather than throughout the whole of Australia is sufficient to satisfy the requirements of the section.

375 Each of the Gardner Group Experts used language in their respective reports to convey their view that:

- the Relevant Practice was consistent with an "industry wide understanding" that ACPs were BCA compliant[602] and "in line with industry practice that was widely conventional at the time" [603] and that "the building industry throughout Australia held an interpretation that the core of a bonded laminated material was not required to be of a non-combustible material"[604];
- that the term laminate was "commonly referred to as the most outer layers laminating the material assembly";[605]
- Gardner Group acted in a manner that was "widely accepted within Australia and Victoria by a significant number of building surveyors at the time, as competent professional practice";[606]
- "[They], and to the best of [their] knowledge, industry practitioners alike, considered the components of a bonded laminate, or ACP, to comprise" two thin layers of non-combustible material and a core which may be combustible.[607]

376 Mr Kip, on the other hand, disagreed with the position that the whole of the industry had that view: "I certainly have never held that view, and at least a half a dozen of my colleagues off the top of my head did not hold that view".[608] Mr Kip was later tested on this evidence, including by being asked to name the colleagues concerned, which he did.[609] Mr

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601 [2008] NSWSC 505 at [553]-[555]
602 Mr Leonard C5.0006 at [4.1.1]
603 Mr Leonard C5.0021 at [4.1.5]
604 Mr Leonard C5.0010
605 Mr Capouleas C6.0007 at [4.2.2.5]
606 Mr Capouleas C8.0012 at [29]
607 Mr du Chateau C9.0026 at [8.26]
608 T2461
609 T2502-3

Kip also gave evidence that: "statements about 'This is what the industry thought at the time' are unhelpful. I don't think any of us can say what the whole industry thought. We can certainly say what our – our group of colleagues thought".[610]

377 Obviously statements by any of these witnesses about what colleagues thought or what the industry thought, are problematic from a strict evidentiary point of view. Ideally, evidence from industry experts of the kind referred to above would be supported by published statements of professional bodies or in recognised professional journals discussing and endorsing the practice concerned. There is nothing of that kind here. It seems that the Relevant Practice (in so far as it was accepted in the industry) developed organically and apparently without any practitioner seeking any kind of assessment or endorsement from a professional body or regulatory authority. Notably, there is no evidence of any approach to the ABCB for guidance on the issue.

378 In this context, each of the Gardner Group Experts put significant store in their evidence in the ABCB's decision since the Lacrosse tower fire to amend BCA C1.12(f) (which is now found in BCA C1.9(e)(vi)). For example, Mr Leonard asserts in his report that an advisory note foreshadowing this change confirmed that the ABCB was "well aware that clause C1.12 BCA was being interpreted in a manner that permitted the use of ACP with a combustible core".[611] In my view, the Gardner Group Experts overstate what conclusions or inferences can be drawn from the change. At most is shows that at some point (probably after the fire), the ABCB became aware of the Relevant Practice. Moreover, the explanatory note expressly states that the "clarification was made to prevent the *incorrect interpretation*" of the concession in C1.12(f) (emphasis added).[612]

379 Despite some reservations about the evidence discussed above on whether the Relevant Practice was widely accepted within the meaning of s59 of the *Wrongs Act*, on balance I am prepared to accept that it was. As I have said, each of the Gardner Group Experts presented as credible and respected practitioners in the field of building surveying and I am satisfied that the views they expressed were probably shared by a significant number of their equally respected colleagues. As s59(3) makes clear, the fact that other respected practitioners (including Mr Kip and his six colleagues) held differing opinions, does not prevent the opinion represented by the Gardner Group Experts being relied upon.

380 The second area of doubt concerning the evidence of acceptance of the Relevant Practice for the purpose of s59 of the *Wrongs Act*, concerns

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610 T2489
611 Leonard C5.0009
612 Leonard C5.0009 and Appendix C to Mr Leonard's first report

the suggestion of a disconnect between the Relevant Practice and the evidence of Gardner Group's conduct. In particular, LU Simon submits (among other things) that none of the Gardner Group Experts described a practice which was uniform and that they had not been asked to consider the Fifth FER or taken into account the GG Consultant Agreement (including the scope of services in that agreement).[613] In relation to the GG Consultant Agreement, LU Simon cites *Thiess Pty Ltd and John Holland Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd*.[614]

381 I am satisfied that the Gardner Group Experts' evidence did describe a practice that was essentially uniform and that Gardner Group relied on that practice in issuing the Stage 7 Building Permit. However, putting aside for the moment the question of reasonableness, it does not follow that Gardner Group is thereby absolved from a finding of negligence. It may be that the "specific obligations that the professional undertakes pursuant to the contract of retainer",[615] impose an obligation that supersedes the peer professional opinion. Or that there was negligent conduct that sits outside the protection of that opinion.

382 As to the former, LU Simon do not identify any particular provision of the GG Consultant Agreement, notice of which may have led the Gardner Group Experts to a different view. And I have not identified any, except for those concerning liaison with the fire engineer discussed further below. In relation to the latter (negligent conduct outside the protection of the peer professional opinion), again LU Simon do not descend to particulars and the only clear example I have identified also relates to the dealings with the fire engineer and the Fifth FER. As to this, it should be noted that Mr du Chateau identified this as a possible qualification to the views expressed in his report:

> "In preparing this opinion I have not considered in detail the process otherwise adopted by Galanos or the design team in relation to documentation supporting any Report and Consent from the MFB or any performance solutions applicable to the building. i.e. as described in a Fire Engineering Report prepared by Thomas Nicolas…I note however that the design of the external walls of the building comprising ACP and the proposed installation of ACP to external walls was not the subject of consideration in the MFB Report and Consent or the Thomas Nicholas FER."[616]

383 Turning now to whether the opinion represented by the Relevant Practice was unreasonable, both LU Simon and Gardner Group cite the decision of Garling J in *King v Western Sydney Local Health*

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613 I159 at [146]-[147]
614 [2016] NSWSC 173 at [488]
615 *Thiess Pty Ltd and John Holland Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd* [2016] NSWSC 173 at [485]
616 Mr du Chateau C9.0034 at [8.83]

Network[617] as authority for the construction of the exception in s59(2). I am content to do likewise, although I note that the differences between the NSW provision under consideration in that case and s59 of our *Wrongs Act* are not immaterial. In particular, in my view, the formulation adopted in Victoria is closer to the "Modified *Bolam* Test" recommended by the Ipp Report than the NSW approach.[618] As LU Simon's written submissions explain:[619]

> "The 'Modified *Bolam* Test' prescribes a test for the standard of care which suggested changes to the *Bolam* Test from the seminal case of *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582, 587. The *Bolam* Test provides that a doctor is not guilty of negligence if he/she has acted in accordance with a practice accepted as proper by a responsible body of medical men skill (sic) in that particular art."

384 LU Simon's submissions then set out the "Modified *Bolam* Test", which is a paraphrase from the speech of Lord Browne-Wilkinson in the House of Lords decision in *Bolitho v City and Hackney Hospital Authority* ("*Bolitho*").[620] It is worth setting that passage out in full:

> "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."

385 In short, as explained by Garling J in *King v Western Sydney Local Health Network*,[621] s59(2) of the *Wrongs Act* imposes an "irrationality exception". In particular, Garling J (also referencing *Bolitho*) noted:[622]

> "A more recent example of the 'irrationality exception' is to be found in the judgment of the House of Lords in *Bolitho v City and Hackney Health Authority* [1998] AC 232, in the speech of Lord Browne-Wilkinson, where he said:
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> > "But if ... it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable and responsible.'

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618 See the discussion of this background in *King v Western Sydney Local Health Network* [2011] NSWSC 1025 at [104]-[105]

619 I159 at [149]

620 [1998] AC 232 at 241-2

621 *King v Western Sydney Local Health Network* [2011] NSWSC 1025 at [106]-[109] and [114]

622 *King v Western Sydney Local Health Network* [2011] NSWSC 1025 at [108]

386 Despite Garling J going on to observe that cases where peer professional opinion is found to be irrational "are likely to be rare",[623] in my view this is such a case. The evidence that any expert directed their mind to a proper construction of BCA C1.12(f)—in the sense of conducting a robust and critical analysis of the true intent of the clause—is scant. And, as I have discussed already, in my view the Relevant Practice does not withstand logical analysis.

387 Dealing first with the evidence of analysis, there were only two passages of evidence where any of the Gardner Group Experts discussed any process by which they arrived at a construction of BCA C1.12(f), beyond apparently uncritically adopting what they understood was an industry wide approach. The first fell from Mr Leonard, where I asked him whether his view about the word "laminate" was based on any enquiries. He said it was "discussed in the office" and he looked at dictionary definitions. He could not recall which dictionary.[624] The second was given by Mr Capouleas, who related an anecdote concerning one of his first projects as a building surveyor on major projects in 1993. He said that the project involved approving an ACP and that "it was explained to me [by a senior colleague] that the bonded laminate clause was in fact introduced to approve ACP panels".[625]

388 Accepting that Mr Leonard had looked at one or more dictionary definitions of "laminate", as the discussion of those definitions above demonstrates,[626] they could hardly be said to provide any real certainty about the meaning of the term. Unless, of course, the exercise involved seeking out particular definitions that confirmed a pre-conceived view and disregarding any inconsistent definitions. In my view, a critical examination of the dictionary definitions would have done little more than amplify any existing uncertainty. And Mr Capouleas's anecdote tends to reinforce my general impression of the evidence on this issue. Namely, 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.

389 It is not in dispute that Mr Galanos and the Gardner Group Experts' approach to the issue was influenced by what they perceived to be the widespread approval of ACPs for use in type A and B construction, including by respected colleagues. They are therefore likely to have approached any examination of the pathway for compliance on the assumption that at least one such pathway existed. From that starting point, it is easy to see how BCA C1.12(f) would suggest itself as the most likely candidate (with BCA C2.4 of Specification C1.1 as a

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623 *King v Western Sydney Local Health Network* [2011] NSWSC 1025 at [114]
624 T2453-4
625 T2485
626 [253]-[255]

possible—and similarly flawed—alternative). It also explains why the need for a robust analysis of the provision, perhaps supported by input from a fire engineer or other authoritative source (for example, the ABCB), might be overlooked. In more simple terms, it would be fair to describe their approach to the issue as having been infected by confirmation bias.

390 The need for building surveyors to seek confirmation where they lack relevant specialist expertise was reinforced by the evidence of Mr Leonard:

> "[A] building surveyor is more like a general practitioner doctor or an auditor. We …know a little bit about a lot, but we don't know a lot about anything in particular. Each and every one of those standards, codes, or 95 per cent of them have a discipline behind them - so the mechanical engineering standard has a mechanical engineer, four years' training."[627]

In my view, a fire engineer's skill and knowledge concerning the combustibility standards and the fire hazard characteristics of an ACP used in an external wall, falls into the same category.

391 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.

392 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.

393 The suggested explanation that this combustible element is addressed by C1.12(f)(iv)[628] (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

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627 T2524

628 See, for example, the evidence of Mr Capouleas at T2465-66

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."[629]

394 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.[630] 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".[631]

395 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.[632] 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.

396 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

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629 T2464-5

630 Joint Expert Report, answer to Question 3 at C17.0004. See also Mr Kip at T2286 and T2292-3, Dr Barnett at T2291 and Dr Clancy at T2305

631 T2069-70

632 I160 at [129]

incident, is hardly a scientific or rational basis for regarding it as safe (citing asbestos as an illustration of this point).[633] Further, as discussed above,[634] 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.

397 For these reasons, I am satisfied that the Relevant Practice was unreasonable within the meaning of s59(2) of the *Wrongs Act* and, accordingly, Gardner Group's defence based on peer professional opinion fails. Given this finding, it is unnecessary for me to deal with the final issue under this heading, namely, did Gardner Group's liability arise in connection with the giving or failure to give a warning under s60 of the *Wrongs Act*? But for completeness, I agree with Gardner Group's submission to the effect that the case as against Gardner Group is not a "failure to warn" case. More particularly, I agree that issuing the Stage 7 Building Permit involved the exercise by Mr Galanos as relevant building surveyor of:

> "[A] statutory function assessing documentation for compliance with the requirements of the statute (including the BCA), no part of which involved the giving of warnings or other information in respect of a risk or other matter."[635]

Did Gardner Group fail to identifying deficiencies in the Fifth FER?

398 Gardner Group defines this issue in the following terms:

> "If Mr Galanos reasonably considered that the Alucobond Specification complied with the DTS requirements of the BCA, he had no basis to require or confirm the Alucobond Specification as an alternative solution to be documented in the fire engineering report. If his view in this respect was not reasonable, then he is liable for that failure. In those circumstances, this allegation adds nothing to the claims against Mr Galanos or Gardner Group."[636]

399 I do not agree. In my view, Gardner Group's obligation to critically assess (relevantly) the Fifth FER and the MFB Application, went beyond requiring or confirming the Alucobond Specification as an alternative solution. In particular, that obligation included (in substance) ensuring that the documentation accurately identified and considered the important features of the structure of the Lacrosse tower, which it omitted to do. In my judgment, Gardner Group's conduct in failing to identify and take steps to remedy that omission was a failure

633 T2842-3
634 [170]
635 I160 at [55]
636 I160 at [132]

to exercise reasonable care. Further, that failure was a discrete act of negligence from any associated with its interpretation of the BCA.

400 I have set out above[637] extracts of the "Scope of Services" agreed to by Gardner Group pursuant to the GG Consultant Agreement, which was entered into in late January or the first half of February 2010. These relevantly included during one or more of the various development phases:

- liaison with MFB including meetings as required;
- meetings and consultancy with Fire Engineer on approach and agreement of approval parameters;
- coordination of the Fire Engineering design process, liaison with the appointed Fire Engineering Consultant and provision of input into the design as necessary to ensure approval on design completion; and
- assessment and approval of the final fire engineering design."

401 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".

402 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.[638] 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.[639] Mr Ho responded to this email by email dated 10 December 2010 stating: "Have reviewed updated Reg 309 submission, no further comments".[640]

403 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;

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637 [62]-[66]
638 G836, attaching G837 and 838, see also G823 and Mr Nicolas's statement at F64 at [77]
639 T1077
640 G844

- 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.

404 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.[641]

405 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.

Was Gardner Group in breach by failing to properly inspect the works?

406 In simple terms, this claim rests on the allegation that during Mr Galanos's inspections towards the latter half of 2011, "he must have seen the Alucobest being installed".[642] It would follow that he must have been aware that non-compliant ACPs had been installed, which should have led to him refusing to issue the Occupancy Permit until the matter was rectified.

407 Gardner Group has dealt with this claim at length in its written submissions,[643] and while I broadly agree with those submissions, it is unnecessary for me to reach a concluded view. As discussed above,[644] I accept Mr Galanos's evidence that he did not in fact see the Alucobest labelling at the time of any of his visits to the constructions site (for inspection or otherwise). Accordingly, any claim against Gardner Group based on its inspections falls at the first hurdle and it is unnecessary for me to say anything further about it.

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641 [402], see also [100]
642 I159 at [99]
643 I160 at [137]-[140]
644 [164]

Did Gardner Group contravene s18 of the ACL?

408 Gardner Group's submissions refer to the decision of the NSW Court of Appeal in *Heydon v NRMA Ltd*,[645] which concerned the provision of legal advice. In that case, the Court determined that the giving of advice was not negligent and accordingly that the advice did not constitute misleading and deceptive conduct. Malcolm AJA observed that:[646]

> "Where negligence and misleading or deceptive conduct are both pleaded based upon the same material facts, it is not uncommon for the result to be that they will succeed or fail together: *Boland v Yates Property Corporation Pty Ltd*, supra, at 229 per Gaudron J."

409 In my view, this is such a case. I am satisfied that it follows from my findings above that Gardner Group failed to exercise reasonable care in respect of the issue of the Stage 7 Building Permit, that it also engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s18 of the ACL. More particularly, by issuing the Stage 7 Building Permit, Gardner Group represented to LU Simon in trade or commerce, that the Alucobond Specification and the approved drawings providing for ACPs as part of the external façade of the Lacrosse tower, were compliant with the BCA. That representation was misleading or likely to mislead.

410 On the other elements of this claim, I accept LU Simon's submissions on reliance and causation, for the reasons it gives.[647] I accept as a fact that LU Simon relied on the issue of the Stage 7 Building Permit in constructing the Lacrosse tower incorporating the ACPs, and would in any event infer that it did so, given the operation of s16 of the *Building Act*. I reject Gardner Group's submissions that Mr Galanos's implicit representations were opinions based on reasonable grounds,[648] for the same reasons that I reject Gardner Group's peer professional opinion defence. The grounds were not reasonable.

ELENBERG FRASER'S LIABILITY

What are the claims against Elenberg Fraser?

411 The Owners' claim against Elenberg Fraser is framed in negligence, but essentially relies on the obligations imposed on Elenberg Fraser under the EF Consultant Agreement.[649] Thus those claims are effectively subsumed in LU Simon's case against Elenberg Fraser. That case (like the case against Gardner Group) is based on alleged breach of the EF Consultant Agreement. Again, the allegations of breach are expansive,

645 I160 at [73]-[74]
646 *Heydon v NRMA Ltd* [2000] NSWCA 374 per Malcolm AJA at [307]
647 I159 at [176]-[181]
648 I160 at [143]
649 A1.0011-13

but can be distilled for the purposes of analysis into allegations that Elenberg Fraser:

- failed to ensure that its design of the external cladding satisfied all the "Legislative Requirements applicable to the design of the work, including the applicable requirements of the BCA" and was otherwise fit for purpose; and
- failed to check whether the sample of Alucobest ACP provided by LU Simon complied with the BCA and was otherwise fit for purpose.

412 The surprising feature of Elenberg Fraser's submissions in response to these allegations is the extent to which they focus on LU Simon's obligations to the Owners under the D&C Contract (in particular, the terms of the T2 Specification). It is surprising because it is largely, if not wholly, irrelevant to LU Simon's claims. 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.[650] And there is no claim for rectification of the EF Consultant Agreement or allegation that Elenberg Fraser's obligations under that agreement were somehow varied or discharged by the obligations that LU Simon had to the developer under the D&C Contract.

413 Elenberg Fraser also raises ancillary arguments to the effect that:

- it did not owe a duty to the Owners to avoid pure economic loss;
- LU Simon's indemnity under the EF Consultant Agreement is limited to the Owners' property damage; and
- any breaches by it did not cause the loss to the Owners or LU Simon.

414 For the purposes of my discussion of the claims against Elenberg Fraser, I refer to and repeat my finding above that all of the breaches of the Consultant Agreements found against each of Gardner Group, Elenberg Fraser and Thomas Nicolas in fact involved a failure to exercise reasonable care and that the duties and obligations of the consultants under those agreements are, on the facts, co-extensive with their duties at common law to exercise reasonable care.

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650 Elenberg Fraser does appear argue that its sample approval obligation under the EF Consultant Agreement is informed by the terms of the Superintendent's sample approval obligation under the T2 Specification, but I reject this argument for the reasons below: [444]-[445]

What are the facts relevant to the claims against Elenberg Fraser?

415 The full text of the relevant provisions of the EF Consultant Agreement is set out above.[651] Key among them are that Elenberg Fraser agreed (in substance):

- that the EF Consultant Agreement embodied the "entire agreement" between the parties;
- to perform the Services to the standard of care and skill to be expected of an architect with Elenberg Fraser's skill and experience;
- to prepare the Contract Material in a manner consistent to satisfy all "Legislative Requirements" applicable to the design of the work (including the BCA);
- to inspect the works during construction for compliance with the Legislative Requirements applicable to the Services, exercising the knowledge, skill and expertise of an appropriately experienced, competent and qualified architect;
- by the "Services" section of the agreement specifically tailored for the "Architect", to be appointed as "Head Design Consultant";
- as head design consultant, to be "responsible for coordination of all design issues into the final design";
- in the early design stages, to undertake the detailed design of the project and fully define all building elements, finishes, materials, fixtures and finishes;
- in the contract document stage, to undertake the preparation and coordination of all construction drawings, details, specifications…and all other information that fully describes the project's construction suitable for construction purposes;
- in the construction phase, to regularly inspect the project works (including off-site fabrication locations) and observe critical tasks as they are executed to establish that the work is being constructed in compliance with the project architectural requirements; and
- to inspect and approve samples as required in the architectural specification.

416 Also as noted above (and consistently with the Deeds of Novation with other consultants) under the Deed of Novation, Elenberg Fraser agreed to 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

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651 [70]-[73]

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).

417 In his witness statement, Mr Fraser was critical of LU Simon's lack of consultation with Elenberg Fraser and its failure to ask for, or follow, its advice.[652] Somewhat in contrast to the terms of the EF Consultant Agreement, Mr Fraser said in evidence that up until the involvement of LU Simon, Elenberg Fraser were able to operate in the capacity of head design consultant, but "once the builder was in charge, the builder was really taking on the role of lead coordinator, dealing with consultants"[653] and in managing the design.[654] He added that Elenberg Fraser had not been referred to as head design consultant within a design and construct novated agreement before or since. Thus, having that role post-engagement of a design and construct builder was clearly unfamiliar to Mr Fraser. He nevertheless accepted that he was aware that the EF Consultant Agreement had a provision in it appointing Elenberg Fraser as the head design consultant.[655] And it is notable that Mr Fraser signed up to this arrangement on 4 August 2010, [656] several months after the D&C Contract was signed.

"Indicative to Alucobond"

418 I have set out above the relevant provisions of the T2 Specification and made passing reference to the evidence of Mr Fraser concerning his role in the selection of ACPs and, in particular, the Alucobond Specification.[657] It is appropriate at this point to set out that evidence in detail. While I have some reservations about whether Mr Fraser's recollection of these matters was as reliable as he appeared to assert, I am prepared to accept the evidence.

