‘Harsh and draconian’: Judge shoots down bid for class closure in combustible cladding action

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A court has dismissed a “harsh and draconian” class closure order sought by German cladding manufacturer 3A Composites in a class action against it over allegedly combustible cladding.

Federal Court Justice Michael Wigney on Monday allowed 3A to gain information from group members through a registration process to investigate possible cross claims. However, the judge found that the court had no power to make an order stripping group members of their claims if they did not register.

“Such a drastic and far-reaching order would appear to be fundamentally at odds with the opt out nature of representative proceedings under Pt IVA and go well beyond the scope of the specific provisions in the statutory scheme which it is intended to supplement,” the judge said.

The William Roberts-led class action accuses 3A Composites and Australian distributor Halifax Vogul Group of misrepresenting the quality of the allegedly highly flammable Alucobond cladding. Both companies have denied the cladding is unsafe, saying its suitability would be subject to assessments by builders, architects or certifiers.

Registration required to tackle prejudice

3A urged the court to make the registration and class closure order extinguishing group members’ rights if they did not register and provide information about the cladding in their buildings.

This information, the company argued, could help it look into cross claims against developers, builders, architects, certifiers, fire safety engineers and more who were engaged in buildings where the Alucobond cladding was affixed.

Justice Wigney accepted 3A’s arguments that the information was necessary because potential limitation issues might bar the company from pursuing these claims if it waited too long to obtain the necessary details. The judge found it was “at least arguable” that these limitation issues could arise through legislation enacted in all states and territories except Western Australia.

“[It] is neither necessary nor desirable to finally determine those issues for the purposes of this application. It can, however, be concluded that there is at least a risk that some of the provisions may be found to apply, that the time periods prescribed in those provisions may be currently running and that, if 3A is not able to investigate and prosecute its potential claims in the relatively near future, at least some of those claims may become statute barred before 3A is able to bring them,” the judge said.

With this in mind, Justice Wigney ruled that it would be “appropriate or necessary to ensure justice is done in the proceedings” to order registration in the matter.

“But for some form of registration process, 3A may not be able to investigate, let alone commence, any cross claims it might have in respect of group member claims until after a trial in respect of the common questions. That would not be in the best interests of the parties or the group members. Nor would it be an efficient way to progress the proceeding.”

An order even more harsh and draconian

However, the judge rejected 3A's proposed class closure orders, saying they ran afoul of both the High Court's Brewster decision last December and the NSW Court of Appeal's Haselhurst decision in April this year.

Brewster examined the scope of section 33ZF of the Federal Court of Australia Act, which the High Court ruled was a supplementary power that could not itself broaden the class action regime.

"Applying the reasoning of the majority in Brewster to the order in question in this case, it is difficult, if not impossible, to see how a provision which is said to provide a supplementary or gap-filling power could empower the Court, at this very early stage of the proceeding, to make an order which would have the effect of barring group members who do not register by a particular date from making any claim against the respondents 'in respect of or relating to the subject matter of this proceeding' and yet disentitle them from receiving any distribution from any future settlement of, or judgment in, the proceeding," Justice Wigney said.

There was a "real possibility" that not all potential group members would receive the notice or even realise their eligibility to register if they did receive the document, the judge noted, saying that these individuals would then have their rights extinguished.

"That would appear, on just about any view, to be a harsh and potentially quite unfair outcome in all the circumstances, particularly given that representative proceedings are ordinarily opt out, rather than opt in, in nature."

The Haselhurst decision, which rejected a similar class closure order in the Takata air bags class action, also laid to rest whether 3A's order could be made, Justice Wigney found.

"It is tolerably clear from the reasons of Bell P in *Haselhurst* (at [12]) that his Honour considered the order in question in that case to be harsh and draconian. On one view, at least, the order in question in this case is even more so."

A judge's refusal to make an order

Even if the court did have power to make the class closure orders, Justice Wigney said he would not use his discretion to do so at this early stage.

