IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
BUILDING CASES LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-22-05416

OWNERS CORPORATION 1 PLAN NO PS 707553K and ORS — Plaintiffs

v

SHANGRI-LA CONSTRUCTION PTY LTD (ACN 130 534 244) and ANOR — Defendants

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JUDGE:	HIS HONOUR JUDGE MACNAMARA
WHERE HELD:	Melbourne
DATE OF HEARING:	7–11, 17 August 2023
DATE OF JUDGMENT:	24 August 2023
CASE MAY BE CITED AS:	Owners Corporation 1 Plan No PS 707553K and Ors v Shangri-La Construction Pty Ltd (ACN 130 534 244) and Anor
MEDIUM NEUTRAL CITATION:	[2023] VCC 1473

REASONS FOR JUDGMENT

Subject:	Subrogated claim for costs of remediation under s137F *Building Act* 1993 (Vic)
Catchwords:	Apartment complex of ten units constructed with combustible cladding – Use of combustible cladding and departure from Deemed-to-Satisfy standards Building Code of Australia 2010 authorised by permit and amended permit issued by relevant building surveyor – Permit incorporated two fire engineering briefs and fire engineering report – Cladding rectification work funded by Cladding Safety Victoria pursuant to *Cladding Safety Victoria Act* 2020 (Vic) – State of Victoria claiming to be subrogated to rights of owners of apartments and their owners corporations to recover cost of rectification as damages against building company for breach of warranties implied by s8 *Domestic Building Contracts Act* 1995 (Vic) – Liability of director of building company as "officer" of company whether use of combustible cladding occurred "without the knowledge or consent" of such officer – Proof that officer knew of use of combustible cladding sufficient to exclude defence of lack of knowledge or consent without proof that the officer knew that the relevant product was combustible – Judgment for the State of Victoria
Legislation Cited:	Building Code of Australia 2010; *Building Act* 1993 (Vic); *Cladding Safety Victoria Act* 2020 (Vic); *Victorian Civil and Administrative Tribunal Act* 1998 (Vic); *Domestic Building Contracts Act* 1995 (Vic); *Charter of Human Rights and Responsibilities Act* 2006 (Vic); *Corporations Act* 2001 (Cth); *Working with Children Act* 2005 (Vic);

Interpretation of Legislation Act 1984 (Vic); *Evidence Act* 2008 (Vic); *Travel Agents Act* 1986 (NSW); *Competition and Consumer Act* 2010 (Cth); *Trade Practices Act* 1974 (Cth); *Fair Work Act* 2009 (Cth)

Cases Cited: *Tanah Merah Vic Pty Ltd (ACN 098 935 490) v Owners Corporation No 1 of PS613436T and Ors* [2021] VSCA 72; *Owners Corporation 1 Plan No. PS707553K v Shangri-La Construction Pty Ltd (No 3) (Building and Property)* [2022] VCAT 1385; *Maxwell v Murphy* (1957) 96 CLR 261; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; *R S Howard & Sons Limited v Brunton* (1916) 21 CLR 366; *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1; *Nicholas v Commissioner for Corporate Affairs* [1988] VR 289; *Rich v The Australian Securities & Investments Commission* [2003] NSWCA 342; *Natural Forests Pty Ltd v Turner* [2004] TASSC 34; *Doro v Victorian Railways Commissioners* [1960] VR 84; *Jacobs v London County Council* [1950] AC 361; *Wilde v Australian Trade Equipment Co Pty Ltd* (1981) 145 CLR 590; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435; *Travel Compensation Fund v Dunn* (2 December 1992, BC9203833); *Yorke v Lucas* (1985) 158 CLR 661; *Australian Building and Construction Commissioner v Parker* [2017] FCA 564; *Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56; *Spotlight Pty Ltd v NCON Australia Ltd* (2012) 46 VR 1; *Keys Consulting Pty Ltd and Anor v CAT Enterprises Pty Ltd and Ors* [2019] VSCA 136; *Jones v Dunkel* (1959) 101 CLR 298

Judgment:

1. Within 28 days the parties must bring in short minutes to give effect to these reasons
2. Costs reserved.

APPEARANCES:	Counsel	Solicitors
For the Thirteenth Plaintiff	Ms G Crafti with Mr R Chaile	Corrs Chambers Westgarth
For the Second Defendant	Dr M Wolff	Prior Law

HIS HONOUR:

Background

1 According to the Court of Appeal:

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

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

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

> "The Victorian Government is committed to removing the scourge of combustible cladding from our communities. The safety of building occupants is our top priority.
>
> As the Victorian Cladding Taskforce detailed in its final report in July 2019, rectification of combustible cladding on buildings is complex and difficult. Different solutions will be required for different buildings. It will also take time—in large part due to the size and number of affected buildings and the nature of the building works to be carried out.
>
> In the years that followed Melbourne's Lacrosse Fire in 2014 and the tragic Grenfell fire in the United Kingdom, it's become clear that often owners corporations are not adequately governed and resourced to deal with complex, large-scale building matters like cladding rectification.
>
> Taking note of the advice of the Cladding Taskforce, the Government decided it needed to intervene to support owners of buildings assessed as higher-risk to rectify their combustible cladding. This support includes funding, but also a critical role for the Government in helping to advise and guide owners and owners corporations through the process of

rectification. This is why the Government has established Cladding Safety Victoria." (Hansard Legislative Assembly, 4 September 2020, 2124)

4 The Minister concluded, saying:

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

5 The bill included by s54 an amendment to the *Building Act* 1993 headed "Subrogation", which provides:

> "**137F Subrogation**
>
> (1) This section applies if, after the commencement of section 54 of the **Cladding Safety Victoria Act 2020**, Cladding Safety Victoria pays an amount to an owner of a building (the ***payee***) by way of a grant of financial assistance in relation to cladding rectification work on the building.
>
> (2) When the financial assistance is paid to the payee, the Crown is subrogated to all the rights and remedies of the payee against any person in relation to the installation or use of any non compliant or non-conforming external wall cladding product, or other building work, that required the cladding rectification work to be undertaken.
>
> (3) If a right or remedy to which the Crown is subrogated under this section is exercisable against an entity that is not an individual, it is enforceable jointly and severally against the entity and the people who were its officers at the time the act or omission that gave rise to the right or remedy occurred.
>
> (4) If it is proved that an act or omission by an entity occurred without the knowledge or consent of an officer of the entity, a right or remedy is not enforceable as provided by subsection (3) against the officer in relation to the act or omission.
>
> (5) The Crown may exercise its rights and remedies under this section in its own name or in the name of the payee.
>
> (6) If the Crown brings proceedings under this section in the name of the payee, the Crown must indemnify the payee against any costs awarded against the payee in the proceedings.
>
> (7) If, in exercising its rights and remedies under this section, the Crown recovers more money than the amount of financial assistance paid to the payee, the Crown must pay the difference to the payee after deducting costs incurred to recover the money.

(8) The payment of an amount referred to in subsection (1) in relation to cladding rectification work does not affect any right or remedy of the Crown by virtue of subsection (2) to recover from a person in relation to the installation or use of any non compliant or non-conforming external wall cladding product, or other building work, that required the cladding rectification work to be undertaken.

(9) A reference in this section to the rights of a payee includes any right the payee may have under section 86 of the **Sentencing Act 1991**.

(9A) Despite the amendment of this section by section 54 of the **Cladding Safety Victoria Act 2020**, any right of subrogation conferred on the Crown under this section as in force immediately before its amendment continues to have effect.

(10) In this section—

officer—

(a) in relation to an entity that is a corporation—means an officer of the corporation within the meaning of section 9 of the Corporations Act; or

(b) in relation to an entity that is neither an individual nor a corporation—means an officer of the entity within the meaning of section 9 of the Corporations Act."

6 The commencement date referred to in subsection (1) is 19 November 2020.

7 This proceeding concerns an apartment complex at 290 Hawthorn Road, Caulfield, erected by Shangri-La Construction Pty Ltd ("Shangri-La"), one of the defendants in this proceeding, in accordance with, or purportedly in accordance with, a building permit granted 3 December 2014 (Court Book ("CB") 2851-2868), as amended or varied on 10 December 2014 (CB 2869-2876). It will be noted that this permit was granted some weeks after the Lacrosse fire. Despite that earth-shattering event in the building industry, this multi-apartment residential development, consisting of a basement, ground floor, and some two additional floors, was constructed using combustible cladding, specifically RMAX Orange Board. This external wall cladding was described in the specifications forming part of the contract between Shangri-La and the developer, "Clause 19.1 External Rendering", as "75mm foam board rendered as per working drawings" (CB 3103).

8 On or around 13 December 2013, Shangri-La and the developer, 290 Hawthorn Road Pty Ltd, entered into an agreement for the design and construction of the apartment development. The principal of the developer company, according to Mr Obaid Naqebullah, who was at material times the principal of Shangri-La, was a Mr Gregory Frid (CB 2920−21). According to Mr Naqebullah:

> "They [the developer company and Mr Frid] had a set of documentation, drawings and specification [sic], when they came to me. So a developer always has a few information. They have 3D renders of the project, what they would like the building to look like. They already have chosen certain materials in the contract of sale because they [*viz*, the apartments] are sold off the plan." (Transcript ("T") 506, Line/s "L" 5−10)

9 I take this to mean that the developer company had a set of plans with detail sufficient to enable the relevant apartments to be sold off the plan, and that, at the time of the contract to design and construct, one or more of the units had already been sold off the plan (T506, L5−10).

