

## Insurance Insights

### “Property Damage” – Sounds Simple, Right?

At its simplest, a liability policy provides cover to an insured, whose acts and/or omissions cause property damage and/or personal injury to a third party. In many claims, determining whether there has been property damage will require nothing more than a cursory review of the allegations. In others, the enquiry can be far more complicated, as evidenced by the number of judgments addressing the issue, the latest of which is *Owners - Strata Plan No 91086 v Fairview Architectural Pty Ltd (No 3) [2023] FCA 814*.

#### Background

Fairview Architectural Pty Ltd (**Fairview**) manufactured and supplied combustible “Vitrabond Panels” (aluminium composite cladding), which were used in the construction of two high rise residential buildings located in Warwick Farm, NSW. The relevant owners corporation (**the Claimant**) issued representative proceedings against Fairview, alleging the panels “*were not of merchantable or acceptable quality*”. To quote from the judgment:

*“The relief sought by the Claimant includes compensation for loss or damage arising from the supply of the Vitrabond panels, including the costs of, and incidental to, the removal of the panels and the remediation of the buildings and parts thereof to remedy any damage caused by their affixation to the buildings.”*

During the period that the panels were fixed to the buildings, Fairview held liability policies with AAI Limited (**AAI**), which provided cover for “*property damage*” caused by an “*occurrence*”.

Owing to Fairview having entered into voluntary administration, the Claimant made an application to join AAI as a party to the proceeding. AAI opposed the application on the basis that Fairview was not entitled to indemnity under the liability policies. AAI argued “*affixation*” of panels was not an “*occurrence*”, which caused “*property damage*” to the Claimant’s buildings.

#### The Parties’ Submissions

The Claimant submitted that the “*affixation of defective panels caused physical loss and or damage to its tangible property*”. The Claimant pursued its claim in four ways:

1. The panels created a fire risk, which made the buildings unsuitable/less suitable for their intended use (habitation).

AAI's response:

*"There was no physical damage to the buildings simply because there is a risk that the buildings may be damaged by fire at some point in the future...[F]or loss of use to constitute physical damage, the loss of use must result from damage to the property, not the mere risk of future damage."*

2. The process of fixing defective panels to the building, using thousands of screws, caused damage to the structure of the buildings.

AAI's response:

*"Any damage to the buildings caused by the insertion of screws or nails, and the resulting holes in the exterior of the buildings, was not unintended or unexpected damage. Fairview knew that the top hats were to be affixed by way of nails or screws. The damage was therefore not caused by an occurrence as defined in the policies. AAI also submitted, in the alternative, that the damage was not caused by an event which was unintended or unexpected because the affixation of the panels was clearly intended."*

3. The process of removing the panels will inevitably result in damage to the "top hat" subframes to which the panels were fixed.

AAI's response:

*"Any damage to the top hats that may result from the removal of the Vitrabond panels would not be damage that occurred during the periods of insurance. Rather, it is damage that may occur in the future, or amounts to no more than a risk that damage may occur in the future."*

4. There was a risk that the structural integrity of the buildings or the subframes would be damaged when the panels came to be removed.

AAI's response:

*"[Once again], the mere risk that some damage to the buildings or top hats may occur at some time in the future is not physical damage that occurred during the periods of insurance."*

## Findings

After considering the authorities and the parties' evidence, Wigney J concluded that:

*"...affixation of the defective Vitrabond panels to Owners' buildings caused "physical damage ... to tangible property", that property being the buildings (specifically the concrete walls, steel struts and sarking that together comprise the walls of the buildings), as well as the top hat subframe that was affixed by nails and screws to the walls of the buildings and upon which the panels were themselves affixed in a manner that was intended to be permanent. The affixation of the defective panels therefore caused or resulted in "property damage."*

Wigney J made a point of noting that while the panels made the buildings less suitable for their intended use, this, alone, was not sufficient to satisfy the definition of property damage. His Honour relied on two other factors to get the Claimant's case "across the line":

1. Fixing the top hats and panels to the buildings resulted in nail or screw holes in the concrete and steel walls of the buildings, as well as holes in the wall sarking. Removal of the top hats and panels will therefore result in "thousands of [screw] holes throughout the buildings' structural walls". This damage was not, as AAI argued, "trivial or superficial" or "de minimis";
2. Removal of the panels will result in damage to/destruction of at least some of the top hat subframe – "the existing top hat structure will have to be removed and disposed of and a new bespoke system will have to be designed to affix the replacement panels".

Wigney J made reference to the well-known decision of [Austral Plywoods Pty Ltd v FAI General Insurance Company Ltd \[1992\] QCA 4](#), the circumstances of which he described as "indistinguishable" to subject case. In Austral, defective plywood was screwed and glued to a vessel's hull. The method by which the plywood was affixed affected the integrity of, and resulted in "physical injury" to, the hull.

## Implications

Insurers and their advisors should never "get comfortable" when considering the issue of property damage. To quote Wigney J, "the resolution of the question...is not easy...The authorities are not entirely consistent and certainly do not supply any coherent rule or rules that can simply be applied..."

The enquiry requires a detailed review of the allegations and evidence, with a particular focus on whether there has been any physical damage, even if only seemingly marginal.

Assuming the third party has suffered property damage, enlivening the insuring clause, it is still necessary to consider the application of any relevant exclusions and/or conditions, which may limit cover.

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