419 Mr Fraser began by explaining at length what he considered was encompassed by the specification of "indicative to Alucobond":

> "Because the way I read our specification it calls up "Alucobond" or something which matches it in terms of its qualities and in terms of its details and in terms of all the elements that encompass Alucobond and that is not just the four millimetre composite sheet. That is the fixing systems, the sealants, all the other elements of the Alucobond installation which might be difficult to find now but when we called up Alucobond there was a technical manual on our desk this thick[658] with all of the fixing details attached to it…[The specification also

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652 F63 at [82]-[83]
653 T1335
654 T1338
655 T1339
656 F63 at [80]
657 [122]-[129]
658 When giving this evidence, Mr Fraser indicated with his fingers a thickness of approximately 6cm

called up] all the different products within the Alucobond range because my experience with ACPs before this was on the Watergate Tower where we had installed our ALPOLIC/fr with side throw sprinklers and – it's a material that has a 70 per cent mineral core and that was a few years before. So I've heard reference in the commentary in this room that Alucobond is a generic term for a polyethylene core aluminium panels and I disagree with that."[659]

420 Mr Fraser further explained that there were several different applications for Alucobond on the building and that the particular product in the Alucobond range that was chosen would be the most appropriate for the job.[660] He later said it was for the builder to decide which product to choose.[661] The general effect of Mr Fraser's evidence on this issue was that, in his view, the product LU Simon should have chosen was the Alucobond Plus product.[662] He seemed to be saying this was a view he held at the time, because of his experience with ACPs before this, which had been with "Alpolic FR" that had a 70% mineral core, similar to Alucobond Plus.[663]

421 Importantly, however, Mr Fraser agreed that the choice under the terms of the specification extended to Alucobond with the 100% polyethylene core.[664] He also agreed that at the time the T2 Specification was being prepared, he knew that when referring to Alucobond with the PE core, "PE" stood for polyethylene, which he knew to be combustible.[665] He went on to say in effect that it was because there was a combustible element between the two laminates, that the installation procedures for Alucobond required the core to be "backfolded" away from any potential flammable sources.[666]

422 In relation to how the T2 Specification came to refer to Alucobond, Mr Fraser gave evidence that: "Karl [Engstrom] brought certain sections of the drafting of the specification to me to ensure that they met with the design intent of the building". He said that the fixing detail in respect of the ACPs was one of the matters Mr Engstrom brought to his attention. He was asked if he had a distinct memory of that, and he answered: "I remember having the conversation around the selection of the Alucobond brand for the purposes of this building".[667] He added: "The conversation that I remember having with Karl was that all

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659 T1458
660 T1459
661 T1480
662 T1458-9; T1479-80
663 T1458-9
664 T1480
665 T1477-8
666 T1479
667 T1528

elements of the Alucobond installation would be in compliance with the details set out in the Alucobond manual of fixings."[668]

423 When it was suggested that he had a remarkable memory from 10 years earlier of what he specifically wanted in relation to the ACPs, Mr Fraser said: "Because it was an important element of the building which was discussed at length".[669] Mr Fraser disagreed that the idea specifying "Indicative to Alucobond" came from Davis Langdon as part of their online specification system.[670]

424 Mr Fraser was taken back to this issue later in his evidence. He was asked directly whether the reference to Alucobond was something Mr Dekker put into the T2 Specification and he answered: "It was always the intention to use that. It's just the first time that the documentation gets to the point of naming a manufacturer and a manufacturer's set of systems and details is in the production of the detailed specification". He continued:

> "There was a conversation around what the most appropriate form of composite panels was. Casper [Dekker] had asked the question of Karl [Engstrom] because in our elemental specification brief it didn't have a brand name, it just said, '4 mm composite panels' and you've read that. And then Karl has had the conversation with me, what do I want to do? And I said, 'I want to use Alucobond because it has all of these products in its range and because there were new product within the range which were superior'… The reference to the manufacturer, Alucobond Australia, is important for us."[671]

425 However, Mr Fraser said he did not know that Mr Dekker was proposing to use "indicative to" in identifying the particular product. He said: "I thought we were going to get an Alucobond system with all of its proprietary details and technical data".[672]

Sample approval

426 On the issue of sample approval, in his witness statement, Mr Palmer said that:

> "I did not approve the Alucobest sample as 'suitable'. My approval was for the aesthetic selection of material to ensure that it complied with the planning permit documentation and the many sales brochures and literature which has been published to market the sale of the apartments in the Lacrosse building."[673]

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668 T1529
669 T1531
670 T1531-2
671 T1592-4
672 T1596-7
673 F62 at [32]

427 LU Simon observe in its submissions that there is no record that Elenberg Fraser's approval of the sample was confined to colour or visual characteristics. It then submits that:

> "The situation with PDS was different. Under the Design and Construct Contract: PDS was performing the role of Superintendent. Under the T2 Specification, which was part of the Design and Construct Contract, PDS was required to approve samples. Clause 4.4B at page 0013 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 sample. There is no provision in the architecture consultant agreement which limits Elenberg Fraser's role in approving samples."[674]

428 In his witness statement, Mr Fraser said:

> "Upon ascertaining the system that EF was being required to undertake for the approval of samples, I raised this with David as I was furious that our standard protocols were not being used. LU Simons were forcing the project architects to approve small scale unrepresentative samples of material according to their own self-serving signoff forms. As LU Simon post novation was EF's client, we did not have the ability to insist on our own processes and procedures being used. At no time before or after this project have we encountered opposition to the use of our standard protocols for samples approvals."[675]

429 After setting out this passage from Mr Fraser's witness statement, LU Simon submits that:

> "A number of points should be noted about this. First, Mr Fraser had handed over supervision of the project to Mr Kristens in early 2008. Second, Mr Palmer did not refer to being forced to use LU Simon's form. Indeed, he created his own document, being AAS-61 (sic). Third, Mr Fraser has not identified what the Elenberg Fraser protocols were. Fourth, Mr Palmer does not remember Mr Fraser counselling him about this: [T1271 L30]. Mr Fraser's evidence appears to be reconstruction to excuse Elenberg Fraser for giving formal signed approval of the use of Alucobest in the building." [676]

What are Elenberg Fraser submissions on breach?

430 Elenberg Fraser's written submissions set out in considerable detail the obligations imposed on LU Simon under the D&C Contract and, in particular, by the provisions of the T2 Specification. They also discuss at length what they assert is the correct meaning and effect of the Alucobond Specification. In oral submissions, senior counsel for

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674 I159 at [159]
675 F64 at [95]
676 I159 at [257]

Elenberg Fraser refined Elenberg Fraser's written submissions. In particular, he emphasised that where the T2 Specification identified a product by name (such as "Alucobond") this should be read as being limited to identifying the particular visual characteristics or aesthetic quality the design is trying to achieve. He said the product name did not refer to its "integral components" or mean a product with "the same identical material composition". Rather, these matters were dictated by the performance requirements laid down in the T2 Specification.

431 Going first to the written submissions, the thrust of these was that it was ultimately LU Simon's responsibility under the D&C Contract to select the ACPs and that the T2 Specification imposed on it comprehensive obligations to ensure that the ACPs it selected were compliant with the BCA. For example, Elenberg Fraser submits that:

- 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;[677]
- 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";[678]
- the intention of the references in clause 1.31, "Fire" of the T2 Specification to "non-combustible" and "not easily ignitable with low flame spread characteristics" was to ensure that LU Simon complied with both AS1530.1 and AS1530.3, depending upon the product and its intended use;[679]
- the inclusion by Elenberg Fraser of ACPs in the Preliminary Design Drawings and the T2 Specification as part of the external façade 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 the performance requirements of the BCA;[680]
- 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

677 I161 at [38]-[39]
678 I161 at [40]
679 I161 at [46]
680 I161 at [57]

requirements of the BCA by an alternative solution or by the DTS provisions;[681]

- although LU Simon would not have been able to establish compliance with the BCA by the DTS provisions for a 100% PE core product, LU Simon was at liberty to seek an alternative solution for the PE product it had selected and then proceed to comply with the performance requirements of the BCA in liaison with Thomas Nicolas and Gardner Group;[682]
- but whatever product LU Simon selected had to be non-combustible in accordance with AS1530.1 and the performance requirements of the BCA via one of its permitted pathways;[683] 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.[684]

432 Additional matters raised by senior counsel for Elenberg Fraser in the course of oral submissions included the following:

- where a particular product has been identified in the "work" sections of the T2 Specification (which included Section 04-203 – "Metal Roof and Wall Cladding"), it was for visual reasons only, and the contractor is still obliged to select a product that satisfies the necessary performance requirements;[685]
- this follows from the opening provisions of the "work" section as shown on page 91 of the T2 Specification (Section 04-203, clause 1.1 and 1.2[686]), which reference Section 01-100 and, in particular, the section headed "1.1 Specification Format",[687] commencing "This Specification is Descriptive (D)";
- the purpose of clause 2.5A of the T2 Specification (including the Alucobond Specification) is to identify a descriptive quality for the work. It does not identify a particular product. It simply identifies what visually has to be provided. Whatever product was ultimately selected not only had to comply with the visual aspect of the design, it also had to comply with the performance requirements;[688]
- on a proper reading, LU Simon had to select the product that complied with "1.31-Fire", which required that all elements shall

681 I161 at [69]
682 I161 at [84]
683 I161 at [84]
684 I161 at [101]
685 T2689
686 G299.0091
687 [124]
688 T2688-9

be non-combustible (a reference to AS1530.1) or not easily ignitable with low flame spread characteristics (a reference to AS1530.3). Further, LU Simon could not opt for a product that only complied with the requirement of AS1530.3, as this would have put it in breach of the BCA: "We submit that that is an absurd way to read this particular document to say that you could go for the lesser quality and therefore the lesser test";[689]

- Elenberg Fraser took on a design responsibility and was responsible for ensuring that its design complied with the law, but its job was that of assistance, not lead design consultant. Elenberg Fraser has never been told what lead design consultant actually involves;[690] and
- Elenberg Fraser's sample inspection obligation under the EF Consultant Agreement should be construed so that it accords with the T2 Specification (see clause "4.4 Samples Generally" of the T2 Specification), with the result that the obligation under the EF Consultant Agreement is to inspect for visual characteristics only. Architects are "interested in visuals", they are not experts in the BCA, thus Elenberg Fraser's inspection of the sample was only to check it against the look or intent of its design. [691]

Are Elenberg Fraser's submissions supported by the evidence?

433 There are several difficulties with these submissions. First, a number of the submissions are directly contrary to Mr Fraser's evidence. For example, as my summary of Mr Fraser's involvement in the Alucobond Specification demonstrates, he clearly considered that the specification went beyond merely a statement of visual intent. He was adamant that it carried with it all of the product range (including the differing core constituents available) and the detailed fixings manual. Further, he expressly conceded that it did encompass Alucobond with the 100% polyethylene core. He also gave evidence contrary to the submission that LU Simon was obliged to ensure compliance both with the AS1530.1 and AS1530.3 tests. His evidence was that, "the appropriate test for combustibility of bonded laminates is not 1530.1, but 1530.3.[692]

434 While Mr Fraser's evidence on these matters is relevant to Elenberg Fraser's ongoing role in implementing the T2 Specification as required under the EF Consultant Agreement, it does not, of course, inform the proper construction of the T2 Specification. I interpolate that in my examination of the claims involving Elenberg Fraser, I have not overlooked the evidence of the architect expert witnesses, Messrs

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689 T2694
690 T2698
691 T2699-701
692 T1365

Bullen and Quigley. That evidence was informative in a general sense, but it too does not assist with the proper construction of either the T2 Specification or the EF Consultant Agreement. I am satisfied that these issues can be resolved by general principles of contractual interpretation—there was no particular term of art or technical reference that was illuminated by the expert evidence.

How should the T2 Specification be construed?

435 This brings me to the second difficulty with the Elenberg Fraser submissions. Many of them are unsustainable as a matter of construction. For example, the argument that the reference to Alucobond is there only to identify visual quality, is untenable. It is clear from a plain reading of the "work" sections of the T2 Specification that a reference to a proprietary product is directed at far more than just the visual characteristics. The specification for the "Fibre Cement Cladding" in clause 2.2 set out above is a further illustration.[693] In any event, the T2 Specification itself spells out in clause 7.12 what is required when "proprietary products" are specified.[694] In my view, these provisions amply demonstrate that "indicative to Alucobond" is specifying the use of the proprietary product named, or something that has an equivalent level of quality, and not just visual quality.

436 I also do not agree with the submission that clause 1.31 "Fire" in the T2 Specification should be read as disallowing LU Simon from choosing products that satisfied only the test under AS1530.3. Consistently with Mr Fraser's evidence, the better view is that the use of "or" confers that very choice. Thus it too (like the Alucobond Specification) is specifying a design option that does not comply with the BCA provision for non-combustible external walls, for the reasons discussed in my analysis of the claims against Gardner Group.

How does the D&C Contract affect the EF Consultant Agreement?

437 I do not propose to expand further on these two difficulties with the Elenberg Fraser submissions, because the third essentially trumps them. This third difficulty was summarised in the oral submission of senior counsel for LU Simon. He confirmed that LU Simon agreed under the D&C Contract to manage the design process and procure from Gardner Group a permit to build. It also agreed to bear the design risk. But that was in its contract with the developer, not with Elenberg Fraser. And it only agreed to assume those obligation on the basis that it would enter into the EF Consultant Agreement (via the Novation Agreement), under which Elenberg Fraser agreed to "complete the design, to act as the

693 [126]
694 [126]

head design consultant, to coordinate the design issues, and to assume all liability and risk in the design."[695]

438 He later added that Elenberg Fraser's submissions continued to refer to the T2 Specification as if it in some way regulates the terms of the EF Consultant Agreement, or in some way affects the obligations owed by Elenberg Fraser under that agreement.[696] He continued:

> "The specification was not, however, written to regulate any legal relationship that might arise between the contractor and a person with whom it contracts to perform the services under the consultant agreement. In this case, LU Simon chose itself to perform the construct part of the design and construct contract, because that's where its skills lay. But it chose to employ the services of among others, Elenberg Fraser, to undertake the design in order that it could better fulfil its obligations to its principal. So in the context of the architecture consultant agreement between LU Simon and Elenberg Fraser, the T2 Specification is largely irrelevant".[697]

439 I agree. Any reliance by Elenberg Fraser on references in the T2 Specification to its design being only at the "Preliminary Design Drawing" stage is misplaced. Further, its submissions to the effect that:

- the T2 Specification passed all responsibility for the design from Elenberg Fraser to LU Simon;
- 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 both the clear terms of the EF Consultant Agreement and the reality of Elenberg Fraser's ongoing role.

440 The argument by senior counsel for Elenberg Fraser developed in oral submissions was in substance that it was LU Simon's responsibility to deduce that the reference to "Alucobond" in the T2 Specification did not in fact permit the use of any product so named. The argument is misconceived and contrary to the clear terms of the T2 Specification. It is also untenable to suggest that, despite being responsible for the development of the T2 Specification and later accepting the role of head design consultant, Elenberg Fraser was apparently absolved from responsibility for:

- ensuring its client LU Simon understood and applied what it now asserts was the design intent implicit in the T2 Specification; and

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695 T2800
696 T2804
697 T2805

- continuing to develop and implement a design that departed from that asserted design intent.

441 As its senior counsel noted, LU Simon had "contracted Elenberg Fraser to complete the preliminary design and Elenberg Fraser worked on the design development drawings and they were then developed into the as for construction drawings".[698] This ongoing work on the design included finalisation of drawings that were then submitted by LU Simon as part of its application for the Stage 7 Building Permit. Elenberg Fraser's revision of the Specification Brief dated 8 April 2011 titled Stage 1 Revision 2, provided details for the external walls,[699] including reference to the "4mm composite panel (full height), over light weight stud framing".[700] None of this material identified that the 4mm composite panel should be entirely free of polyethylene and thus non-combustible. Indeed, it is far from clear that such an ACP existed (noting that the minimum thickness of the Alucore panel was 6mm).

442 To my mind, it is self-evident that the commercial intent of the Consultant Agreements and the associated Novation Agreements, was to facilitate the ongoing involvement of the Consultants in (and thus their responsibility for), the development of the work they started before execution of the D&C Contract. This is made clear not only by the evidence but (relevantly) by the terms of the Consultant and Novation Agreements themselves. In particular, as LU Simon submits:

> "Finally, it must be remembered that by the Deed of Novation Elenberg Fraser agreed that it would be liable to LU Simon with respect to the performance or non-performance of the services under the [EF Consultant Agreement], whether such liability arose under the law of contract, tort or otherwise, including without limitation, liability for any defects, including latent defects, in the Services (whether those services were carried out or performed before or after novation)."[701]

443 The same can be said of Elenberg Fraser's appointment under the EF Consultant Agreement as head design consultant. It makes perfect commercial sense for LU Simon to seek to ensure that the entity responsible for conceiving the design is also responsible for coordinating its implementation. I do not dwell on Elenberg Fraser's submission that it was not "told" what being head design consultant involved – this is apparent from reading the EF Consultant Agreement. In relation to Mr Fraser's evidence to the effect that LU Simon sidelined Elenberg Fraser from fulfilling that role, I make three observations:

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698 T2802
699 G1038.0014
700 G1037.0006, see also The "Wall Types" drawing A639, revision 4 "For Construction", including wall type detail F6 issued on 21 March 2011, at G1225
701 I159 at [280]

- as LU Simon submitted, there was no evidence in minutes, emails or other correspondence of Elenberg Fraser raising any concern about this at the time;
- there is no pleading that this operated to frustrate or vary the EF Consultant Agreement or otherwise absolve Elenberg Fraser from meeting its contractual responsibilities; and
- in any event, the evidence shows that Elenberg Fraser in fact had sufficient ongoing involvement with the project (including by providing specification and drawing revisions and approving samples), to correct any failure by LU Simon to achieve Elenberg Fraser's design intent, at least in respect of its external wall design.

444 Turning finally to the sample approval, I reject Elenberg Fraser's submission that the scope of its obligation under the EF Consultant Agreement to "Inspect and approve samples as required in the architectural specification", should be read as incorporating from the T2 Specification the qualification that they be reviewed for visual characteristics only. 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.

445 I am reinforced in this view by, first, the other reference to "samples" in the "Construction Phase", "Inspections"[702] section of the "Services" under the EF Consultant Agreement. To my mind, this confirms that Elenberg Fraser's obligation in relation to samples was considerably more expansive than visual intent alone. Further, it was common ground that by the time the EF Consultant Agreement was executed by Elenberg Fraser, the Superintendent role (including in relation to the T2 Specification) had been assumed by PDS. Thus it was by then PDS's obligation under the T2 Specification to review samples for "visual characteristics only" (which it did in relation to the Alucobest sample). It is unlikely that Elenberg Fraser as head design consultant would assume a responsibility under the EF Consultant Agreement that added nothing to PDS's existing obligation under the T2 Specification.

Was Elenberg Fraser in breach of the EF Consultant Agreement?

446 It follows from my analysis above that I am satisfied that Elenberg Fraser's design comprised in both the architectural drawings and the T2 Specification incorporating the Alucobond Specification, specified ACPs for the external walls of the Lacrosse tower that failed to comply with the BCA. More particularly, the Alucobond Specification by its terms at least permitted, and on one view expressly prescribed, an ACP

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[702] B35.0049

with a 100% polyethylene core. When Elenberg Fraser executed the EF Consultant Agreement, it undertook express obligations to LU Simon to exercise care and skill and ensure that the "Contract Material" (which included the "for construction" architectural drawings prepared by Elenberg Fraser in early 2011) complied with the "Legislative Requirements" including the BCA.

447 I am satisfied that by failing to remedy those defects in the course of its ongoing design work after appointment as head design consultant under the EF Consultant Agreement, Elenberg Fraser breached that agreement. Thus I accept LU Simon's submission that: "If the aluminium composite panels were non-compliant with the BCA and not fit for purpose, then Elenberg Fraser breached the [EF Consultant Agreement]". I note that the references to non-compliant with the BCA and not fit for purpose, are derived from, respectively, clauses 3(v) and 3(u) of the AS General Conditions forming part of the EF Consultant Agreement.

448 I also accept its submission that "[t]his is so despite the fact that it relied on Gardner Group or PDS or anyone else [including, I interpolate, Thomas Nicolas] to review the design documentation. So much is expressly provided for in the [EF Consultant Agreement]: clause 3(e)".[703] Elenberg Fraser may have been less expert in the application of the applicable provisions in the BCA than Gardner Group and Thomas Nicolas, but it was nevertheless sufficiently expert to be alert to the need to ensure that the materials it specified did not unduly contribute to flame spread.

449 Mr Fraser's evidence that he thought LU Simon should have selected Alucobond Plus suggests he, at least, was alive to this issue. It is clear that Mr Fraser was also alive to the risk of fire and fire sources on balconies. In response to questions concerning the deletion of sprinklers from balconies, he said:

> "In my experience in high-rise buildings we had used side throw sprinklers from the building façade to cover the balconies, because people put barbecues on balconies and things happen."[704]

450 He went on to explain that he had a conversation with Mr Gibson of Gardner Group about this and he was "told to leave these issues of fire engineering to the building surveyor and fire engineer". He later said that he "bitterly complained" to Mr Gibson about the deletion of sprinklers "with regards to there being barbecues and all that".[705] In any event, Elenberg Fraser assumed a contractual obligation to LU

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703 [I159] at [272]-[273], referring to the AS Special Conditions at B35.0015
704 T1408
705 T1631

Simon to ensure its specifications and drawings were fit for purpose and BCA compliant.

451 As I have made clear, it is no answer to these findings of breach to point to equivalent obligations owed by LU Simon to the developer under the D&C Contract. Elenberg Fraser's arguments to this effect were a time consuming and unnecessary distraction in the proceeding. I accept LU Simon's submission to the effect that what it was seeking to achieve in engaging Elenberg Fraser under the terms of the EF Consultant Agreement, was to shift back to Elenberg Fraser responsibility for ensuring that LU Simon complied with these obligations.

