



Supreme Court  
New South Wales

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Case Name: Strata Plan 92450 v JKN Para 1 Pty Ltd & Anor

Medium Neutral Citation: [2022] NSWSC 958

Hearing Date(s): 30 June 2022, 1 July 2022, 7 July 2022

Date of Orders: 19 July 2022

Decision Date: 19 July 2022

Jurisdiction: Equity - Technology and Construction List

Before: Black J

Decision: Separate questions answered. Plaintiff to pay the costs of and incidental to the determination of the separate questions and this hearing, as agreed or as assessed.

Catchwords: BUILDING AND CONSTRUCTION — Home Building Act 1989 (NSW) — Statutory warranty — Proceedings for breach — Where the plaintiff owners corporation seeks a range of relief relating to allegedly combustible cladding on a residential unit block — Where the parties seek the determination of several separate questions — Whether the cladding complied with the Building Code of Australia with respect to combustibility — Whether any statutory warranties were breached in relation to the cladding — Whether the plaintiff suffered assessable loss recoverable against the defendants.

Legislation Cited: - Building Products (Safety) Act 2017 (NSW)  
- Environmental Planning and Assessment Act 1979 (NSW)  
- Home Building Act 1989 (NSW), s 18B, s 18C, s 18D

Cases Cited: - Bellgrove v Eldridge (1954) 90 CLR 613 at 617-618  
- Owners – Strata Plan No 74602 v Brookfield Australia Investment Ltd [2015] NSWSC 1916  
- Owners Strata Plan 69230 v Kell & Rigby Holdings Pty

Ltd [2020] NSWSC 612  
- Owners of SP 76888 v Walker Group Constructions Pty Ltd [2016] NSWSC 541  
- Owners of Strata Plan No 69312 v Rockdale City Council [2012] NSWSC 1244  
- Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272  
- Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS 613436T [2021] VSCA 72  
- Taylor Construction Group Pty Ltd v Strata Plan 92888 [2021] NSWSC 1315  
- Taylor Construction Group Pty Ltd v Strata Plan No 92888 [2020] NSWCA TAP 163  
- Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd (2017) 94 NSWLR 108  
- Westpoint Management Ltd v Chocolate Factory Apartments Ltd [2007] NSWCA 253

Category: Principal judgment

Parties: Owners SP 92450 (Plaintiff)  
JKN Para 1 Pty Limited (First Defendant)  
Toplace Pty Limited (Second Defendant)

Representation: Counsel:  
J Steele SC/R Size (Plaintiff)  
R Cheney SC/H Pintos-Lopez (Defendants)

Solicitors:  
Eakin McCaffery Cox (Plaintiff)  
EA Legal (Defendants)

File Number(s): 2019/75454

## **JUDGMENT**

### **Nature of the proceedings**

1 By Amended Technology and Construction List Statement (“ATCLS”) filed on 5 April 2019, the Plaintiff, The Owners – Strata Plan No 92450 (“Owners Corporation”), sought a range of relief against JKN Para 1 Pty Ltd (“JKN”) and Toplace Pty Ltd (“Toplace”). Only part of that relief is the subject of determination of separate questions in this application. The Owners Corporation is the registered proprietor of common property in a strata scheme

comprising 28 storeys and 133 lots situated at Parramatta in New South Wales (“Building”). JKN was, until 15 July 2016, the owner and developer of the Building and Toplace carried out its design and construction. A final occupation certificate for the Building was issued on 10 March 2017 (ATCLS, Section A, [4]). Relevantly, for the purposes of the separate questions that were determined at this hearing, the Owners Corporation brings a case in respect of allegedly combustible aluminium composite panels (“ACPs”) installed as cladding on the Building.

- 2 Relevantly, the Owners Corporation contends (ATCLS [27C]) that, in breach of the statutory warranties under s 18B of the *Home Building Act 1989* (NSW) (“HBA”), the ACP cladding installed on the Building did not comply with the Building Code of Australia (“BCA”). The Defendants respond that the ACP cladding installed on the Building complied with the BCA at the time of installation. The parties agreed that several questions be determined separately, at this hearing, from any other issue in the proceedings. For completeness, the Plaintiffs also advance allegations of other defects, but it appears the parties are in negotiations to resolve those other issues, and that was the basis on which the dispute as to the ACP cladding was listed to be determined by way of the separate questions.
- 3 The parties also agreed certain facts, recorded in a Statement of Agreed Facts dated 3 June 2022, including that Toplace did all or part of the “residential building work” within the meaning of the *HBA* relating to the construction of the common property; that the Owners Corporation is both the immediate successor in title to JKN in respect of the common property within the meaning of s 18C of the *HBA* and a successor in title to JKN within the meaning of s 18D of the *HBA*; and that a final occupation certificate was issued in relation to the Building. The parties have also agreed the estimated costs of replacing the cladding, which exceed \$5 million, excluding GST, but it will not be necessary to address those costs having regard to the conclusions which I reach below. By Notice to Admit Facts dated 14 October 2021 issued by the Owners Corporation, and JKN’s and Toplace’s Response dated 28 October 2021, the parties agreed three further matters, and a fourth was disputed. They agreed that the external cladding of the Building performs a waterproofing function,

which is a matter relevant to the application of the BCA; they agree that the cladding does not comply with the Deemed to Satisfy (“DtS”) provisions of the BCA, which I address below; they agreed that cladding installed on the building is now a banned product under the *Building Products (Safety) Act 2017* (NSW) (“*BPSA*”); and it was disputed whether, prior to the commencement of these proceedings, any Alternative Solution (as defined in the BCA) was performed under the BCA to demonstrate that the cladding complied with either the Performance Requirements (as defined in the BCA) or the DtS provisions under the BCA.

- 4 The parties also led affidavit and expert evidence which I address below. I considered whether it was necessary to approach the assessment of the evidence in this hearing having regard to s 140 of the *Evidence Act 1995* (NSW) which broadly reflects the principle noted in *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34 and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449–450; [1992] HCA 66. While no allegation of fraud or impropriety is made, that section arguably directs attention more broadly to the nature of the subject matter of the proceedings and the gravity of the matters alleged. Ms Steele, who appears with Mr Size for the Owners Corporation, contended that section had no application on the basis that the Owners Corporation’s claim was simply one for breach of the statutory warranties under s 18B of the *HBA*. I am not persuaded by that submission, where the breach of the statutory warranties for which the Owners Corporation contends depends on the underlying factual contention that the Building was constructed with ACP cladding that is combustible and a threat to the safety of occupants of the Building and has the implication that an occupation certificate for the Building should not have been issued. That finding would have significant implications at least for the developer, KM; the builder, Toplace; the certifier; owners who have sold and purchasers who have purchased units in the Building, presumably on the , presumably on the basis of the existing occupation certificate; and existing owners. It seems to me that these are, on any view, matters of real gravity and the Court should arguably have regard to their gravity in determining whether the findings for which the Owners Corporations contends should be made. However, it is not necessary

to express a final view as to that matter, where I would reach the same result with and without reference to s 140 of the *Act*.

### **The requirements of the BCA**

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

“It is not necessary for the determination of the current proceedings to decide whether the BCA was, or was not, in 2001 (or at some other time) a legislative “instrument” or “statutory rule” so as to engage ss 33 and 34 of the *Interpretation Act*.

As was observed of a different form of “standards code” in a different legislative context, in *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 74 NSWLR 148 at 161 [68], the BCA appears always to have been something of a hybrid.

Whatever side of the line it might be thought to fall on for the purposes of the definitions of “instrument” and “statutory rule” in the *Interpretation Act*, the task for the court in these proceedings is to construe it as a formal document designed to define standards, for the promotion of public safety, in the construction of buildings. ...”