10 On 11 June 2014 a design meeting was held at Shangri-La's office, Level 12, 600 St Kilda Road, Melbourne, with Mr Naqebullah and a number of the consultants who had been appointed relative to the project, including representatives of the appointed fire engineer (CB 2923, paragraphs 40−43). The building surveyor who issued the permit in December 2014, Mr Tsaganas, was also in attendance. One of the representatives of the fire engineering consultancy "advised that it would be sufficient and compliant to install the RMAX Orange Board with render finish on top of the fire rated wall" (CB 2924, paragraph 24). According to Mr Naqebullah, "We preferred RMAX Orange Board because it was superior than the other three [brands discussed]" (T505, L21−23). The effect, therefore, according to Mr Naqebullah, was that the plans already propounded by the developers provided for some form of combustible cladding generically referred to variously as "styrofoam board" or "extended polystyrene": "EPS" for short. Mr Naqebullah could not produce this preliminary documentation which he said was given to him by the developer, 290 Hawthorn Road Pty Ltd. He said:

> "Once we sign contract, we've got specifications. Everything before that we throw away, we don't use." (T507, L14−16)

11 The design meeting in June 2014 therefore did not make the decision to use EPS cladding. Rather, it simply decided to use one brand of EPS cladding, *viz* RMAX Orange, in preference to one of the other brands (T505, L24−25).

12 The occupancy permit for the apartment development was issued 8 September 2015 by building surveyor Sokratis Kromidellis (CB 7723). The EPS cladding therefore was installed some time between December 2014 and 13 August 2015, the date of the final inspection referred to in the occupancy certificate. A building audit conducted by Mr Stephen Kip of SKIP Consulting Pty Ltd on 12 November 2019 identified extensive use of EPS cladding at 290 Hawthorn Road (CB 442−444).

13 Mr Kip quoted a "fact sheet" issued by the former Building Commission in 2011 which referred to "non DtS cladding systems" including "Expanded polystyrene panels (EPS)". The scheme of the Building Code of Australia 2010, which the parties were agreed is the version of the code by reference to which this matter should be analysed, is to provide a prescriptive set of rules for a particular building element which is said to be "Deemed-to-Satisfy" the code or else resort to a product-specific or site-specific Alternative Solution which must be approved by the relevant building surveyor and by other relevant consultants. In the case of an issue of combustibility the relevant consultant would be the fire engineer. Mr Kip continued:

> "Since then [2011] further VBA [*viz* Victorian Building Authority] documents have described the status and properties of EPS products." (CB 443)

14 The footnoted VBA document is no longer current. The current "Fact Sheet" available on the Authority's website says:

> "The Minister for Planning announced a prohibition on the use of EPS as external wall cladding for any building work in connection with Class 2-9 buildings of Type A and Type B construction. This prohibition took effect from 1 February 2021."

15 Mr Kip recommended removal and replacement of the EPS cladding (CB 444, paragraph 3.3.1.2).

16 In a subsequent report (20 July 2023, just before trial), Mr Kip said:

> "The provision for external walls and other critical building elements to be of non-combustible construction or concrete or masonry has been a fundamental part of building regulations in Australia, and elsewhere in the world, for many hundreds of years and remains in the BCA [Building Code of Australia] as a requirement for external walls to be non-combustible. The requirement for non-combustible material instead of combustible materials (traditionally timber) on multi-storey buildings can be traced back to the proclamation of King Charles II after the Great Fire of London in 1666 and is repeated in early building regulations in Australia, including the now revoked original Sydney Building Act of 1837". (CB 956-957)

17 Mr Kip extracted section 42 of this statute as requiring that:

> "every external wall ... of every building of the first second third fourth or fifth rate ... shall be of brick stone artificial stone lead copper tin slate tile or iron or of brick stone ..." (CB 957)

18 On 14 June 2017 a 24-storey block of social housing in London known as the Grenfell Tower was gutted by a blaze in its external combustible cladding. The fire lasted for 60 hours, and 72 people died and 70 were injured.

19 In the implementation of the scheme provided for in the 2020 statute referred to above, the State of Victoria appointed Sedgwick Australia Finance Pty Ltd ("Sedgwick") to oversee the processes of rectification. Sedgwick was initially engaged as part of a "pilot panel" on 16 July 2019. It was appointed by deed dated 7 April 2021 "to undertake clerk of work services" for the State. According to Sedgwick's construction manager:

> "Clerk of work services are generally in the nature of independent quality assurance and inspection services, separate from project management of the building rectification works, ..." (CB 1162−3, paragraphs 17 and 23)

20 The construction manager, Mr Morris Mellinger, described a tender process for the rectification works which ultimately resulted in Marradon Constructions being "the only tenderer with a conforming bid" (CB 1172, paragraph 57), which tender

was accepted. He described how PLP Building Surveyors & Consultants was appointed following a tender process to provide building surveying services (CB 1174, paragraph 64). He noted that a company known as NVM Facades was appointed to provide the following services:

> "(a) Undertake a desktop review of provided documents and drawings.
>
> (b) Site inspection, including the identification of material types, installation details, build quality and workmanship and associated existing conditions for accessible areas.
>
> (c) Prepare and facilitate material testing of samples.
>
> (d) Prepare a report based on the above.
>
> (e) Conduct a follow up site inspection to close out defects." (CB 1175)

21 Mr Naqebullah observed that the Lacrosse fire involved cladding in the form of aluminium composite panel, as did the conflagration in 2017 at the Grenfell Tower in London (T563−4). Despite the occurrence of the Lacrosse fire only a month prior to the approval of the building permit for the second stage (above basement level) of the building at 290 Hawthorn Road, Mr Naqebullah said that the Lacrosse fire, to his understanding in 2015, had nothing to do with EPS (T566, L27−28). Mr Naqebullah said it was only in 2017 that he reached the conclusion that EPS was "wrong [and should not have been used]" (T531, L25 to T532, L8). He said this conclusion was driven by a consensus in the building industry involving building surveyors, fire engineers and practice notes from the Victorian Building Authority. Mr Naqebullah also observed that the Lacrosse building, being of 21 levels, was quite different from the development at 290 Hawthorn Road (T581, L11−22).

This proceeding

22 This proceeding commenced as No BP125/2019 in the Building and Property List of the Victorian Civil and Administrative Tribunal. As initially constituted, the proceeding entailed allegations by the unit owners and the owners corporation:

> "that the builder [*viz* Shangri-La] constructed the apartments in a defective manner. The primary issues of defective work relate[d] to the ingress of water due to inadequate waterproofing and non-compliant cladding, and fire isolation. The applicants claim damages for the cost of rectification works and dislocation costs in excess of $2 million." [2022] VCAT 400 [6]

23 Vice President Judge Anderson dismissed a constitutional challenge mounted by Shangri-La alleging that the case against it sought to rely impermissibly upon matters of Commonwealth law which could be considered only by a body being either a federal or state court by reason of the provisions of Chapter III of the Commonwealth Constitution ([2022] VCAT 1385).

24 Later, on 15 December 2022, his Honour made orders joining the State of Victoria as an applicant, together with Mr Naqebullah as a joined party. His Honour also ordered that the proceeding be struck out pursuant to s77(1) of the *Victorian Civil and Administrative Tribunal Act* 1998, and be referred pursuant to s77(3) of that Act to this court (CB 169).

25 When the matter came on for hearing before me, the only active parties were the State of Victoria making a claim pursuant to s137F of the *Building Act* 1993, and Mr Naqebullah as an officer of Shangri-La sought to be made responsible for moneys or damages pursuant to subsections (3) and (4) of that section.

26 The State's claim against Shangri-La was stayed by reason of that company's entering into liquidation in March this year.

Statement of claim

27 By its amended statement of claim dated 6 March 2023, the State noted that the first to thirteenth plaintiffs:

> "were at all material times the owners of lots in the Plan of Subdivision [affecting the property at 290 Hawthorn Road, Caulfield] ... which lots included certain portions of the external façade of and attachments to the Building". (CB 22)

28 As against Shangri-La it was alleged that the owners corporation became the registered proprietor of the common property in its plan of subdivision as

nominee for the lot owners, and the second to twelfth plaintiffs became registered proprietors of the lots. The contract for the construction of the building was entered into between Shangri-La and "the Developer" [*viz* 290 Hawthorn Road Pty Ltd], which contract was said to be a domestic building contract to which the provisions of the *Domestic Building Contracts Act* 1995 apply (CB 23−24).

29 The statement of claim referred to s8 of the *Domestic Building Contracts Act*, whereby it was said that Shangri-La warranted that all materials to be supplied by it for use in the work carried out under the contract would be good and suitable for the purpose for which they were used (s8(b) of the *Domestic Building Contracts Act*), and that the work under the contract "would be carried out in accordance with and would comply with all laws and legal requirements including the *Building Act* and the regulations" (reference was made to s8(c) of the Act), and that the work under the contract and any material used in carrying out the work "would be reasonably fit for purpose of the building, being a building containing residential apartments". The claim referred to s8(f) of the Act. The claim noted that by virtue of s9 of the Act the owners of the building might take proceedings against Shangri-La for breach of the warranties referred to.

30 Next it was said that:

> "19. At all material times:
>
> A. the construction of the Building was required to comply with the Building Code of Australia (**BCA**), which was adopted by and formed part of the *Building Regulations 2006* (Vic) made under the Building Act;
>
> B. pursuant to cl C1.1 of the BCA, the Building was required to be of Type A construction, being the most fire-resistant type of construction prescribed under the BCA;
>
> C. pursuant to cl 3.1 of Specification C1.1 of the BCA, the external walls of the Building, being a building required to be of Type A construction, were required to be non-combustible;
>
> D. pursuant to cl CP2(a)(iv) of the BCA, the Building was required to have elements which would, to the degree necessary, avoid the spread of fire in the Building; and

E. pursuant to cl 2.4 of Specification C1.1 of the BCA, a combustible material could only be used as an attachment to a building element if it did not constitute an undue risk of fire spread via the façade of the Building." (CB 24−25, Clause 19)

31 The building was said to have been constructed with the occupancy permit issuing "on 8 September 2015" (CB 25, paragraph 20), with the builder "using combustible Expanded Polystyrene (EPS) (Combustible Cladding) as part of the external walls to the building" (CB 25, paragraph 21). This cladding was said to be combustible and not fire-resistant, and "was not non-combustible for the purposes of cl 3.1 of Specification C1.1 of the BCA", hence it did not comply with the Building Code of Australia and was not suitable or fit for the purpose of being used in external walls of the building (CB 25−26, paragraph 22). These matters were said to constitute breaches of warranties incorporated into the building contract by s8 of the *Domestic Building Contracts Act* (CB 26, paragraph 23). It was said that on 5 March 2020 the municipal building surveyor for the City of Glen Eira issued a written emergency order pursuant to s102 of the *Building Act* requiring various steps to be taken (CB 26, paragraph 25). Accordingly, it was said that by reason of these matters the building owners, the first to twelfth plaintiffs, had suffered loss and damage by reason of breach or breaches of warranty by Shangri-La (CB 28, paragraph 27).