452 In my view, Elenberg Fraser was also in breach by effectively abdicating its responsibilities as head design consultant. This is exemplified by Mr Fraser's approach to the Alucobond Specification. He went to some trouble in his evidence to emphasise that, at the time the T2 Specification was being finalised, he saw this as an important element of the design and had strong views as to what it entailed. He gave clear instructions to Mr Engstom about these matters to pass on to Mr Dekker. He did so because "it was an important element of the building which was discussed at length". But he thereafter did nothing to ensure that these firmly held convictions as to design intent and quality were translated into the constructed building.

453 In particular, there is no evidence that any of he, Mr Engstrom or Mr Kristens communicated any information about these matters to Mr Palmer. Mr Palmer replaced Mr Engstrom as the project architect in about July 2010 and reported to Mr Kristens as "head of delivery".[706] Neither Mr Engstrom nor Mr Kristens gave evidence in the proceeding. Unsurprisingly, therefore, Mr Palmer had no real appreciation of Mr Fraser's intent in relation to the Alucobond Specification. This, in turn, probably explains why (as LU Simon submits):

> "Mr Palmer understood 'indicative to Alucobond' to mean Alucobond or something similar to it: [**T1231 L6**], which is consistent with LU Simon's understanding but inconsistent with Mr Fraser. When asked what his knowledge of Alucobond aluminium composite panels was at the time, he said: 'Not an awful lot' and he did not know that they contained polyethylene: [**T1231 L9-12**]. Mr Palmer was also unware of the BCA definition of non-combustible or the test for combustibility: [**T1236 L11**]."[707]

454 In my view, it also explains Mr Palmer's failure to identify any concerns with the Alucobest sample or raise any questions about it, either within Elenberg Fraser or with LU Simon, apart from the period of the warranty. In this regard, Elenberg Fraser's inadequate

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706 F63 at [84]
707 I159 at [275]

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.

455 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, 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.

456 The evidence concerning the sample approval by Elenberg Fraser outlined above[708] 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".[709] Against this background, it is perhaps no coincidence that Mr Fraser was "furious that our standard protocols [for approval of samples] were not being used".[710]

457 Similar points to those raised above were made by Gardner Group in its written submissions on the issue of apportionment.[711] I set out in full Gardner Group's submission on the culpability of Elenberg Fraser in my discussion of the Proportional Liability issue below. In my view, it has considerable force.

Do the other matters raised by Elenberg Fraser reduce its liability for breach?

458 In relation to the first of the ancillary arguments raised by Elenberg Fraser (it did not owe a duty to the Owners to avoid pure economic loss), Elenberg Fraser submits (omitting the citation) that:

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708 [426]-[429]
709 Clause 3(h) of the AS General Conditions at B35.0015
710 F63 at [94]
711 I160 at [172(b)]

> "There is no precedent which, as a matter of principle, holds an architect liable for pure economic loss suffered by subsequent owners of domestic buildings or an owners' corporation where the risks are allocated under the Contract with the Builder… Neither the applicants nor LU Simon have pleaded, proved and submitted that the applicants were vulnerable."

459 The Owners did not press this claim in submissions, relying exclusively on its warranty claim against LU Simon. For its part, LU Simon also does not make any contrary submissions, because it seeks damages from Elenberg Fraser for breach of contract (the EF Consultant Agreement), not damages in tort. In the circumstances, while this submission appears to have merit, it is unnecessary for me to reach a concluded view.

460 The second matter is whether LU Simon's indemnity under clause 9.2 of the AS General Conditions forming part of the EF Consultant Agreement, is limited to the Owners' property damage. Clause 9.2 relevantly provides that Elenberg Fraser shall indemnify LU Simon against claims by any person against LU Simon in respect of "personal injury or death or loss of or damage to any…property" (not being the property of LU Simon), caused by the negligent or wrongful acts of Elenberg Fraser. The clause goes on to provide for an apportionment regime which, for all practical purpose in this case, mirrors the *Wrongs Act* scheme.

461 Elenberg Fraser argues that LU Simon can seek indemnity under clause 9.2 only in respect of the property damage component of the Owners' warranty claims. It submits that there is no room to include in those word "pure economic loss".[712] It further submits that the claims by the Owners for replacement of cladding unaffected by the fire, but as ordered by VBA, is pure economic loss. It refers to the decision of *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[713]as authority for that latter proposition. I accept these submissions and I note that LU Simon did not seek to argue a contrary position. However, the indemnity provision does not operate to limit or exclude LU Simon's entitlement to claim damages for breach of the EF Consultant Agreement on general principles. Elenberg Fraser does not contend otherwise.

462 This brings me to the third matter raised by Elenberg Fraser, namely, whether its breaches of the EF Consultant Agreement caused LU Simon's loss. Elenberg Fraser's submissions also raise the related

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712 T2708

713 (2004) 205 ALR 522 – the submission references the decision of Brennan J, but I think in this senior counsel had in mind His Honour decision in *Bryan v Maloney* (1995) 182 CLR 609, discussed at length in *Woolcock*. The relevant statement in *Woolcock* is in the majority judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ at [20]

issues of remoteness and, more specifically, whether LU Simon's loss is recoverable under the second limb of damage in *Hadley v Baxendale*.[714] It is convenient to deal with these issues as they relate to LU Simon's claims against all other respondents under a single heading, and I do so below.[715]

THOMAS NICOLAS'S LIABILITY

What are the claims against Thomas Nicolas?

463 Unsurprisingly, there are a number of parallels between the structure of the claims against Thomas Nicolas and those against Gardner Group and Elenberg Fraser. As with Elenberg Fraser, the Owners' claims against Thomas Nicolas are effectively subsumed in LU Simon's case, with the latter primarily based on alleged breach of the TN Consultant Agreement. Further, as I have found, those claims involved a failure to exercise reasonable care with the result that the duties and obligations under the TN Consultant Agreement are co-extensive with its equivalent duties at common law. And as with Gardner Group, LU Simon makes additional claims directly against Thomas Nicolas under the ACL.

464 Thomas Nicolas resists these claims on various bases, including arguing for limitations on the scope of its obligations under the TN Consultant Agreement, pointing to deficiencies in the information provided to it and asserting that its work (primarily the Fifth FER) discharged its obligations. In particular, it argues that on a proper reading of the Fifth FER, it specified that external walls were to be constructed of non-combustible materials. It also argues that there was no alternative solution required for its conclusion that the external balconies did not require sprinklers. Finally, Thomas Nicholas (like Elenberg Fraser) posits that there is no basis to conclude that any failure by it to exercise reasonable care caused the loss claimed.

465 Although not the order in which they are dealt with in Thomas Nicolas's written submissions, it is convenient to deal with the issues raised by those submissions as follows:

- How should the TN Consultancy Agreement be construed?
- Did Thomas Nicolas breach the TN Consultancy Agreement by failing to conduct a full engineering assessment or by otherwise failing to identify the proposed use of non-compliant ACPs?
- Did Thomas Nicolas breach the TN Consultant Agreement in relation to the deletion of sprinklers from the balconies on the eastern side of the Lacrosse tower?

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714 (1854) 9 Exch 341
715 [540]-[578]

- Did Thomas Nicolas breach the TN Consultancy Agreement or its duty of care to LU Simon by failing to warn LU Simon that the proposed use of ACPs was non-compliant?
- Did Thomas Nicolas engage in conduct that was misleading and deceptive in contravention of the ACL?

466 I will first outline the facts relevant to the claims against Thomas Nicolas before dealing with each of those issues in turn. As with the claims against the other respondents, I will consider Thomas Nicolas's submissions on causation as part of my more general discussion of causation and remoteness below.

What are the facts relevant to the claims against Thomas Nicolas?

467 LU Simon submits that Thomas Nicolas played a very important role in the Lacrosse project because it was the primary consultant responsible for fire safety compliance under the BCA. I agree. Further, based on the evidence of its director Mr Nicolas, Thomas Nicolas was unique among the building professionals engaged on the Lacrosse project in holding the view in the period 2007 to 2010 that ACPs with a polyethylene core did not comply with the DTS provisions of the BCA for use as part of an external wall in a type A building.[716] However, it is worth noting that this view was shared by all five fire engineers called to give evidence during the hearing.[717]

468 It is unnecessary to repeat the relevant provisions of the TN Consultant Agreement executed in about July 2010,[718] except to emphasise that the terms of the "Services" description were actively negotiated by Mr Nicolas before signing and included express provision that Thomas Nicolas would (among other things):

- "Fully appraise itself of all information and documentation, which the Principal has made available to the Fire Engineer for the purpose of the Project"; and
- "Conduct a full engineering assessment in accordance with the requisite assessment level dictated within the [IFEG]".

469 These clauses echo provisions in earlier iterations of Thomas Nicolas's engagement agreements with the developer, which also referred to services including "undertake the performance fire engineering analysis and life safety design for the building generally…in accordance with…the Fire Engineering Design Guidelines" and "the

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716 T1679-80, see also T1766, where Mr Nicolas confirms his view at the time that an ACP with a 100% PE core would not comply with C1.12(f) of the BCA

717 See C17.0003-4, answers to questions 1 to 3—noting that Dr Clancy's part withdrawal of his agreement on these questions during oral evidence, related to the definition of ACP. He at no stage revised his view that an ACP with a PE core was non-compliant

718 [79]

assessment…is to include…Fire Spread and Management" and "this office undertakes fire engineering on a global basis". As explained above, the reference to "Fire Engineering Design Guidelines" is probably to the 1996 FEG. However, clearly the TN Consultant Agreement created fresh and distinct obligations at the time it was executed in around July 2010, being obligations enforceable by LU Simon under the Novation Agreement executed at about the same time.

470 I also will not repeat the parts of the narrative of the Lacrosse design development and construction concerning the development of the FEDB and various FER, except to highlight the following key matters:

- The FEDB prepared in January 2008 was the first Thomas Nicolas document to describe the general structure of the building as including: "Precast panel wall systems are proposed for external cladding systems". Despite numerous design and structural changes in ensuing years, this "incomplete statement"[719] was never revised in subsequent FERs or in the MFB Application, to add a reference to the proposed extensive use of ACPs on the east and west façades of the building. The FEDB also referenced the 1996 FEG, which had been superseded by IFEG three years earlier.
- It is likely that at the time Mr Nicolas prepared the FEDB, he was aware of drawings that at least included reference to "lightweight wall infill". In any event, it is clear that the overall design was still in its early stages and likely that there would be significant changes in materials specifications as the design continued to develop up to the tender stage.
- The evidence is that Mr Nicolas was not given the T2 Specification dated 17 April 2008 and was unaware of the Alucobond Specification. However, in a supplementary witness statement, Mr Nicolas confirmed that he had received Elenberg Fraser's "Materials, Fixtures & Fittings Schedule" dated 20 March 2008.[720] In the section "Walls" this includes a reference to "INFILL WALLING – 4mm COMPOSITE PANEL (FULL HEIGHT), OVER LIGHT WEIGHT WALL FRAMING".[721]
- Mr Nicolas refers in his evidence to the recommencement of work on the project in around May 2010 following the award of the D&C Contract to LU Simon and to his informing Design Development Meeting 001 on 18 May 2010 of the need to re-brief the MFB, bearing in mind that the original FEDB was based on two towers.

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719 T1714
720 G241
721 G241.0006

- The Fifth FER was circulated by Mr Nicolas by email dated 9 December 2010. This was the version used to support the MFB Application, which was sent by Thomas Nicolas under cover of a letter dated 22 February 2011. Under the heading "A. BUILDING DESCRIPTION" on the first page of the letter, Thomas Nicolas again 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". There is no reference to ACPs.
- The application form that accompanied this letter was in Mr Nicolas's handwriting and described the "Details of Construction", "Walls" as ""CONC/MASONRY/DRY WALL". There is no reference to ACPs.

471 I refer above[722] to the description of the external cladding systems in both the Fifth FER and the MFB Application being repeated word for word in the FEDB in January 2008, each iteration of the FER and in this letter to the MFB. The fact that it has found its way unchanged into this letter, coupled with the similarly incomplete description in the handwritten application, is particularly notable. This was not simply a matter of this description being carried over unchanged from an early preliminary draft. These documents are discrete statements, prepared for the first time at a late stage in the design development, when Mr Nicolas can be taken to have known that ACPs were to be used in the external cladding.

472 Mr Nicolas's evidence about the Fifth FER included the following:

> "The Fifth FEDR is comprised of two volumes… I have conducted extensive searches for Volume Two of the Fifth FEDR but I have not been able to locate a copy. I believe that Volume Two of the Fifth FEDR has been lost or destroyed.
>
> In the Fifth FEDR the "General Structure" set out in the "Building Description" identified that "Precast panel wall systems are proposed for external cladding systems". This was a general comment given in the Fifth FEDR in circumstances where Thomas Nicolas believed that the building design (including the façade) was incomplete.
>
> The Fifth FEDR maintained the following requirements for the design of the balconies:
>
> (a) Table 1.4.2 Item 6 states: "***Fire Suppression Subsystem***… *Sprinkler spacing arrangement to ensure full floor coverage is maintained throughout the building as required. Unless otherwise noted, external areas (e.g. balconies, eaves, overhangs etc.), which comprise non-combustible construction, need not be sprinklered.*"

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722 [100]

(b) Table 1.4.5 Item 4 states: ***"Barrier Sub System/Fire Resisting Construction****… Apartment balconies may be constructed of non-combustible materials in lieu of construction having the prescribed FRL subject to maintaining building sprinkler protection throughout internal apartment areas.*"

It is now apparent that the Developer, LU Simon, the design team, and the building surveyor did not follow the abovementioned design requirements in the Fifth FEDR when finalising the design of the Lacrosse project and selecting the cladding material.

The Fifth FEDR states in Table 1.2 that the report is based on a series of architectural drawings…Drawing A004/U is a materials legend. The drawing designates: material "WP3" as "Wall Panel Type 3: Composite Panel Cladding" and material "V" as "Composite Wall Cladding – Silver Aluminium Composite Sheet". Drawings A425/U, A426/U and A427/U show that material WP3 is to be used in construction of the external balcony walls. Drawings A400/V, A402/U and A502/U show that material V is to be used in construction of the external balcony walls.

I noted that the abovementioned drawings were at various early stages of design development."[723]

473 The statement in the above extract that "the design team…did not follow the abovementioned design requirements", is a reference to a key aspect of the case advanced on behalf of Thomas Nicolas. Thomas Nicolas submits that the two passages from (respectively) Table 1.4.2 Item 6 and Table 1.4.5 Item 4 of the Fifth FER extracted above imposed a requirement that "balconies, eaves and overhangs etc" be constructed from non-combustible materials.[724] Mr Nicolas's witness statement referred to emails and design meeting minutes which he asserted confirmed approval of the Fifth FER from each of Gardner Group, Elenberg Fraser and LU Simon.[725]

How should the TN Consultant Agreement be construed?

474 Thomas Nicolas confirms in its submissions that the TN Consultant Agreement should be construed in accordance with the "well-established principles of contractual construction as restated in *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited*", discussed above.[726] They also submit that "the contractual standard of care is subject to a criterion of reasonableness, not cast in absolute terms, nor perfection".[727] For reasons already explained,[728] I agree that the obligations under the TN Consultant Agreement are not absolute, and

723 F64 at [63]-[72]
724 A14 at [77A(c)]
725 F64 at [78]-[80]
726 (2015) 256 CLR 104, [45]-[46]
727 I162 at [54]
728 [315]-[324]

are to be construed as co-extensive with the common law duty to exercise reasonable care. This does not, of course, absolve Thomas Nicolas from any breach of the TN Consultant Agreement that is shown to fall short of that standard.

Did Thomas Nicolas fail to conduct a full fire engineering assessment?

475 The primary allegation against Thomas Nicolas is that it failed to conduct "a full engineering assessment of the building in accordance with the requisite assessment level dictated within the [IFEG]", as required by paragraph d. of the "Scope of Services" forming part of the TN Consultant Agreement. I agree with Thomas Nicolas's submission that this issue is to be assessed only in respect of the work done after execution of the TN Consultant Agreement in July 2010. In particular, Thomas Nicolas's compliance with this obligation is best judged by reference to the Fifth FER[729] (including the revised version of the Fifth FER issued by Thomas Nicolas in May 2011[730]).

476 Thomas Nicolas's argument in response to this allegation is that, because the IFEG are a series of guidelines and not mandatory law, it was able to comply with this obligation by going through each of the five broad stages in the "typical fire engineering process" referred to in IFEG.[731] According to Thomas Nicolas, taking each of these steps equated to conducting a full fire engineering assessment. The first difficulty with this argument was identified in oral closing submissions by senior counsel for LU Simon. As he submitted,[732] it is irrelevant what status the IFEG had in the industry generally. In this case, the requirement to conduct a full engineering assessment in accordance with the requisite assessment level dictated within the IFEG, was given express contractual force by the TN Consultant Agreement.

477 The second difficulty is that, in my view, the "typical fire engineering process" relied on by Thomas Nicolas does not constitute a "full engineering assessment" as contemplated by the TN Consultant Agreement. The expressions "full engineering assessment" and "assessment level" are not defined or explained in the IFEG. However, at least part of the process of assessment referred to by Thomas Nicolas in its submissions is the "Hazards Prevention Protection" at 1.2.6 of the IFEG which provides: (emphasis added)

> "A systematic review should be conducted to establish potential fire hazards (both normal and special) of the building. *The information gathered in determining the principal building characteristics in*

729 G837
730 I21
731 I162 at [56]-[61]
732 T2789

Section 1.2.3 forms the basis for this review. Section 1.2.6.1 provides examples of potential fire hazards.

The various preventive and protective measures that already exist, are planned or could be used to address the hazards should then be identified. Examples of such measures are listed below in Section 1.2.6.2."[733]

478 The determination of the "principal building characteristics" that are said to form the basis for the systematic review is guided by Section 1.2.3 of IFEG, under the heading "Principal building characteristics", which provides as follows:

"In order to evaluate or design a building's fire safety system, it is important to understand the building's characteristics and its normal mode of functioning. The principal characteristics should be identified early in the FEB process in order to facilitate the decisions that need to be made and issues to be resolved (see Figure 1.2 and the following Sections). The information available will vary according to the stage in the design process but the following list of characteristics, together with examples, is indicative of those characteristics that might be appropriate:"[734]

This is followed by a list of characteristics which includes "Structure - construction materials".

479 Thus, a "full fire engineering assessment" at least required Thomas Nicolas to inquire into and assess the range of construction materials for the purpose of establishing "potential fire hazards (both normal and special) of the building". I am satisfied that Thomas Nicolas failed to do this. Indeed, this failure is essentially undisputed. Thomas Nicolas has maintained consistently throughout the proceeding, that it was not part of its role to look at the building generally and inquire into and assess whether there were any fire hazards, apart from those identified by Gardner Group as deviations from the DTS requirements of the BCA.[735]

480 As explained in LU Simon's written submissions,[736] Thomas Nicolas opened its case on the basis that "it was never expected that the fire engineer would have the role of going through architectural drawings and identifying possible non-compliances".[737] Rather, the role of the fire engineer was limited to responding to the alternative solutions or "deviations from the DTS provisions" identified by the "Authority Having Jurisdiction" (namely, in this case, Gardner Group).[738] This

733 IFEG at D19.0173
734 IFEG at D19.0169
735 See, for example, the exchange at T252
736 I159 at [320]
737 T254
738 T255-6

position was echoed by Mr Nicholas, both in his witness statement[739] and in oral evidence:[740] "It wasn't my role, again as I said, to go on never ending searches through documents, looking for non-compliances".

481 This evidence demonstrates starkly the disconnect between how Mr Nicolas viewed Thomas Nicolas's role and the obligations it in fact assumed on executing the TN Consultant Agreement. It may have been Mr Nicolas's usual practice to limit his assessment to matters identified for his consideration by the building surveyor, but the TN Consultant Agreement demanded more than this. Under that agreement, Thomas Nicolas assumed an express obligation at least to assess the construction materials for any fire hazards. The obligation may not have extended to undertaking "never ending searches…for non-compliances". But it at least required some proactive investigation and assessment of the principal building materials.

482 Further, as LU Simon observed, identification of the proposed use of ACPs did not require any searching:

> "Mr Nicolas had already been put on notice that aluminium composite panels had been specified. There was therefore nothing to search for. The question is, why didn't he say anything to the architect, or the building surveyor, or the builder? Given that Mr Nicolas knew that polyethylene had a calorific value of 44 Mj/kg and was highly combustible, then he was on notice that without any specific details of which type of composite panels was to be used, there was a very real chance that a panel with a polyethylene core would be used."[741]

483 Mr Nicolas had actual knowledge that the construction materials proposed for the Lacrosse tower included extensive use of ACPs on the east and west façades. He knew that ACPs with a polyethylene core were combustible and could constitute a fire hazard. Against that background, I am satisfied that Thomas Nicolas's agreement to conduct a "full fire engineering assessment" imposed on Mr Nicolas at the very least an obligation actively to inquire about what ACPs were proposed, and advise accordingly. He failed to do this. Instead, the effect of his evidence was that he wrongly assumed the ACPs would be non-combustible, where a simple enquiry of any of LU Simon, Elenberg Fraser or Gardner Group would have revealed the true position.

484 The assessment of this issue is essentially a question of construction of the TN Consultant Agreement, and thus is a matter for the court. I am nevertheless reinforced in my views by the expert evidence in answer to Question 8 in the Joint Report.[742] That question was: "If a Fire Safety

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739 See, for example, F64 at [107]
740 T1753, T1765
741 I159 at [332]-[333]
742 C17.0005-6

Engineer, acting reasonably, had conducted a full fire engineering assessment of the design of the Lacrosse building in accordance with the requisite assessment level dictated within the IFEG…would the fire risks (if any) associated with the use of ACP as part of the façade and/or the balconies of the Lacrosse building have been identified?". All the experts apart from Dr Clancy (the expert called by Thomas Nicolas) answered this question "yes".