- 6 Ms Steele submits and I accept that, having regard to the BCA, the Building had to comply with the Performance Requirements (as defined), which could be established by compliance with the DtS Provisions or formulating an Alternative Solution (as defined) or a combination of those matters. The mechanism by which compliance with the BCA can be achieved through the DtS provisions or through an Alternative Solution, or a combination of both, was in turn noted by Stevenson J in *Owners – Strata Plan No 74602 v Brookfield Australia Investment Ltd* [2015] NSWSC 1916 (“*Brookfield*”) at [462]. Ms Steele also submits, and I accept, that the *Environmental Planning and Assessment Act* 1979 (NSW) (“*EPA Act*”) and associated regulations gave legal effect to the BCA, and that the requirement in s 18B(1) of the *HBA* that work be done in accordance and compliance with the *HBA* and “any other law” extended to the BCA: *Taylor Construction Group Pty Ltd v Strata Plan 92888* [2021] NSWSC 1315 at [33].

- 7 The Introduction to the BCA as it stood in 2013 in turn stated that it is a uniform set of technical provisions for the design and construction of buildings and other structures throughout Australia, and Part A0 outlined its structure, introducing the concepts of Building Solutions, Performance Requirements, Objectives and Functional Statements and Alternative Solutions. Part A0 cl A0.4 noted that a Building Solution (as defined) would comply with the BCA if it satisfied the Performance Requirements (as defined) and cl A0.5 explained that compliance with the Performance Requirements could be achieved by complying with the DtS provisions or formulating an Alternative Solution (as defined) which complies with the Performance Requirements or is shown to be equivalent to the DtS provisions, or is a combination of the two. Part A0 cl A0.8 refers to the manner in which an Alternative Solution must be assessed and cl A0.9 identifies relevant assessment methods. The term “Combustible” is defined, in Part A1 of the BCA, in relation to a material, as combustible as determined by AS1530.1-1994 (“AS1530.1”) and, as applied to construction or part of a building, as constructed wholly or in part of combustible materials. The term “Non-Combustible” is there defined, as applied to a material, as not deemed combustible as determined by AS1530.1, and the definition for construction or part of a building has a corresponding character.
- 8 Section C in turn sets out requirements as to fire resistance and several Performance Requirements in respect of fire resistance. Part C1 specifies the type of construction which is required in buildings of various kinds. Specification C1.1 cl 2.4 provides that Attachments (as defined) are not to impair fire resistance, and refers to the circumstances in which a combustible material could be used as a finish or lining to a wall or roof or other attachment to a building. It also provides that the attachment of a facing or finish to a part of a building required to have a FRL (as defined) must not impact the required FRL of that part. Specification C1.1 cl 3.1 provides that, in a building (such as the Building) which is required to be of Type A construction, external walls must be Non-Combustible (as defined) and also refers to fire resistance requirements in respect of building elements, which are not applicable where the distance from a fire-source feature (as defined) is 3 metres or more in respect of non-load bearing parts.

## **The report of the parties' single expert**

- 9 The parties tendered a report of their single expert, Mr McDaid (Ex J1), which referred to the letter dated 18 May 2016 from Fire & Rescue New South Wales ("FRNSW"), in respect of the application for an occupation certificate for the Building, which noted that:

"It was found during the inspection that the external façade separating the balconies of the units are constructed with aluminium composite panels (ACP's) fixed directly to the framework. In light of the worldwide spate of fires involving ACPs burning rapidly to the roof of multi-storey buildings, FRNSW recommended that: any ACPs utilised on external walls be certified compliant with an internationally recognised fire protection listing for full scale façade tests. FRNSW deem that full scale façade tests are the appropriate method to test the suitability of a complete façade assembly, and that intermediate or small scale tests should be considered as supporting evidence only to the full-scale tests."

- 10 It is not apparent from the evidence whether such full scale façade tests were done at that time and Mr McDaid noted that a response to FRNSW's letter was not provided to him. Mr McDaid addressed the requirements of the BCA in the period from 2015 to 2017, which were ultimately not a matter for expert evidence but a matter for the Court, and the requirements of the BCA as at the date of his report, which would only have been relevant had the Owners Corporation established the basis for the relief it sought. Mr McDaid referred to a report dated 25 March 2019 of AE&D Group (to which I refer below) and a report dated 25 February 2019 of UQ Materials Performance/Acor Consulting which concluded that the core of the ACP cladding contained predominantly between 35% and 40% polyethylene, and expressed his agreement with that conclusion. That is now common ground between the parties. Mr McDaid also noted ([4.11]) that he had been provided with an NFPA 285 test report on a product "Vitrabond" with no correspondence to indicate whether that was the product used at the Building and whether it was installed in accordance with manufacturers' specifications for the application. That was one of several occasions on which documents were relied on at this hearing without it being apparent whether they related to the product that is in issue. Mr McDaid also referred to the manner in which an NFPA 285 test is used to evaluate fire propagation characteristics of exterior non-load-bearing wall assemblies and panels, and noted that the NFPA 285 test indicated that the particular

“Vitrabond” product, which may or may not have been the product used on the Building, passed the requirements of that test.

- 11 Mr McDaid also noted that there was no Australian test standard on ACP cladding at the time of the development approval, construction certificate or occupation certificate for the Building. He noted the composition of the ACP samples, and he indicated that he was not aware of any “internationally recognised test that could demonstrate that this ACP could be certified as compliant based on a full-scale test of such ACP cladding”. While I admitted that evidence, Mr McDaid did not there identify the assumed facts or reasoning process that lead him to that view and it does not address whether the Vitrabond FR cladding is, in fact, combustible and, if so, to what extent and with what speed. Mr McDaid also expressed the view that the ACP cladding installed on the external walls did not comply with the BCA, if it formed part of the external wall, and may have complied with those requirements if it formed part of an Attachment (as defined) to the external wall. Those parts of the ACPs on the external walls are part of the external walls, for the purposes of the BCA, where it is common ground that they perform a waterproofing function; and other parts of the ACPs in the ground floor area are an Attachment (as defined) to the external walls. Mr McDaid also addressed the question whether the cladding installed on the external walls complied with the BCA as it now stands, but it is not necessary to determine that question.
- 12 Mr McDaid recommended that the ACP cladding be removed and replaced with a product that had been tested and attained a “non-combustible” criteria against AS1530.1 or had been deemed non-combustible in accordance with the DtS provisions of the BCA. That appears, on its face, to be a sensible recommendation, although the Owners Corporation does not appear to have implemented it in the nearly two and a half years since it was made on 10 February 2020. The desirability of that course does not, in itself, establish any liability on the part of the Defendants.
- 13 The parties also tendered further questions which they had raised with Mr McDaid (Ex J1A), aspects of which related to matters other than those in issue in the separate questions. Mr McDaid there confirmed that, although the term



“ACP” was not a defined term under the National Construction Code (“NCC”), that term was commonly understood as describing cladding generally comprising at least three main layers, being an inner and outer layer typically made of aluminium and a central layer or core, and that Vitrabond FR met the general industry understanding of an ACP. He accepted that, in order to know whether that cladding complied with the relevant provisions of the BCA and the NCC, it was first necessary to determine whether it comprised part of the external wall or was an Attachment to it. He expressed the view that the cladding would be considered to be part of the external wall, which was required to be non-combustible, if it performed any part or function of an external wall, including a waterproofing function, and it is common ground that the cladding here performs a waterproofing function. He also expressed the view that information provided with reference to Vitrabond FR and NFPA 285 test report, when assessed against Specification C1.1 cl 2.4 of the BCA, to the extent that the cladding was an Attachment, would have been deemed by many fire engineers at the relevant time as evidence that would satisfy the relevant Performance Requirements under the BCA. That assumed that the relevant information related to the Vitrabond FR product which was used on the Building.