32 According to paragraph 31 of the statement of claim, "on or about 17 November 2020" the owners corporation, for itself and the second to twelfth plaintiffs, entered into a funding arrangement with Cladding Safety Victoria under which it "agreed to provide funding to the Building Owners to fund the performance of cladding rectification works in relation to the Building." According to paragraph 32, various payments were made pursuant to that arrangement, by reason of which the State "became subrogated to all the rights and remedies of the Building Owners against the Builder in relation to the Combustible Cladding" (CB 32, paragraph 33).

33 The statement of claim sought to hold Mr Naqebullah jointly and severally liable with Shangri-La (CB 33, paragraph 37). The State claimed damages, interests, costs and further or other relief.

Defence

34 By his amended defence dated 8 May 2023, Mr Naqebullah admitted the various allegations as to the title of the first to twelfth plaintiffs (CB 10366). He challenged the standing of the State of Victoria to bring the claim against him by way of subrogation pursuant to s137F(2) of the *Building Act* 1993. Subject to this denial, he proceeded to plead to the balance of the statement of claim as a "fallback" position should the challenge to standing not be sustained. He noted that Shangri-La had provided design, project management, supervision, programming, time management, and other services, but said that "Shangri-La is under external administration". In paragraph 13 of the amended defence, Mr Naqebullah challenged the standing of the plaintiff the owners corporation, and the standing of the owners, being the second to twelfth plaintiffs. By paragraph 15 of his amended defence he admitted that Shangri-La and the developer had entered into a design and construction agreement. He admitted that sections 8 and 9 of the *Domestic Building Contracts Act* were "as alleged" and that Shangri-La "supplied its design and construction services to the Developer [*viz* 290 Hawthorn Road Pty Ltd] ... between 1 December 2013 and 8 September 2015". He said that the specifications and finishes schedule forming part of the contract authorised the use of "styro foam rendered" or "75 mm foam board" (CB 10372), and that Shangri-La had informed various parties that it intended to use EPS "during a meeting on or around 11 June 2014" (CB 10372, paragraph 21).

35 Mr Naqebullah admitted that the cladding was combustible. Mr Naqebullah said he did not know that RMAX Orange Board was a non-compliant or non-conforming external wall cladding product or that any non-compliant or non-conforming external wall cladding product would be installed or used, or that any

other building work would be done that would later require cladding rectification to be undertaken. Accordingly, "upon proper interpretation of Sec 137F(4)" he said that his lack of knowledge that RMAX Orange Board was not compliant or not conforming meant that no liability could be enforced against him under s137F of the *Building Act*. He said his lack of knowledge that non-compliant or non-conforming external wall cladding would be installed or used meant that no right was enforceable against him under s137F. He repeated his assertion of lack of knowledge in so far as he was a director of Shangri-La. He said further that:

> "a reasonable building company director's lack of knowledge in 2014 that any non-compliant or non-conforming external wall cladding product would be installed or used ... [meant] that any remedy or right of the plaintiffs under Sec 137F is not enforceable against [him]." (Closing submissions, paragraph [65](h))

36 Mr Naqebullah admitted that, upon Cladding Victoria making the payments alleged, "the State became subrogated to all the rights and remedies of the Building Owners". He further said that s137F "does not apply as Sec 137F does not have retrospective or retroactive application." Finally, Mr Naqebullah relied upon s8(3) of the *Charter of Human Rights and Responsibilities Act* 2006, contending that s137F(3):

> "violates that provision insofar as it discriminates without proper basis between people who were officers at relevant times of an entity engaged in the installation or use of non-compliant or non-conforming external wall cladding product on one hand, and others on the other hand". (CB 10375)

37 He said that s137F(3) was "in violation of Sec 20 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)" and also s24 of the Charter. He said he relied on "Sec 39 (1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)". He did not admit the service of the notices alleged to have been served by the municipal building surveyor. He denied that the plaintiffs had suffered loss or damage as alleged.

The Warranties

38 Section 8 of the *Domestic Building Contracts Act* 1995 implies *inter alia* the following warranties into every domestic building contract. The phrase "domestic building contract" is defined in s3(1) of the Act to mean "a contract to carry out, or to arrange or manage the carrying out of, domestic building work ...". It is common ground that the contract between Shangri-La and the developer was such a contract. The State's case relies on the following of those implied warranties:

> "(a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
>
> (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
>
> ...
>
> (f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result." (Section 8, *Domestic Building Contracts Act* 1995)

39 These warranties, according to s9 of the Act, are said to "run with the building"; that is, to be enforceable by "any person who is the owner for the time being of the building or land in respect of which the domestic building work was carried out under the contract".

40 Section 10 of the Act invalidates any attempt to "contract out" the remedies available to the original contracting party or its or their successors in title.

41 It follows therefore that even if the developer propounded a preliminary contract providing for the use of combustible cladding which might be seen to be at variance with any of the quoted warranties, this would not relieve the builder, Shangri-La, of the responsibility to comply with the warranties. It may be thought

that this provision prohibiting "contracting out" is important as a matter of consumer protection, but also important in circumstances such as the present where the contracting party as developer has typically already sold all or most of the proposed apartment units "off the plan" before construction commences. The interest in having the s8 warranty observed and performed therefore resides not with the immediate contracting party, the developer, but rather with its successors in title.

Knowledge and responsibility

42 Mr Naqebullah's witness statement describes his knowledge and experience as at the date of the building work at 290 Hawthorn Road. At paragraph 104 (CB 2933) Mr Naqebullah said:

> "I have at no times between 2010 and 2016 known that the use of EWCC [that is, external wall combustible cladding] when part of stamped permit documentation was not permitted."

43 It may be observed that the expression used throughout his witness statement and abbreviated to "EWCC" is wide enough to encompass both the aluminium composite material that was implicated in the Lacrosse fire and later the fire in the Grenfell Tower and EPS. The conflagration at Lacrosse must have been sufficient to alert Mr Naqebullah that there were issues with the type of EWCC used at Lacrosse, whether or not, as he said, it alerted him to any problems with EPS.

44 The thrust of Mr Naqebullah's written statement, and therefore his evidence-in-chief as well as his evidence given in cross-examination and re-examination, was that the issues as to "EWCC" were beyond his expertise and were such that he was relying upon guidance from the relevant building surveyor in approving or not approving plans which might entail the use of EWCC and the fire engineer by way of the fire engineering brief and the fire investigation report.

The relevant building surveyor

45 The 3 December 2014 building permit was issued as previously noted by Mr Jim Tsaganas. Condition 6 of the permit provided as follows:

> "This Building Permit (Stage 2) [Stage 1 covered the construction of the basement] has been assessed and issued in conjunction with a Fire Engineering Report prepared certified by Paul Veheijdan EF-15977 and independently certified permitting the following BCA DTS variations [Building Code of Australia and Deemed-to-Satisfy]:
>
> ...
>
> - Reduction in FRL's to class 2 sections" (CB 3132)

46 The amended permit dated 10 December 2014 was issued by Sokratis Kromidellis of the same firm as Mr Tsaganas. The plans and specifications were stamped approved by the relevant building surveyor so as to incorporate them by reference into the permit itself. The only variation as between the two Stage 2 permits dated respectively 3 December 2014 and 10 December 2014 was that an additional fire investigation brief (No 4) issued 15 July 2014 was stamped "approved" and therefore incorporated into the building permit together with brief No 5 dated 7 December 2014 (CB 3397). Before Mr Kromidellis issued the occupancy permit in September 2015 he required letters to his firm over the signature of Mr Naqebullah, both of which were dated 12 August 2015, and stated respectively:

> "I confirm that Shangri La Construction Pty Ltd has met all of the Fire-Rated Construction requirements at the abovementioned Property." (CB 7700)

and:

> "Please note that Shangri_La Construction Pty Ltd has met all Fire Engineering requirements as per the BCA and consultants design at the above-mentioned address." (CB 7701)

47 It will be seen therefore that the building permit and occupancy permit which constituted the "green lights" for the erection and occupancy of the property at 290 Hawthorn Road depended crucially upon the fire engineering briefs and fire engineering report.

Fire engineering briefs and fire engineering report

48 According to Mr Shafto, a building surveyor who gave expert evidence on behalf of Mr Naqebullah, a fire engineering brief:

> "is a document that is putting forward to the designer and the stakeholders, for want of a term, what the solution proposed is. It's like a summary document but it then describes a methodology that that designer is going to use to provide an outcome or an expected outcome and the process that he's going to follow, and then the stakeholders all agree to that, and that can include the fire brigade where they are consulted or need to be consulted, but it also may not." (T339, L21−30)

49 In a similar vein, Mr Kip, a fire engineer giving evidence on behalf of the State, said:

> "Once there's agreement reached that the brief is correct and the analysis proposed is acceptable, then the engineer would do that report and then it would be independently reviewed." (T320, L12−16)

50 This reasoning is consistent with the use of the word "brief" in the legal profession, where a brief is delivered to counsel seeking his or her opinion. The resulting opinion, or, in fire engineering terms, "report", is the solution where an alternative solution is being sought under the terms of the Building Code of Australia, and the brief or briefs are superseded and fall away. In this case, however, this is not what happened. The fire engineering report dated 8 December 2014 was stamped as approved as part of the permit as varied (CB 7396), as was the fire engineering brief Issue 5 dated 7 December 2014 (CB 7056), and also Issue 4 of the fire engineering brief (CB 6592).

51 Mr Naqebullah said he had found a provision in one of the documents that said that the brief and the report were to be read as one (T570, L28−30). In any event, since the two versions of the brief were stamped so as to be incorporated by reference into the permit, the briefs as well as the report are regarded as being operative for permit purposes (T571, L3−5).