485 The further exploration of this issue in evidence added little to the answer in the Joint Report. It was clear from Dr Clancy's answers in the Joint Report (particularly his answer to Question 8) and in evidence, that he fell into the same trap as Mr Nicolas. His approach was informed by what he asserted was usual practice, and not what the terms of the TN Consultant Agreement actually prescribed. For example:

- the Joint Report states that in Dr Clancy's opinion: "the IFEG is not a document that is to be used for correcting or policing the fire safety engineering process. That assessment requires the Consultant Building Surveyor to determine the deviations from the DtS provisions of the BCA, to call for advice as required and relevant building professionals to oblige"; and
- in oral evidence (after discussing "the way the industry works") and being asked about the role of the actual contract, he responded: "The contract's certainly important – the contract, I don't believe, can redefine basic professional roles".[743]

486 The lawyers' response to this is, of course, yes it can. The matters referred to by Dr Clancy may in some cases found an argument based on conventional estoppel or form part of the surrounding circumstances to assist to resolve a contested question of construction. But they do not operate to vary the clear terms of the contract, so that an express positive obligation to investigate and assess can be ignored. I note that Thomas Nicolas has not sought to advance a case based either on conventional estoppel or on a construction of the TN Consultant Agreement contrary to its plain meaning.

487 It is worth observing that the reason for this apparent disconnect between Mr Nicolas's evidence of what he understood his role to be, compared to the terms of the contract he signed, may have been hinted at by his reference to the use of templates.[744] My impression generally of Thomas Nicolas's approach to the FERs and other documents, was that there were a number of instances of the use of template or "boilerplate" language (as well as reference to out-of-date guidelines), without much attention being given to what the words actually meant or

[743] T2221
[744] T1673

required. Thomas Nicolas is, of course, not alone in this. It is often the case that diligent and competent professionals blithely reuse standard documents that have served them well over the years, focusing only on those parts that need to be tailored to each job. It is only when something goes wrong and the lawyers become involved, that any real attention is given to how that boilerplate language informs potential liability.

Did Thomas Nicolas breach other provisions of the TN Consultant Agreement?

488 Turning to whether Thomas Nicolas breached the TN Consultant Agreement by otherwise failing to identify the proposed use of non-compliant ACPs, Thomas Nicolas begins its response to this issue by identifying the information it was not given. In particular, it confirms that there is no evidence that Mr Nicolas was given documents or other information revealing that Elenberg Fraser had specified ACPs "indicative to Alucobond". In those circumstances, Thomas Nicolas argues, there was no reason for Mr Nicolas to assume that the ACPs provided for in Elenberg Fraser's drawings and materials schedules would be combustible.

489 In support of this submission, Thomas Nicolas notes that, in its Joint Report, the fire engineering experts did not treat a panel with an aluminium honeycomb core sandwiched between two aluminium sheets (including Alucore), as an ACP. It also relies on the evidence of the experts that: "there were ACP products 'out there' that could have met the requirements of the BCA and may have been the basis of an appropriate performance based solution allowed for use on the External Walls".[745] Thomas Nicolas adds that the experts' position is consistent with the evidence of Mr Nicolas that at least one ACP (Alucore) met the DTS criteria pursuant to C1.12(f)[746] and that:

> "There were products that were compliant at that time, and I wasn't alarmed at the proposition of composite panels, because composite panels does not mean a reference to non-compliance. There were pathways to compliance there."[747]

490 Thomas Nicolas submits in substance that its assumption that the ACPs would be non-combustible excuses its failure to identify and advise that the ACPs proposed for use in the Lacrosse tower did not comply with the BCA:

> "Irrespective of how one chooses to read the FER… Thomas Nicolas required, and all the relevant decision makers understood, that the External Walls were to be constructed with non-combustible

745 I162 at [6]
746 I162 at [7] and F64 at [101]
747 I162 at [7] and T1690

> materials, consistent with the BCA requirements. The criticism of the FER in relation to its alleged failure to take into account the ACPs on the External Walls becomes problematic as the assumption of non-combustibility was used by Thomas Nicolas…[T]he Tribunal should reach a conclusion that this assumption was reasonable and real."[748]

491 There are two matters relied on by Thomas Nicolas as grounding this assumption. In my view, both are unsustainable. The first matter concerns what was purportedly conveyed to Thomas Nicolas by the references to ACPs in the architectural drawings and materials schedules it reviewed. It submits that descriptions including "Composite Wall Cladding – Silver Aluminium Composite Sheet" (and like descriptions), did not necessarily convey a combustible ACP. In particular, according to Mr Nicolas, it could have referred to Alucore.

492 The overwhelming evidence from experts and building professionals alike was to the effect that in around 2010 and 2011, by far the most common ACP in use was the 4mm panel with a polyethylene core.[749] Further, although products with a lower polyethylene content were being used, the versions with a 100% polyethylene core were still in common use. As Mr Kip explained, "the reason that the aluminium composite panels were created was because the polyethylene core allows a very flat surface that can be worked reasonably well, very sharp edges".[750] I note that Mr Nicolas had at least one document that identified that the ACP proposed was a 4mm composite panel.[751]

493 In contrast, Alucore was not available in a 4mm thickness – its minimum thickness was 6mm and it was much harder to work.[752] Thus, if Mr Nicolas did in fact turn his mind in 2010 to the possibility that the ACP referred to in the documents was Alucore (which is doubtful), he clearly had limited understanding of the properties of the product. Further, even Dr Clancy agreed that, in the suite of ACPs in use in the period 2008 to 2011, Alucore was a "rare bird".[753] It follows that anyone of Mr Nicolas's experience who in around 2010 saw a reference in architectural drawings or other documents to an ACP, should have been aware that there was a high likelihood that the product proposed would have core containing highly combustible polyethylene (with a distinct possibility, if not probability, of having a core of 100% polyethylene).

494 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

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748 I162 at [13] and [15]
749 See Gardner Group written submissions – I160 at [177(b)] and fn 226, notably the evidence of Mr Leonard at T2439-40
750 T2387
751 [470]
752 T2387
753 T2389

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.

495 The second matter said to justify the assumption relied on by Thomas Nicolas is that the Fifth FER "imposes a requirement" that the external walls (including the balconies) be constructed from non-combustible materials. More particularly, as explained above, Thomas Nicolas submits that the two passages from (respectively) Table 1.4.2 Item 6 and Table 1.4.5 Item 4 of the Fifth FER imposed a requirement that "balconies, eaves and overhangs etc" be so constructed. Thomas Nicolas also refers to evidence that each of LU Simon, Gardner Group and Elenberg Fraser were aware of the BCA requirement that external walls be non-combustible.

496 I reject this submission. In my view, these references in the Fifth FER cannot reasonably be read as "imposing a requirement" to the effect alleged. The first merely acknowledges in substance that, as long as external areas are non-combustible, they need not be sprinklered. Indeed, on one view, it could be argued that this reference should have acted as a prompt to Thomas Nicolas, having advised in the FER that balconies need not be sprinklered, either to take steps to ensure that external areas did in fact comprise non-combustible construction, or state expressly and unequivocally that its analysis was based on that assumption. And the second reference can be read as stating the opposite of what Thomas Nicolas contends: "Apartment balconies *may* be constructed of *non-combustible* material…" (emphasis added). Thus these passages are ambiguous[754] and, at most, might be said to raise oblique questions about combustibility of construction materials. On no view are they "a clear assumption and statement in the report that the external areas were to be code-compliant".[755]

497 It is not clear to me how the evidence that other parties were aware of the requirement that the external walls be non-combustible assists the argument. As the analysis above shows, each of LU Simon, Gardner Group and Elenberg Fraser had sufficient information about the potential combustibility of the ACPs. But, for a variety of reasons, they each failed to identify or conclude the ACPs were non-compliant. Thomas Nicolas, on the other hand, failed to conduct the investigations

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754 This ambiguity is discussed by a number of the fire engineering experts. See, for example, Dr Barnett at C10.0015 [3.9.5] and Mr Wise at C12.0015 [7.32]

755 I162 at [26].

and assessments necessary to confirm the relevant features of the ACPs proposed for use. But had it done so, it would have come to a different conclusion about compliance to that reached by these other parties. Allocating liability for these varying roles is determined by reference, first, to principles of causation and, second, to principles of apportionment, both of which are dealt with below.

498 Putting to one side Thomas Nicolas's obligation under the TN Consultant Agreement to investigate and assess the ACPs as part of a "full engineering assessment", in my view the information it in fact had available was sufficient to engage a number of other obligations under the agreement, including the obligations to:

- give notice about ambiguities or insufficiencies in the information provided (clause 3(h) of the AS General Conditions);
- prepare the Contract Material (notably the Fifth FER) so that it was fit for purpose "having regard to the assumptions that [Thomas Nicolas] can be reasonably expected to make in accordance with sound professional principles"—AS General Conditions clause 3(u) (for the reasons discussed, the assumptions it alleges it made were not reasonable);
- be liable for the accuracy and completeness of all Contract Material—AS General Conditions clause 17.3(e);
- fully appraise itself of all information and documentation, which was available to Thomas Nicolas for the project—"Scope of Services" paragraph (b);
- liaise with the building surveyor primarily and other consultants to obtain a clear understanding of the project—"Scope of Services" paragraph (c);
- advise on all fire engineering design and management aspects of the project and necessary approval requirements—"Scope of Services" paragraph (e); and
- provide clear confirmation of the fire safety objectives required by the BCA and provide solutions to each within the Fire Engineering Report—"Scope of Services" paragraph (h).

499 I consider that Thomas Nicolas failed (in varying degrees) in all these areas. First, it either failed to fully appraise itself of the information and documents provided to it concerning the ACPs or it failed to give notice about ambiguities or insufficiencies in that information. It also failed to liaise with the other consultants to obtain a clear understanding of this aspect of the Lacrosse project. Mr Nicolas's apparent uncertainty about the composition of the ACPs proposed, coupled with what he knew from the architectural drawings about the extensive and contiguous use of ACPs on the east and west façades, compelled further

enquiry by him of the kind that Thomas Nicolas agreed under the TN Consultant Agreement to undertake.

500 Further, the failure by Thomas Nicolas to make reference to the ACPs in the Fifth FER and the body of MFB Application,[756] rendered those documents (each being "Contract Material" within the meaning of the TN Consultant Agreement) inaccurate, incomplete and not fit for purpose. And, as a result, the Fifth FER (in particular) failed to advise on all fire engineering design and management aspects of the project and necessary approval requirements and failed to provide clear confirmation within the Fifth FER of the fire safety objectives required by the BCA and associated solutions.

501 Finally, as explained in relation to each of the GG Consultant Agreement and the EF Consultant Agreement, the TN Consultant Agreement also imposed on Thomas Nicolas the overarching obligation to "perform the Services to the standard of care and skill to be expected of a Consultant who regularly acts in the capacity in which the Consultant is engaged and who possesses the knowledge, skill and experience of a Consultant qualified to act in that capacity".[757] It is perhaps self-evident that my findings above about specific breaches, also give rise to a breach of this provision. But, for completeness, I should also refer briefly to the evidence of the experts also supporting findings of breach of this obligation.

502 This issue is dealt with in a number of the individual expert reports, but it is also conveniently dealt with in the Joint Report, primarily in the response to Question 13. Again with the exception of Dr Clancy, all experts agreed that Thomas Nicolas did not exercise the standard of care which you would reasonably expect of a reasonably competent fire engineer in issuing the Fifth FER having regard to:

- the construction of the building and the proposed use of ACPs in the façade and balconies of the Lacrosse tower;
- the analysis or consideration given to the fuel loads that were to be on external balconies; and
- the other requirements and recommendations of the Fifth FER.

503 Dr Clancy's contrary position is said to be for the reasons set out in his answer to Question 9. The reason there stated by Dr Clancy is that Thomas Nicolas did "sufficiently" take into account the IFEG as set out in his answer to Question 8 and "the headings [Thomas Nicolas] has used in preparation of the [Fifth] FER are all sourced from the IFEG". There are several problems with this evidence. First, as noted above,

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[756] That is, the part of the application prepared by Thomas Nicolas (noting that the ACPs were referred to in the architectural drawings attached to the MFB Application)

[757] Clause 2(c) of the TN Consultant Agreement

Dr Clancy's answer to Question 8 overlooks the contractual obligations imposed on Thomas Nicolas under the TN Consultant Agreement that plainly compelled it to look beyond the matters referred by Gardner Group. Second, Dr Clancy appears to be saying that taking IFEG into account in the FER is sufficient, which appears to contradict his earlier statement in answer to Question 8 that IFEG is not a document that is to be used for correcting or policing the fire safety engineering process. And, third, using headings sourced from IFEG is hardly a basis for endorsing the quality of what is reported under those headings.

504 On this basis, I accept the evidence of Dr Barnett, Mr Kip, Mr Wise and Mr Hughes-Brown on this issue for the reasons they give and reject the evidence of Dr Clancy. The former experts make a strong case for a finding that Thomas Nicolas failed to exercise the standard of care and skill prescribed under the TN Consultant Agreement, which also articulates (in substance) the standard at common law. In particular, I agree with the observation that the Fifth FER was "too generic and superficial" and generally failed to undertake the systematic hazard analysis that "would have discovered the use of 100% polyethylene core ACP and concluded this created an unacceptable risk of spread of fire in the location and configuration proposed on the architectural drawings".[758]

Did the deletion of sprinklers breach the TN Consultant Agreement?

505 Thomas Nicolas notes that:

> "Mr Wise raised the opinion that by reason of the deletion of the sprinklers being recorded in Table E3, Item 13 of the [Fifth] FER…, the absence of a performance-based analysis of the deletion of sprinklers in the FER supports the opinions which are thereafter given in answer to Questions 11 – 14 in the Conclave Report."[759]

It lists 10 items of contemporaneous material and evidence of witnesses that it contends clearly establish that the deletion of sprinklers from the balconies was not intended to be a performance-based solution. Rather, it argues, the evidence establishes that the deletion of sprinklers in the Fifth FER was on the basis of a DTS pathway, or 'as of right'.[760] Thomas Nicolas then proceeds to explain at length why it was entitled to delete, or not include, sprinklers on the balconies as a DTS matter, without an Alternative Solution.

506 Among other things, Thomas Nicolas argues in this part of its written submissions that there is no basis to conclude these balconies should be treated otherwise in accordance with the Classification of Occupancies

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758 C17.0009
759 I162 at [17], referencing C17.0007
760 I162 at [18]-[21]

set out in clause 2.2 of AS 2118.1.[761] It adds that Appendix A would treat the typical occupancy for the Lacrosse building as 'Light Hazard Occupancies',[762] and that:

> "In these circumstances there is no fire engineering design basis to require additional safety margins over and above those which are implicit in the Standard, which is of course incorporated into the BCA and the compliance with which is deemed to meet the Performance Requirements CP1 to CP9. This is confirmed by the BCA itself at C1.0 [D19.0009]. This is also consistent with the statutory prohibition contained in section 24(2) of the *Building Act 1993* [E1.0043], which prohibits a building surveyor from imposing "lesser or greater standards or requirements than those prescribed by this Act or the building regulations…", which includes those prescribed in AS2118.1 in this case."[763]

507 Thomas Nicolas concludes this part of its submissions by responding to contrary arguments advanced by Elenberg Fraser.[764] In my view, Thomas Nicolas's analysis supporting the submission that the deletion of sprinklers in the Fifth FER was on the basis of a DTS pathway, or 'as of right', is generally sound. In particular, I am satisfied that the deletion of sprinklers was consistent with the requirements of AS2118.1. Thus, read in isolation, the statement in the Fifth FER to the effect that balconies need not be sprinklered does not give rise to any breach of the TN Consultant Agreement.

508 On the other hand, as discussed above, the statement where it appears in Table 1.4.2 ("…external areas (e.g. balconies…), which comprise non-combustible construction, need not be sprinklered") is premised on the balconies comprising non-combustible construction, which they did not. As I have found, Thomas Nicolas's failure to assess and advise on the implications of the use of combustible ACP's on the balcony walls, was in breach of the TN Consultant Agreement. Had that assessment occurred, one option open to Thomas Nicolas might have been to advise on an alternative solution involving sprinklers on the balconies.[765] In this limited sense, the advice in the Fifth FER concerning deletion of sprinklers on the balconies was a by-product of Thomas Nicolas's lack of attention to the significance of the ACPs.

Did Thomas Nicolas fail to warn of non-compliant ACPs?

509 Although this is a distinct head of claim by LU Simon against Thomas Nicolas, it relies on much the same evidence and analysis as the claims for breach of the TN Consultant Agreement discussed above. LU

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761 D3.0015
762 I152
763 I162 at [22a]
764 I162 at [23]-[24]
765 See, for example, the report of Mr Wise at C12.0015, [7.32]

Simon submits that: "had Thomas Nicolas provided warning to LU Simon, Gardner Group or Elenberg Fraser [that the ACPs were non-compliant], the design of the Lacrosse building would have been changed to incorporate the use of a compliant external cladding material".

510 Thomas Nicolas commences its response to this submission by setting out the principles relevant to a failure to warn. It refers to:

- *Pullen v Gutteridge Haskins & Davey Pty Ltd*,[766] in which the Court of Appeal found that a professional soil engineer had a duty to warn its client that the proposed design of a swimming centre was not foolproof and to advise the client that if it sought a foolproof design, more extensive piling would be required at greater expense;
- the need to establish causation – how the plaintiff would have acted had the defendant given the advice of a competent professional;[767]
- the principle that the duty of care may require the taking of positive steps beyond the specifically agreed professional task, where the steps in question are necessary to avoid a real and foreseeable risk of economic loss being sustained;[768] and
- the principle that a duty to warn in respect of products may not arise in circumstances where the particular audience has actual knowledge of the risks associated with a product.[769]

511 Thomas Nicolas then sets out what it submits are the factual and legal difficulties with the claim. The first is that "the allegation overlooks the framework in which Thomas Nicolas was engaged". But the fact that each of Gardner Group, Elenberg Fraser, LU Simon and PDS had roles and responsibilities outlined in the submissions, does not diminish Thomas Nicolas's particular role and responsibility. Notably, this included a responsibility for proactively identifying fire hazards and advising accordingly.

512 The second asserted difficulty concerns the superior knowledge of these other parties, including what Thomas Nicolas alleges was an awareness on their part of the risks associated with ACPs. There are two problems with this submission. First, whatever awareness these other parties had of the risks (and the evidence of that is mixed), Mr Nicolas's awareness was superior. For example, he was the only lay witness who knew in

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766 [1993] 1 VR 27

767 *Richtoll Pty Ltd v WW Lawyers Pty Ltd (In Liquidation)* [2016] NSWCA 308 per Sackville AJA [52].

768 *Berryman v Hames Sharley (WA) Pty Ltd* [2008] WASC 59; 38 WAR 1, per Hasluck J at [493], a case involving a town planner/architect failing to warn a property developer of proposed changes in planning regulations

769 LexisNexis, *Product Liability Australia*, (at May 2014).

around 2008 that the calorific value of polyethylene was 44 mJ/kg.[770] Second, and more relevantly, only Mr Nicolas knew that an ACP with a polyethylene core did not meet the DTS requirements of the BCA.

513 Third, Thomas Nicolas relies on the submission that it assumed the ACP would be non-combustible and stated that assumption in the Fifth FER. I have rejected that submission above. And fourth, Thomas Nicolas posits the question, if it had issued a warning about the ACPs, what would that warning have been? Thomas Nicolas's lengthy discussion of this issue in its submissions is misplaced,[771] as the answer is simple. It should have given a warning consistent with Mr Nicolas's knowledge about ACPs with a polyethylene core. Namely, that they did not meet the DTS requirements of the BCA. The last part of this submission dealing with the counterfactual is dealt with as part of my discussion of causation.

514 In the circumstances, and based on my findings concerning the facts giving rise to a breach of the TN Consultant Agreement, I am satisfied that Thomas Nicolas had a clear duty as the fire engineer engaged on the project, to warn at least LU Simon (and probably also Gardner Group, Elenberg Fraser and PDS) that the ACPs proposed for use on the east and west façades of the Lacrosse tower did not meet the DTS requirements of the BCA. Having given that warning, Thomas Nicolas also had a duty to advise about a solution to the non-compliance, which could have either involved non-combustible and therefore compliant cladding (such as the "precast concrete panel wall systems" identified by Thomas Nicolas in the FERs and the MFB Application) or an Alternative Solution. As the facts show, Thomas Nicolas failed to do either.

Did Thomas Nicolas contravene the ACL?

515 In my discussion above of LU Simon's claims under the ACL against Gardner Group, I refer to the decision of the NSW Court of Appeal in *Heydon v NRMA Ltd*,[772] and, in particular, the observation by Malcom AJA that, where negligence and misleading or deceptive conduct are both pleaded based upon the same material facts, it is not uncommon for the result to be that they will succeed or fail together. As with Gardner Group, this is the case with Thomas Nicolas as well. I am satisfied that it follows from my findings above that Thomas Nicolas failed to exercise reasonable care in respect of the Fifth FER, that it also engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s18 of the ACL.