- 14 The parties also relied on several joint reports of Mr Stephen Bolt dated 27 October 2020 (Ex J2), 26 April 2021 (Ex J3) and 17 June 2022 (Ex J4) as to rectification costs, which it is not necessary to address given the conclusion which I reach below.

#### **The evidence led by the Owners Corporation**

- 15 The Owners Corporation read the affidavit of their solicitor, Ms Linda Holland, dated 14 June 2022 which referred to the letter from FRNSW and noted that the Owners Corporation had served a notice to produce for inspection requiring the production of any documents forming an Alternate Solution under the BCA in respect of the external cladding, and had been advised that there were no documents to be produced. I refer to a second affidavit of Ms Holland below.
- 16 The Owners Corporation also relied, with leave, on a separate expert report dated 11 February 2022 of Mr Allan Harriman (Ex P1). Mr Harriman there

expressed the view, and I accept, that the east, south and west elevations of the Building contained ACP cladding as part of the external wall; that the north and west elevations at ground floor level had ACP cladding as a soffit lining to the awnings, which was an Attachment to a building element for the purposes of the BCA; and the northern elevation for levels 1-4 also had ACP cladding to the external columns of the balconies which was also an Attachment for that purpose.

- 17 Mr Harriman expressed the view that the ACP cladding did not comply with the DtS provisions of the BCA, and that is now common ground between the parties, although Mr Harriman had based that opinion on the incorrect premise that a test certificate from CSIRO (Annexure D to his report) (“CSIRO test”) had indicated that Vitrabond FR was combustible when tested in accordance with AS1530.1. That premise was incorrect because that test certificate referred to an unidentified Vitrabond product rather than Vitrabond FR, and Mr Harriman now accepts (as I note below) in his supplementary report that that test likely related to a different Vitrabond product. Mr Harriman’s error as to that test certificate affected substantial parts of his first report since, obviously enough, he had readily found that Vitrabond FR was not compliant with the BCA, at least in external walls, where he had wrongly assumed it had been shown to be “Combustible” (as defined) under the CSIRO test. That was not the case, although I will refer to another possible basis for that conclusion below.
- 18 Mr Harriman expressed the view, in his first report (Ex P1 [8.3.14]) that Specification C1.1 cl 3.1 of the BCA (dealing with fire resistance of building elements including external walls) imposed a higher standard of performance than Specification C1.1 cl 2.4 (dealing with Attachments) and overrode the latter clause for wall linings in Type A constructions. As Mr Harriman fairly recognised in his concurrent evidence, nothing turns on that proposition where, to the extent that the ACP cladding here constitutes part of a wall, then it is subject to the requirement under Specification C1.1 cl 3.1 that relate to external walls; and the other parts of the cladding, which the experts agree are Attachments, would not be subject to that clause in any event. Mr Harriman also made an observation in his first report that the joints in respect of cladding was filled with silicon and that he was unaware whether that silicon had been

tested and had passed an AS1530.1 test. He acknowledged in that report and in concurrent evidence that this was the usual method of installation of cladding, and the unanswered question whether the silicon had passed an AS1530.1 test does not advance matters where the Owners Corporation did not seek to establish that it had not or would not.

- 19 Mr Harriman also there addressed the mechanism for identifying Alternative Solutions under the BCA, as it stood at the relevant time, and correctly noted that that could be achieved by methods including one or more of the means to establish suitability outlined in Part A2.2 of the BCA; verification methods within the BCA; comparison to the DtS provisions in the BCA; and expert judgment. He noted that expert judgment is usually used in combination with other assessment methods, although the BCA did not appear to require that to occur. Mr Harriman noted that the development of an Alternative Solution would, in respect of the ACP cladding, require an assessment of several Performance Requirements of Section C of the BCA including CP2 (fire spread); CP4 (tenable conditions in a fire); CP8 (protection of penetrations); and CP9 (fire brigade access). He addressed the contents of those Performance Requirements in assessing the cladding against the DtS provisions of the BCA, and expressed the view that it would not satisfy those requirements, because Vitrabond FR had been tested and found to be combustible; however, as I have pointed out above, he now accepts that the CSIRO test likely did not relate to Vitrabond FR, although I will again refer to another possible basis for that conclusion below.
- 20 Mr Harriman also noted that at least part of the ACP cladding was located adjacent to or above exits from the Building, and he expressed a view that the cladding would have the result that the exits were unusable, based on an assumption as to the combustible nature of the FR core which, as I have noted above, also reflected his assumption that Vitrabond FR had been found to be combustible under the CSIRO test. He also expressed a view as to the risk of fire spread by the façade, but that depended upon the same assumption. He expressed the view that, if the cladding is combustible, there would be a risk of fire spread by the façade; however, that conclusion depended on its premise,

that the cladding was combustible, which would ordinarily be established (or not) by an appropriate test of its combustibility, which has not taken place.

- 21 Mr Harriman also addressed whether an Alternative Solution under the BCA would have been available, at the relevant time, but his reasoning was again affected by his assumption that the Vitrabond FR cladding was combustible (Ex P1 [10.1.7]). He identified the matters which were relevant to assessments to Performance Requirements CP2, CP4, CP8 and CP9, and observed that the fire load, fire intensity and fire hazard could not be determined without undertaking additional laboratory testing of the material. He also identified, in concurrent evidence, the manner in which such testing could be undertaken by a cone calorimeter test so as to determine those matters. Where the Owners Corporation and the Defendants have not undertaken such testing, it is simply unknown what the result of it would have been, whether in 2013 or today. Mr Harriman again noted the risk of spread fire through the cavities, although it is also not possible to separate his reasoning in that respect from his assumption that the Vitrabond FR cladding was combustible under the CSIRO test; he noted that the common solution for that risk is the installation of cavity barriers, but questioned their availability in 2013; and questioned the implications that could be drawn from the NFPA 285 test report to which I referred above.
- 22 Mr Harriman was asked the important question in concurrent oral evidence as to whether, if an Alternative Solution had been formulated, the ACP cladding as installed would have been capable of meeting the Performance Requirements of the BCA. He noted that an Alternative Solution could have been carried out in 2013, which he clarified in concurrent evidence was merely a reference to the availability of that option, but he considered that information was not available to allow a comprehensive Alternative Solution to be undertaken. The difficulties with that answer are, first, that one would ordinarily expect that, if information was not then available, then attempts would be made to obtain it, including, for example, undertaking the cone calorimeter test of Vitrabond FR to make an assessment of its fire load, fire hazard and fire intensity, as Mr Harriman indicated could have been done in his concurrent evidence, so as to obtain the information which Mr Harriman had noted was not then available. Second, if the result of undertaking an Alternative Solution is not known,

because the relevant tests were not performed at the relevant time or in leading evidence for this hearing, then it is also not known whether the ACP cladding could have complied with the BCA at the relevant time, had that Alternative Solution been undertaken. I recognise that Mr Harriman also identified other difficulties in developing an Alternative Solution, including the absence of commercially available cavity barriers at the relevant time and the question of the application of the NFPA 285 test to the Building, to which I referred above, but his evidence did not extend beyond identification of issues to be addressed in that process to establish that it could not be done.

