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Alternative Solutions Under the BCA – It Is Never Too Late

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While "never" may be an exaggeration, it is important to remember that Alternative Solutions[1] under the Building Code of Australia (BCA) can be formulated retrospectively, including in the defence of legal proceedings alleging breach of statutory warranty.

The NSW Supreme Court provided a recent reminder of this in *Strata Plan 92450 v. JKN Para 1 Pty Ltd & Anor* [2022] NSWSC 958 (*Strata Plan 92450*). In that case, an Owners Corporation had commenced proceedings against the builder and developer of an apartment building alleging breaches of the statutory warranties contained in the Home Building Act 1989 (NSW). The allegations included that the external cladding installed on the building did not comply with the BCA, as it was combustible.

It is well known that compliance with the Performance Requirements of the BCA can be established either by demonstrating satisfaction of the Deemed to Satisfy (DtS) provisions or by the formulation of an Alternative Solution (or a combination of these options).

In *Strata Plan 92450*, the parties agreed that the external cladding did not comply with the DtS provisions of the BCA regarding combustibility. The court was, therefore, required to consider whether there was an Alternative Solution that satisfied the BCA Performance Requirements.

Black J said that the strict answer to that question was "no", as an Alternative Solution had not been prepared prior to the issue of a construction certificate and "has not been prepared now".

However, his Honour went on to say that this would not assist the Owners Corporation, as the court would plainly be less likely to order damages in excess of AU$5 million on the basis that the replacement of the cladding was "reasonable" where an Alternative Solution could now be prepared establishing compliance with the BCA. It was, therefore, necessary for the Owners Corporation to establish that an Alternative Solution could not be prepared to satisfy the BCA requirements The Owners Corporation failed to do so.

The expert engaged by the Owners Corporation merely said that further inquiries would need to be made and issues addressed in undertaking an Alternative Solution. In particular, he said that additional laboratory testing of the cladding material was required to determine matters relevant to the assessment of certain Performance Requirements under the BCA (fire load, fire intensity and fire hazard). Black J said that where the necessary laboratory testing had not been performed, it was "simply unknown" what the result of the testing would have been and whether the external cladding could have complied with the BCA had an Alternative Solution been undertaken.

The Owners Corporation's expert also expressed a reservation about the availability of an Alternative Solution on the basis of flow information specifications for the sprinkler system posted in the sprinkler pump room. However, Black J said that there was no indication that the Owners Corporation had investigated that matter further, stating that it just raised "another unresolved question" rather than establishing that an Alternative Solution was or is not available on that basis.

The defendants' expert's evidence was also inadequate, as it failed to establish that an Alternative Solution was available. Black J said that the evidence did not amount to a full Alternative Solution, which the expert was not asked to prepare. Rather, it involved a "degree of speculation" as to steps that were not taken to develop a full Alternative Solution and, therefore, could not be given substantial weight.

While neither party provided adequate expert evidence addressing the availability of an Alternative Solution, this resulted in a loss for the Owners Corporation given its obligation to prove its case.

Key Takeaways

- While the formulation of an Alternative Solution should be undertaken sooner rather than later, it is not "too late" once legal proceedings are commenced.
- Consideration should be given to the formulation of Alternative Solutions as a potentially cost-effective mechanism for the resolution of defect disputes.
- It is critical for evidence to be obtained to demonstrate that any Alternative Solution meets the Performance Requirements of the BCA. Such evidence can include laboratory testing of materials and expert judgments.
- When instructing an expert, care needs to be taken to ensure all necessary information is provided to the expert and appropriate instructions are given regarding the opinions to be provided (and whether a full Alternative Solution is to be prepared).

1 Alternative Solutions are now called Performance Solutions.

The Costs of Not Following e-Discovery Best Practices

Authors: Carolyn Wyatt and Surbhi Sacklecha

UK law firm Fieldfisher and its client MGA recently received criticism from a High Court judge in the matter *Cabo Concepts Ltd v. MGA Entertainment (UK) Ltd & Anor* [2022] EWHC 2024 due to its failures in overseeing the disclosure process for its client MGA. The failures resulted in 800,000 documents being inadvertently missed during data collection, causing a two-year delay in the civil trial and a hefty payout for costs thrown away to Cabo.

Cabo Concepts brought claims against MGA in respect of alleged breaches of statutory duties and an anti-competitive campaign to stifle the launch of Cabo's "Worldeez" collectible toys, toys likely to compete with MGA's brands. The breaches were claimed to have caused the failure of Cabo's business with MGA's conduct being evidenced by individual emails.

The initial searches and data collection of emails by MGA were undertaken by its in-house IT team, and it had initially advised Cabo's legal team that the MGA disclosure process would be supervised by electronic discovery (e-disclosure) specialists and Fieldfisher lawyers. The collection or harvesting of documents by MGA was then undertaken without supervision, with Fieldfisher relying on MGA's IT team to conduct the harvesting exercise appropriately. 860,000 emails, or around 40% of the documents, were missed in the harvesting exercise due to MGA's in-house IT team not having a sufficient level of experience or knowledge of best practice and inappropriate use of software for harvesting.

During preparation for trial, Fieldfisher became aware of a key email referenced by Cabo in its pleading that had not been disclosed or harvested from MGA. It was "not unduly alarmed by this" and did not suspect widespread issues existed, so decided that reharvesting emails for the custodian sending that email would be disproportionate at that time. It also transpired that a small number of emails identified as relevant and requiring disclosure and emailed to Fieldfisher by one of the key MGA custodians had not been harvested or disclosed. The batching of documents for review also provided challenges, with potentially responsive documents failing to be batched for review, and not being disclosed.

Shortly prior to trial, the High Court was advised of the significant disclosure failures by MGA.

The High Court judge, Mrs. Justice Joanna Smith, stated that the identification of the email that was not disclosed should, at the very least, have prompted the law firm to re-run that data collection.

Smith J considered the consequential matters arising from the inadequacies of the discovery process and adjournment of the trial, including Cabo's entitlement to costs thrown away. The High Court awarded costs to Cabo on an indemnity basis accounting to 45% (nearly £580,000) of Cabo's total costs incurred in preparation for the trial and noted that "it was inevitable that the proper conduct of the disclosure process by MGA would be of the utmost importance" and that "MGA's conduct in connection with the disclosure exercise was out of the norm in that it was outside the 'ordinary and reasonable conduct of proceedings'".

The decision confirms the significance of involving experts, and providing supervision, as a part of best practice for e-discovery processes. While the deficiencies in disclosure were not deliberate, it did not reduce the seriousness of the deficiencies.

Key Takeaways

- **Engage e-disclosure experts from the very beginning** – Ensure that the people involved in the document collection and production processes are experts who are qualified and sufficiently experienced in the performance of the tasks being undertaken by them, and with the software being utilised by them for that process. There is a risk of having internal IT teams lead e-discovery if it is not their area of expertise.
- **Supervise e-disclosure processes** – Ensure that e-disclosure processes are overseen and supervised, with appropriate project management procedures in place to ensure that:
  - Red flag issues get investigated
  - Instructions to those collecting documents or assisting with the management of the document review and production process are followed
  - Quality control processes take place
  - Action items stay open until complete

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