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770 T1689
771 I162 at [46]
772 I160 at [73]-[74]

516 More particularly, the version of Fifth FER produced by Thomas Nicolas in May 2011, shortly before the issue of the Stage 7 Building Permit in June 2011,[773] included statements that:

- "The life safety and fire protection requirements of the building have been designed on a performance fire engineering basis with cognizance given to the relevant Fire Engineering Guidelines and the performance provisions of the [BCA]";[774]
- "The means by which compliance with the BCA has been established is on an equivalence basis pursuant to Clause A0.5"; [775]
- "The building will be designed to meet the Performance Requirements of the BCA (2006) as adopted by Building Regulations. The relevant Performance Requirements being those for access and egress, smoke hazard management, structural fire protection and spread of fire";[776] and
- "Provided it can be demonstrated that the structural stability and barrier resistance to the spread of fire and smoke are maintained for evacuation and considering fire brigade intervention, then the Performance Requirements of Clauses CP1 and CP2 are considered to be satisfied".[777]

517 Thomas Nicolas provided the Fifth FER to LU Simon as "Contract Material" under the TN Consultant Agreement. It also provided the final version directly to Gardner Group in response to a direction by Gardner Group. Thomas Nicolas was later provided with minutes of design development meeting #49 which recorded that Thomas Nicolas "had addressed all items on Gardner Group's Regulatory Review reports and that LU Simon was to follow up Gardner Group for the issue of the Stage 7 Building Permit".[778]

518 In the circumstances, I am satisfied that Thomas Nicolas represented to LU Simon and Gardner Group in trade or commerce that the design of the Lacrosse building incorporating the use of ACPs in the external facade complied with the BCA, including by making each of the representations listed in paragraph 81 of LU Simon's second further amended points of claim dated May 2018.[779] I am also satisfied that those representations were misleading or likely to mislead because:

- a full fire engineering assessment in accordance with the requisite levels dictated in IFEG was not carried out;

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773 I21; a copy bearing the Gardner Group "Building Permit" stamp is at G761
774 I21.0007
775 I21.0007
776 I21.0024
777 I21.0027
778 F64 at [95]-[96]
779 A11.0060

- thus, the life and safety protection requirements of the building had not been designed on a performance fire engineering basis with cognizance given to IFEG and the performance provisions of the BCA; and
- the Lacrosse Building as designed would not when constructed comply with the BCA including the Performance Requirements of Clauses CP1 and CP2.

519 On the issue of reliance, LU Simon submits that Gardner Group's reliance on the representations above caused LU Simon to suffer loss and damage. It refers in this regard to the proposition (which I accept) that "the applicant need not establish that it relied upon the respondent's conduct, but can establish liability by proof that others did, as a result of which the applicant suffered loss".[780] It goes on to submit that Gardner Group reasonably and substantially relied upon the representations in issuing the Stage 7 Building Permit and, more specifically, that:

> "Galanos gave evidence that when he was considering the application for the Stage 7 Building Permit he read the [Fifth FER] [**T924 L1-3**] and in doing so he came to the conclusion that the construction of the Lacrosse Building was compliant with the BCA [**T923 L2-4**]. Furthermore, Galanos admitted that he would not have issued the Stage 7 Building Permit in the absence of the [Fifth FER] (and presumably the representations contained therein): [**T1074 L1**]. LU Simon submits that such examples establish that Gardner Group…substantially relied upon the [Fifth FER] and the representation contained therein when issuing the Stage 7 Building Permit.
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> As a result of …Gardner Group's reliance on the representations made by Thomas Nicolas, which caused …Gardner Group to issue the Stage 7 Building Permit, LU Simon constructed the Lacrosse Building using ACPs as part of the façade." [781]

520 Thomas Nicolas has submitted that: "It is self evident that Mr Galanos and Gardner Group did not rely on the FER for its approval of an ACP with a PE core, as Mr Galanos's view was based solely on his interpretation of C1.12(f) of the BCA". I accept that Gardner Group's decision to issue the Stage 7 Building Permit was based on Mr Galanos's interpretation of C1.12(f) of the BCA, but I do not accept that it was "solely" so based. I agree with Gardner Group's submission that[782] the evidence was that, unlike a building surveyor, who was described as a "generalist",[783] it is the fire engineer that possesses

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780 *Ford Motor Co of Australia v Arrowcrest Group Pty Ltd* [2003] FCAFC 313; (2003) 134 FCR 522, per Lander J (Hill and Jacobson JJ agreeing) at [115], see also [118]-[119] .
781 I159 at [381]-[382]
782 I160 at [172(a)]
783 T2218 and T2524

specialist skill in the assessment of risk of fire.[784] In my view, the Thomas Nicolas submission understates the significance attaching to advice from the fire engineer to the effect that a particular building material was non-compliant and, for fire safety reasons, should not be used in the manner proposed.

521 In my view, LU Simon's submissions should be preferred. The effect of the representations extracted above, particularly to an informed reader like Mr Galanos, was that Thomas Nicolas considered that the Lacrosse tower as detailed in the architectural drawings (including the references to the use of ACPs) complied with the BCA. I am satisfied that if Thomas Nicolas had instead stated its view that ACPs with a polyethylene core did not satisfy the DTS requirements of the BCA, Gardner Group would not have issued the Stage 7 Building Permit, allowing (as it did) for the extensive use of ACPs on the east and west façades of the tower (including on unsprinklered balconies).[785] I have found above that LU Simon relied on the issue of the Stage 7 Building Permit in constructing the Lacrosse tower incorporating the ACPs.

KIM AND GUBITTA'S LIABILITY

What are the claims against Mr Kim and Mr Gubitta?

522 The claim against Mr Kim is that as "occupier" of apartment 805 of the Lacrosse tower, he owed to the Owners a duty to exercise reasonable care not to create a fire hazard in the use and occupation of the apartment. It is alleged that he breached that duty by storing or allowing others to store combustible material on the balcony of the apartment. As I have found that the evidence of fire spread does not support a finding that the storage of items on the balcony contributed to the ignition of the Alucobest panels or the subsequent fire spread,[786] it is unnecessary to say any more about that claim.

523 Turning to Mr Gubitta, the Owners concede that the evidence establishes that the fire was started by the cigarette discarded in the plastic container, that it was Mr Gubitta who disposed of the cigarette, and that the fire ultimately reached the Alucobest panels. However, they submit that: "It has not been shown that Mr Gubitta was negligent in the disposal of his cigarette. He disposed of the cigarette butt in a container of water and, in his witness statement, described that he heard the sound of the butt being extinguished within the container".[787] I refer above to his unchallenged statement describing butting out the cigarette and hearing a "psh" sound "because there's water".[788]

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784 T2219
785 T1073-4
786 [243]
787 I158 at [67]
788 C1.0115

524 Gardner Group and Thomas Nicolas both urge a finding on negligence against Mr Gubitta. The latter submits (citations omitted):

> "In respect of Mr Gubitta, the elements of negligence could not be more clearly established. It is trite to observe that but for Mr Gubitta's negligence, the fire and associated property damage and economic loss would not have occurred. The only limitation to recovery is that Mr Gubitta has left the jurisdiction, although that is not a relevant consideration for the purposes of apportionment under the *Wrongs Act 1958*."[789]

Did Mr Gubitta fail to exercise reasonable care?

525 I agree that I am compelled to find on the facts that Mr Gubitta owed a duty to the Owners to take care in the disposal of his smouldering cigarette and that he breached that duty by failing to ensure that his cigarette was fully extinguished before leaving it in the plastic container. But I also agree with the Owners' submission that the question, for the purposes of apportionment, is the extent to which Mr Gubitta can be said to be responsible for the subsequent loss and damage arising from property damage caused by the fire.[790] In that regard, the Owners submit that:

> "All of the Alucobest panels, including those which were destroyed in the fire, required replacement because of their non-compliance with the BCA, even in the absence of a fire. Any liability of Mr Gubitta must be confined to the balcony of apartment 805 and to cleaning up after the fire. The apartments in the building would need to have been vacated for some period to allow replacement of the cladding in any event. Should the Tribunal conclude that Mr Gubitta is a concurrent wrongdoer for the purposes of apportionment, it should find that the extent of his responsibility for the loss and damage which has occurred is minimal."[791]

526 There is force in these submissions. My conclusions on how the principles on apportionment of liability under the *Wrongs Act* should be applied in relation to Mr Gubitta are set out in the "Proportionate Liability" section below.

PDS'S LIABILITY

What are the claims against PDS?

527 The claims against PDS were originally brought by Elenberg Fraser, and subsequently adopted by the Owners in their pleadings. Both the Owners and Elenberg Fraser have since withdrawn their claims against PDS. However, those claims have been adopted by Gardner Group and

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789 I162 at [153]
790 *Wrongs Act* s24AI(1)
791 I158 at [68]-[69]

Thomas Nicolas, for the purposes of apportionment. LU Simon has not brought any claim against PDS in the proceeding. In its closing submissions, LU Simon submits that, in contrast to its allegations against Elenberg Fraser, under the T2 Specification, PDS was required to review samples for their visual characteristics only.[792]

528 Gardner Group submits that PDS's duty to the owners arises by a combination of the PDS Agreement and the obligations assumed by PDS as Superintendent under the D&C Contract, including the T2 Specification. It says that notwithstanding the decision in *Brookfield Multiplex Ltd v Owners Corporations Strata Plan 61288*,[793] PDS owed a duty of care to the Owners on the basis that it "played a pivotal project management role in design and construction of the Lacrosse building". It submits that PDS should at a minimum have:

- identified that the Alucobest product did not have certification under AS1530 and therefore did not meet the requirements under specification 1.31(B) of the T2 Specification;
- identified that there were insufficient "quality benchmarks, calculations, test reports and other relevant data" in order for PDS to be able to properly consider the Alucobest sample against the T2 Specification; and
- made further enquiries of the other consultants involved in the project.

529 Thomas Nicolas points in particular to what it alleges was PDS's contractual responsibility to manage the consultants to ensure compliance with the BCA, and manage LU Simon to ensure compliance with its design obligations under the D&C Contract. Both Gardner Group and Thomas Nicolas point to PDS's failure to call any of its personnel involved in the Lacrosse project as witnesses and ask the tribunal to draw the inference that any evidence that those witnesses might have given would not have assisted PDS's case.

530 As noted above, PDS was represented through the latter part of the interlocutory stages of the proceeding, but was not independently represented during the hearing. However, written and oral submissions were made on its behalf by counsel for Elenberg Fraser. These included:

- no evidence was given by PDS and the PDS Agreement has not been formally proved; more specifically there was no evidence supporting allegations of what PDS did, what it was aware of and its alleged assumption of liability to the Owners;[794]

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792 I159 at [254]
793 (2014) 254 CLR 185.
794 I161 at [130]-[133]

- the "Samples Generally" provision in clause 4.4 of the T2 Specification clearly limited PDS's obligation as Superintendent to approving samples "for visual characteristics only" and this confined the scope of any responsibility PDS might have in respect of the approval of the Alucobest sample;[795]
- in the context of the decision of the High Court in *Brookfield Multiplex Ltd v Owners Corporations Strata Plan 61288*,[796] there is no express obligation in the PDS Agreement to ensure compliance with the BCA and no other facts were proved that justify a finding that PDS assumed responsibilities under the PDS Agreement or T2 Specification giving rise to a duty of care to the Owners.[797]

Did PDS fail to exercise reasonable care?

531 Although the allegations against PDS are framed more widely, they depend in large part on its involvement in the approval of the Alucobest sample. In relation to this, I agree with Elenberg Fraser's submission that PDS's obligation was to review samples for "visual characteristics only", and did not require PDS also to consider "quality benchmarks, calculations, test reports and other relevant data". First, it is far from clear under the terms of the T2 Specification whether this latter obligation, which appears in clause 4.2 under the heading "Submittals Generally", extends to clause 4.4 "Samples Generally".[798] On balance, I consider that it does not. But even if it does, in my view the obligation of the D&C Contractor under clause 4.2 to provide the information cannot be construed imposing an obligation on the Superintendent to review that information where clause 4.4 clearly provides that scope of the Superintendent's obligations are more limited.

532 As to PDS's broader obligations under the PDS Agreement to (for example) "manage the consultants to design the project to comply with the requirements of the [BCA]", there is insufficient evidence to reach a concluded view about any breach by PDS of any duty derived from these obligations. Despite Elenberg Fraser's submission to the contrary, I am satisfied that the PDS Agreement has been proved in accordance with the arrangements for tendering documents referred to above.[799] Thus I am also satisfied that PDS had the obligations to the developer set out in the PDS Agreement. But there is no evidence from any representative of PDS or from any lay witness in the proceeding about what PDS did or did not do in pursuance of these obligations. Indeed, with the exception of the sample approval discussed above, no party has pointed to any particular act or omission by PDS under the

795 I161 at [134]
796 (2014) 254 CLR 185.
797 T2705-8
798 G299.0013
799 [16]

PDS Agreement or otherwise that supports any finding of breach by PDS.

533 The resort to the rule in *Jones v Dunkel*[800] does not advance the issue. As was made clear in *Trkulja v Markovic* (omitting citations):[801]

> "The rule also does not enable the absence of a witness to make up for any deficiency in a party's evidence. The rule will not support an adverse inference unless the evidence otherwise provides a basis on which that unfavourable inference can be drawn. It has therefore been said that the rule cannot be employed to fill gaps in the evidence, or to convert conjecture and suspicion into inference."

534 In this case, the gaps in the evidence are such that any assertion about failures by PDS contributing to the installation of non-compliant ACPs can rise no higher than conjecture or suspicion. For example, even assuming that PDS was obliged by the PDS Agreement to ensure the suitability of the ACPs, there is no evidence one way or the other about what steps it took to that end, apart from signing the sample approval form for "visual characteristics only". In particular, I can do no more than speculate about what (if any) investigations or enquiries it made about the ACPs. And there is no evidence that PDS was aware of any particular risk, or that any party drew PDS's attention to any matter or sought any assurance, that may have enlivened a positive duty to act.

535 Accordingly, I am satisfied PDS's involvement in the sample approval process does not amount to a failure to exercise reasonable care, and the evidence of PDS's conduct is otherwise insufficient for me to make any other findings of breach by PDS. It is therefore unnecessary for me to consider the application of *Brookfield Multiplex Ltd v Owners Corporations Strata Plan 61288*[802] to the claims against PDS. But for completeness, the principles confirmed in that case appear to me to present an additional insurmountable obstacle to any assertion that PDS owed the Owners a duty of care to avoid pure economic loss resulting from the installation of the Alucobest ACPs.

OWNERS' LIABILITY

536 The claim for contribution against the Owners relied on the allegation that the Owners failed to conduct any routine inspections to ensure that the balconies of the Lacrosse tower were not used for storage as required by the Owners Corporation Rules.[803] However, this claim was expressly abandoned by Gardner Group,[804] and not pressed by any of the other parties. Rightly so. As I have found, there is no evidence that

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800 (1959) 101 CLR 298
801 [2015] VSCA 298, per Kyrou and Kaye JJA and Ginnane AJA at [96]
802 (2014) 254 CLR 185.
803 G1659.0008
804 I160 at [160]

any items that could be said to have been stored on the balcony of apartment 805 contributed to the spread of the fire to the Alucobest ACPs on the southern balcony wall.

DAMAGES

DAMAGES FOR BREACH OF CONTRACT

537 The nature of the claims in the proceeding and my findings in relation to those claims frame the approach to damages, including issues of causation and remoteness (and questions of proportionate liability and, ultimately, the quantum of damages). In that regard, I have found that:

- LU Simon breached the warranties implied into the D&C Contract by s8(b), (c) and (f) of the DBC Act, but did not fail to exercise reasonable care;
- each of Gardner Group, Elenberg Fraser and Thomas Nicolas breached their respective Consultant Agreements by failing to exercise due care and skill in carrying out particular (and varying) obligations imposed by those Consultant Agreements;
- aspects of the conduct of each of Gardner Group and Thomas Nicolas giving rise to the breaches above, also constituted the making of representations that were misleading and deceptive in contravention of the ACL;
- Mr Gubitta failed to exercise reasonable care in the disposal of his lit cigarette; and
- the claims against Mr Kim, PDS and the Owners are not established.

538 The principles governing the calculation of damages for breach of contract are well understood and have been conveniently summarised in the Owners' submissions, which I gratefully adopt. The Owners submit that:[805]

- The 'ruling principle' with respect to damages at common law for breach of contract is that a party who has sustained a loss is to be placed in the same situation, so far as money can do it, as if the contract had been performed.[806]
- Where a party has sustained a loss due to a breach of a contractual warranty, the ruling principle requires that the party be put in the same position as if the warranty were true; that is, what the promisee would have received had the promise been performed.[807]

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805 I158 at [77]

806 *Robinson v Harman* (1848) 1 Exch 850, 855; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 286 [13].

807 *Clark v Macourt* (2013) 253 CLR 1, 7-8 [10]-[12], 30-1 [106]-[108].

- In the context of defective building work occasioning loss, in breach of a contractual warranty, the measure of damages is not limited to diminution in value but extends to the costs of rectification of the defective work, so as to give the promisee the equivalent of a building which is substantially in accordance with the contract.[808]
- The entitlement to damages of the party that has sustained a loss extends to those damages which arise naturally or according to the usual course from the breach of contract, or such damages as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as a probable result of the breach.[809]
- Subject to the previous principle, where an innocent party has incurred expenditures which the party would not have sustained but for the breach of contract, damages for those losses are recoverable.[810]
- A plaintiff's right to recover for damage caused to property crystallises when the property is damaged. The plaintiff is entitled to recover its expenses reasonably incurred in connection with the cost of remediating the damage, even if those costs have not yet been incurred.[811]
- The plaintiff's expenses in putting itself in the position in which it would be if the contract had been performed must be reasonable. However, the test of 'unreasonableness' is satisfied only by exceptional circumstances.[812]
- A plaintiff who has suffered loss due to a breach of contract is required to mitigate its loss. The reasonableness of actions taken by a plaintiff to mitigate its loss is a question of fact depending on the circumstances.[813] The defendant bears the onus of proving that those actions were unreasonable.[814]

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808 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 287 [15]; *Bellgrove v Eldridge* (1954) 90 CLR 613, 617.

809 *Clark v Macourt* (2013) 253 CLR 1, 34 [119]-[120]; *European Bank Ltd v Evans* (2010) 240 CLR 432, 437-8 [11]-[13].

810 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 128. See generally *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130; *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327.

811 *Thomas v Powercor Australia Ltd* [2011] VSC 586, [34]-[54] and the cases cited therein; upheld on appeal: *Powercor Australia Ltd v Thomas* (2012) 43 VR 220

812 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 288-90 [17]-[19]; *Bellgrove v Eldridge* (1954) 90 CLR 613, 618

813 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways of London Ltd* [1912] AC 673, 688-9

814 *Metal Fabrications (Vic) Pty Ltd v Kelcey* [1986] VR 507

- An overly exacting approach should not be taken to evaluating the steps taken by a party who mitigates its loss:[815]

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measure to which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

539 In broad terms, the attacks on the Owners' damages claims and LU Simon's entitlement to pass on those damages claims, are as follows:

- for the purposes of proving causation, LU Simon has failed to establish the counterfactual – that is, the Tribunal cannot be satisfied that if the alleged breaches had not occurred, the outcome would have been any different;
- in relation to the "pure economic loss" claimed (that is, the Owners' compliance costs, including the future cost of replacing non-compliant cladding and associated costs, not being costs of reinstatement of property damaged by the fire), this is not covered by any contractual indemnity and does not satisfy the "second limb" of the rule in *Hadley v Baxendale*;[816]
- in applying the principles of proportionate liability, each of Gardner Group, Elenberg Fraser and Thomas Nicolas has submitted that they are only minimally responsible for the damages claimed, and the lion's share of responsibility should be borne by the others, and by LU Simon; and
- aspects of the quantum of the damages claimed by the Owners are not sufficiently proved.

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815 *Banco de Portugal v Waterlow* [1932] AC 452, 506

816 (1854) 9 Ex 341 [[156 ER 145] as discussed by the High Court in *Clarke v Macourt* (2013) 253 CLR 1, 34 [119]-[120]

CAUSATION AND REMOTENESS

What are the principles to be applied?

540 The starting point for examination of the causation issue is "Part X – Negligence" of the *Wrongs Act*, noting that s44 provides:

> "This Part applies to any claim for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise"

541 Division 3 of Part X—"Causation" commences with s51 "General principles", which provides:

> "(1) A determination that negligence caused particular harm comprises the following elements—
>
> (a) that the negligence was a necessary condition of the occurrence of the harm (**factual causation**); and
>
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (**scope of liability**).
>
> (2) In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
>
> (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the **injured person**) would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances.
>
> (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party."

542 Thus there are two elements to the test of causation in s51, factual causation and scope of liability. In *Wallace v Kam,*[817] the High Court held that courts must engage in an "entirely factual" exercise when considering whether factual causation is made out and an "entirely normative" exercise when considering whether the scope of liability extends to the respondent's conduct. Factual causation is generally made out if the respondent's conduct passes the "but-for" test; that is, if the evidence adduced by the applicant allows a negative answer, on the balance of probabilities, to the question "but for the negligent act or

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[817] (2013) 250 CLR 375, per French CJ, Crennan, Kiefel, Gageler and Keane JJ at [14]

omission, would the harm have occurred?"[818] However, the straightforward application of the test may not be appropriate in certain cases, notably where there are multiple causal factors.

543 Turning to the scope of liability, the respondent's conduct will satisfy the test at s 51(1)(b) if, as the result of a normative exercise, it is found that it is appropriate to extend the scope of liability to encompass that conduct. As noted by the majority in *Wallace v Kam*, "in a case falling within an established class, the normative question … is properly answered by a court through the application of precedent. [Section 51(1)(b)] guides but does not displace common law methodology. The common law method is that a policy choice once made is maintained unless confronted and overruled."[819] In a novel case, s51(4) requires that the decision-maker "consider and explain in terms of legal policy whether or not, and if so why, responsibility for the harm should be imposed on the negligent party."[820] However, the High Court noted that in most cases:

> "[T]he scope of liability is … coextensive with the content of the duty of the negligent party that has been breached. That is because the policy of the law in imposing the duty on the negligent party will ordinarily be furthered by holding the negligent party liable for all harm that occurs in fact if that harm would not have occurred but for breach of that duty and if the harm was of a kind the risk of which it was the duty of the negligent party to use reasonable care and skill to avoid."[821]

544 The test for remoteness in contract referred to in the Owners' submissions set out above relies on the information available to the parties at the time the contract was formed. This is distinct from the test in tort cases, which depends on what is foreseeable at the time of breach. The foreseeability analysis in tort is broader than the analysis in contract claims of what was within the parties' contemplation; for example, a loss may be foreseeable, but not within the contemplation of the parties at the time of contract formation.[822] In both contract[823] and tort[824] only the type or kind of harm must be reasonably foreseeable or within contemplation of the parties. It is not necessary that the actual harm and its extent, or the manner in which it came about, be reasonably foreseeable.