52 The fire engineering report commencing at CB 7396 refers to a departure from the "Deemed-to-Satisfy" provisions of the Building Code, being the use of external wall combustible cladding. It describes the "DtS Requirements" as

being "For type A & B construction external walls must be non-combustible or have a Group 3 fire hazard property." The performance requirements are said to be constituted by CP1 and CP2. The performance requirements referenced from the 2010 version of the Building Code of Australia are as follows:

"**CP1**

A building must have elements which will, to the degree necessary, maintain structural stability during a fire appropriate to—

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

(b) the *fire load*; and

(c) the potential *fire intensity*; and

(d) the *fire hazard*; and

(e) the height of the building; and

(f) its proximity to *other property*; and

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

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

(i) *fire brigade* intervention; and

(j) other elements they support; and

(k) the *evacuation time*.

CP2

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

(i) to *exits*; and

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

Application:

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

(iii) between buildings; and

(iv) in a building.

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

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

(ii) the *fire load*; and

(iii) the potential *fire intensity*; and

(iv) the *fire hazard*; and

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

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

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

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

(ix) *fire brigade* intervention; and

(x) other elements they support; and

(xi) the *evacuation time*." (CB 11711−11712)

53 I asked Mr Salomonsson, a fire engineer who gave evidence on behalf of Mr Naqebullah:

> "Are you able to point me to the passage or passages in either the fire engineering report or the fire engineering brief which encapsulate the grounds on which this fire engineer took the opposite view from the one that you take, namely, that the performance requirements in the Building Code can be met by the use of this [EPS] cladding?" (T370, L27–T371, L2)

54 Mr Salomonsson replied:

> "So it's in the wording how he tried to justify, partly being compared to a class 1 residential house where it permits this material, and trying to compare that to this building that is multi storeys where you have different people living on different levels, where the Building Code has a higher requirement in CP2, performance requirement of section C, to limit fire spread between people who have living in different dwellings. In that argument, I don't agree with him that he demonstrates that." (T371, L10−19)

55 Giving concurrent evidence, the expert fire engineer called on behalf of the State observed:

> "Sir, the Building Code deem to satisfy provisions prohibit combustibility but the performance requirements don't. So as Mr Salomonsson said, the performance requirements say you have to adequately avoid the spread of fire, so that's how the fire engineer works in that space." (T372, L17−22)

56 Mr Kip commented of the fire engineering report:

> "His report is very, frankly, dense." (Ibid, L24)

57 Mr Kip continued:

> "In short, I don't believe the report does do the analysis. It talks about how the analysis should be done and in fact, section 13.4.2 of the FEB lists all the materials that are used as a reference benchmark. The actual analysis is (indistinct) in my view." (T373, L16−20)

58 Mr Kip referred to s13.4.2 of the "FEB" without identifying whether he was speaking of Issue 4 or Issue 5. Clause 13.4.2 of Issue 5 of the brief (CB 7139) refers to "Failure of Building Elements" and does not appear to deal with the cladding issue. Clause 12.3.1 of the same document is headed "A comparison of the DtS benchmark and alternative designs are provided below". The benchmark design states:

> "External wall cladding may be combustible if attached to the outside of a fire rated barrier and:
>
> - is a Group 3 (ie material with a test certificate that indicates this fire hazard property)
> - not located directly over the exit from the building
> - does not cause a fire spread hazard
> - does not impair the FRL" (CB 7126)

59 According to the report, the alternative design, presumably the one adopted at 290 Hawthorn Road, states:

> "Combustible cladding materials used on the external wall.
>
> Refer to schedule of departures below.
>
> Not located directly over the exit from the building.
>
> Still maintains the required fire resistance level of external walls." (CB 7126)

60 The fire engineering report identified some eight "relevant stakeholders":

> "1. The project manager
> 2. Building operations management
> 3. Building designer(s)
> 4. Relevant Building Surveyor
> 5. Fire brigade

6. Representative of owners insurance company
7. Building tenants
8. Fire Safety Engineer." (CB 7077)

61 As far as Mr Naqebullah knew, consultations with these stakeholders, and certainly with the fire brigade, did not in fact occur (T496, L16−21). I have seen no documentation recording any such consultations, and no expert reported having identified documentation of any such consultations.

62 Mr Naqebullah said that as he read the fire engineering material, the rationale was to be found in the fire engineering brief Issue 4 dated 15 July 2014 marked as approved by the building surveyor (see CB 6593). He took me to Part 14 (CB 6683) headed "Departure C1.13.1: Reduced FRL of external walls". At section 14.7.2 (CB 6693), under the heading "Design fire scenario C1.13.1b: Ground external fire (large hot fire)" there appeared a table at 14.7.2.1 headed "Analysis method and acceptance criteria" with the introductory words:

> "Analysis of the design fire scenario is to be undertaken using the following assessment method and acceptance criteria (refer to 8.2 Assessment Methodology for information)" (CB 6693)

63 In the table next to the heading "Acceptance Criteria" is the statement:

> "The potential fire intensity does not exceed the following radiation heat flux on the outer face of the external wall:
>
> - 20KW/m^2" (CB 6693)

64 A similar statement is to be found at Part 14.7.3 "Design fire scenario C1.13.1c: Adjacent building fire" (T571−3; CB 6696). As Mr Naqebullah saw the statement, that established a benchmark of 20KW/m^2 being a measure of ignition heat flux kilowatt/m^2. He noted that according to Table 13.4.2, RMAX Orange Board was "BAL 29 − Compliant", having an ignition heat flux kW/m^2 of 19. In cross-examination Ms Crafti said of this table, at CB 6677:

> "So all it tells you really ... Mr Naqebullah [is], that it's Bushfire Attack Level 29 compliant"? (T524, L24−26)

65 Mr Naqebullah said:

> "the fire engineer, if you read his report, he uses 20 as a benchmark from BCA to justify how RMAX Orange Board is quantitatively and qualitatively and deterministically he justifies the alternative solution." (T525, L16−19)

66 The brief included plans depicting the "departures" from the Deemed-to-Satisfy requirements of the Building Code of Australia. Those for the ground floor, first floor and second floor (CB 7234−7236) all depict departures being "permit external wall combustible cladding in certain areas" with no clear designation as to which areas are involved.

67 The fire engineering report was subject to "peer review". As Mr Kip read this:

> "The independent peer review didn't cover the cladding." (T320, L16−17)

68 The "peer review" document carried out by another fire safety engineer was given pursuant to Regulation 1507 of the Building Regulations 2006 described as "Certificate of Compliance—Design" (CB 7516). It did not, as I read it, specifically refer to the "alternative design solution" relative to the use of combustible external wall cladding. Mr Shafto agreed that the list of departures did not cover the cladding issue. Referring to the first item, he said:

> "That one relates to a reduction in a FRL in a wall. The cladding is a separate matter. The cladding on the wall would be a separate matter." (T365, L13−15)

69 As to the cladding issue, Mr Shafto said:

> "It's not mentioned here, other than that it refers to, 'The design documents below', which refer to the brief and the report, which still mention combustible cladding as an option, but following from our previous discussion, yes, it didn't include RMAX in the description, but it did definitely mention combustible cladding in the brief and the report." (T364, L9−15)

That is, the text at the foot of the certificate under the heading "Design documents" refers to the fire engineering report and the fire engineering brief Issue 5.

70 Mr Naqebullah said he interpreted the peer review document as approving departures by way of "reducing FRLs" as being referable to the use of EPS by way of external cladding (T538−9).

71 Mr Tobias Salomonsson, a fire engineer, gave expert evidence on behalf of Mr Naqebullah:

> "The role of the fire safety engineer at the time of design and construction was to address identified Building Code of Australia Deemed-to-Satisfy departures. During the design of the development, it appears that the fire safety engineer promoted the use of combustible cladding as part of an Alternative Solution, to reduce construction cost.
>
> It is my opinion that the Alternative Solution prepared by the fire safety engineer did not achieve compliance with the relevant Performance Requirements of the Building Code of Australia.
>
> It is further my opinion that it is reasonable for the builder to rely on the stamped documentation, although it is also my opinion that the builder should be aware that any inconsistency in the building permit documentation should be confirmed with the Relevant Building Surveyor, as only they can determine compliance." (CB 1146)

Conclusions

The case against Shangri-La

72 Mr Naqebullah's liability to the State (if it exists) is derivative from the liability said to be owed to the State by Shangri-La as being subrogated to the rights of the owners and their owners corporation as the original applicants/plaintiffs in this proceeding. The first step in considering the alleged liability of Mr Naqebullah is to consider whether, subject to the statutory stay imposed by the *Corporations Act*, the State has a good claim against Shangri-La.

73 The State claims to be entitled to enforce the rights otherwise belonging to the owners by virtue of s137F(2) of the *Building Act* 1993. Further, it claims an entitlement to enforce those remedies in its own name pursuant to ss(5) of that section.

74 Dr Wolff, on behalf of Mr Naqebullah, contended at the outset of the trial that s137F did not authorise the State to proceed in the manner in which it had. For

reasons given on 7 August, I rejected that contention. In those circumstances, Dr Wolff did not renew these contentions in his closing argument (Closing submissions, paragraph [18]).

75 He did, however, contend that the attempt to use s137F as the State sought to do entailed giving that section an impermissibly retrospective or retroactive effect. This defence was enunciated in paragraph [38] of his client's amended defence, which referred to two well-known High Court authorities: the judgment of Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261, 637−8 (sic, *scil* 265−7), and a joint judgment of French CJ, Crennan and Kiefel JJ in *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 [30], where their Honours said that this presumption could be regarded as an aspect of the "principle of legality" or an aspect of the rule of law. Dr Wolff said that:

> "Statutory construction begins with the text, read in its context, and with appropriate reference to legislative history and extrinsic materials to the extent that they assist in fixing the meaning of the text: *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]." (Closing submissions, paragraph [23])

76 He said the text of s137F did "not contain a clear indication whether it applies retroactively or not" (Closing submissions, paragraph [25]). He said that absent clear language indicating a retrospective or retroactive application, this section should be presumed to operate only prospectively and not retrospectively. He referred to *R S Howard & Sons Limited v Brunton* (1916) 21 CLR 366 per Griffith CJ, and *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at [27] per French CJ, Crennan, Kiefel and Keane JJ, [48]-[50] per Gageler J. With no clear indication of retrospectivity, the section should only be regarded as operating prospectively.

