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Insurers on hook for combustible cladding claims against builder LU Simon



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A judge has found insurers must cover claims against builder LU Simon Builders over alleged combustible cladding in Melbourne's Atlantis Towers after a judge found the owners were "obvious candidates" to bring legal action.

In a judgment handed down on Monday, Federal Court Justice Ian Jackman found that insurers MS Amlin Corporate Member Limited, Brit UW Limited of Lloyd's Syndicate and Chaucer Group are liable to cover claims by LU Simon under a professional indemnity policy from 2014 and 2015.

While the legal claims over combustible cladding in the Atlantis Towers were not made during the insurance period, LU Simon said it was covered under section 40 of the Insurance Contracts Act 1984, which holds that an insurer cannot avoid liability if it has "notice of a claim" while the policy has effect.

LU Simon argued that it provided two notifications to the insurers via its broker in emails from May 2015.

The emails attached a newspaper article, a report and an investigation by the Victorian Building Authority concerning a fire in the Lacrosse Apartments in Docklands, Melbourne, which LU Simon also built, allegedly caused by combustible aluminium composite panel (ACP) cladding.

Justice Jackman said the article and investigation notified the insurers of a broader problem than the fire at the Lacrosse Apartments.

"[The article, report and investigation] all referred to a wider problem concerning the use of non-compliant and unsafe ACP products on other buildings in Australia," the judge said.

"That was referred to as a problem for LU Simon generally and the buildings which it had constructed, as well as for other builders which had used ACPs, highlighted by the fact that the email of 7 May 2015 made specific reference to...the report which dealt generally with the lack of compliance by ACPs in relation to their combustibility."

Justice Jackman found it did not matter that the emails failed to identify the potential claimants in the Atlantis Towers, saying that owners and owners corporations of buildings with "non-complaint and unsafe ACP cladding would be obvious candidates to be making such claims".

"In my view, there is clearly sufficient correspondence between the notifications and the Atlantis claims," the judge said.

"Moreover, there is a clear causal connection between the investigation conducted by the VBA which was reported upon in the notifications, and the progression to the Atlantis claims.

“It follows that the insured gave notice to the Insurers before 30 June 2015 of facts that gave rise to the Atlantis claims.”

LU Simon is facing three proceedings over alleged breaches of warranties under its contract with developer Avon Grove Pty Ltd for Atlantis Towers — a 36-storey building in Melbourne.

The warranties concerned allegedly combustible cladding that created an undue risk of fire that could spread through the building’s facade.

The Atlantis Towers residents have claimed loss and damage for the cost of replacing the cladding under an order by the municipal building surveyor of Melbourne in August 2019.

ACP cladding has been the subject of several legal actions in recent years after major fires broke out in buildings that used polyethylene core cladding, most notably, the 23-storey Lacrosse tower in Melbourne in 2014 and the Grenfell tower in London in 2017.

William Roberts Lawyers has [brought a class action](#) against supplier Halifax and producer 3A Composites that centres on Alucobond polyethylene cladding, which is installed in countless buildings across Australia.

The case seeks damages for buildings fitted with the cladding between February 2009 and February 2019. Damages include the cost of replacing the cladding with suitable material and any other costs required to make a building fire safe. A two-month trial is scheduled for August 2024.

A second class action targets the defunct Fairview Architectural, alleging the company misrepresented the quality of its popular but alleged highly flammable Vitrabond polyethylene cladding.

The NSW government issued a retroactive ban on the use of certain aluminium cladding, which took effect on August 15, 2018, and applies to cladding where the core is more than 30 percent polyethylene.

MS Amlin and Brit UW Limited are represented by Edward Muston SC and Kate Lindeman, instructed by Lander & Rogers. LU Simon is represented by Peter Murdock KC and Daniel Briggs, instructed by Giannakopoulos Solicitors. Chaucer is represented by Michael Jones SC and Nicholas Simone, instructed by Hall & Wilcox. Elkington Bishop Molineaux Brokers is represented by Stuart Lawrence SC and Andrew Byrne, instructed by Clyde & Co. Amwin Global Risks Limited is represented by Amelia Smith, instructed by Arnold Bloch Leibler.

The case is MS Amlin Corporate Member Limited v LU Simon Builders Pty Ltd.