- 23 In addressing the position under the current BCA, which is not an issue that I need to determine, Mr Harriman referred to a manufacturer's publication that indicated that Vitrabond FR was tested under AS5113 and did not meet an aspect of the criteria for fire resistance (as distinct from combustibility) under that standard, relating to total debris and flaming debris, although it also stated that flame spread and temperatures were well below the AS5113 requirements. That publication went on to observe that:

*"Given the lack of flame propagation in extensive large scale testing, Vitrabond VR can generally be used on a performance basis to meet fire resistance and building safety requirements. However, for an aluminium composite panel appropriate for use where non-combustible material is required, see Fairview's Vitracore G2 deemed non-combustible 4mm composite panel by Fairview, tested to AS1530.1."* [emphasis added]

- 24 The proposition that Vitrabond FR did not meet the fire resistance standard under AS5113 does not itself establish the Owners Corporation's claims, because I accept Mr Tatian's evidence that the ACP cladding would not be required to meet that standard given its location. Ms Steele sought to read that document as going further to demonstrate the unsuitability of Vitrabond FR for use as cladding. That document does not demonstrate that matter, not least because it makes an affirmative statement that Vitrabond FR *can* generally be used on a "performance basis" to meet fire resistance *and building safety* requirements. While it implied either that Vitrabond FR (as distinct from Vitracore G2) had not then been tested to or that it had had not then passed the AS1530.1 test, that had the consequence only that it could not meet the DtS requirements under the BCA as distinct from the performance-based requirements under an Alternative Solution under the BCA.

- 25 Mr Harriman also expressed, in his first report, a reservation as to the operation of the sprinkler system in the Building as a reason why an Alternative Solution might not be available, apparently based on flow information specifications for the sprinkler system that he observed were posted in the sprinkler pump room in the Building. There is no indication that he or the Owners Corporation have investigated that matter further, and that simply raises another unresolved question, rather than establishing that the sprinkler system is not adequate or that an Alternative Solution was or is not available on that basis. Mr Harriman then responded to the report of Mr Tatian led by the Defendants, again placing significant weight upon the incorrect assumption that Vitrabond FR had been found to be combustible under the CSIRO test. Mr Harriman also referred to the withdrawal of a CodeMark certificate for Vitrabond FR in February 2019, although it is not apparent that that is relevant, where it took place well after the Building was constructed.
- 26 By a second report dated 20 June 2022 (Ex P2), led shortly before the commencement of the hearing, Mr Harriman acknowledged that the CSIRO test was *unlikely* to refer to Vitrabond FR, not only because it referred to an unidentified Vitrabond product rather than to Vitrabond FR but also because the weight per square metre for the product tested by the CSIRO did not correspond to the weight per square metre of Vitrabond FR, and that he did not rely on CSIRO test as part of his evidence. The difficulty with that proposition is, of course, that Mr Harriman *did* rely on that test for essential parts of his first report, as I noted above, and a bare statement to the contrary did not displace that fact. Mr Harriman also repeated his earlier reference to a report dealing with the fire resistance of the Vitrabond FR product, but I noted above that I am not satisfied that the fire resistance requirements under the BCA are applicable to the ACP cladding used on the Building, having regard to Mr Tatian's evidence as to that matter.
- 27 The Owners Corporation also tendered, and heavily relied on, a brochure (Ex P3) published by manufacturer of Vitrabond FR at some time after 2019 ("2019 publication"); the date of that document is known because it refers to the 2019 NCC (Ex P3). The 2019 publication pointed (at page 1) to the availability of a Performance Solution (which I take to refer to an Alternative Solution) under

the BCA for the “FR” type of ACP cladding in a building required to be of Type A construction, such as the Building, rather than excluding that possibility; noted (at page 3) that “FR” products were combustible as they did not pass the AS1530.1 test, but went on to observe that “they can be considered not to spread fire if installed in the right configuration and can be fire-engineered based on their full-scale performance (Performance Solution)”; and observed (at page 4) that FR panels can be used in Type A construction “only if there is a full fire engineering report provided by a quality engineer, based on full-scale testing”.

- 28 The Owners Corporation relied on the 2019 publication to seek to establish that Vitrabond FR was combustible under an AS1530.1 test and unsuitable for use in the Building. I cannot reach that conclusion. First, and most importantly, I cannot reasonably treat the reference to not passing an AS1530.1 test as indicating *the fact* of combustibility of the bonded Vitrabond FR panels installed at the Building, where the additional inquiries recorded in Ms Holland’s second affidavit (to which I refer below) indicate the AS1530.1 test was not properly applicable to those bonded panels, as distinct from their separate component parts. There is plainly an available reading of the 2019 publication that it indicated no more than that the Vitrabond FR ACPs did not and could not pass that test where it was not applicable to them in their bonded form. Second, there is no evidence that the composition of Vitrabond FR was constant between 2016-2017 when it was installed in the Building and 2019 or later when that publication was issued. Mr Harriman, who was asked about that matter in concurrent evidence, fairly accepted that he did not know whether the composition of the product had remained the same in that period. That document did not otherwise demonstrate unsuitability of the product for use in a building required to be of Type A construction, as distinct from the need for any use to be based on a Performance Solution or Alternative Solution.
- 29 The Owners Corporation also tendered correspondence with FRNSW in relation to the occupation certificate for the Building (Ex P4, P6-P8) which provided context for the letter from FRNSW to which I referred above. That correspondence also indicated that a fire safety engineer had assessed Alternative Solutions under the BCA in respect of some aspects of the fire

safety of the Building, by reference to a performance-based fire safety engineering approach as an alternative to the DtS provisions of the BCA, although it had done so on the assumption that the design complied with current DtS provisions of the BCA other than in respect of those Alternative Solutions. As I noted above, it is now common ground between the parties that the Vitrabond FR cladding does not comply with the DtS requirements of the BCA. The Alternative Solutions that were addressed appeared to involve consideration of the adequacy of the sprinkler system, but I do not consider it necessary to speculate as to that question, as both parties sought to do in submissions, where there is no proper evidentiary basis for that speculation.

- 30 The Owners Corporation also tendered the architectural plans for the Building (Ex P5), although no reference was made to them in the course of the hearing. The Owners Corporation also tendered a façade compliance assessment report dated 25 March 2019 prepared by AE&D Group (Ex P9) which referred to the composition of the ACP cladding and expressed the view that, where the ACPs had a core percentage of greater than 30% polyethylene, as is the case here where the core contains between 35 and 40% polyethylene, then that constituted a non-compliance with the BCA's requirement that all external walls be non-combustible, and a non-compliance with Specification C1.1 cl 2.4(a) and cl 3.1(b) which relate respectively to Attachments and external walls in a building required to be of Type A construction. That report recommended the removal of the relevant panels and their replacement with a product deemed non-combustible in accordance with AS1530.1. The conclusion in that report that the ACPs were "combustible" was based upon the extent of polyethylene contained in them, and did not reflect any test of their performance under AS1530.1 or otherwise. It provides little assistance in determining the extent of such combustibility, where Mr Tatian provided a convincing explanation why it is not possible to deduce combustibility from the component parts of a composite product in concurrent evidence. That report also did not address the availability or otherwise of a performance-based solution or Alternative Solution under the BCA.
- 31 The Owners Corporation also tendered a bundle of correspondence (Ex P10) between the Owners Corporation and the City of Parramatta Council, which



establishes that the Council made an inquiry, in 2019, as to the status of the ACP cladding on the Building, to which the Owners Corporation responded by referring to the existence of these proceedings, discussions with JKN and Toplace and steps which they have taken to minimise fire risks at the premises. I do not doubt that there is good reason for FRNSW, the City of Parramatta Council and the Owners Corporation to be concerned as to the extent of the combustibility of the ACPs but the existence of concerns is not determinative of the proceedings.

