

Combustible cladding class action in doubt as insurer Vero denies coverage



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A class action against failed Fairview Architectural over alleged combustible cladding hangs in the balance as a court sets the stage for a fight with insurer Vero over a \$190 million policy.

AAI Limited, trading as Vero Insurance, is resisting a bid by the class action to be joined to the proceedings and has denied coverage to Fairview. Vero argues the policy does not indemnify the collapsed cladding manufacturer for the claims of loss and damage in the case.

Fairview entered voluntary administration in July 2020, citing challenges from COVID-19 and a \$1.5 million legal bill incurred in defending the Federal Court class action to then.

Counsel for the class, William Edwards, argued Wednesday before Justice Michael Wigney that the question of whether the Vero policy responded to the claims should be answered after the insurer was joined to the case under the Civil Liability (Third Party Claims Against Insurers) Act.

Edwards said Vero would need a powerful argument to persuade the court to refuse leave to include it as a respondent if there were an arguable claim for indemnity and the insurer were the “sole source” of cover for the claim.

The arguments for joining Vero overlapped with the arguments the class action made to persuade the court to permit them to proceed with a claim against Fairview, he told Justice Wigney.

But a barrister for Vero, Julian Sexton SC, told the court the question of whether Fairview’s policy responded to the claims should be determined before the insurer is joined.

He argued that the class action pleadings did not support the proposition that the policy was enlivened, and noted that under section 5 of the Act the court must refuse leave if the insurer could establish that it was entitled to disclaim liability.

“Our position is that it is in everyone’s interest to work out whether or not the policy responds sooner rather than later,” Sexton said.

Edwards assured the court the applicant wished to have the question determined quickly.

“Obviously the applicant is very desirous of having this issue resolved as soon as possible. If the insurance question is resolved against the applicant then the proceedings become a futility,” he said.

Noting that he would be assisted by argument on how the Federal Court’s jurisdiction were enlivened by the NSW Act, Justice Wigney said he would hear a contest over the joinder application.

The judge said he was not bound in the dispute with the insurer by his judgment granting leave for the class action to proceed against Fairview.

“The findings I made in the context of the leave to proceed application were obviously made in the absence of a contradictor, as it were, and in a different context,” he said.

A hearing was set down for April 21.

In August 2020, the court heard that [the lead applicant in the class action had a claim for \\$5.8 million](#).

The potential for an additional \$190 million in insurance to cover the class action’s claims were revealed in a notice to group members in the William Roberts-led class action in July last year.

“The applicant believes Fairview has insurance policies which are likely responsive to at least part of the claims of the applicant and class members and which may result in up to \$190 million in total being available to the applicant and class members in the event the class actions succeeds,” the notice said.

William Roberts filed the class action against Fairview in June 2019, alleging it misrepresented the quality of its alleged highly flammable Vitrabond cladding. The class action, funded by Omni Bridgeway, seeks compensation for the cost of replacing the cladding and costs associated with making any affected buildings safe.

In hearing the joinder application, the court will likely determine whether any loss or damage suffered by group members meets the definition of ‘property damage’ in the Vero liability policy held by Fairview and whether this loss or damage was caused by an ‘occurrence’, as defined under the policy.

The class action applicant says the supply or affixation of the cladding constitutes the ‘occurrence’ and the ‘property damage’ is the loss or damage that followed, including the cost of removing the Vitrabond PE Core cladding and the cost of remediating any damage caused to the building by the cladding.

Fairview described Vitrabond as an aluminium composite panel comprised of a fire resistant core, sandwiched between either two aluminium or other natural metal cover sheets. Fairview admits the core is combustible, but maintains Vitrabond has excellent large scale fire resistance.

On its website, Fairview lists more than 50 projects that have used Vitrabond across Australia, including: the Melbourne Airport tower; Star City Casino and Royal Randwick Racecourse in Sydney; the Attorney-General’s Department building in Canberra; Canberra Airport; the ABC Headquarters in Brisbane; and Metricon Stadium on the Gold Coast.

Vitrabond apartment buildings promoted by Fairview include Connor Central Park, Duo Central Park, Harbour Mill, Mirage and The Monarch in Sydney; 1 McNab Avenue, Bunjil Place, George Windsor, Joulia, Jacques, Momentum and XI Apartments in Melbourne; Gasworks in Brisbane; and the Kingston Foreshore in the ACT.

William Roberts and Omni Bridgeway [filed a separate cladding class action in February 2019](#) against Halifax Vogel Group (HVG) and German manufacturer 3A Composites over Alucobond polyethylene cladding, which is also installed in countless buildings across Australia.

HVF has [denied the material is unsafe](#), instead saying that its suitability for use in certain buildings would depend on an assessment by a builder, architect or certifier.

The class actions were filed after major fires broke out 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 action is represented by William Edwards and Jerome Entwisle, instructed by William Roberts Lawyers. Vero is represented by Julian Sexton SC, instructed by Moray & Agnew.

The Fairview class action is [The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd ACN 111 935 963](#). The Halifax Vogel and 3A Composites class action is [The Owners – Strata Plan 87231 v 3A Composites GmbH & Anor](#).