77 He turned next to two decisions: one of the old Full Court of the Supreme Court of Victoria, *Nicholas v Commissioner for Corporate Affairs* [1988] VR 289 ("*Nicholas's* case"); and a decision of the New South Wales Court of Appeal, *Rich v The Australian Securities & Investments Commission* [2003] NSWCA 342

[297]−[299] ("*Rich's* case"). Dr Wolff said that the present case, unlike those, did not:

> "refer to unfitness by virtue of past conduct but create[d] a liability. It arguably imposes penalties for conduct antecedent to its enactment, if the creation of a liability can be considered a penalty. It is not a statute the object of which is to protect the public interest by disqualification based on conduct antecedent to the enactment." (Closing submissions, paragraph [34])

78 He said s137F did not affect existing rights, but created a retrospective liability:

> "It is not that part of the requisites for its action is drawn from a time antecedent to its passing. It is the fact that a liability was created where before none existed." (Closing submissions, paragraph [36])

79 He referred to formulations of the presumption against retrospectivity by Underwood J in the Supreme Court of Tasmania in *Natural Forests Pty Ltd v Turner* [2004] TASSC 34 [16] and *Doro v Victorian Railways Commissioners* [1960] VR 84, 86. (Closing submissions, paragraph [37]) Dr Wolff said:

> "In the case before us, a palpable injustice would result if the Second Defendant [*viz* Mr Naqebullah] was held liable in 2023 for conduct in 2014 for which he had no liability then. The presumption against retrospectivity should be given its fullest weight." (Closing submissions, paragraph [38])

80 As to "extrinsic materials", Dr Wolff said that the Parliament's Scrutiny of Acts and Regulations Committee Alert Digest No 13 of 2019, dated 29 November 2019, was "silent on the question of any retrospective or retroactive application of Sec 137F", where in the same edition retrospective application to amendments of other statues was discussed (Closing submissions, paragraph [40]). He referred to other parliamentary material to similar effect. Likewise, he said the statement of compatibility with the Charter of Human Rights and Responsibilities did not identify any retrospective effect for the legislation. In so far as the *Working with Children Act* has the effect of restricting the ability of persons involved in certain conduct before the statute's commencement in the future to work with children, he said:

> "This is not an instance of merely creating an unfavourable status by reference to past events. In the analogy, these past events were well known at the time of their occurrence to be rights and liabilities, or perhaps criminal offences. A further consequence of already prohibited behaviour came into effect, but that is not unusual." (Closing submissions, paragraph [57])

81 The context in which the 2020 Act and its amendment of the *Building Act* 1993 was enacted has already been explained. In his closing submission, "setting the scene" in which the relevant events occurred and in which the existence or non-existence of any liability on Mr Naqebullah's part needed to be determined, Dr Wolff referred to Victoria's statewide cladding audit, where the Victorian Building Authority identified some 4,466 relevant buildings statewide that contained "EWCC". As the Minister's Second Reading Speech indicated, this problem has been identified by reason of the occurrence of a highly-publicised fire at the Lacrosse building in Victoria in 2014 and a tragic fire in the Grenfell Tower in London in 2017. The purport of the speeches and the reports and the evidence before me is that this cladding issue is the result of serious blundering on the part of the building and development community worldwide, but that community and government regulators, it is said, have "learnt their lesson". EPS is now, by official publications, expressly banned from use as external cladding. I referred earlier to Mr Naqebullah's evidence that since 2017 he regards EPS as inappropriate for such a use. The premise of all this and the statewide audits is that the combustible cladding issue is a legacy of building practices pre-2014 or at the very least pre-2020 which it is not expected will be repeated, unless that belief – namely, that the building and development community and government regulators have "learnt their lesson" as to flammable cladding – is incorrect.

82 Dr Wolff's contentions as to retrospectivity relative to the 2020 Act would mean that it would have no operation whatsoever unless more buildings are erected with flammable cladding after 2020. On Dr Wolff's interpretation, s137F would never be engaged. It would serve no purpose. Section 35 of the *Interpretation of Legislation Act* 1984 states, *inter alia*:

> "In the interpretation of a provision of an Act or subordinate instrument—
>
> (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; ..."

83 Dr Wolff's construction would not promote the purpose or object of the 2020 Act, whereas the contrary construction, which applies it literally without any modification to avoid retrospectivity, would promote the Act's purpose.

84 In *Nicholas's* case, the Full Court had to consider the operation and effect of an amendment to the Companies (Victoria) Code coming into effect on 31 March 1986. This section entitled the Corporate Affairs Commissioner to serve on someone designated as a "relevant person" a notice in writing prohibiting him or her for a period not exceeding five years from being a director of a company. A person would be a "relevant person" if, and only if, the person was a director of a company whose liquidator had made certain reports to the Commission. The Commissioner sought to serve a notice based on events occurring before 31 March 1986. Mr Nicholas contended that this action would give the amendment to the Companies Code an impermissibly retrospective effect. The Full Court rejected this contention, accepting the general presumption against retrospectivity advocated by Dr Wolff. Kaye J, with whom King J concurred, said:

> "The common law rule of construction concerning retrospectivity is subject to a qualification that "a statute is not retrospective merely because it affects existing rights; nor is it retrospective because a part of the requisites for its action is drawn from a time antecedent to its passing"." ([1988] VR 289, 296)

85 His Honour continued:

> "Moreover, a line of authority establishes that a statute, the object of which is to protect the public interest by disqualification based on conduct antecedent to the enactment, does not fall within the principle of retrospectivity." ([1988] VR 289, 297)

86 It may be accepted that the second principle is not engaged by the 2020 Act. However, in my opinion the first such principle is.

87 *Rich's case*, referred to by Dr Wolff, was concerned with the availability to a director relative to a provision similar to the one considered by the Court in *Nicholas's case*, but now in the Commonwealth *Corporations Act* 2001, to "penalty privilege". ASIC contended that a series of cases including *Nicholas's case* on the issue of retrospectivity indicated "that disqualification orders were protective rather than punitive" and therefore did not attract penalty privilege ((2003) 183 FLR 361, 418 [289]). The passage at [297] quoted and relied on by Dr Wolff in his closing submissions occurs in the judgment of McColl JA, who dissented from the decision reached by the other two members of the Court, Spigelman CJ and Ipp JA, despite the fact that the reference in Dr Wolff's closing submissions paragraph [33] referred to "Spigelman CJ, Ipp and McColl JJA" as if all three judges had joined or concurred in the statement. At any rate, the passage relied on by Dr Wolff does not in any way disapprove of the Full Court's decision in *Nicholas's* case.

88 Dr Wolff correctly observed that the present case is quite different from *Nicholas's*, in that it does not refer to "unfitness by virtue of past conduct". However, Kaye J gave two reasons for his conclusion that the presumption against retrospectivity did not apply to the relevant amending section to the Companies Code, only one of which relied upon cases relative to proof of unfitness by virtue of past conduct. Where two reasons for a decision are given, they both form part of the Court's *ratio decidendi*: *Jacobs v London County Council* [1950] AC 361.

89 I reject Dr Wolff's contention as to retrospectivity.

90 Turning now to the warranties, the State contends that materials supplied by the builder Shangri-La, namely EPS cladding, for use in the erection of the building at 290 Hawthorn Road, Caulfield, was not good and suitable for the purpose, contrary to s8(b) of the *Domestic Building Contracts Act* 1995. The terms of that warranty are absolute. The materials are either "good and suitable for the

purpose" or they are not. No criterion of reasonableness affects the outcome. Here, no one now seeks to contend that EPS cladding meets the performance requirements of the Building Code of Australia as they stood in 2010 and as they relevantly provided when the building permit was issued and the relevant building work was carried out. I have already referred to the evidence of Mr Naqebullah that at least as from 2017 he accepted that EPS was not satisfactory for external wall cladding and ought not to be used. This was also the opinion of Mr Salomonsson, the expert fire engineer called on behalf of Mr Naqebullah (see [54] above).

91 The evidence of the experts must be treated with some caution, because when they prepared their reports and gave their evidence they were unaware that Issue 4 of the fire engineering brief had been stamped "approved" by the relevant building surveyor for the purposes of the Stage 2 December 2014 permit. However, the conclusions most recently referred to do not, so far as I can see, depend upon Issue 4's not being regarded as part of the permit. Rather, they are based upon a view as to the inherent suitability of EPS as external wall cladding.

92 The result is therefore that Shangri-La, subject to the statutory stay on the proceeding against it, breached the warranty contained in s8(c) of the *Domestic Building Contracts Act* 1995. The owners are, subject to the stay, entitled to judgment against it for that breach. The State, by reason of its subrogation, is likewise entitled to judgment subject to the stay, and subject also to the issue of quantification of damages, to which I will turn in due course.

93 More complex issues arise out of the allegation that Shangri-La breached the warranty implied by s8(c) of the Act. This implied warranty entails an obligation on the builder to build in accordance with the *Building Act* 1993 and the regulations made under its terms. It engages s16(2) of the *Building Act*, which provides:

> "(2) A person must not carry out building work unless the work is carried out in accordance with this Act, the building regulations and the building permit issued in relation to that work.
>
> Penalty: 500 penalty units, in the case of a natural person;
>
> 2500 penalty units, in the case of a body corporate."

94 Mr Naqebullah's case is that Shangri-La carried out building work at the Hawthorn Road site in accordance with the December 2014 building permit as amended, and in accordance with the Building Code of Australia, 2010 edition, with relevant departures: specifically the use of flammable external cladding authorised by two fire engineering briefs, a fire engineering report, and the approval of the permit, incorporating the fire engineer material given by the relevant building surveyor.

95 The experts gave evidence-in-chief and were cross-examined on the subject of the relative standing of the building permit in comparison with the building regulations, the Building Code of Australia, and so forth. They also spoke to whether the permit imposed an obligation upon the builder to build in accordance with its terms, even if, according to Mr Naqebullah's case, it mandated the use of flammable cladding, which is now universally recognised as being wrong and inappropriate. These questions are questions of domestic law upon which evidence, whether expert or lay, is not admissible: s143, *Evidence Act* 2008.