32 After I had reserved judgment, the Owners Corporation sought, and on 7 July 2022 I granted, leave to reopen their case to read a second an affidavit dated 6 July 2022 of their solicitor, Ms Holland. That affidavit was directed, in part, to explaining why the Owners had not led evidence of a test of the combustibility of the Vitrabond FR cladding under AS1530.1, and went further to explain the likelihood that such a test was not applicable to that composite product, as distinct from its separate component parts. Ms Holland referred to Mr Harriman's evidence, in his first report, that he was aware of a test of Vitrabond FR under AS1530.1, where it was deemed combustible, which was a reference to the CSIRO test to which I referred above. She recognised that Mr Tatian's report had then expressed doubt whether the CSIRO test related to Vitrabond FR, referred to subsequent conferences with Counsel recognising the potential need to correct Mr Harriman's evidence, and to Mr Harriman's supplementary report which accepted that it was unlikely that the CSIRO test had referred to Vitrabond FR. She also referred to documents produced on subpoena, including a subpoena to CSIRO in respect of the CSIRO test, and to Mr Harriman's subsequent advice that he could not be sure that the product tested was Vitrabond FR, from the description and weight information provided by CSIRO.

33 Ms Holland also referred to inquiries she had made, after the completion of the hearing, to seek to arrange testing of Vitrabond FR panels from the Building to determine whether they complied with AS1530.1. She referred to communications with the CSIRO which had advised that it did not undertake testing for "dispute resolution" purposes, but had also pointed out that cl 1.4 of AS1530.1 stated that the test method was *not applicable* to products which

were coated, faced or laminated, and an AS1530.1 test could only be carried out separately on the individual materials from which the product was formed. I pause to note the likely lack of utility of a test of component parts of the ACPs, where Mr Tatian's evidence (which I address below) had emphasised the significance of the interaction with fire retardant materials in the bonded panels. Ms Holland also referred to CSIRO's advice that, if a sample was to be taken from the Building, the ACPs would need to be removed then delaminated to separate the material layers and each of those material layers would need to be prepared for testing, and CSIRO had also pointed to the difficulty of delaminating that type of ACP to produce samples for tests, so that ordinarily a manufacturer would instead provide such samples from the raw materials that are used to form the panels. Ms Holland also referred to a further inquiry, with another laboratory, which also emphasised the difficulty of testing material for combustibility under AS1530.1 after it had been bonded, and pointed to the need to take at least 250 samples from different panels to be properly representative. That laboratory had identified the possibility of testing that was analogous to but not strictly compliant with AS1530.1 but the Owners Corporation did not pursue that possibility.

- 34 I accept that Ms Holland's evidence provides a comprehensive explanation of why the Vitrabond FR panels on the Building have not been tested for combustibility under AS1530.1, and the likely lack of utility in performing that test of their component parts. However, the fact remains that the evidence of combustibility of the ACP cladding on the Building (whether tested under AS1530.1 on any other basis) was not led by the Owners Corporation and I have explained above why I cannot draw an inference of combustibility from the 2019 publication. The Court is still no better informed by evidence as to the critical question, which is ultimately not whether the panels were combustible for the purposes of an AS1530.1 test, even if they could properly have been tested using that test, but the extent of any risk that fire would spread across the exterior of the building or adversely impact its exits by reason of the use of the ACP cladding in the Building.

## **The evidence led by the Defendants**

- 35 The Defendants in turn rely on a report dated 26 April 2021 of Mr Tatian (Ex D1) which expresses the view, now common ground between the parties, that the ACP cladding installed on the Building was Vitrabond FR. Mr Tatian there expressed the view that that cladding operated in the same manner, from a fire safety performance standpoint in relation to fire spread, as an Attachment within the scope of Specification C1.1 cl 2.4 of the BCA (Ex D1 [54]). I accept that that observation raises the possibility of a degree of artificiality in treating the cladding differently, depending upon whether it is characterised as a wall under the BCA because it has a waterproofing function, which has no apparent connection with its fire safety performance, or as an Attachment where it did not have that function. However, the difference between the two approaches has no impact on the conclusions that I reach below.
- 36 Mr Tatian noted that the Performance Requirements in the BCA can be met by either demonstrating compliance with the DtS provisions in the BCA or by formulating an “Alternative Solution” which complied with the Performance Requirements or is shown to be at least equivalent to the DtS provisions or a combination of both (Ex D1 [18]); he outlined the evidence which may be relied on when determining compliance with a Performance Requirement or a DtS provision, and notes that this will commonly include documentation such as CodeMark certificates of conformity or NFPA 285 test reports. He also points out that the BCA permits an expert with relevant qualifications and experience to make a judgment in determining compliance with the Performance Requirements of the BCA, although he expresses the view that resort to expert judgment in this context is not common.
- 37 Mr Tatian in turn describes the operation of the terms “Combustible” and “Non-Combustible” in the BCA, to which I have referred above, by reference to the requirements of AS 1530.1. Mr Tatian agrees with the view that the ACP cladding forms part of the external wall for the purposes of the BCA, although I read that opinion as having the same exclusion as to the ACP cladding at the ground floor as Mr Harriman’s report. He indicates that he also cannot conclude that the ACP cladding as installed complies with the DtS requirements of the BCA as he was not provided with an AS1530.1 test for that

cladding demonstrating that it had been deemed as Non-Combustible within the meaning of the BCA. Mr Tatian also indicated the steps which, in his view, would demonstrate compliance with Performance Requirements CP1 and CP2 and that the as built Building complied with the BCA which relied, relevantly, on the fact that non-load bearing external walls of the Building were located more than 3 metres from any fire-source feature; the Building was provided with an AS2118.1-1999 sprinkler system and certain fire resistance requirements were not applicable on that basis; the as-built external wall construction will not compromise the structural stability of load-bearing elements during a fire; and the ACP cladding would not expected adversely to contribute to the fuel load during a fire. I am not persuaded that I could give substantial weight to Mr Tatian's evidence in that regard, which also involves a degree of speculation to steps which were not taken to develop a full Alternative Solution, had it been necessary for the Defendants affirmatively to establish compliance with the Alternative Solution path under the BCA. It is not necessary for them to do so, where the Owners Corporation has not established, in their affirmative case, that an Alternative Solution was not available at the relevant time so or is not available now as to support the relief they seek.

38 By a supplementary report dated 13 April 2022 (X D2), Mr Tatian pointed to the difficulty with Mr Harriman's reliance, since abandoned, upon the CSIRO test and responded to other aspects of Mr Harriman's report, and maintained his opinion noted above.

39 The Defendants also tendered the interim occupation certificate for the Building (Ex D3), the final occupation certificate (Ex D4) and the BCA in its 2013 version (Ex D5), which both parties accept is the relevant version.

### **Concurrent expert evidence**

40 Mr Harriman and Mr Tatian were also examined by Counsel, at considerable length, in concurrent evidence. It was perhaps not surprising that that examination was disordered in parts, where they had not participated in a joint expert conference or prepared a joint expert report before giving concurrent evidence; and its utility was undermined by the fact that both experts made

unprovable, or at least unproved, factual assumptions in giving their concurrent evidence.

