

3A Composites fights for class closure order in combustible cladding action



Class Actions

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By Miklos Bolza | Sydney

German cladding manufacturer 3A Composites is pushing forward with a bid to close a class action over allegedly combustible cladding to registered group members, arguing that a recent appeals court decision does not bar class closure in this case.

In an interlocutory hearing on Tuesday, 3A's barrister Matthew Darke SC said [last month's decision in the Takata airbags class actions](#), known as Haselhurst, did not prevent the Federal Court from shutting unregistered class members out of the case in order to investigate possible cross claims against third parties, such as installers.

“Haselhurst, properly understood, is confined to the question of making class closure orders to facilitate settlement. It doesn’t go beyond that,” Darke told Justice Michael Wigney.

3A Composites and Australian distributor Halifax Vogul Group have been accused in the William Roberts-led class action on behalf of owners 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.

‘The orders we seek are appropriate or necessary’

The Court of Appeal for the NSW Supreme Court reached a “narrow conclusion” preventing class closure to facilitate settlement, Darke said. If a broader application was a proper interpretation of the judges’ findings, the Haselhurst decision was plainly incorrect, he told Justice Wigney.

“If Haselhurst stands for a broader proposition that you can’t make a class closure order under 33ZF prior to settlement or judgment, it is in our submission wrong,” he said.

In its proposed orders, 3A wants registered group members to supply information to help identify potential third party cross claim respondent.

While class closure would extinguish some group member claims, this had to be weighed against 3A losing out on its right to a fair trial by being blocked from bringing these cross claims if the orders were not made, Darke said.

“We have made it perfectly clear that the orders we seek are appropriate or necessary to be made now because given the extraordinary length of the claim period ... 3A’s rights of contribution against third parties may well be expiring as this very argument goes on.”

Nicholas Owens SC, representing Halifax Vogul, said his client adopted Darke’s submissions.

Flying in the face of the legislative scheme

Resisting the class closure bid, counsel for the class Justin Gleeson SC argued the court had no power to make the class closure order sought by 3A, pointing to

both Haselhurst and the High Court's Brewster decision last year, which shot down common fund orders made under section 33ZF.

The legal effect of a class closure order was important to consider, he told Justice Wigney. In this case, not only would the order bar anyone who did not register from benefiting from any settlement or judgment in the class action, but appeared to also bar those who could not accurately identify third parties, such as companies who installed the cladding in their apartments.

"It appears to go beyond the form of any form of these orders being sought, even prior to Brewster and Haselhurst," Gleeson said.

The court did not have the power to make these "draconian" orders because they took a "broader approach" to section 33ZF than the one allowed by the High Court in Brewster, Gleeson said.

3A's class closure orders required group members to effectively "opt in" and identify themselves, a requirement contrary to the provisions of the class action regime that imposed no requirement for group members to identify themselves before settlement or judgment, he said.

"We submit that the order sought by Mr Darke flies directly in the face of the legislative scheme and purpose so identified by Brewster and why is that? Firstly, it turns an opt out scheme into an opt in scheme. Secondly it imposes the added penalty that if you do not opt in and answer the interrogatories completely, you will have your claims extinguished for no compensation without any judicial consideration of the merits and thirdly, that may happen even if you never receive notice of the order or you did not have the information to complete the form," Gleeson said.

Even with 3A's purpose — to gain third party information, rather than reach settlement — the order was still beyond power, Gleeson said, because it extinguished group member rights, which Haselhurst confirmed could be done only on judgment and settlement.

Proposing a 'deemed opt out' notice

Darke proposed an alternative order, in the event the judge was not persuaded to make a class closure order, that he called a "deemed opt out". Under that proposed order, group members who failed to provide the necessary information would be kicked out of the class action but could still file separate proceedings.

“The effect of it would be to deem group members who fail to register and provide the information sought by the deadline of having opted out of the proceedings. So their rights would not be extinguished... but they would no longer be part of the class in this proceeding,” Darke said.

A deemed opt out order could be made under 33ZF and was “entirely consistent” with Haselhurst, Darke told the court. In fact, this type of order had been made previously in cases with competing class actions so that group members registering for one proceeding automatically opted out of the other, he said.

Gleeson argued that even this ran afoul of the rulings of Brewster and Haselhurst.

“Firstly, it’s been amply emphasised that opt out is an essential element of the scheme and opt out is a substantive right. Members are to receive that notice and to be given a real and reasonable opportunity. Do they wish to be in or out? A deemed opt out ... is an oxymoron. It directly contradicts the nature of the scheme. It effectively makes it an opt in scheme and directly contradicts the Parliament’s original choice between opt out and opt in. And the reason Brewster was relevant is that’s the very vice that the common fund order has, which was rewriting the scheme,” Gleeson said.

Justice Wigney reserved his judgment.

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.

A joint case management hearing has been scheduled for both class actions with Justice Wigney on June 1.

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, Sparke Helmore with Quinn Emanuel retained as strategic counsel. 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](#).