96 As to the use of flammable cladding, the permit and the fire engineering report and briefs commenced from the proposition that its use was inconsistent with the "Deemed-to-Satisfy" provisions of the Building Code of Australia. The basis upon which the alleged "Alternative Solution" which was in fact implemented remains unclear. Nobody, so far as I can see, would seek to defend this "Alternative Solution" now. I have already referred to evidence from the experts and from Mr Naqebullah himself. Moreover, the fire engineering material which apparently formed the basis for the relevant building surveyor's approval of the "Alternative Solution" is, at least according to the way things are approached in the legal system, unsatisfactory. Reliance on three separate documents, all of

which deal with substantially the same subject matter but in somewhat different ways, can scarcely be regarded as satisfactory. The "pathway of reasoning", the phrase used by the Court of Appeal to describe what is regarded as acceptable judicial reasoning for the purposes of a judge's obligation to give proper reasons for decision, is far from clear. The experts found no evidence of vital consultations with the stakeholders who were identified for the purposes of the briefs and report, and Mr Naqebullah was unaware of such consultations having taken place. The confused and unsatisfactory operation of these permit documents is compounded by the "certificate of compliance" constituting the "peer review". In the section dealing with design departures from the Deemed-to-Satisfy provisions of the Building Code of Australia, as noted, there is no mention at all of the crucial external wall cladding issue. I am unpersuaded by Mr Shafto's evidence that the reference to the fire engineering brief (Issue 5) and the fire engineering report at the foot of the certificate under the heading "Design documents" renders the lack of specific reference to the combustible wall cladding immaterial. The explanation, according to Mr Naqebullah, as to why the fire engineer thought the combustible cladding was an acceptable "Alternative Solution" was to be found not in either of the "design documents" referenced but in the fire engineering brief Issue 4, which does not seem to have been considered by the "peer" at all. More generally, there is no explanation as to why a rating apparently regarded as significant for bushfire purposes (referable to the Bushfire Attack Level) is material, nor are the other references identified by Mr Naqebullah directly applicable to external wall cladding. All in all, a welter of what Mr Kip described as "dense" documentation from the fire engineer, without proper integration and without a "pathway of reasoning" which can be discerned other than by guesswork, is entirely unsatisfactory relative to this crucial external cladding issue.

97 The premise that the existence of a permit or a varied permit authorising what was done, as Mr Naqebullah's case says occurred here, which necessarily

entails the conclusion that the warranty in s8(c) of the *Domestic Building Contracts Act* has been complied with, must include the unstated premise that the permit is not subject to collateral attack: that is, that the permit is deemed a valid permit unless and until some administrative law process is undertaken to set it aside or declare it void. Decisions of superior courts have this standing: *Wilde v Australian Trade Equipment Co Pty Ltd* (1981) 145 CLR 590. In contrast, orders by courts which are not regarded as "superior courts of record", such as this court and the District Court of New South Wales, may be disobeyed with impunity if it is established that the orders are made without jurisdiction. The disobedience is a form of "collateral attack": *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435.

98 In my opinion, the Stage 2 permit as varied should be accorded no higher status than the order of an inferior court such as this court. This means it is subject to collateral attack. Given the defects and infirmities which I have described, the permit is one which should never have been granted, and should therefore be treated as invalid. The result then is that these works are to be regarded as having been carried out, at least as regards the flammable cladding, without the authority of a valid permit. I accept the evidence of Mr Salomonsson that the performance requirements of the Building Code of Australia 2010 were not met, and so the work has been carried out in violation of the terms of the Code. In those circumstances, the State has made good the cause of action as to liability relative to the warranty implied by s8(c) of the *Domestic Building Contracts Act* as to liability, and subject of course to the statutory stay of the proceeding against Shangri-La.

99 Dr Wolff drew my attention to paragraph 73 of Mr Naqebullah's witness statement at CB 2928 where he identified Alucabond, sometimes referred to as "ACP", as being provided for in the plans for the Hawthorn Road building. The plan in question is an energy-rating plan, and is to be found at CB 6928. This

material is the very material which is implicated in the Lacrosse and Grenfell Tower conflagrations (T652, L12–T653, L4; T709 L4−6). Speaking of this Alucabond or "ACP" cladding, Dr Wolff said in final submissions:

> "It ended up not being on the building and the reason why it's not on the building is, as we have heard, because he's [*viz* Mr Naqebullah] taking it off after the Lacrosse fire." (T653, L6−9)

100 Assuming this cladding was removed as Dr Wolff described, it subverts the case that the issue of the building permit was the "be all and end all" of design issues which would preclude any modification to design or materials in the interests of fire safety and bestow blanket immunity on the builder from liability for an unsafe structure so long as the structure was built in accordance with the terms of the permit.

101 As to liability for the warranty implied into the building contract by s8(f) of the *Domestic Building Contracts Act*, it must go without saying that a building which does not meet the relevant performance requirements under the Building Code of Australia 2010 (which applied to this building) cannot be regarded as being "reasonably fit" for use and occupation as an apartment house. Subject to the issue of the statutory stay, the State's claim under this implied warranty against Shangri-La is complete on issues of liability.

The Charter

102 At paragraph [329] of his closing submission, Dr Wolff said:

> "The Second Defendant no longer relies on his defence that Sec 137F is in violation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("the Charter") but reserves the right to raise such defences anew in any further proceeding."

103 I am unclear as to the purport or effect of the reservation or attempted reservation in this paragraph. The paragraph does, however, relieve me of any need to deal with Charter issues in these reasons.

The case against Mr Naqebullah

104 With the case made out as against Shangri-La, now in liquidation, on the basis of ss(2) of s137F, the question next for consideration is whether, where the direct remedy is "against an entity that is not an individual", *viz* Shangri-La, the remedy that would otherwise be available against Shangri-La is enforceable against Mr Naqebullah as a person who was an officer "at the time the act or omission that gave rise to the right or remedy occurred": see ss(3). It is conceded that Mr Naqebullah was a director of Shangri-La at all relevant times, and therefore that he falls within the definition of "officer" for the purposes of ss(3) and as stated in ss(10) of s137F. Mr Naqebullah, through his counsel Dr Wolff, contends that the relevant "act or omission" which would have rendered Shangri-La liable but for its liquidation occurred "without the knowledge or consent of an officer of the entity [*viz* Mr Naqebullah]", such that the State's claims are "not enforceable as provided by subsection (3)" against Mr Naqebullah: see ss(4).

105 The evidence established, and it was not in dispute, that the use of RMAX Orange Board – a form of EPS – was known to Mr Naqebullah, since he was in charge of Shangri-La's building operations. He knew that this material was being employed, and he consented to it. Dr Wolff contended that the ss(4) defence was available to Mr Naqebullah if he could be shown to have been ignorant of what now seems to be known and accepted by everyone: namely, that the "Alternative Solution" authorised or purportedly authorised by the building permit for Stage 2 in its original or varied form, and approved in the fire engineering briefs and report, did not achieve the performance requirements under the Building Code of Australia 2010. Likewise, it was Mr Naqebullah's case that, not being aware of the unsuitability of EPS or external wall cladding, he was unaware that the material used by Shangri-La under his direction was not suitable material for external cladding, and that an apartment house clad by this combustible cladding was not suitable for its purpose.

106 The State contended, and I did not understand Dr Wolff to deny, that the form of ss(4), and, one may think, the fact that matters of knowledge and consent are peculiarly within Mr Naqebullah's knowledge and not within the knowledge of the plaintiff owners or the State, meant that the burden of proof on this issue rested with Mr Naqebullah.

107 Mr Naqebullah's written and oral evidence was to the effect that he was at relevant times in 2014 and 2015 ignorant that there was any problem with the use of EPS, and he had his company employ it in construction because it was "green-lighted" by the relevant building surveyor and by the fire engineer. He said he was also influenced by what transpired at the design meeting in June 2014 where, as noted above, the discussion between the attendees was as to the proper brand of EPS to use, and the consensus was that the product RMAX Orange, the product which was in fact fitted, was the one to use. He said he was also influenced by an email from the fire engineer indicating the suitability of RMAX Orange by email dated 9 April 2014, albeit with respect to a different development at 58 Queens Parade, Fitzroy (CB 5051).

108 Whilst a number of comments were made by Ms Crafti and Mr Chaile, and a number of attacks in cross-examination were mounted as to these matters, it was not squarely put to Mr Naqebullah that he was lying in so far as he had given such evidence; nor could it be said that this evidence was other than probative as to his level of knowledge at material times. In those circumstances, I accept Mr Naqebullah's evidence that he was unaware that EPS or RMAX Orange was problematic or inappropriate in its use as external cladding on the building at Hawthorn Road, and that he became aware as to this problematic nature only in 2016 or 2017.

109 The question then becomes whether the knowledge which Mr Naqebullah clearly did possess, that EPS was being used as external cladding on the building at Hawthorn Road, is sufficient to negative the defence he claims under ss(4) of

s137F without further proof that he knew that EPS was problematic and non-compliant in that use.

110 On this difficult question, Ms Crafti and Mr Chaile said that s40 of the *Travel Agents Act* 1986 of New South Wales constituted an analogy with s137F. Subsection (5) of that section provided:

> "Where it is proved that an act or omission by a body corporate occurred without the knowledge or consent of a director of the body corporate, rights are not enforceable as provided by subsection (4) against the director in relation to the act or omission."

111 The language of this subsection of the *Travel Agents Act* of New South Wales seems closely aligned to the corresponding provision in s137F of the Victorian *Building Act*. Ms Crafti and Mr Chaile referred to an unreported decision of Wilcox J of the Federal Court of Australia in *Travel Compensation Fund v Dunn* (2 December 1992, BC9203833) ("*Dunn's* case"). *Dunn's* case concerned an application by the Fund to recover the amount of a defalcation or defalcations by a travel agent company against two of the company's directors or former directors. One seems to have been the principal and directing mind of the company, and the relevant events plainly occurred with his knowledge and consent. The other director was less closely involved in the business, and had attempted to arrange a "rescue" of the company with an injection of further capital. Wilcox J concluded that since the latter and less active director was aware that the company was carrying on business and therefore receiving deposits and payments for travel from its customers, and had taken no steps to satisfy himself that an appropriate trust account arrangement was in operation, he could not avail himself of the defence. Given the very different context of this case and *Dunn's* case, despite the close resemblance in language of the two statutory provisions, *Dunn's* case seems to provide no guidance on the simple but crucial question which I have posed.