- 41 Mr Harriman there referred to the risk that a fire in the ACP cladding could vent to the cavity, as well as to the atmosphere, and pointed to the risk where smoke and gases travelled to multiple levels and multiple units in the Building and could reignite when exposed to oxygen (T55). I do not underrate the risk of those matters. However, that that risk depended upon the extent to which the ACP cladding was combustible, which in turn depended on the interaction of its polyethylene component and fire retardant components in a fire. As I noted above, Mr Harriman initially relied on the CSIRO test which he understood to establish that Vitrabond FR was combustible, which he now accepts did not relate to that product. For the reasons noted above, I cannot find that that the 2019 publication establishes that matter. Mr Tatian pointed, in concurrent evidence, to the significance of the fact that the rate of any combustion of Vitrabond FR is not known, and also pointed to the importance of the interaction between its polyethylene component, which is combustible, and the fire retardant elements which would produce an inert compound and water vapour in a fire that would retard combustion, in determining that question. That matter was not addressed by an AS1530.1 test or by the cone calorimeter test of the combustibility of the ACP cladding to which Mr Harriman referred in concurrent evidence, as I noted above.
- 42 Mr Harriman also referred in concurrent evidence (T74) to the NFPA 285 test as an indication that the product was combusting; however, that did not indicate the rate of such combustion, and I referred above to the evidence that the product passed that test. Mr Harriman also referred to his knowledge of the composition of the Vitrabond FR product as between 2013 and 2016 (T79); he observed (T81) that the product had generally not been installed on buildings since about 2016 and was still manufactured and used for signage rather than building cladding; and that he could not say what the composition of the product was in 2019 or later, when the 2019 publication was issued (T79).

**Question (a) – Whether the cladding installed on the building complies with the DtS provisions of the BCA**

- 43 The parties are agreed, and I accept, that the answer to this question is no, because no test result under AS1530.1 was or is available to establish that the Vitrabond FR ACP cladding is not Combustible (as defined) for the purposes of the BCA.
- 44 For completeness, I should also refer to the Owners Corporation's pleaded case and address the wider issue as to whether the Owners Corporation has established that the ACP cladding is combustible, within the meaning of the BCA or in any general sense of that term, which will be relevant to the further questions to be addressed below. The Owners Corporation contended (ATCLS [27A]) that the ACPs specified to be installed on cladding of the external walls of the Building were "Alucobond". By their Technology and Construction List Response dated 10 May 2019 ("TCLR"), JKN and Toplace responded that the ACPs that were installed on the external walls of the Building were Vitrabond FR rather than Alucobond and that is now common ground. The Owners Corporation also contended (ATCLS [27B]) that the ACP cladding installed on those external walls has a core percentage of greater than 30% polyethylene, being between 35% and 40%, and that it is now (as distinct from at the time when the Building was constructed) a banned product under the *BPSA*. The Defendants respond that, if the ACP cladding did not pass the test under AS1530.1 for building materials, components and structures or the test under AS5113 for fire propagation, the Building was made safe for the purposes of the *BPSA* by their use in conjunction with other fire safety measures in the Building. The separate questions ultimately did not raise any issue as to the application of the *BPSA*, which the parties accept does not itself any liability on the Defendants.
- 45 In addressing the question whether the ACP cladding installed on the building complies with the DtS provisions of the BCA, Ms Steele pointed to the definitions of "Combustible" and "Non-Combustible" in cl A1.1 of the BCA, to which I referred above. Ms Steele submitted, in closing submissions, that the 2019 publication indicated that Vitrabond FR had been tested and deemed combustible pursuant to the AS1530.1 test. For the reasons noted above, I

cannot find that that the 2019 publication establishes that matter. Ms Steele in turn points out, and I accept, that cl 3.1(b) of Specification C1.1 of the BCA required external walls, in a building required to be of Type A construction, to be Non-Combustible, again defined in the manner which I have noted above; she points out that both Mr Harriman and Mr Tatian agree, and I accept, that the large part of the cladding forms part of the external walls of the Building; however, even if the combustibility of Vitrabond FR had been established by the 2019 publication, that would leave open the possibility of an Alternative Solution to address that risk.

46 Ms Steele also refers to the less exacting standard in respect of Attachments, in applying the DtS Provisions under the BCA, under cl 2.4(a) of Specification C1.1 of the BCA. Those provisions involve an inquiry as to whether the Attachments, including the material used near the ground floor entrance, would make the exits unusable in a fire or would constitute an “undue risk of fire spread via the façade of the building”. Ms Steele relies on Mr Harriman’s view that the exits are “likely” to be unusable in the event of a fire involving the ACP cladding, as that cladding is immediately above the exits. That view was expressed in his first report, based on the incorrect assumption that the CSIRO test had established that Vitrabond FR was combustible; is not established by the 2019 publication; and it seems to me that I can give it little weight without evidence as to the rate of that combustibility and the other design aspects of the exits to which I referred above. If it had been established by an AS1530.1 test or the 2019 publication or otherwise that the Vitrabond FR ACPs were combustible, that would have raised a risk that it could make the exits unusable, or give rise to an undue risk of fire spread. However, that risk has not established and could not in any event be quantified without evidence as to the rate of combustibility of the kind that a cone calorimeter test (to which Mr Harriman referred in concurrent evidence) might have established.

47 As I noted above, Mr Harriman also expresses an opinion as to the effect of the use of silicon between the joints of the Vitrabond FR cores, on the premise that the silicon is combustible; but that premise is also not established, where his evidence was that he was not aware of any test of the silicon’s combustibility. Ms Steele also refers to the events involved in the Grenfell fire in London and

the Lacrosse Tower fire in Melbourne, but little can be drawn from those events, where the experts' concurrent evidence was that the cladding used in those buildings was made *wholly* of polyethylene, by contrast with the Vitrabond FR which includes a substantial proportion of fire retardant material.

**Question (b) – Is the cladding otherwise compliant with the BCA by way of Alternative Solution under the BCA**

- 48 The second question identified by the parties is that, if the answer to the first question is no, is the cladding otherwise compliant with the BCA by way of Alternative Solution under the BCA? The strict answer to this question is “no”, because an Alternative Solution under the BCA was not prepared prior to the issue of a construction certificate for the Building and has not been prepared now. However, that strict answer would not assist the Owners Corporation in obtaining substantive relief, since the Court would plainly be less likely to order damages in excess of \$5 million on the basis that removal and replacement of the existing ACP cladding was reasonable, if that existing cladding would comply with the BCA if an Alternative Solution was now prepared. For that reason, Ms Steele rightly noted in opening that the Owners Corporation sought to establish that an Alternative Solution could not be prepared to satisfy the BCA requirements.
- 49 Ms Steele submits that, for the Building to comply with the BCA by way of an Alternative Solution, that Alternative Solution would have to demonstrate compliance with the relevant Performance Requirements under the BCA. Ms Steele challenges Mr Tatian's approach to an Alternative Solution in his first report (Ex D1 [61]) on the basis that it had regard only to Performance Requirements CP1 and CP2 and submits that the reasoning adopted in Mr Tatian's opinion is inadequate. I give little weight to the first criticism where the several Performance Requirements overlap and were addressed in Mr Harriman's and Mr Tatian's concurrent evidence. I accept that Mr Tatian's opinion plainly does not amount to a full Alternative Solution, which neither he nor Mr Harriman was asked to prepare. Ms Steele submits that the Court should accept Mr Harriman's opinion as to why the an Alternative Solution “could not” be prepared in respect of the Building. With respect, Mr Harriman did not go that far in his first report, which pointed to further inquiries that would



need to be made and issues that would need to be addressed (including a difficulty as to the availability of cavity blocking products at the relevant time) in undertaking an Alternative Solution, and he retreated further from any such proposition in concurrent evidence, where he recognised that several of the information deficiencies to which he had referred could have been addressed had a cone calorimeter test been performed to assess the Combustibility of the ACP cladding. Ms Steele also refers to Mr Harriman's evidence that any Alternative Solution would have to be accepted by FRNSW. The Owners Corporation have not established that would not occur, and the Defendants have conversely not established that would occur, where neither seek to identify its content in any detail.

