Combustible cladding class action gets makeover

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The lead applicant in a class action over allegedly combustible cladding has been ordered to immediately pay the defendants' costs that were thrown away by amended pleadings that bring a "substantially new case", over a year after the high-stakes case was filed.

In a case management hearing on Thursday, Justice Michael Wigney found there was "good reason" to order the lead applicant in the William Roberts Lawyers-led class action to pay the costs of German cladding manufacturer 3A Composites and Australian distributor Halifax Vogel Group that were spent prior to February.

"After almost a year, the applicant filed a substantially new — [will be] running a substantially new case — effectively almost starting the case again in circumstances

where the respondents will, if the ordinary [costs] order is made, will not be able to recover costs for many years," the judge said.

The owners corporation for Shore Dolls Point Apartments have accused 3A and HVG of misrepresenting the quality of the allegedly highly flammable Alucobond cladding. The class is seeking compensation for replacing the cladding as well as additional expenses required to make the buildings safe.

The new pleadings, to be filed with the court before March 20, change the common questions that the court will need to determine, add a number of risks allegedly posed by the cladding, and bring a new misleading conduct claim.

The bringing of a brand new case

3A barrister Matthew Darke SC convince Justice Wigney to make an order for costs forthwith, saying the class had brought on an "entirely new case" which 3A would now have to adjust its strategies to defend.

Not only had the common questions been "entirely struck out", the core case had been "entirely rewritten" to include allegations that the Alucobond cladding was subject to a number of risks, Darke.

These alleged risks include the rapid spread of fire within the building, the cladding being removed due to government bodies finding it unsafe, non-compliance with the Building Code of Australia, and the risk of potential removal due to non-compliance with the BCA.

An "entirely new case" of misleading conduct had also been included by the class in its amended pleadings, Darke said. This includes the alleged making of false statements by 3A and HVG around the suitability of the cladding, its compliance, and its performance when it came to fire safety.

This meant "an entirely new causation case" seeking loss and damage from this allegedly mislead conduct, the barrister said.

A question of unreasonable conduct

Justice Wigney also sided with Darke in ordering the class to immediately pay 3A's costs thrown away by a contested application surrounding the common questions in the case — a key issue which has been on foot since June last year and which brought about threats by 3A to de-class the proceedings as late as December.

“It’s plain that we would have succeeded on the application. Our friends have effectively conceded that by jettisoning the original common questions,” Darke told the court.

While the class could have reformulated its case at any time since June, it chose to service 3A with the new pleadings “without any intervening notification” on February 14 this year, the barrister continued.

In order for the court to make an order for costs forthwith, Darke argued that a party had to “incur significant costs beyond what would have occurred had the other party acted with competence and diligence”.

“This case has that in spades,” he said.

3A was “basically back at square one” after almost a year of the case being on foot, the court heard.

“I can accept that its not inherently unreasonable to amend a claim but the extent of the delay … the lack of foreshadowing the nature of those amendments, and the need for us to put on our common questions application … all of those matters do point to unreasonable conduct here,” Darke said.

“Your Honour, in my submission, would not want to encourage the conduct the applicant has engaged in in this case.”

‘We are trying to be responsible here’

Representing the lead applicant, William Edwards agreed that his client would pay costs thrown away by the amendment and the common questions application, but resisted that they should be paid right away. He denied any contentions the class’ legal team had acted unreasonably.

“Some considerable time ago we accepted that [the common questions] needed to be reformulated. We are trying to be responsible here. We put on amended pleadings because we perceived there were misapprehensions about the way the case was being put.”

The new pleadings “matched the qualities” noted by Justice Anna Katzmann about acceptable and merchantable quality in her landmark judgment in the pelvic mesh class action against Johnson & Johnson unit Ethicon in November last year, Edwards told the court.

Many of the changes were simply on topics that all parties were aware of, the barrister continued, although he admitted that there were some new parts to the case.

Justice Wigney questioned Edwards, saying there seemed to be a "good reason" to make the requested costs orders in this case.

"A good reason here, it seems to me at first blush, is you have effectively restarted your case. The respondents are effectively in a position where they have to start from square one again."

"There are some new common questions, the pleadings have been restructured, but the core of the case has not really changed, your Honour," Edwards replied.

The judge wasn't convinced and pressed further as to why the case had gotten to this point.

"So why wasn't it pleaded like this in the first place? You're not seriously suggesting this was an epiphany that you had after reading Justice Katzmann's judgment?" Justice Wigney asked.

"When we looked at [the pleadings] at the end of last year, it was better to do it this way. I can't answer your Honour's questions as to why decisions were made in the past," Edwards replied.

Edwards was not legal counsel when the matter first came before the court in March last year, with barrister Ian Roberts SC then representing the class.

William Roberts also filed a second combustible cladding class action in August last year against Australian cladding manufacturer Fairview Architectural over its representations regarding the quality of its Vitrabond polyethylene cladding.

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

The class is represented by William Edwards and Jerome Entwhistle, instructed by William Roberts Lawyers. 3A Composites was represented by Matthew Darke SC and

Amelia Smith, instructed by King & Wood Mallesons. HVG was represented by Nuala Simpson, instructed by Sparke Helmore with Quinn Emanuel retained as strategic counsel.

The 3A Composites and HVG 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.