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818 *Adeels Palace v Moubarak* (2009) 239 CLR 420 at [43] – [45]
819 (2013) 250 CLR 375, per French CJ, Crennan, Kiefel, Gageler and Keane JJ at [22]
820 (2013) 250 CLR 375, per French CJ, Crennan, Kiefel, Gageler and Keane JJ at [23]
821 *Wallace v Kam* (2013) 250 CLR 375, per French CJ, Crennan, Kiefel, Gageler and Keane JJ at [26]
822 *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310 at 365
823 Ibid
824 *The Wagon Mound (No 1)* [1961] AC 388 at 426; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 402; *Chapman v Hearse* (1961) 106 CLR 112 at 120

545 Where a respondent's negligence consists in failing to warn the applicant, to establish causation, the applicant must show that, on the balance of probabilities, it would have responded to the warning in a manner that would have avoided the harm.[825] For example, in *Quigley v the Commonwealth*,[826] Stephen J (with Mason and Aickin JJ agreeing) held that if it is improbable that the plaintiff would have used a particular safety feature, it is not negligent for the defendant to fail to supply it. Similarly, causation was not made out in *Commissioner of Main Roads v Jones*[827] on the basis that it was very unlikely that a reduced speed limit sign would have caused the respondent to reduce the speed of his vehicle, thereby avoiding his injuries.

546 Whether or not the applicant would have responded to the respondent's warning in a manner that avoided the danger is to be tested subjectively (*Wrongs Act* s51(3)). But despite the fact that the test is subjective, in order to avoid a hindsight bias, the reliability of an applicant's evidence as to what it would have done is to be "determined by reference to objective factors, particularly the attitude and conduct of the plaintiff at or about the time when the breach of duty occurred."[828] Courts must also consider the reasonableness of the applicant's evidence as to how it would have acted. This is because "most plaintiffs will genuinely believe that, if he or she had been given an option that would or might have avoided the injury, the option would have been taken."[829]

547 Courts and commentators alike have noted the difficulty in applying the statutory statement of the "but-for" test in s51(1)(a) of the *Wrongs Act* to scenarios where, for example, multiple sufficient causes exist. In *March v Stramare*,[830] Mason CJ (with Deane, Toohey, and Gaudron JJ agreeing) said:

> "The 'but for' test gives rise to a well-known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the plaintiff's injury. The application of the test 'gives the result, contrary to common sense, that neither is a cause': Winfield and Jolowicz on Tort, 13th ed. (1989), p 134. In truth, the application of the test proves to be either inadequate or troublesome in various situations in which there are multiple acts or events leading to the plaintiff's injury … the test, applied as an exclusive criterion of causation, yields unacceptable results …"

548 Since the introduction of legislation allowing for the apportionment of damage, "courts readily recognize that there are concurrent and

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825 *Rosenberg v Percival* (2001) 205 CLR 434, [24]-[25], [87], [154]
826 (1981) 35 ALR 537, at 539
827 (2005) 79 ALJR 1105; 215 ALR 418
828 *Chappel v Hart* (1998) 195 CLR 232, at 246 n 64; *Rosenberg v Percival* (2001) 205 CLR 434, [89] – [91]
829 Ibid
830 (1991) 171 CLR 506

successive causes of damage on the footing that liability will be apportioned as between the wrongdoers."[831] This approach to factual causation requires that the court ask whether the respondent's conduct "caused or materially contributed to" the applicant's injuries.[832] In *Henville v Walker*, McHugh J (Gummow and Hayne JJ agreeing) said:

> "If the defendant's breach has 'materially contributed' to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage."[833]

549 In the High Court's decision in *Strong v Woolworths,*[834] the majority considered the various, and differing, uses of the term "material contribution" in the context of causation in tort. Their analysis noted that the term may be used to describe cases involving multiple causal factors, which, as a result, are not suited to the straightforward application of the but-for test, but in which factual causation can nevertheless be made out. In such cases, the expression has been used to convey that "a person whose negligent conduct was a necessary condition of harm may be held liable for that harm even though some other person's conduct was also a necessary condition of that harm".[835] Allsop P, in *Zanner v Zanner*[836] noted that this type of case, in which there are two or more negligent defendants, can satisfy the "but-for" test in s 51(1), saying:

> "However, the notion of cause at common law can incorporate 'materially contributed to' in a way which would satisfy the 'but for' test. Some factors which are only contributing factors can give a positive 'but for' answer. Both the driver who goes through the red light and the driver with whom he collides who is not paying attention contribute to the accident. If either episode of neglect had not occurred the accident would not have occurred."

550 The High Court made a similar point in *Strong v Woolworths,* stating that the statutory "necessary condition" requirement may be satisfied by reference to sets of conditions:

> "Under statute, factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm. A necessary condition is a condition that must be present for the occurrence of the harm. However, there may be more

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831 *March v Stramare* (1991) 171 CLR 506, per Mason CJ at [13]
832 *March v Stramare* (1991) 171 CLR 506, per Mason CJ at [15]
833 (2001) 206 CLR 459 at [106]
834 (2012) 246 CLR 182
835 *Strong v Woolworths* (2012) 246 CLR 182, at [24]
836 [2010] NSWCA 343

than one set of conditions necessary for the occurrence of particular harm and it follows that a defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation within s [51(1)(a)]."[837]

551 The High Court also noted that in some cases, the "necessary condition" requirement in s 51(1)(a) could be satisfied, and factual causation made out, even where the relative contribution of each factor in a particular set of conditions could not be determined, so long as it could be determined that the set of conditions was necessary to the occurrence of the harm:

"The authors of the Ipp Report and Allsop P in *Zanner v Zanner* assume that cases exemplified by the decision in *Bonnington Castings* (where multiple factors operated cumulatively to result in the total harm, and the contribution of each factor was unascertainable) would not meet the test of factual causation under s [51](1)(a)]. However, whether that is so would depend upon the scientific or medical evidence in the particular case, a point illustrated by the decision in *Amaca Pty Ltd v Booth* with respect to proof of causation under the common law. In some cases, although the relative contribution of two or more factors to the particular harm cannot be determined, it may be that each factor was part of a set of conditions necessary to the occurrence of that harm."[838]

552 In the same vein, the New South Wales Court of Appeal in *Gaskin v Ollerenshaw*[839] used the example of individual grains of sand put in a balance against a one-gram weight. While noting that each individual grain, on a purely common-sense assessment would not be sufficient to tip the balance, the Court of Appeal said that:

"[E]ach grain of sand may constitute a material contribution to the tipping of the balance and each will satisfy the 'but for' test."

553 The authorities discussed above support the proposition that where there are multiple causal factors each satisfying the "but-for" or "necessary condition" test of s 51(1)(a), or where there is a set of factors that cumulatively satisfy the test, each factor will satisfy the provision on the basis that it has made a material contribution to the harm.

554 I agree with Gardner Group's submissions[840] that s51(2) of the *Wrongs Act* was included to deal with complex cases that have what is described as an "evidentiary gap" where the courts have to decide whether or not to apportion legal liability, in circumstances where a

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[837] *Strong v Woolworths* (2012) 246 CLR 182, at [20].
[838] *Strong v Woolworths* (2012) 246 CLR 182, at [27].
[839] [2012] NSWCA 33 at [57]
[840] I160 at [65]-[66]

cumulative operation of multiple factors causing loss or an increase in risk, lack a clear connection to the loss suffered. I also note that in *Powney v Kerang and District Health,*[841] the Victorian Court of Appeal made it clear that s51(2) is only to be applied in exceptional cases, and not to be used as a fall back when an applicant cannot establish causation.[842] This is not such a case. In my view, causation is established on the evidence by an application of the tests in s51(1) of the *Wrongs Act*.

What are the parties submissions on causation and remoteness?

555 In its written submissions, Gardner Group discusses the authorities concerning the application of s51(2) of the *Wrongs Act*[843] and complications that arise because of the necessity to consider counterfactual scenarios which involve the use of alternative products. However, these are for the most part overtaken by my finding that the selection and installation of Alucobest was not a necessary condition for the harm caused by the fire. Gardner Group further submits that it follows from its analysis that findings in respect of certain matters (assuming that it is determined that there was a departure from the standard of care by the relevant party to whom the conduct can be attributed) would satisfy the test in s51(2). Of those matters, the only one with currency following my findings concerning Alucobest and the smoke alarm is: "Any party responsible for the nomination of the Alucobond Specification in the T2 Specification". I note that the only party meeting that description is Elenberg Fraser. Further, I consider that Elenberg Fraser's responsibility in relation to those matters is established without resort to s51(2) of the *Wrongs Act*.

556 In oral submissions, senior counsel for Gardner Group relevantly submitted that: "Undoubtedly, the issue of the building permit is a relevant causative factor. We don't run away from that, but we do say that there is a lot of missing causal analysis".[844]

557 For its part, Elenberg Fraser's written submission single out Gardner Group on the issue of causation. It submits (citations omitted):

> "Mr Galanos's wrongdoing, in and of itself, is critical to the question of causation because he was the gate keeper [citing the evidence of Dr Barnett T2197 L4 – L6; Kip T2526 L13 – L21]. Mr Galanos permitted the design that included 'indicative to Alucobond'. Whether or not the VCAT accepts that Alucobest is indicative to Alucobond, Mr Galanos gave permission under the stage 7 permit to use ACPs with a PE core. In other words he allowed the risk to eventuate… Given Galanos's involvement as the relevant building

841 [2014] VSCA 221.
842 *Powney v Kerang and District Health* [2014] VSCA 221 at [96] to [97]
843 I160 at [65]-[66]
844 T2756

surveyor, his breach of the legal norm was so significant that, as a matter of common sense, it should be regarded as the sole or principal cause of damage, alternatively the breach was so profound that any loss after the permits approval was due principally or solely to his negligence."[845]

558 Senior counsel for Elenberg Fraser addressed the broader causation issues in oral submissions, arguing that LU Simon had not demonstrated the counterfactual – if there is no material fitting the description of an ACP that is non-combustible, what then would Elenberg Fraser have done? He then answered this question, noting in effect that Elenberg Fraser could have avoided breaching its contract by not having inserted into its design a material that was combustible for a non-combustible application. He continued:

"But what then would LU Simon have done? They haven't told Your Honour what they would've done in terms of the counter factual, and they haven't demonstrated that they would've done anything different to what they actually did. In our respectful submission LU Simon has not proved that we were causative of their loss."[846]

559 In its written submissions, Thomas Nicolas commences its discussion of causation by setting out the terms of s51(3) of the *Wrongs Act* and submitting that:

"The consideration of the counterfactual is particularly relevant to the allegation made against Thomas Nicolas of a failure to warn in relation to the fire risks of ACPs. In determining what would have occurred, had a warning been given, Thomas Nicolas's submission is that the counterfactual would equate to the actual situation: the FER would not have been relied on, or read, by the other respondents, who were each aware of the requirement for the External Walls to be non-combustible."[847]

560 Thomas Nicolas had earlier submitted that: "it must first be acknowledged that no party led evidence as to what it would have done had a warning been given by the Fire Safety Engineer. Obviously, the inference must be drawn that nothing would have been done differently"[848]. Thomas Nicolas refers in support of this inference to evidence which it says shows, in effect, that any warning by it in any of its FERs would not have been read by any of the key players involved.[849] Thomas Nicolas concludes on this issue that:

"In these circumstances, Thomas Nicolas submits that the assumption made in the FER in respect of the requirement for non-combustibility of the External Walls was sufficient and the Tribunal ought not to find

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845 I161 at [191]-[192]
846 T2718
847 I162 at [76]
848 I162 at [47]
849 I162 at [48]

> Thomas Nicholas held a duty to warn in relation to the fire risks of ACPs, in circumstances where the design team had been established with defined statutory and contractual roles."[850]

561 In oral submissions, senior counsel for Thomas Nicolas put what I take to be an additional or alternative approach in relation to this argument. He submitted that nothing would have been done differently because, had Thomas Nicolas given a warning, the warning would have been: "Don't use combustible material". He countered that: "But as we now know, everyone intended not to use a combustible material, everyone intended to use a non-combustible material".[851]

562 Only Elenberg Fraser made submissions touching on the question of remoteness of damage. In its written submissions, Elenberg Fraser observes that:

> "Loss incurred by the Applicants and caused by LU Simon's breach of warranty is distinct from any loss and damage caused to LU Simon. Such loss had to be recoverable under the second limb of damage in *Hadley v Baxendale*) from Elenberg Fraser's breach of the [EF Consultant Agreement] as pleaded. The second limb depends upon whether the loss was reasonably within the contemplation of the parties at the time that they entered into the contract. In order to establish what that loss is, LU Simon cannot "tunnel ball" its liability, it must prove it was within the reasonable contemplation and the loss is not too remote."

563 Senior counsel for Elenberg Fraser revisited the issue in oral closing submissions.[852] He complained about the lack of a clear case on the part of LU Simon about how it claims loss and damage against any of the professional consultants, adding (consistently with the written submissions) that "we've assumed that it's under the second limb of *Hadley v Baxendale*". However, as with the written submissions, it is difficult to discern where the argument leads. I also note there was ultimately no suggestion by Elenberg Fraser that contractual damages in the nature of "pure economic loss" somehow warranted different treatment on an analysis of what damages were within reasonable contemplation. Senior counsel submitted that:

> "We say it is not reasonably in the contemplation of Elenberg Fraser and LU Simon at the time that they entered into the contract, that the building surveyor would come up with an interpretation of the Building Code of Australia that would permit a combustible material to be used on the facade of this building…There's no doubt that it was reasonably foreseeable that if we breached our contract, they would also be in breach of their contract. There's no doubt about that. I can't argue against that. What I am saying though, is it's not

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850 I162 at [49]
851 T2673
852 T2710 and T2717-8

> reasonably foreseeable that permission would be given – the basis of the interpretation that's been advanced by the second and third respondents that they would put up a combustible material in lieu of a non-combustible material, knowing that it had to be non-combustible."[853]

Has LU Simon established causation and an entitlement to damages?

564 I am satisfied that each of the breaches of the Consultant Agreements identified above was a necessary condition of the occurrence of the harm, being LU Simon's liability to the Owners for breach of the D&C Contract. Turning first to Gardner Group, it issued the Stage 7 Building Permit based on a flawed and unreasonable view about the application of clause C1.12(f) of the BCA to ACPs. And without that permit, LU Simon could not have proceeded to construct the Lacrosse tower incorporating the Alucobest panels.[854] Senior counsel for Gardner Group effectively conceded that the Stage 7 Building Permit was a "causative factor".

565 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.

566 Moving next to Elenberg Fraser, I reject its submissions that LU Simon has failed to establish the counterfactual and that the harm to LU Simon was not in the reasonable contemplation of the parties. Elenberg Fraser specified the non-compliant ACPs in the T2 Specification and architectural drawings. It then failed in later iterations of its drawings up to and including the construction drawings included as part of the application for the Stage 7 Building Permit, to correct the non-compliance. There are any number of design options Elenberg Fraser could have pursued in place of non-compliant cladding, including the choice of non-combustible cladding materials or an option likely to attract approval from Thomas Nicolas by way of an alternative solution.

567 LU Simon constructed the Lacrosse tower to Elenberg Fraser's design, as it was obliged to do under the terms of the D&C Contract, including

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853 T2717

854 *Building Act* s16

the T2 Specification. It follows (and is self-evident) that LU Simon would have constructed to a different and compliant design had Elenberg Fraser so specified. In those circumstances, I am satisfied that LU Simon has sufficiently established factual causation against Elenberg Fraser in respect of its breach of the EF Consultant Agreement in respect of its non-compliant design.[855]

568 In my view, causation is independently established in relation to the breach constituted by Elenberg Fraser's approval of the Alucobest sample. Mr Fraser's views concerning the importance of the use of an ACP that had, to his mind, a much lower risk of contributing to fire spread (such as Alucobond Plus), could hardly have been more clearly expressed. Had these views been in play when the Alucobest sample was submitted for approval, it is more likely than not that the ensuing exchanges about what product was required would have come to involve both Gardner Group and Thomas Nicolas, particularly given Mr Fraser's having "bitterly complained" to Mr Gibson of Gardner Group about the deletion of sprinklers to the balconies because of the likely presence of barbecues.

569 I also reject Elenberg Fraser's submission to the effect that the presence of Gardner Group as "gatekeeper" precludes a finding that it was reasonably in the contemplation of the LU Simon and Elenberg Fraser at the time they made EF Consultant Agreement, that the breaches found against Elenberg Fraser would result in LU Simon breaching its contractual warranties. Elenberg Fraser appears also to raise Gardner Group's failure to take reasonable care as an intervening act which broke the chain of causation,[856] although contention was not developed in oral submissions.

570 In any case, I am satisfied that it was reasonably in the contemplation of the parties that a non-compliant design by Elenberg Fraser might be overlooked by other professionals involved and find its way into the constructed building. This is particularly so where (as here):

- the architect is made the head design consultant in the lead up to the issue of the Stage 7 Building Permit, with overall responsibility for coordination of all design issues into the final design; and
- the particular architect concerned shared the same misconceived view as the relevant building surveyor, of the application of the DTS provisions BCA to bonded laminated materials.[857]

571 For completeness, I should also observe that I see no basis for an argument that the damages that in fact accrued to LU Simon fall outside the principles governing the calculation of damages for breach of

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855 See A11.0049 at [63]
856 I161 at 192, fn 203
857 See at T1365-6, T1418, T1584 and T1645

contract discussed above.[858] The relevant damage is LU Simon's liability to the Owners for breach of warranties resulting from its construction of the Lacrosse tower, incorporating highly combustible ACPs that did not comply with the BCA. That liability comprises claims in turn resulting from a fire involving those combustible ACPs, as well costs associated with replacing the remaining non-compliant ACPs.

572 In my view, the liability to which LU Simon is thereby exposed comfortably meets the test of damages which arise naturally or according to the usual course from the breach of the Consultant Agreements, or such damages as may reasonably be supposed to have been in the contemplation of the parties at the time they entered into those agreements as a probable result of the breach.[859] Put simply, a breach of the Consultant Agreements leading to non-compliant use of combustible material, clearly conjures both damages relating to heightened fire risk and fire, as well costs associated with rectifying the non-compliance.

573 Turning finally to what Thomas Nicolas says on causation, its submissions depend in part on its assertion that the Fifth FER already states that the external walls needed to be constructed of non-combustible materials, so any warning would not have provided new information. It also appears to suggest that the warning would not have added to what the other respondents already knew about the BCA requirement for the external walls to be non-combustible. But I have found above[860] that the passages of the Fifth FER relied on in this regard do not express a requirement that the external walls be constructed of non-combustible materials. I have also found that the relevant warning that Thomas Nicolas failed to give was not simply that the external walls must be non-combustible. Rather, it was that the ACPs proposed did not comply with the DTS provisions of the BCA.[861]

574 In relation to Thomas Nicolas's submission to the effect that none of the key players would have read the FERs to notice any warning, there are two difficulties with this submission. First, this was not the effect of the evidence of at least Mr Moschoyiannis. His evidence was that he looked through the Fifth FER for things that were important to him as builder and that he relied on the Fifth FER in relation to whether composite cladding was BCA compliant, because the Fifth FER said nothing to the contrary: "Only in that it was absent. A comment about

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858 [538]

859 *Clark v Macourt* (2013) 253 CLR 1, 34 [119]-[120]; *European Bank Ltd v Evans* (2010) 240 CLR 432, 437-8 [11]-[13].

860 [472] and [496]

861 [513]

ACPs was absent from the report. Therefore in their view, must be code compliant".[862]

575 Second, and in any event, I do not accept that if Thomas Nicolas had recognised consistently with its obligations under the TN Consultant Agreement that the ACPs proposed for use in the Lacrosse tower did not comply with the BCA, it would have merely made passing reference to this in the Fifth FER. Rather, the strong likelihood is that it would, as a minimum, have included it in the Fifth FER as a matter requiring an alternative solution or raised it in discussions with at least Gardner Group (or both).[863] This in turn would have brought the issue of non-compliance directly to the attention of Gardner Group during its consideration of the application for the Stage 7 Building Permit, thus precluding the issue of that permit pending resolution of that issue.

576 It is likely also to have been raised and discussed with representatives of (among others) the developer, LU Simon, Gardner Group, Elenberg Fraser and PDS at design committee meetings and also referred to in the MFB Application and associated meetings. Thus Thomas Nicolas's view on the compliance issue was likely to have come to LU Simon's attention by one or more of express reference in the Fifth FER, failure of Gardner Group to issue the Stage 7 Building Permit or in discussions at design meetings. In either case, I am satisfied that had Thomas Nicolas not breached its obligations to LU Simon under the TN Consultant Agreement or warned that the ACPs were non-compliant, LU Simon would not have constructed the Lacrosse tower incorporating the ACPs as specified by Elenberg Fraser.[864]

577 I am therefore satisfied that factual causation is established against each of Gardner Group, Elenberg Fraser and Thomas Nicolas, in that the negligence of each of them was a necessary condition for the occurrence of LU Simon's harm. More particularly, in my view, this is the category of case where there are multiple causal factors each satisfying the "but-for" or "necessary condition" test of s 51(1)(a). In terms of the High Court decision in *Strong v Woolworths*, each made a material contribution to the harm suffered by LU Simon with the result that each may be held liable for that harm "even though some other person's conduct was also a necessary condition of that harm".[865]

578 In relation to scope of liability in s51(1)(b), no party has sought to argue that it should escape liability on the basis of the normative exercise contemplated by this second element of a finding of causation for negligence. Given each had a direct contractual relationship with LU Simon, incorporating an express requirement to exercise due care

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862 T727
863 See A11.0027 at [19.6]
864 See A11.0060 at [80.3]
865 *Strong v Woolworths* (2012) 246 CLR 182, at [24]

and skill, this is unsurprising. In my view, this case falls squarely within the category of case discussed in the extract from in *Wallace v Kam* above, where "the scope of liability is … coextensive with the content of the duty of the negligent party that has been breached".[866]

PROPORTIONATE LIABILITY

What is in dispute in relation to proportionate liability?