112 Dr Wolff contended that, in context, the knowledge referred to and necessary to make out the statutory defence was subjective knowledge: what Mr Naqebullah actually knew, as distinct from any objective version as to what he ought to know. Had Parliament wished to introduce any concept of "ought to know" into the defence, it could have used language which specifically invoked this concept. Since no such language appears in s137F in general, or ss(4) of that section in particular, I accept Dr Wolff's contention on this point.

113 Dr Wolff said that the subject matter of the "knowledge" or lack of knowledge required for a consideration of the ss(4) defence was the relevant "act or omission by an entity [*viz* Shangri-La]". This, according to Dr Wolff, referred one back to ss(2), identifying the act or omission which might impose liability on the "entity", in this case Shangri-La, as being "the installation or use of any non-compliant or non-conforming external wall product ... that required the cladding rectification work to be undertaken". He noted that the Act includes a definition of cladding rectification work in s3 which is in the following terms:

> "*cladding rectification work* means—
>
> (a) building work in connection with, or otherwise related to, a product or material that is, or could be, a non-compliant or non-conforming external wall cladding product; or
>
> (b) work of a type specified in a notice under section 185I of the Local Government Act 1989".

114 Dr Wolff said that this definition incorporated within itself a requirement that the relevant material [here EPS] be "non-compliant or non-conforming".

115 In a broad sense, Dr Wolff's expatiation on the statutory provisions is plainly correct. It does not, however, provide an answer to the question posed. As previously noted, EPS is "non-compliant or non-conforming". The textual analysis leaves unanswered the question whether knowing that what is admittedly a non-compliant or non-conforming material to be used amounts to sufficient knowledge to exclude the ss(4) defence, whether one knows that the material is non-compliant or non-conforming or not.

116 I referred the parties to a decision of the High Court of Australia in *Yorke v Lucas* (1985) 158 CLR 661 ("*Yorke's* case"). This case concerned the cause of action for misleading or deceptive conduct, which at that time was constituted by s52 of the *Trade Practices Act* 1974. Section 75B of that Act extended liability from a corporation which has engaged in misleading or deceptive conduct to persons who had aided, abetted, counselled or procured the contravention; induced the contravention, whether by threats, promises or otherwise; or had "been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention". These provisions are now to be found in the Australian Consumer Law. The counterpart of s52 of the *Trade Practices Act* is s18 of the Code.

117 Earlier High Court authority had established that a corporation which represented to another person something which was misleading or deceptive was to be regarded as having contravened s52 without any proof that the corporation knew or ought to have known that what it represented was misleading or deceptive. That is, the primary liability attaching to the corporation was absolute, in the same way as the liability attaching to Shangri-La here – subject to the statutory stay of proceeding – was strict and absolute in accordance with the warranties implied by s8 of the *Domestic Building Contracts Act*.

118 Mr Lucas, a director of the relevant corporation, was found at trial not to be liable as someone knowingly concerned in his company's contravention because, according to the summary in the joint judgment in the High Court of Mason ACJ, Wilson, Deane and Dawson JJ:

> "he [Mr Lucas] was insufficiently aware of the relevant facts for him to be involved in the contravention within the meaning of ss75B and 82 of the Act." ((1985) 158 CLR 661, 665)

119 An appeal to the Full Court of the Federal Court against the dismissal of the claim against Lucas was unsuccessful, and the matter then proceeded to the High Court. The High Court affirmed the decisions below. According to the joint judgment:

> "A contravention of s.52 involves conduct which is misleading or deceptive or likely to mislead or deceive and the conduct relied upon in this case consisted of the making of false representations. Whilst Lucas was aware of the representations – indeed they were made by him – he had no knowledge of their falsity and could not for that reason be said to have intentionally participated in the contravention." ((1985) 158 CLR 661, 667−8)

120 Their Honours said later in their judgment:

> "There can be no question that a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention." ((1985) 158 CLR 661, 670)

121 Brennan J said:

> "When the conduct constituting the contravention [of s52] is the making of a false representation, it is immaterial that the corporation did not know that the representation was false when it was made. The essential facts to be established in sheeting home liability to a corporation under s.52 include the making of the representation and the falsity of the representation but not the corporation's knowledge of the falsity." ((1985) 158 CLR 661, 675−6)

122 His Honour said:

> "The operation of s.75B(a) in conjunction with s.52 may be incongruous, for s.52 throws a strict liability on a corporation, but s.75B(a) does not extend liability for a s.52 contravention to a person who procures the corporation to engage in contravening conduct if that person is honestly ignorant of the circumstances that give that conduct a contravening character." ((1985) 158 CLR 661, 677)

123 As to persons being knowingly concerned in the contravention, his Honour said that he could not read the words "knowingly concerned in" as being the equivalent of "unknowingly concerned in". (Ibid)

124 Dr Wolff said in the course of his closing submission that "there were 1137 cases decided" mentioning *Yorke v Lucas* "as of yesterday": *viz*, 16 August 2023. He continued:

> "I have not gone through all of them, but when you read them, you always see a reluctance by the various judicial authorities to accept something that didn't have some factual basis." (T663, L26−30)

125 I have not read the 1,137 cases referred to by Dr Wolff.

126 The context of *Yorke v Lucas* is materially different from this case. In *Yorke's case* the "knowledge" was a component of a cause of action. Here, "knowledge" is a component of a defence. Again, the High Court noted that the language in s75B was taken from the criminal law, referring to concepts of "aiding and abetting", "counselling", and "procuring", which would tend to impart the strict requirements of proof into the cause of action constituted by s75B. Here, there is no context or language which would render the analyses and approaches adopted in the criminal jurisdiction appropriate. I was referred to a number of the 1,137 cases, but none of them took the matter any further than *Yorke v Lucas* itself, though a number of them stated the principle which I would have supposed governed in any event: that the knowledge required for someone to be knowingly involved in a contravention did not extend to the lawfulness or otherwise of the acts said to constitute the contravention: see for instance *Australian Building and Construction Commissioner v Parker* per Flick J, [2017] FCA 564 at [128] ("*Parker's* case"). His Honour continued, however:

> "For a person to contravene s 50, it is sufficient to prove that conduct took place which was in fact a contravention of a term of an enterprise agreement. For the purposes of accessorial liability, all that need be proved is that the accessory had knowledge of the conduct." [2017] FCA 564 at [128]

127 In *Parker's case*, the Australian Building and Construction Commissioner brought proceedings against Mr Parker, who was the State Secretary of the New South Wales Divisional Branch of the Construction, Forestry, Mining and Energy Union (the CFMEU). Section 50 of the *Fair Work Act* at that time provided:

> "A person must not contravene a term of an enterprise agreement."

128 Section 550 of the Act provided:

> "(1) A person who is *involved in* a contravention of a civil remedy provision is taken to have contravened that provision.
>
> (2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention."

129 The resemblance to s75B of the *Trade Practices Act* 1974 is obvious enough. His Honour referred to a passage from the joint judgment in *Yorke v Lucas* at (1985) 158 CLR 661, 667, and a passage at page 670 of the Commonwealth Law Report to the effect:

> "There can be no question that a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention."

130 At paragraph [126] of *Parker's* case, Flick J said:

> "Actual knowledge is required – mere constructive or imputed knowledge is not sufficient. But actual knowledge may be inferred from "*exposure to the obvious*"."

131 His Honour's judgment went on appeal to the Full Court of the Federal Court of Australia, *sub nom Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56. His Honour's reasoning as to s550 of the *Fair Work Act* was considered by the Court – Besanko, Reeves and Bromwich JJ – in connection with a cross-appeal by the Commissioner. The Commissioner contended that the reasoning of Flick J on this point should have led to a number of charges which his Honour had dismissed being sustained. The Court considered these matters at [234]−[240], dismissing this part of the cross-appeal without either specifically approving or disapproving the trial judge's analysis of the operation of s550.

132 The effect of the decision of Flick J in *Parker's case* would seem to be supportive of the State's case. His Honour held, as summarised in the headnote to the Industrial Reports version of his Honour's decision:

> "For the purposes of accessorial liability, all that needed to be proved [relative to alleged breach of s50 of the *Fair Work Act* 2009] is that the accessory had knowledge of the conduct." ((2017) 266 IR 340, 383)

133 The provision as to accessorial liability was to be found in s550 of the *Fair Work Act* in terms not materially different from s75B of the *Trade Practices Act* 1974 as considered by the High Court in *Yorke v Lucas*.

134 *Yorke v Lucas* plainly stands for the proposition that a person cannot be "knowingly" concerned in a contravention without knowing every element making up the contravention. The concept of "knowingly" is an integral part of the relevant cause of action or criterion of liability. In this case, the element of "knowledge" is not part of the primary cause of action, which is one of strict or non-fault liability. Rather, it is part of a defence which may be made out by a particular "officer". Ultimately, however, this would seem to make no material difference to the operation of the *Yorke v Lucas* principle in circumstances such as the present.

135 The question remains "knowledge of what?" Mr Naqebullah knew that RMAX Orange was being used on the Hawthorn Road site. He says he participated in the decision made at the design meeting in June 2014 to use that material. It was an unsatisfactory material which is required to be removed in accordance with the program provided for in the 2020 statute. Mr Naqebullah is and was at all material times an "officer" of Shangri-La.