- 50 Mr Cheney, with whom Mr Pintos-Lopez appears for the Defendants, in turn relies on Mr Tatian's evidence to submit that the Building's compliance with the Performance Requirements in the BCA was capable of being demonstrated by means of an Alternative Solution. Mr Cheney relies on *Owners of Strata Plan 7688 v Walker Group Constructions Pty Ltd* [2016] NSWSC 541 at [44]-[46] and [66]-[67] for the proposition that, even if previously incorrectly certified, compliance with fire safety requirements in relation to a building can be achieved by the retrospective formulation of an Alternative Solution to produce conformity with the relevant contract and the BCA. Ms Steele seeks to distinguish that decision on the basis that both experts there agreed as to the availability of Alternative Solutions for the relevant defects, and on the basis that the defects were relatively minor. I do not consider those matters would prevent the later recognition of an Alternative Solution, if it would have been available at the relevant time.
- 51 In my view, the evidence as it stands does not establish that an Alternative Solution would not have been available, nor have the Defendants established the availability of any Alternative Solution had it been necessary for them to do so. I return below to the significance of that matter for the question of the remedy in this case.

**Question I – Whether the cladding is composed of material that is not good and suitable for the purpose for which the cladding is used**

- 52 The third question identified by the parties is whether the cladding is composed of material that is not good and suitable for the purpose for which the cladding is used. Relevantly, the Owners Corporation contended (ATCLS [27D]) that, in breach of the statutory warranties, and as a result of the installation of the ACPs, the residential building work included materials that were not good and suitable for the purpose for which they are used. They particularise that contention by reference to an allegation that the ACP cladding is combustible. The Defendants do not admit this allegation, and contend that the ACPs installed in conjunction with other fire safety features in the building were and remain good and suitable for the purpose for which they were used. The Owners Corporation here relies on the statutory warranties implied by s 18B of the *HBA* into “every contract to do residential building work” and particularly the statutory warranties under s18B(1)(b)-(c) and I. It is common ground that the statutory warranties were implied into the relevant construction contract and that Owners Corporation is entitled to the benefit of the statutory warranties against JKN and is entitled to the same rights as JKN in respect of the statutory warranties as against Toplace.
- 53 Ms Steele submits, and I accept, that compliance with the BCA is relevant, but not determinative, as to whether the materials used were “good and suitable for the purpose for which they [were] used” under s 18B(1)(b) of the HBA. Mr Cheney in turn referred, in both opening and closing submissions, to the absence of a challenge to the validity of the occupation certificate by the Owners Corporation. I give little weight to that matter where, as, the Appeal Panel of the NCAT observed in *Taylor Construction Group Pty Ltd v Strata Plan No 92888* [2020] NSWCA TAP 163 at [81], affirmed in *Taylor Construction Group Pty Ltd v Strata Plan 92888* [2021] NSWSC 1315, that an occupation certificate does not create an “irrebuttable presumption” that the relevant statutory warranties have been complied with, or preclude a claim that the Building does not comply with the BCA.
- 54 Ms Steele submits that the ACP cladding is “Combustible” within the meaning of the BCA, which, as I noted above, is defined as “combustible as determined

by AS1530.1". For the reasons noted above, that has not been established by an AS1530.1 test and I cannot find that that the 2019 publication establishes that matter. Ms Steele also contends that the ACP cladding is "combustible" in the way in which a fire safety expert would otherwise use that term, but it is not apparent to me that a fire safety expert would use that term, in this context, other than in accordance with the AS1530.1 standard and the meaning which it is given under the BCA, and there is no other evidence that the ACP cladding is combustible in any event, where neither a cone calorimeter or any other test of it has been performed. Ms Steele in turn submits that the Court should find that the ACP cladding was composed of material that was not good and suitable for the purpose for which it was used, because it was combustible, and gave rise to a real risk of fire spreading via the façade, through the cavity behind the cladding and into the windows of the apartment. I have explained why I cannot reach that finding in addressing the evidence above.

55 Ms Steele sought to develop an alternative contention that the ACP cladding was not good and suitable for its purpose, because it had a core consisting of 35-40% polyethylene, as is common ground; however, that submission begs the question of how that ACP cladding would perform in a fire, with its combination of a polyethylene component and a fire retardant component, which has not been established by the evidence. Ms Steele also relies, for the proposition that the cladding is composed of a material that is not good and suitable for the purpose for which it is used, on the contention that the cladding is now a banned product under the *BPSA*. I do not accept that it is possible to reason from the fact that the legislature subsequently bans a product that was previously permitted, to a conclusion that that product has never been good and suitable for the purpose for which it has been used. That proposition is untenable, because community standards may change and the legislature can properly be cautious in passing protective legislation and ban the use of a product notwithstanding that once was, and indeed may still be, suitable for its purpose, other than for the statutory prohibition on its use.

56 Mr Cheney responds that there is no evidence that the ACP cladding had been tested in accordance with AS1530.1 to show that it was "combustible" within the meaning of the BCA, and I have noted above Ms Holland's second affidavit

indicates that test was likely not applicable to the composite product as distinct from its component parts. Mr Cheney also points out that the fact that a product is “combustible” is not conclusive of its suitability, where combustible materials can be used in an Attachment to a building, or because their use can be supported under an Alternative Solution for the purposes of the BCA. Mr Cheney in turn submits that the *BPSA* did not operate retrospectively, and Ms Steele does not contend to the contrary. Mr Cheney also responded that the combustibility of the ACP cladding, even if established, would not establish a breach of the warranty of suitability for use, although he accepted that that would have meant that the dwelling was not reasonably fit for occupation as a dwelling. Had it been established that there was a real risk of fire spreading by the façade, through the cavity behind the cladding and into the windows of the apartments, then I would have found that this statutory warranty was breached.

- 57 I cannot find that the combustibility of Vitrabond FR has been established for the purposes of AS 1530.1 or otherwise, for the reasons noted above, and the evidence also does not adequately address the rate at which combustion would occur or the effect of the other design features of the Building, including the sprinkler system, which are the matters that would also have been relevant to the availability of an Alternative Solution under the *BPSA* at the relevant time.

**Question (d) – Whether the cladding resulted in a dwelling that is not reasonably fit for occupation as a dwelling**

- 58 The fourth question identified by the parties is whether the work of installing the cladding resulted, to the extent of that work, in a dwelling that is not reasonably fit for occupation as a dwelling. The Owners Corporation contended (ATCLS [27E]) that, in breach of the statutory warranties, as a result of the installation of the ACPs, the residential building work resulted in dwellings that are not reasonably fit for occupation as dwellings because they are combustible. The Defendants do not admit this allegation and contend that the ACP cladding installed on the Building, in conjunction with other fire safety features in the Building, resulted in dwellings that are reasonably fit for occupation as dwellings.

59 Ms Steele submits, and I accept, that compliance with the BCA is relevant, but not determinative, as to whether the work resulted in a “dwelling that [was] reasonably fit for occupation as a dwelling” under s 18B(1) of the *HBA*. I also accept that a breach of the latter statutory warranty would be established if it were established that the use of the ACP cladding in the Building gave rise to a real “danger to health” or “risk to life and limb”: *Owners Strata Plan 69230 v Kell & Rigby Holdings Pty Ltd* [2020] NSWSC 612 at [108]. Mr Cheney responds by pointing to the issue of the final occupation certificate in respect of the Building, and to its use by residents, commercial entities and the Owners Corporation for more than five years since the registration of the Strata Plan, and repeats the matters on which the Defendants rely in dealing with the allegation as to the suitability of the cladding for the purpose for which it has been used, which I have addressed above.

60 For the same reasons that the Owners Corporation has not established a breach of the statutory warranty addressed in question I, it has also not established this breach of the BCA or the relevant statutory warranties on the balance of probabilities, whether or not regard is had to the gravity of the allegation for the purposes of s 140 of the *Evidence Act*.