579 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,[867] 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*.[868] 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.[869]

580 Each of Gardner Group, Elenberg Fraser and Thomas Nicolas were essentially unanimous in their submissions that, if they were found to be in breach of the Consultant Agreements, any judgment against them is limited by the proportionate liability regime in Part IVAA of the *Wrongs Act*, to a sum reflecting their allocated responsibility for the loss and damage caused – except that the Owners cannot recover more than the total sum of their claim. Unsurprisingly, they all disagreed on what their respective allocation of responsibility should be. For its part, LU Simon's senior counsel made clear in closing submissions that LU Simon was "not saying anything about apportionment".[870] There was no dispute concerning the principles to be applied.

What are the principles to be applied?

581 The proportionate liability regime in Victoria applies to an "apportionable claim", which includes 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 a claim for damages under s18 of the ACL

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866 *Wallace v Kam* (2013) 250 CLR 375, per French CJ, Crennan, Kiefel, Gageler and Keane JJ at [26]
867 [322]-[323]
868 *"A Contractual Path Around Proportionate Liability?",* Grant Lubofski, (2018) 34 BCL 5
869 See *Wrongs Act* s26
870 T2828

(Victoria).[871] In proceedings involving an apportionable claim, the liability of a respondent who is a "concurrent wrongdoer" is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just, having regard to the extent of the respondent's responsibility for the damage or loss. Judgment may not be given against the defendant for a sum greater than that amount.[872] A concurrent wrongdoer is a person who is one of two or more persons whose acts or omissions have caused, independently of each other or jointly, the damage or loss that is the subject of the claim.[873]

582 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".[874] The principles to be followed when conducting that exercise are set out in *Podrebersek v Australian Iron & Steel Pty Ltd:*[875]

> "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."

583 As Elenberg Fraser noted in its written closing submissions,[876] the High Court in *Podrebersek*[877] referred to *Smith v McIntyre*[878]. 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: [879]

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871 *Wrongs Act* s24AF(1)
872 *Wrongs Act* s24AI(1)
873 *Wrongs Act* s24AH(1)
874 *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463, at [93]-[94]:
875 (1985) 59 ALJR 492 at 494.
876 I161 at [209]
877 Ibid at 494
878 [1958] Tas SR 36
879 Ibid at 46

> "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."

584 In its written closing submissions,[880] Thomas Nicolas referred to the decision of John Dixon J in *Dual Homes Pty Ltd v Moores Legal Pty Ltd*,[881] where His Honour observed that a Court's apportionment requires a broad discretionary evaluation of the conduct of the wrongdoers in terms of both causation and culpability:[882]

> "What is required of the court is a broad consideration of both the culpability of the departure from the standard of reasonable care and the relative importance of the acts of the parties which caused the damage. The concept of culpability which is applied is not 'moral blameworthiness but [the] degree of departure from the standard of care of the reasonable man', while the relative importance of the conduct of the wrongdoers invokes an assessment of causal potency. These considerations may overlap."

585 In *Thiess Pty Ltd and John Holland Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd*,[883] McDougall J noted that "even if each breach of duty was an effective cause, it does not follow that their contributions were equally potent. Assessment of causal potency requires more than an analysis of causation."[884] His Honour considered the rule in *Podrebersek* and held that the apportionment exercise involves two elements (omitting citations):

> "The first is a comparison of the culpability of each wrongdoer – the extent to which it departed from the requisite standard of care. The other element looks at the relative importance of each party's acts in causing the damage complained of; their "causal potency"…. The exercise of apportionment involves a consideration of the whole of the relevant conduct of each party."[885]

586 In *Perpetual Trustee Company Ltd v Ishak*,[886] Brereton J held that courts must consider, among other factors, which of the wrongdoers is actively engaged in the activity causing loss, and which was more able

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880 I162 at [155]
881 (2016) 50 VR 129
882 Ibid at [391]
883 [2016] NSWSC 173.
884 Ibid, at [514]
885 Ibid at [511].
886 [2012] NSWSC 697 at [194].

effectively to prevent the loss. In the same decision, His Honour noted that a wrongdoer's responsibility may be relatively increased if it was engaged by the plaintiff specifically for the purpose of guarding against the potential wrongdoing of another.[887] Courts must not consider, however, matters such as the financial strength or profitability of a party, the situation or status of a party, or the attitude of a wrongdoer in terms of remorse or lack of remorse.[888]

Submissions and findings on proportional liability

587 Gardner Group submits that:

> "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."[889]

588 In relation to Elenberg Fraser, Gardner Group submits that:[890]

> "The evidence of Mr Fraser was to the effect that the real intent of the Alucobond Specification, when read in conjunction with the entirety of section 04-203 of the T2 Tender Specification, was that a product such as either Alucobond Plus or Alucobond A2 should have been used. If this was the intended specification, because Mr Fraser understood the enhanced safety characteristics of those products (and by inference understood the unfavourable characteristics of a product with a polyethylene core), then Elenberg Fraser ought to have expressly nominated the relevant Alucobond product which was intended by it to be used. The error was compounded by Mr Palmer, being left seemingly to attend to the approval of samples and the issue of compliance certificates confirming compliance of the works with the BCA, in circumstances where he was not particularly familiar with the main architectural specification, being the T2 Tender Specification [T1308-09] and obviously paid little if any regard to its requirements."

589 As to the role of Thomas Nicolas, Gardner Group points to the fact that it is the fire engineer that possesses specialist skill in the assessment of

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887 Ibid, at [194].
888 *Reinhold v New South Wales Lotteries* [2008] NSWSC 187 at [57].
889 I160 at [164]
890 I160 at [172(b)]

risk of fire and that "Mr Nicolas knew that ACPs with a polyethylene core were highly combustible and inappropriate for use in the construction of the Lacrosse building, but failed to inform anyone of that fact".[891] After then criticising Thomas Nicolas's purported assumption that the ACPs proposed for use were a non-combustible product such as Alucore, Gardner Group concludes: "For those reasons, the apportionment of liability against Thomas Nicolas must be substantially greater than any apportionment of liability to Mr Galanos and Gardner Group".

590 For its part, Elenberg Fraser submits that its culpability, if any, should reflect proper consideration of the fact that its design was considered and reviewed by each of the other building professionals before it was put forward as the basis for the D&C Contract. I refer above in dealing with causation, to Elenberg Fraser's submission about Gardner Group's role as "gatekeeper". In a similar vein, on the question of apportionment, Eleberg Fraser observes that:[892]

> "Architects generally are not professionally trained with respect to the BCA, whereas the Galanos and Thomas Nicolas are professionally trained and must have the necessary skills with respect to the BCA. Elenberg Fraser was dependent upon the other professionals to undertake the work of the design and identify a departure from the DtS, including the reviews and reports provided over a significant period. The hazard was not the design but the failure to advise Elenberg Fraser with respect to BCA matters before it prepared and completed its design… The standard, the breach, if any, and the culpability of Elenberg Fraser must be low as it only provided the 'opportunity' through its design which should have been corrected before being presented and is usually addressed by the RBS in the permit approval process."

591 Finally, Thomas Nicolas sets out the extract above from the decision of John Dixon J in *Dual Homes Pty Ltd v Moores Legal Pty Ltd*,[893] and submits that the considerations are identical for apportionment in the Tribunal. It submits that it is "fundamentally less culpable for the damage caused than other respondents".[894] Thomas Nicolas does not go on to undertake a comparative analysis of the culpability of the other respondents against each other and its own culpability, but its senior counsel confirmed in oral submission that it relied on its detailed discussion of the "errors made by other parties" earlier in its written submissions.[895]

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891 I160 at [172(a)]
892 I161 at [211]-[213]
893 (2016) 50 VR 129 at [390]-[392]
894 I162 at [157]
895 T2681

592 In my view, there is considerable force in Garnder 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.

593 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.

594 I have noted already that there is force in Gardner Group's submissions on the role of Elenberg Fraser. In particular, it was clear from his evidence that Mr Fraser had firm convictions concerning the importance of the use of a product such as Alucobond Plus as part of his design, because of (among other things) fire risks. His failure to follow through on these convictions amplifies Elenberg Fraser's culpability and thus the position that an architect might otherwise occupy in the hierarchy of responsibility. On the other hand, I agree with Elenberg Fraser that its place in that hierarchy is still materially below that of the specialist relevant building surveyor and fire engineer. There were flaws inherent in Elenberg Fraser's design giving rise to a failure to comply with the BCA. But, as I have found, it would be expected in the ordinary course of things that either Gardner Group or Thomas Nicolas (or both) exercising reasonable care, would identify and take steps to correct those flaws.

595 In my view, Thomas Nicolas sits at the top of that hierarchy, by a clear margin. This is again essentially for the reasons stated in Gardner Group's submissions. As I have said, Thomas Nicolas was the only building professional involved with knowledge that the ACPs were non-compliant and a fire risk. I have also found that it had both

sufficient knowledge of the design and experience in the industry, to have recognised that the ACPs proposed were likely to contain polyethylene. It was therefore uniquely placed to raise the red flag on the use of the ACPs. And it could have done so by the simple expedient of an email, question or comment at a design meeting or by identifying in the Fifth FER that the ACPs required assessment as an alternative solution. In my view, these factors invest Thomas Nicolas's omissions with considerable causal potency and place it highest in the relative importance of the acts of the parties which caused the damage.

596 Further, even more than Gardner Group, the purpose of Thomas Nicolas's engagement by LU Simon speaks to its level of culpability. It was engaged because of its specialist expertise in fire safety. It assumed an express contractual obligation to conduct a full fire engineering assessment. These matters clearly invested Thomas Nicolas with front line responsibility for identifying and avoiding potential non-compliances relating to the very risks that eventuated, namely, risks relating to fire spread.

597 Turning finally to Mr Gubitta, I have already expressed my agreement with the Owners' submission that I should find that the extent of his responsibility for the loss and damage which has occurred is minimal. This is in part because of his statement (which I accept) that he heard a "psst" sound when he put his cigarette in the plastic container, and thus believed that his cigarette was fully extinguished. I also agree with Gardner Group's submission that Mr Gubitta ought not be considered a concurrent wrongdoer in respect of the claim for recladding works.[896] Indeed, I would go further and say that he should not be considered a concurrent wrongdoer in respect of any damage associated with the involvement of the ACPs in the fire.

598 There is insufficient evidence for me to undertake a forensic calculation of what damage might have occurred if the fire had been contained to the wooden table and one or two other items on the balcony of apartment 805. For example, no evidence was led about whether this would have resulted in a triggering of the internal sprinklers and, if so, how many apartments might have thereby suffered water damage. The best I can do therefore is to apply a percentage figure to Mr Gubitta's liability that reflects a generous assessment of the possible extent of that damage.

599 Having regard to the principles to be applied and based on my assessment above of the relative responsibility of those parties that failed to take reasonable care, the damages payable by LU Simon to the Owners are to be apportioned between each of the concurrent

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[896] I160 at [162]

wrongdoers pursuant to Part IVAA of the *Wrongs Act* in the following proportions:

- Gardner Group: 33%
- Elenberg Fraser: 25%
- Thomas Nicolas: 39%
- Mr Gubitta: 3%

There is no aspect of the ACL claims that materially adds to alters my findings in relation to causation, remoteness or proportionate liability above.[897]

QUANTUM

What is the extent of the agreement on loss and damage?

600 By orders dated 16 August 2018, the parties were directed to meet and confer in relation to the Owners' particulars of loss and damage and identify which of the items were agreed and which were in dispute. The parties later filed a document as required by the orders headed "Quantum Schedule". The items agreed in the Quantum Schedule were so agreed without prejudice as to the question of whether any of the respondents' were liable for those items. Revised versions of the Quantum Schedule were filed both during and after the hearing. The most recent version is dated 14 December 2018 and is an annexure to the Owners' second further amended particulars of loss and damage of that date ("14 December Particulars"). By agreement between the respondents, Elenberg Fraser took responsibility for cross-examination and submissions on the disputed quantum issues.

601 The Quantum Schedule deals only with loss and damage comprising costs in reinstating the building to its pre-fire state. It does not cover:

- the increase in insurance premiums associated with the unburnt Alucobest cladding remaining on the Lacrosse tower until the re-cladding works are concluded;
- the "compliance costs" comprising the costs of removal and replacement of the unburnt cladding pursuant to the orders of the City of Melbourne made 23 October 2015 and associated costs; and
- alleged anticipated future expenditure.

602 The amounts agreed by the parties as set out in the Quantum Schedule total $4,851,937.19 and comprise:

- make-safe works: $522,717.30;
- dry out costs: $693,293.33;

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[897] See generally ACL Part VIA

- reinstatement works stage 1(a) – minor works: $1,221,974.46;
- reinstatement works stage 1(b) – carpets and communal corridor: $273,265.44;
- reinstatement works stage 2 – #05 apartments, podium and external face (major works): $1,794,307.19;
- professional fees (various consulting, architect, engineering and surveyors): $98,873.84;
- strata manager – reinstatement/fire management services fees: $100,000;
- project management fees of Oriel Property Services: $55,537.21;
- project management fees of Sergon Building Consultants: $59,000;
- professional fees for FMG Engineering: $4,870.00; and
- items of Owners' uninsured loss agreed: $28,098.42.

603 The items noted by the Quantum Schedule as in dispute total $1,243,634.10 and fall into five categories, as follows:

- facilities management fees and disbursements charged by TM Facilities in respect of the minor works program: $224,174.22;
- project management fees and disbursements charged by TM Facilities in respect of the major works program: $115,567.50;
- Owners' emergency accommodation: $46,813.22; and
- Owners' loss of rent: $854,194.16; and
- items of Owners' uninsured loss not agreed: $2,885.00.

I deal with each of these categories in turn below.

604 In relation to the claims not covered by the Quantum Schedule comprising the additional insurance costs and "compliance costs", the Owners claim a total of $6,670,241.65, plus two items of unspecified costs. These are formally claimed by the Owners' 14 December Particulars and comprise the following:

- increase in insurance premiums incurred to 2018/19: $534,270.16;
- compliance costs (removal and replacement of the unburnt cladding per Building Orders) including building permit costs, consultants (fire engineer/building surveyor/structural engineer) and general contingency allowance pursuant to the Recladding Contract: $5,645,355.00
- superintendent fees and quality control: $168,700.00;
- insurance for recladding works: $37,035.39;

- costs associated with funding ballot and to convene owner/occupier meetings associated with recladding works: $16,744.10
- owners' costs for consultancy advice/negotiating/executing Recladding Contract: $101,137.00
- future increases in insurance premiums for the Owners for 2019/20: $167,000.00;
- unquantified costs associated with financing the recladding works, which cannot be assessed until any judgment sum is awarded and paid; and
- unquantified "further costs incurred as part of complying with the Building Orders and carrying out recladding works", which "can only be ascertained upon completion of the recladding works".

605 The nature and extent of any agreement in relation to the items not covered by the Quantum Schedule and listed above is uncertain. So far as the increase in insurance premiums is concerned ($534,270.16 for the period to 2018/19 and $167,000 for 2019/20), this is not covered in Elenberg Fraser's written submissions. However, it was the subject of oral submissions on behalf of the respondents, essentially disputing the adequacy of the evidence in support of these claims. I therefore propose to treat these claims as disputed and deal with them below.

606 The balance of these items was the subject of a supplementary statement by Mr Dawson dated 19 December 2018 filed on behalf of the Owners after the hearing concluded. This was accompanied by an email from the Owners' solicitors dated 21 December 2018 stating that (emphasis in original):

> "As mentioned in our email of 14 December, the purpose of Mr Dawson's statement is to further substantiate the revised elements of the Applicants' Second Further Amended Particulars of Loss and Damage dated 14 December 2018 (**Amended Particulars**).
>
> We have invited the parties, once they have reviewed the statement, to inform us as to whether the updated items of loss in the Amended Particulars are agreed or remain in dispute. We expect to be in a position to update the Tribunal once we have heard back from the parties, most likely in late January/early February 2019"

607 The Owners' solicitors sent a further email on 22 February 2019 saying in substance that the parties were continuing to liaise with a view to narrowing the issue and jointly communicating a position on the revised quantum items "as soon as possible". I will therefore fix a time for further hearing of submissions on these items and on the claims for loss of rent for the reasons explained below, allowing time for the parties to attempt to reach agreement on some or all of them, having first considered these reasons.

Evidence of loss and damage generally

608 The evidence of the Owners' loss and damage in respect of reinstatement of the Lacrosse tower to its pre-fire state is comprised primarily of written statements by Mr Mayes. As explained above, Mr Mayes is a chartered loss adjuster formerly employed by Cunningham & Lindsey. He was appointed as the executive adjuster and was primarily responsible for overseeing the preparation of 14 fire damage reports which set out the loss and damage and recommendations for payment to the Owners' insurer, Chubb Insurance. Those reports are exhibited to Mr Mayes's supplementary witness statement dated 10 August 2018.[898]

609 Mr Mayes' evidence was that he was assisted by an in-house team at Cunningham & Lindsey and a range of external consultants at various stages.[899] He states that overall, the adjustment was complicated as issues often arose on a daily basis, the quantum was significant and a number of parties were involved in the building's remediation.[900] The most relevant report for the purposes of the disputed claims is the Fire Damage – Report 14 & Final (Recommending Settlement) dated 25 November 2014 ("14th Report").[901]

TM Facilities fees and disbursements for minor works

610 TM Facilities Management Pty Ltd ("TM Facilities") is the building manager for the Lacrosse building. It provided facilities management services before and after the fire. At the time of the fire, TM Facilities provided those services pursuant to a Superintendent Agreement between the Owners and TM Facilities dated 14 June 2012.[902] This agreement stated that TM Facilities was to be paid an annual fee of $158,528 plus GST to be increased annually. The agreement also allowed TM Facilities to charge for "income and revenue received for the provision of Additional Services". The "Additional Services" appear from schedule 2 of the agreement to relate primarily to providing various utilities within the building, but also included "any other Additional Services as may be deemed suitable by" TM Facilities. Clause 9 of the agreement relevantly provided that "The Superintendent covenants that the prices charged for the Additional Services will be competitive and comparable to prices charged for similar or like services at developments of the type and kind as the Development".

611 A breakdown of the hours charged and activities undertaken by TM Facilities in relation to its "Additional Services" totalling $224,174.22

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898 H1-H14
899 T377, T384
900 F3 at [5]
901 H14.0011
902 F67.0829

is included in the 14th Report,[903] followed by a brief discussion of the steps taken by Cunningham & Lindsey to verify the invoices. The 14th Report concludes on these "Additional Services" that: "we are satisfied that the hours charged were reasonable, the work done related to the fire and was outside of the contracted duties as facilities manager". TM Facilities' invoices for "Additional Services" also included disbursements totalling $68,052.22, which the 14th Report describes as being "for media and legal advice which were required to ensure residents were well informed of the situation (with regards to safety of the building and when they could return) which ultimately helped mitigate the loss".[904]

612 A substantial component of these disbursements was invoices from Royce Communications Pty Ltd ("Royce"), who were engaged by TM Facilities to provide media advice and other communication services. There is no formal engagement agreement with Royce in evidence. Mr Mayes described the circumstances of Royce's engagement as follows: "My understanding was immediately after the loss, there was a lot of media responses, releases that were needed, managing their social media platform – there's a Facebook page set up to communicate with all owners and occupiers, and ongoing – yeah media releases."[905] When it was later suggested to Mr Mayes that he did not recall the circumstances in which various invoices from Royce were written, he said: "I recall I know Royce provided services to TM Facilties but the specifics of what they did for those disbursements I don't know the detail of it".[906]

613 In February 2015, TM Facilities entered into a more formal agreement with the Owners in relation to its ongoing work in relation to the fire damage rectification works. This took the form of a fee proposal dated 20 February 2015[907] and related specifically to services described as: "Arrange and coordinate access for the "Minor" Rectification Works in addition to our normal duties as Facilities Manager". The minor works involved work to apartments other than the '05' apartments, being apartments 2, 3, 4 and 6 on each level.[908] This work did not include the replacement of the carpet and communal corridor plaster and redecoration.[909] The Owners note that there had been some delays in completing the minor works due to access issues. This resulted in a prolonged need for facilities management services. [910]

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903 H14.0011
904 H14.0011
905 T417
906 T419
907 G1733
908 I158 [89]
909 14 December Particulars at [23]
910 I158 at [92] and H6.0006

614 The proposed fee under the fee proposal was $28,800 (excluding GST) for a 12 week period, comprising "Administration" (up to 24 hours per week) for $14,400 and "Project Coordination" (up to 8 hours per week) also for $14,400. I note that this equates to $50 per hour for "Administration" and $150 per hour for "Project Coordination". The fee proposal later sets out hourly rates for "additional works" of $250 for "Director", $150 for "Project Coordinator" and $50 for "Administrator".