136 In closing submissions, Dr Wolff "set the scene" for the cladding replacement program and the liability issues arising therefrom:

> "313. It is common knowledge that the Second Defendant is the first person against which the state has proceeded under Sec 137F(3). It remains unknown to the Court why he has been chosen, and it is perhaps irrelevant.
>
> 314. The evidence does tell us that at least 73 emergency orders were issued (Emergency Action 14 Feb 2020).
>
> 315. We also know that on at least three occasions the VBA issued immediate suspensions to the relevant building practitioner, which it of course did not do here (Extract from Cladding Portfolio PCB Monthly Report – June 2023, A summary of VBA Enforcements where the VBA is MBS – CB 10866). From the Summary of cladding enforcement related activities undertaken by the VBA (as

at 14 February 2020) we know that at least one of these involved a builder (CB 10790).

316. We also know from the Summary of cladding enforcement related activities undertaken by the VBA (as at 14 February 2020) that:

a) The number of sites inspected by the VBA is 2,657;

b) The number of sites inspected which have been the subject of an Advisory Reference Panel is 1,399;

c) The number of sites identified as being of extreme or high risk is 616.

317. The same document tells us that for extreme and high risk sites:

a) The number of building surveyors is 136;

b) The number of builders is 369;

c) The number of fire engineers is 76.

318. Of course, the classification of "high risk" by the VBA may, in fact, mean little. The total number of buildings acquitted by a Council MBSs, including risk rating and building class is shown in Table 2.1.8.1 of the Extract from Cladding Portfolio PCB Monthly Report – 31 January 2022 (CB 10852). It shows 11 buildings were acquitted despite being classified as High or Extreme Risk, which begs the question what that classification really means.

319. Perhaps the best numbers can be obtained from the External Wall Cladding Audit Report of 17 February 2016 (CB 10726-35). They are also the easiest to understand, and the most impressive: Of all the buildings permits surveyed and audited, just over half – 51% – were assessed by the VBA as non-compliant (compare page 21 of the Victorian Cladding Taskforce Interim Report November 2017 at CB 8109)."

137 The class of person who could be described as "officers" of the companies involved in the construction of the buildings which required remediation is very wide indeed. The *Building Act* "picks up" the definition of "officer" from the Commonwealth *Corporations Act*. The concept of "officer" in that lengthy definition specifically includes both company directors and secretaries as well as persons who make "or participate in making decisions that affect the whole or a substantial part of the business of the corporation". It can therefore extend to senior executives who do not hold positions on the board. We may consider that in creating the defence established by ss(4) of s137F of the *Building Act*,

Parliament sought to immunise a number of obvious classes of "officers" from liability. For instance:

(a) non-executive directors such as a building company's solicitor or accountant who sit on the board to bring their legal or accounting expertise to the table;

(b) company secretaries who devote their time to office administration, keeping or supervising accounts or accounting systems, payroll issues and so forth;

(c) executive directors or non-director executives involved in non-building aspects of a company's operations: for instance, a marketing manager or someone devoted entirely to the raising of finance;

(d) executive directors or senior executives tasked to manage or supervise particular projects which are not affected by the cladding issue.

138 There may be other obvious classes of officer whom Parliament intended to exclude.

139 What remains when these obvious classes are excluded? The residuum, whom on the face of it Parliament seemed to seek to subject to liability for the cladding fiasco, would be directors and managers with building qualifications of one sort or another, engaged in managing a building company's building operation, including in particular building projects where non-compliant cladding was used. All of these "officers" could, one supposes, establish, as plausibly as Mr Naqebullah has sought to do in this proceeding, that whilst they are and were generally expert in building matters, they were not expert in fire engineering. The market was using what are now seen as non-compliant combustible materials for cladding (as testified by the figures quoted by Dr Wolff). They relied on the expertise of fire engineers and relevant building surveyors. This line of defence could generally be advanced, one would suppose, by the whole of this residual

class of persons, unless perhaps one or more of them was in fact a fire engineer himself or herself.

140 The result of Dr Wolff's proposed construction of the ss(4) defence is that officer liability under s137F would be a mere *brutum fulmen*, which cannot be what Parliament intended. A document described as "Specifications & Finishes Schedule", stamped by the relevant building surveyor as "APPROVED", in the "External" section referred at Line 1.3 to "Styro Foam Rendered" (CB 6918). On the basis of the judgment of Flick J in *Parker's case* and the considerations just mentioned, I conclude that Mr Naqebullah's "knowledge" of this cladding issue, namely that RMAX was being used on the Hawthorn Road site, is sufficient to exclude him from the benefit of the ss(4) defence. This construction of that defence is the preferable one, because it advances the purposes of the *Cladding Safety Victoria Act* 2020; whereas the construction advanced by Dr Wolff, for the reasons explained, does not.

Quantum

141 The State relied on the evidence of Mr Mellinger as to the progress of the remedial works on the Hawthorn Road property, and the evidence of quantity surveyor Mr Douglas Buchanan. He summarised the outlay as totalling the sum of $1,190,705.55, according to the following table (CB 851):

Vendor Name	Description	Invoiced (excl GST)
Marradon	Cladding Rectification Works	$ 888,942.70
PLP Building Surveyors	Building Surveyor	$ 14,000.00
NVM Facades	Structural/Façade Engineer	$ 6,350.00
Sedgwick	Project Management	$ 192,271.27
Sedgwick	Clerk of Works	$ 60,204.08
	Due Diligence	$ 28,937.50
	total	$ 1,190,705.55

142 Mr Buchanan said that these amounts were "exclusive of GST" and that he was satisfied that such charges were "reasonable" (Ibid, paragraphs 8.4 and 8.5).

143 Dr Wolff contended by reference to the statement of claim filed on behalf of the State that it did not claim "the cost of removing and replacing composite timber cladding ("CTC")" (Closing submissions, paragraphs [331]−[334]). He continued:

> "Yet CTC was removed from the property, and the State paid for that removal." (Closing submissions, paragraph [336])

144 He noted that in cross-examination the State's witnesses, Mr Buchanan and Mr Mellinger, "conceded that the relevant invoices do not provide for a breakdown between the costs of CTC and of EPS removal" (Closing submissions, paragraph [340]). At paragraph [341], Dr Wolff cited the passages which he said made good that contention. Having heard Dr Wolff's cross-examination, I accept that it had the effect for which he contends. Dr Wolff proceeded to state that some four invoices, with a total face value of $54,573.75, "specifically referred to EPS removal" (Closing submissions, paragraph [342]). Dr Wolff proceeded, "At its highest, that is all the State can prove as quantum" (Ibid, paragraph [343]).

145 If Dr Wolff's summary of the State's case on quantum adequately represents it, even if the State is entirely successful (as I have held that it is), no more than $54,573.75 may be awarded in its favour.

146 Ms Crafti on behalf of the State, however, said that Dr Wolff's contentions misread the evidence. She said that whilst CTC cladding was removed, it was in effect the "lining" between the EPS and the underlying wall. The removal of CTC, she said, was incidental to the removal of the EPS, and should therefore be regarded as comprised in the State's allegation in its pleadings as to the outlays it necessarily undertook in the process of remediation. She agreed with an analogy which I proposed that the removal of the underlying lining of the EPS was as much part of, or incidental to, the cladding removal process as would be "make good" work to the underlying wall to deal with any damage which it sustained in the course of the cladding removal process. (T609) She said this

was not an instance in which there were two separate areas of cladding, one being EPS and the other one being CTC (T612−13).

147 This is a matter of the first importance. Whilst damages and other awards may be made on the basis of estimates which a cynic might say amounted to little more than educated guesses, the authorities are clear that absence of evidence from which an entire item in the liability equation may be fixed or estimated is fatal to a damages or debt claim: *Spotlight Pty Ltd v NCON Australia Ltd* (2012) 46 VR 1; *Keys Consulting Pty Ltd and Anor v CAT Enterprises Pty Ltd and Ors* [2019] VSCA 136. Dr Wolff referred to a recladding progress report from NVM Facades relative to the Hawthorn Road building at CB 10833−10837, which at page 10836 stated:

> "The building was included in the CSV Cladding Rectification Program due to external façade areas of:
>
> - Expanded Polystyrene (EPS) cladding
> - Composite Timber Cladding (CTC)",

which, he said, indicated that different areas of the building were covered by different forms of cladding.

148 The evidence in this proceeding extended over five days. The primary Court Book extended to eleven volumes, with page numbers going into five figures. A number of supplementary Court Books were filed "in the running". It is regrettable, to say the least, that there should be any uncertainty as to a matter as fundamental as the present.

149 The emergency order under Regulation 178 of the Building Regulations 2018 and s102 of the *Building Act* 1993 (CB 8610−8615) states the first or primary ground for its issue as "The Building has combustible cladding (ie. Expanded Polystyrene (EPS)) covering a large proportion of the external walls which will result in fire spreading rapidly in the event of a fire" (CB 8613). There is no reference to CTC cladding, which would tend against the view that there were

separate areas of the building covered with different types of cladding. All experts stressed that "EPS" is not the sole combustible material. Timber is also combustible. If CTC constituted an additional and separate area of cladding, one might have expected the emergency order to extend to that as well.

150 Ms Crafti noted that for the purposes of his third report, fire engineer Mr Kip was briefed with Mr Mellinger's witness statement, which described the entire process undertaken in the remediation operation, including the removal of CTC, and attached an extensive range of primary documents. Mr Kip said:

> "I have concluded that the scope of work undertaken to rectify the EPS cladding was reasonable." (CB 925)

151 I noted that Dr Wolff's cross-examination of Mr Mellinger did not seek to elicit any explanation of the position or significance of the "CTC" cladding. Dr Wolff replied:

> "[Y]ou must understand though that my position is not to prove the State's case." (T681, L22−23)

152 If there were indeed separate areas clad in the one location with EPS and in the other CTC, I would have expected Dr Wolff to take me to the plans that made that depiction to make good his case. By way of analogy with *Jones v Dunkel* (1959) 101 CLR 298, I conclude that reference to the architectural engineering plans would not have assisted Dr Wolff's case on this point.

153 I accept the interpretation of the significance of "CTC" cladding in this case as advanced by Ms Crafti and Mr Chaile. The State has therefore established the quantum of its entitlement.

Costs

154 I have heard no argument on the subject of costs, and so I will reserve them.

Disposition

155 I will direct that the parties bring in short minutes to give effect to these reasons.