**Question I – Whether JKN and Toplace breached the statutory warranties**

61 The fifth question is whether JKN and Toplace breached the statutory warranties referred to above. The Owners Corporation has not established that matter for the reasons noted above.

**Question (f) – Whether the Owners Corporation has suffered loss**

62 The sixth question is whether, *if* the Defendants breached the statutory warranties, the Owners Corporation has suffered compensable loss by reason of such breach. The question does not arise since its premise is not established.

**Question (g) – How the loss is assessed**

63 The seventh question is whether, *if* the answer to the sixth question is yes, is the compensable loss assessed by reference to the reasonable cost of removing the ACP cladding and replacing it with cladding that conforms to the

requirements of the BCA as it now applies. That question also does not arise because its premise is also not established.

### **Question (h) – Liability to pay damages**

- 64 The eighth question is, *if* the answer to question (g) is yes, are JKN and Toplace liable to pay damages to the Owners Corporation for the cost of such rectification. The Owners Corporation contended (ATCLS [27F]) that, as a result of the contentions to which I have referred above, it is necessary for it to replace the ACP cladding installed on the Building with a product deemed to be non-combustible pursuant to AS1530.1 in order to rectify the breaches of the *HBA*, and that it has suffered and stands to suffer loss or damage, including the costs of rectifying the breaches. The Defendants also do not admit this allegation and contend that the Building has been made safe for the purposes of the *BPSA*.
- 65 Mr Cheney accepts that, where building works are defective in that they are not in conformity with contractual requirements, the Court will award damages by reference to the costs of rectification, where that rectification work is reasonable and necessary: *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617-618 ("*Bellgrove*"); *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253 at [43] (Giles JA, with whom McColl and Campbell JJA agreed); *Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd* (2017) 94 NSWLR 108 at [186]; see also *Ellis's Town House Pty Ltd v Botan Pty Ltd* [2017] NSWCA 20 at [25]-[44]. In *Brookfield* at [38]-[40], Stevenson J summarised the applicable principles as follows:
66. Assuming that each of loss and damage, breach and a relevant causal connection is established, *Bellgrove v Eldridge* is authority that the measure of damages for alleged defective work is the reasonable costs of rectification, and that:
- (a) the fundamental principle for damages is that the sum awarded should be such an amount as will put an injured party in the same position it would have been in if it had not sustained the injury or suffered the breach for which damages are claimed. As stated in *Robinson v Harman* (1848) 1 Exch 850 at 855; 154 ER 363 at 365, "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed";
- (b) in claims for building defects, the prima facie measure of damages is the "amount required to rectify the defects complained of and so give to [the

plaintiff] the equivalent of a building on [his or her] land which is substantially in accordance with the contract“ (at 617 per Dixon CJ, Webb and Taylor JJ);

(c) the qualification to that general principle is that “not only must the work undertaken be necessary to produce conformity [with the contract], but that also, it must be a reasonable course to adopt“ (at 618); and

(d) it is a question of fact in each case as to what (if any) remedial work is “necessary“ and “reasonable“.

In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8 ; 236 CLR 272, the High Court stated that the test of “unreasonableness“ is only to be satisfied “by fairly exceptional circumstances“, for example where the innocent party was “merely using a technical breach to secure an uncovenanted profit“ (at [17], citing Oliver J in *Radford v De Froberville* [1977] 1 WLR 1262).

Another circumstance in which “unreasonableness“ may be established is where the cost of the “proposed rectification is out of all proportion to the benefit to be obtained“ (*Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2006] NSWCA 361 at [82]–[88], citing *South Parklands Hockey & Tennis Centre Inc v Brown Falconer Group Pty Ltd* [2004] SASC 81 at 90; see also *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 per Macfarlan JA (with whom McColl and Basten JJA agreed) at [81]).”

66 I recognise that it may require “fairly exceptional circumstances” to establish that rectification work is unreasonable, as was found in *Bellgrove* at 618, where demolishing the walls of a house to replace new bricks with second-hand bricks was held to be “quite unreasonable” and to amount to “economic waste”; see also *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [17].

67 This question does not strictly arise here, again because its premise is not established. If it had arisen, it seems to me that the Owners Corporation could not establish that rectification works at substantial cost would be proportionate to any benefit to be obtained or are a reasonable course to adopt, where (1) the only breach of the BCA which the Owners Corporation established was the failure to perform an Alternative Solution at the relevant time; (2) the Owners Corporation has not established that an Alternative Solution could not then or now be performed; and (3) most importantly, the Owners Corporation has also not established that the ACP cladding is combustible to the AS1530.1 standard or otherwise or whether it would, in fact, perform adequately in a fire. In expressing that view, I put aside any need to undertake those rectification works by reason of later arising obligations under the *BPSA*, which does not in itself impose liability on the Defendants.

68 For completeness, I accept, having regard to the matters which I have found above, that it is plainly *possible* that the ACP cladding did not comply with the BCA when it was installed and that a breach of the statutory warranties *may* exist in that respect, and, had those matters been established, that might well have established that rectification was necessary and its costs reasonably incurred. Those matters might well have been proved by the Owners Corporation on the balance of probabilities, had the Owners Corporation undertaken a cone calorimeter combustibility test of the Vitrabond FR product, in the manner explained by Mr Harriman in concurrent evidence, so as to establish that the risk arising from any combustion of the cladding would outweigh the other design aspects of the Building including the sprinkler system. However, on the findings that I have reached above, the Owners Corporation has not established the relevant breach of the BCA or the statutory warranties on the balance of probabilities, whether or not regard is had to the gravity of the allegation for the purposes of s 140 of the *Evidence Act*, and has not established a consequential liability of the Defendants to pay damages.

**Question (i) – Quantum of damages**

69 The ninth question is, if the answer to question (h) is yes, is the quantum of damages the latest estimate of the parties' joint quantity surveyor, Mr Bolt. That question also does not arise where its premise is not established.

**Determination and orders**

70 For these reasons, I answer the separate questions as follows:

**Question (a) - Whether the cladding installed on the building complies with the DtS provisions of the BCA**

Answer - No, because no AS1530.1 test was or is available to establish that the Vitrabond FR ACP cladding is not Combustible (as defined) for the purposes of the BCA.

**Question (b) - Whether the cladding is otherwise compliant with the BCA by way of Alternative Solution under the BCA**



Answer – No, because an Alternative Solution under the BCA was not prepared prior to the issue of a construction certificate for the Building and has not been prepared now.

**Question (c) – Whether the cladding is composed of material that is not good and suitable for the purpose for which the cladding is used**

Answer – The Owners Corporation has not established this matter.

**Question (d) – Whether the cladding resulted in a dwelling that is not reasonably fit for occupation as a dwelling**

Answer – The Owners Corporation has not established this matter.

**Question (e) - Whether JKN and Toplace breached the statutory warranties**

Answer – The Owners Corporation has not established this matter.

**Question (f) - Whether the Owners Corporation has suffered loss**

This question does not arise.

**Question (g) – How the loss is assessed**

This question also does not arise.

**Question (h) – Liability to pay damages**

This question does not arise. If it had arisen, then a basis for compensation on the footing that the cladding should reasonably be replaced is also not established where the only breach of the BCA which the Owners Corporation established was the failure to perform an Alternative Solution at the relevant time, and they have not established that an Alternative Solution could not then or now be performed or the fact of combustibility of the ACP cladding.

**Question (i) – Quantum of damages**

This question also does not arise.

- 71 The Owners Corporation must pay the costs of and incidental to the determination of the separate questions and this hearing, as agreed or as assessed.

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