615 However, the invoices subsequently sent by TM Facilities for additional facilities management were not consistent in how they accounted for the fee proposal. There appeared to be some invoices for the lump sum amounts provided in the proposal,[911] but others during the relevant period that did not reference the fee proposal and included charges at hourly rates that did not accord with those provided for in the fee proposal (for example, Dean Bromage was charged at a rate of $180 per hour).[912] Mr Mayes acknowledged in evidence these variations between invoices and the lack of breakdown in the lump sum invoices and agreed that he did not take issue with Mr Main in relation to the latter's interpretation of the fee proposal.[913]

616 The Owners relied in support of their claim for TM Facilities fees and disbursements for minor works primarily on Mr Mayes' supplementary statement dated 29 August 2018 and the lengthy supporting material attached to that statement (the statement and attachments run to 1043 pages). In particular, the statement summarises the facilities management services provided by TM Facilities and exhibits the documentation Mr Mayes reviewed when adjusting the loss. These essentially comprised the invoices issued by TM Facilities and their corresponding breakdowns of hours spent and activities performed by staff.[914] Mr Mayes referred in evidence to also reviewing a "detailed breakdown of the hours that [Mr Main] had worked and the activities that they did and the number of hours". But he agreed that this was a document produced by Mr Main and that he was not provided with a breakdown for every invoice.[915]

617 The substance of Elenberg Fraser's submissions in respect of these invoices and other material was as follows:[916]

- the spreadsheet breaking down the invoices for additional services by TM Facilities provided to Mr Main,[917] did not cover all invoices,

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911 F67.0880 and F67.0885
912 F67.0882
913 T448
914 Commencing at F67.0865
915 T402-3
916 Elenberg Fraser written closing submissions on quantum at [28]-[31]
917 I28

was not provided contemporaneously with the services performed and was a re-creation of hours worked and tasks performed;

- many of the invoices provided little if any breakdown of the hours claimed and schedules provided with the invoices simply listing the hours claimed and, on occasion, the names of the operator allegedly performing the works and the rate per hour, but no description of the services actually performed;
- Mr Mayes' evidence suggested that because Platinum Strata and the Owners' Corporation were satisfied with the amounts charged, he too considered them reasonable;[918]
- despite significant sums being charged to TM Facilities by Royce, Mr Mayes was unable to explain in any detail the work carried out by Royce; the sums paid to Royce are too remote and should not be allowed;
- invoices from TM Facilities included disbursements for payment of legal services[919] and no explanation was provided in respect of these costs;[920]
- invoices included reference to services provided in respect of assistance with public meetings,[921] hearings at the Building Appeals Board,[922] services provided in respect of applications at the Victorian Building Authority[923] and meetings with the Melbourne City Council Municipal Building Surveyor,[924] without any adequate explanation for these costs.[925]

618 In relation to adequacy of the invoices generally, the Owners say that all the Tribunal needs to be satisfied of is whether there is enough information to establish that the services and expenses incurred related to the fire and fell outside the scope of the superintendent agreement.[926] They argue that the breakdowns provided by TM Facilities should be treated as a proper assessment of the services provided, as opposed to a "pejorative unsubstantiated statement that in some way implies… unacceptable behaviour". They add that if Platinum Strata and the Owners' Corporation were satisfied with the fees why should they not have been paid?[927]

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[918] T401-2
[919] F67.0889
[920] T449-T550
[921] F67.0915
[922] F67.0917
[923] F67.0926-31, .0938
[924] F67.0934-6
[925] See for example T423 and T456-8
[926] T2848 L13-19
[927] T2845-6

619 The Owners submit that the facilities management claim should not be regarded as controversial, particularly given that Elenberg Fraser accepts that the minor works were carried out. Additional facilities management services were clearly required to accommodate the attendance of contractors to perform the works as well as to coordinate residents, owners and other stakeholders which could not be done by the Owners' Committee. Further, the additional resources assisted in expediting the process and therefore, mitigating the loss.[928]

620 In my view, there is some force in Elenberg Fraser's submissions in relation to the TM Facilities and Royce invoices. The TM Facilities invoices are very vague and include charges and hourly rates that are difficulty to reconcile with the hourly rates in the fee proposal. The breakdowns provide a level of further detail, but offer no real assistance in ascertaining, in particular, the level of skill or experience required for the hours of work identified. In relation to the Royce invoices, these too have only very general descriptions of the services involved. The Owners do not address the expenses incurred for the services provided by Royce in their submissions.

621 It is clear that the fire and the subsequent rectification work offered TM Facilities and its principals an opportunity to significantly enhance their capacity to generate income out of their building management role at the Lacrosse tower. Further, the customer footing the bill was effectively a substantial insurance company and, given the range of activities going on at the time, it was likely that there would be only limited opportunity for scrutiny of their charging. This proved to be the case.

622 Having reviewed many of the invoices (including substantial lump-sum invoices) and breakdowns (where they existed), it is difficult not to feel some unease about the possibility that TM Facilities (and possibly also Royce) may have used the opportunity to, for example, round-up claims or use staff that were overqualified (and therefore charging $250, instead of $50, per hour) for straightforward administrative tasks. I hasten to say that I am not suggesting that this did occur. The difficulty is that no one from TM Facilities was called to dispel that feeling of unease, and there was no suggestion that there was any impediment to calling a senior representative of TM Facilities to do so.

623 Having said that, I accept that TM Facilities did substantial work during the various phases of the reinstatement works. I also accept that the Tribunal is not bound by the rules of evidence.[929] And, given the extent of the issues already involved in this proceeding, I understand the Owners' reluctance to burden the Tribunal further with additional

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928 I158 at [97]
929 *VCAT Act* s98

witnesses and source material to formally prove claims at this level of detail.

624 In the circumstances, I am not prepared to disallow these claims in their entirety. But nor am I willing to accept them in full. As to a possible middle course, there is nothing like enough evidence for me to assess whether the individual charges are reasonable. I therefore propose to adopt Elenberg Fraser's suggestion by reducing the award of damages to an amount I consider fair,[930] and to do this by applying a discount factor to the total sum of $224,174.22. Doing the best I can with the evidence available, I consider that the discount should be 50%. I will therefore award the Owners' $112,087.11 in respect of TM Facilities fees and disbursements in respect of the minor works.

TM Facilities fees and disbursements for the major works

625 The major works essentially involved work to the '05' apartments on each level as well as the exterior of the building external to these apartments (primarily replacing the burnt cladding). The project management services were not put out to tender and were awarded by the Owners to TM Facilities. The duration of the works was from January 2015 to July 2016 and the total cost of the works (not including project management) amounted to $1,794,307.19. The total fees and disbursements charged by TM Facilities for project management was $115,567.50, excluding GST.

626 Mr Mayes gave evidence that the major works was the more complex part of the reinstatement process and required extensive resources to be allocated to its project management:

> "In this case a number of levels, a number of different parties – where there's the owners, the strata managers, the profile of the job, the consultants on board, and they're trying to move the claim forward. It's very, very complex. Very time – time consuming, it wasn't a straightforward claim at all because of the nature of why we're here today."[931]

627 It appears that there were at least two arrangements discussed in relation to the fees for project management. The first is an unsigned fee proposal dated 29 January 2015 from TM Facilities to Cunningham & Lindsey, sent by TM Facilities by email to Platinum Strata on 4 February 2015.[932] The terms of this fee proposal were that TM Facilities would charge for work at: "Hourly rates not to exceed $12,000.00 / month (assuming a 6 month programme commencing in January 2015)". The next line of the fee proposal states: "Should any additional works be required we propose the following hourly rates:",

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930 Elenberg Fraser written closing submissions on quantum at [41]
931 T570-571
932 F67.0943

which is followed by rates ranging from "Managing Director" at $270 per hour, down to "Quantity Surveyor" at $150 per hour.[933] How these seemingly inconsistent provisions in the fee proposal were intended to work in practice is far from clear. I note that TM Facilities issued an invoice for project management fees of $12,000 only once in the ensuing months (for the month of July).

628 It seems that a second arrangement was at least discussed at about the same time as the fee proposal was issued. Mr Mayes gave evidence to the effect that it was originally thought that project management services would only be required for a period of four to five months and he therefore advised Platinum Strata or the Owners Corporation that they should agree a to a fixed sum of $50,000 (based on a rate of $10,000 per month).[934] Mr Mayes later said that Trevor or Fraser Main of TM Facilities subsequently advised that TM Facilities did not agree to that fixed fee.[935] On the other hand, TM Facilities' invoices at least for the months of April and May 2015 were for $10,000 each. [936]

629 The fees charged by TM Management for project management generally are curious.[937] Many (although not all) appear to be for lump sum amounts. There are the two invoices of $10,000 each for April and May 2015, which may be explained by Mr Mayes evidence concerning the fixed fee amount. There is one charge of $12,000 for the month of July 2015, which may be explained by the fee proposal. But there are also two invoices for $7,600 each for successive months (February and March 2015) and three invoices for $5,000 for successive months (May, June and July 2016).

630 There is no evidence about any revised or other fee proposals to explain these lump sum charges, except that the invoices themselves for June and July 2016 refer to a "Fee Proposal dated 5 May 2016".[938] Both Mr Mayes in his second supplementary witness statement[939] and the Owners in their submissions[940] assert in effect that the project management fees totalling $115,567.50 were provided pursuant to the fee proposal dated 25 January 2015. I have been unable to locate any copy of, or other reference to, a fee proposal dated 5 May 2016. This apparent gap in the evidence is troubling, and highlight the pitfalls in adducing second-hand evidence of this kind.

631 The invoices and breakdowns more generally also suffer from many of the same difficulties as those discussed above in respect of the TM

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933 F67.0962
934 T413, T466
935 T467
936 F67.0986 and 0987
937 14 December Particulars at pp23-24
938 F67.1009 and 1010
939 F67.0007
940 I158 at [100]

Facilities fees and disbursements for additional works relating to the minor works. Further, Elenberg Fraser raises in its submissions the question whether any project management work was even needed.[941] The Owners counter by pointing out that the major works were extremely complicated and that the amount charged for project management equated to 6.5% of the adjusted contract sum for the works, which was competitive.[942]

632 Once again, I am left in the position that there is simply not enough evidence for me to undertake anything approaching a forensic examination of the individual charges. But I am unwilling to accept the invoices and Mr Mayes' approval of them at face value. I therefore propose again to apply a discount that seems to me to reflect a fair allowance for the concerns raised on behalf of the respondents. That discount should be 50% of the total amount claimed of $115,567.50, with the result being that I will award the owners $57,783.75 in respect of project management fees and disbursements charged by TM Facilities for the major works program

Owners' loss of rent and emergency accommodation

633 The majority of the apartments of the Lacrosse building were leased out to tenants with only approximately 10% being owner-occupied.[943] Immediately after the fire, 304 apartments were evacuated. The Municipal Building Surveyor issued an Emergency Order[944] prohibiting occupation until the 'make safe' works were complete and the council was satisfied the premises were safe for occupation. A phased reoccupation schedule was developed. By 2 December 2014 all the occupants of the 147 unaffected apartments located on the south wing were able to return to their apartments.[945] By about 19 December 2014, the majority of the apartments were reoccupied[946] and the '05' apartment occupants were reoccupied in July 2016, after the completion of the 'major works'.[947]

634 I accept at a general level that the effect of the disruption to occupation referred to above was that tenants terminated their lease agreements, owners were unable to charge rent (including rent for car parking spaces) and owner-occupiers had to stay in emergency accommodation. The Owners claim $853,518.88 for loss of apartment rent[948] and

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941 Elenberg Fraser submissions on quantum at [39]
942 I158 at [99] and [101]
943 H1.0017
944 G1712
945 14 December Particulars at [36]
946 H1.0004 at [2]
947 I158 at [83]
948 14 December Particulars – Quantum Schedule at Appendix G

$675.28 for loss of car park rent.[949] The owner-occupiers claim $46,813.22 for the cost of temporary alternative accommodation.[950]

635 On the other hand, Elenberg Fraser persuasively submits, first, that the Owners bear the burden of proof and, second, that the basis of Mr Mayes' assessment on which the Owners rely, may not align with the assessment of damages according to law. More particularly, it submits that Mr Mayes assessment was conducted in accordance with the terms of the applicable insurance policies, not in accordance with the legal principles applicable to the assessment of loss and damage. It continues:[951]

> "This is particularly relevant to the loss of rent claims as an assessment based on the terms of the policies will not necessarily align with the assessment of damages according to law. The terms of a contract of insurance may include indemnity for losses which are exceptional or special to the insured and which do not flow naturally from the event causing the loss and damage.
>
> An example of such a special loss is where the insurance policy provides indemnity for the period the apartment was uninhabitable plus 60 days loss of rent [T525] and yet the insured's actual loss might be limited to the period the apartment was uninhabitable only. This circumstance appears to have occurred in respect of some of the claims for emergency accommodation costs which is referred to below.

636 In relation to emergency accommodation, I accept Elenberg Fraser's submissions for the reasons it gives[952] that the claims listed in its Table D had insufficient supporting documents or other material. These claims total $21,658.15, and will be deducted from the Owners' total claims for emergency accommodation of $46,813.22. Thus the amount of damages I will award the Owners for emergency accommodation is $25,155.07.

637 Turning to loss of rent, Elenberg Fraser has set out each Owner's claim for loss of rent in a series of tables (Tables A to C). Table A is headed "Loss of rent claims" and shows whether the claim for each apartment is supported by a written statement, a lease agreement or schedule, tenants ledger, and other issues relating to the number of days for loss of rent that has been claimed. It appears that this table has in part been superseded by the 14 December Particulars, where in a number of cases the number of days sought has been reduced. It is not clear whether that reduction reflects part acceptance by the Owners of Elenberg Fraser's arguments on this issue.

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949 14 December Particulars - Quantum Schedule at Appendix G
950 14 December Particulars [68] and [69] and Quantum Schedule at Appendix G
951 Elenberg Fraser submissions on quantum at [13]-[14]
952 Elenberg Fraser submissions on quantum at [46]-[47]

638 For example, apartment 406 is shown in Elenberg Fraser's table as a claim for 215 days loss of rent at $66.44 per day equating to $5,581.28. It is not clear where this total figure comes from—it may be simply a calculation error. I note that the Owners' amended particulars of loss and damage dated 10 August 2018, state a claim for apartment 406 of 215 days loss of rent at $66.44 per day equating to $14,284.92 (215 by $66.44 gives $14,284.92, not $5,581.28). Putting the calculation to one side for the moment, the Elenberg Fraser table suggests that apartment 406 was uninhabitable for only 24 days, not 215.

639 To complicate matters further, in the 14 December Particulars, the claim for apartment 406 is now for 51 days at $66.44 per day, equating to $3,388.64. I am unable to find any explanation in the material as to why the number of days is reduced in the 14 December Particulars from 215 to 51 days, but is still more than the 24 days suggested in the Elenberg Fraser table. The explanation may be in the "annexure titled 'Master Spreadsheet 4 Feb 2016', annexed to Cunningham Lindsey's 11th report dated 10.02.2016", being the reference provided in the 14 December Particulars, but I have found that document virtually impenetrable. In contrast, in relation to apartment 704, the 14 December Particulars appear to accept the reduction from 64 to 24 days suggested in the Elenberg Fraser table.

640 It seems likely that this apparent disconnect between the Elenberg Fraser table and the 14 December Particulars has arisen because of the fact that the latter document was delivered some 2 months after the end of the hearing, including the provision of the submissions on quantum by Elenberg Fraser in October of that year. But I note that the Supplementary Witness Statement of Mr Dawson dated after the 14 December Particulars does not offer any explanation for the revisions in the claims for loss of rent.

641 In these circumstances, and given both the substantial total sum involved and the fact that a number of other aspects of the Owners' damages claims are yet to be resolved, I will invite the parties to consider revisiting the issue of the loss of rent claims with a view to finding common ground and, to the extent that is not possible, filing revised written submissions, including any updated tables on loss of rent as they consider appropriate. However, it is appropriate that the parties be given an opportunity to make submissions against that course and also on the question whether any party seeking to file fresh evidence to support any revised claims should be given leave to do so.

642 In the meantime, in case it assists future discussions, I will note my tentative view that there is force in a number of Elenberg Fraser's submissions on the loss of rent claims at paragraphs 13, 14 and 45. In particular, while I do not accept that it was incumbent on the Owners to call every landlord, it seems to me that some further verification of the claims is appropriate. Consistently with Elenberg Fraser's submissions,

this may include (depending on what is claimed) a witness statement, lease agreement or lease schedule, tenant ledger or evidence that an apartment was in fact unoccupied beyond the date shown in the reoccupation register. I do not say that all of these are necessary. But in cases where none is provided, it seems to me that the claim will be difficult to sustain.

Uninsured losses

643 The remaining few items of uninsured losses in dispute total $2,885.00. The Owners' senior counsel's submissions referring to uninsured losses seemed to elide these claims with the loss of rent claims.[953] I am therefore somewhat in the dark about the Owners' argument in response to Elenberg Fraser's written submissions setting out the basis of the respondents' objection to the claims. Accordingly, for the reasons submitted by Elenberg Fraser,[954] I will not allow this sum.

Additional insurance premiums

644 As noted above, the Owners make a claim for increases in insurance premiums associated with the unburnt Alucobest cladding remaining on the Lacrosse tower until the re-cladding works are concluded. The amounts claimed are the $534,270.16 already incurred for the period up to 2018/19 and an estimated $167,000 for 2019/20. The estimated figure is essentially a carry forward of the sum paid for the current year. In relation to this claim, the Owners submit that:

> "The presence of non-compliant Alucobest cladding on the Lacrosse building has significantly increased the premiums payable under the Owners Corporations' strata insurance policy (clearly, because of the increased risk of damage by fire). Mr Dawson has been advised by the Owners Corporations' insurance broker that the continued presence of non-compliant cladding has accounted for approximately 80% of the amount of premium increases each year since 2014. Removing other factors which have caused premium increases during the same period, the total increase in premiums to date is estimated to be $534,270.16 [citing F1.00056]."[955]

645 In support of this submission, the Owners refer to authority for the proposition that the costs of an increase in premiums payable on an insurance policy are recoverable, subject to the Tribunal being satisfied that the respondents' conduct has caused the increase.[956] Elenberg Fraser does not take issue with this aspect of the claim. Rather, it submits in substance that the Tribunal should not be satisfied based only on an email from the Owners' insurance broker (as distinct from

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953 T2849
954 Elenberg Fraser submissions on quantum at [48]-[49]
955 I158 at [110]
956 *Keeley v Horton* [2016] 1 Qd R 414; *Gough v South Sky Investments Pty Ltd* [2011] QSC 361.

the insurer itself), that the sums claimed do truly reflect that part of the increase that is referrable to the ongoing presence of non-compliant cladding. It says that the evidence of the broker is "insufficient proof" of the claim.[957]

646 In reply, the Owners' senior counsel submitted that the evidence was adequate, noting that: "The only inference Your Honour could draw was that there have been issues with the cladding – a little fire – which would affect the question of insurance".[958] I agree. I have reviewed the evidence of Mr Dawson about these claims (both in his witness statements and in oral evidence) and the email on which he relies. On this occasion (again noting that the Tribunal is not bound by the rules of evidence),[959] I am satisfied that the Owners' claim to the increased insurance premiums totalling $701,270.16 is established.

ORDERS

647 Matters relevant to the orders that should be made as a result of my findings are set out in my summary of findings above.[960] I will hear further from the parties on the form of those orders and on any further orders or directions that should be made to bring to finality the outstanding questions on loss and damage.

Judge Woodward
Vice President

957 T2831-2
958 T2835
959 *VCAT Act* s98
960 [7]

GLOSSARY

1996 FEG	Fire Engineering Guidelines 1996
ABCB	Australian Building Codes Board
ACL	Australian Consumer Law
ACPs	Aluminium composite panels with a core containing polyethylene
AFAC	Australian Fire Authorities Council
AIBS	Australian Institute of Building Surveyors
Alucobond Specification	Clause 2.5A of the T2 Specification
AS General Conditions	AS4122-2000 Australian Standard Amended Form General Conditions of Contract for Engagement of Consultants
AWTA test certificate	AWTA test certificate under AS1530.3
BCA	The Building Code of Australia 2006
Building Regulations	*Building Regulations 2006* (Vic)
D&C Contract	Design and Construct Contract dated 14 May 2010
DBC Act	Domestic Building Contracts Act 1995 (Vic)
Developer	675 La Trobe Street Pty Ltd
EF Consultant Agreement	Elenberg Fraser Consultant Agreement
Elenberg Fraser	Elenberg Fraser Pty Ltd
FEDB	Preliminary Draft Fire Engineering Design Brief FD07.141.1
FER	Fire Engineering Report
Gardner Group	Stasi Galanos and Gardner Group Pty Ltd
GG Consultant Agreement	Design Consultant Agreement
IEAust	The Institution of Engineers, Australia
IFEG	International Fire Engineering Guidelines
LU Simon	L.U. Simon Pty Ltd
MFB	Metropolitan Fire and Emergency Services Board
MFB FIA Report	MFB PIA Report, entitled "Fire Investigation & Analysis"
MFB PIA Report	MFB Post Incident Analysis Report, issued in about May 2015
MFB R309 Report	Report of the Chief Officer pursuant to regulation 309 of the *Building Regulations* 2006
OC 1	Owners Corporation No 1 PS613436T
OC 2	Owners Corporation No 2 PS613436T
OC 4	Owners Corporation No 4 PS613436T
Owners	211 named applicants
PDS	Property Development Solutions (Vic) Pty Ltd
PDS Agreement	Lacrosse Docklands Stage 1 – Project Management and Superintendent Agreement

Pomeroy	Pomeroy Pacific Pty Ltd
Relevant Practice	The issuing of building permits for the use of ACPs such as Alucobond with a polyethylene core and with a test 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)
T2 Specification	T2 Specification dated 17 April 2008
Thomas Nicolas	Tanah Merah Pty Ltd t/as Thomas Nicolas
TN Consultant Agreement	Thomas Nicolas' Consultant Agreement
Wrongs Act	Wrongs Act 1958 (Vic)
Fifth FER	The fifth iteration of the Fire Engineering Report prepared by Thomas Nicolas bearing the date November 2010 but finalised on about 9 December 2011
Joint Report	Joint report of the fire engineering experts signed by the facilitator and each of the five experts on 27 August 2018
MFB Application	Letter from Thomas Nicolas dated 22 February 2011 comprising the Regulation 309 application to the MFB
Stage 7 Building Permit	Building Permit for Stage 7 of the construction of the Lacrosse tower issued on 2 June 2011 by Gardner Group
DTS	Deemed to Satisfy
EF Consultant Agreement	Agreement between Elenberg Fraser and the developer executed on about 4 August 2010 and later novated to LU Simon
Building Act	*Building Act 1993* (Vic)
Gardner Group Experts	Each of Messrs Leonard, Capouleas, and du Chateau
14 December Particulars	Owners' second further amended particulars of loss and damage dated 14 December 2018
14th Report	Fire Damage – Report 14 & Final (Recommending Settlement) dated 25 November 2014
TM Facilities	TM Facilities Management Pty Ltd
Royce	Royce Communications Pty Ltd