3A had not demonstrated that the risk of prejudice it claimed it would suffer by being statute barred outweighed "the drastic and somewhat draconian" effect the orders

would have on group members, the judge wrote.

“The difficulty or weakness in 3A’s contentions in that regard is that, at least at this stage of the proceeding, it is effectively impossible to gauge or determine the real extent of the risk of prejudice faced by 3A. While the risk cannot necessarily be excluded, it equally cannot said to be significant or substantial. Indeed, on one view at least, the risk may be fairly theoretical or remote.”

Any claims by 3A that the class closure orders were not draconian should be rejected, Justice Wigney found, despite there being a risk that time limitations may come into play.

“[There] is a significant degree of uncertainty as to whether 3A will ever in fact suffer any prejudice as a result of otherwise viable contribution claims being found to be statute barred. It must also be accepted that there is a degree of certainty that, if the class closure order proposed by 3A is made, some group members who have actual claims against 3A will be effectively deprived of the ability to prosecute their claims, possibly without ever knowing or appreciating that to be the case.”

Rewriting the class action regime

3A’s proposals for alternative methods to deal with the potential limitation issue were also rejected by the court. These included narrowing the class to only include Western Australia where legislation did not place a time limit on its cross claims.

Justice Wigney found that while this would eliminate any prejudice to 3A, this result did not justify the “drastic” remedy of substantially narrowing the class.

A de-classing proposal by 3A was also dismissed, with the judge finding it was not in the best interests of justice for the court to instead hear individual lawsuits by the more than 1,000 group members in the proceeding.

“It is difficult to see how it could possibly be said to be in the interests of justice for there to be potentially upwards of 1,000 separate proceedings, which would be the result if an order was made under s 33N. That is all the more so given that it appears likely that there will be at least some substantial common issues of law and fact arising from the group members’ claims.”

The judge also rejected a “deemed opt out” scheme proposed by 3A under which group members who did not register were assumed to opt out but would not have their rights extinguished to pursue further claims over the combustible cladding.

"[The] effect of a deemed opt out order of the sort suggested by 3A would be to effectively turn the statutory scheme on its head. It would have the effect of converting what is and was plainly intended to be an opt out scheme for representative proceedings into an opt in scheme. Deeming a group member who has not positively responded to a notice requiring registration to have opted out is, for all intents and purposes, practically indistinguishable from requiring a group member to opt in."

More potential class actions to come

The Alucobond class action is being case managed alongside a second class action filed by William Roberts Lawyers in June 2019 against Fairview Architectural over its representations regarding the quality of its Vitrabond polyethylene cladding.

The Vitrabond case, which was filed June 13, is being funded by IMF Bentham and seeks compensation for the cost of replacing the cladding and costs associated with making any affected buildings safe.

William Roberts and IMF Bentham are continuing to investigate possible class actions against other polyethylene core cladding manufacturers, but have confirmed they are not pursuing claims against any other third parties that might have been involved.

The Australian class actions were filed after major fires around the world in buildings that used polyethylene core cladding. Most notably, the 23 storey Lacrosse tower in Melbourne caught fire on November 25, 2014 and the Grenfell tower in London caught fire on June 14, 2017, resulting in loss of lives and property.

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 PE. In Victoria, orders to remove and replace flammable cladding have been issued to owners of several buildings.

The class actions are represented by Justin Gleeson SC, William Edwards, and Jerome Entwisle, instructed by William Roberts Lawyers. 3A Composites is represented by Matthew Darke SC and Amelia Smith, instructed by King & Wood Mallesons. Halifax Vogel Group is represented by Nicholas Owens SC and Sam Adair, instructed by Sparke Helmore. Fairview is represented by Colin Biggers & Paisley.

The Halifax Vogel and 3A Composites class action is The Owners – Strata Plan 87231 v 3A Composites GmbH & Anor. The Fairview class action is The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd.