

Like ‘dousing one’s house in kerosene’: Owners rebuff ‘no damage’ claim in cladding class action



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Property owners are fighting arguments that claims in a class action over allegedly combustible cladding do not fall under a \$190 million insurance policy’s definition of property damage, saying installing the cladding was like “dousing one’s house in kerosene”.

In a hearing on Tuesday before Federal Court Justice Michael Wigney, counsel for the class action, Peter Braham SC, argued cladding manufacturer Fairview

Architectural's insurer Vero Insurance **should be joined** as a respondent in the class action because the policy responds to the claims of loss and damage.

The joinder bid rests on whether the installation or process of removing and replacing the cladding can be considered 'property damage' under the policy.

Braham argued that damage occurred at the point of installing the cladding, saying it was "as if someone walked up to the side of one's house and doused it in kerosene".

"While on there [the building] is uninhabitable...and the people who have lived there live with catastrophic risk of fire," said the barrister.

"You don't need to look further to identify damage."

William Roberts Lawyers filed two class actions in 2019 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.

A class action filed against Halifax Vogel Group (HVG) and German manufacturer 3A Composites centres on Alucobond polyethylene cladding, which is installed in countless buildings across Australia. The separate class action against Fairview Architectural alleges the company misrepresented the quality of its popular but allegedly highly flammable Vitrabond cladding.

The class actions seek damages, compensation, interest and costs. Primary losses include the cost of replacing the PE cladding with suitable material and any other costs to fireproof affected buildings.

Replacing cladding not like pulling off 'sticky tape', court told

Braham told the court the cladding was part of a single system built to withstand weather and wind and that fixing the issue was "not simply a matter of pulling off a piece of panel stuck on with sticky tape and putting a new one on".

Pulling off the existing panels of cladding will "compromise" parts of the building's substructure, Braham said.

Evidence showed that Vero's proposed method to replace the cladding was "unrealistic", the barrister told the court.

“You can’t not expect as a very real consequence that there’s going to be all sorts of damage to the substructure,” said Braham.

Policy doesn’t cover ‘superficial damage’, says Vero

Counsel for Vero, Julian Sexton SC, said there had to be “something more than superficial damage” for the insurance policy to be engaged.

The point of the policy was to cover damage similar to the incidents in London and Melbourne where the buildings caught fire, said Sexton.

“There is absolutely no doubt that this policy would respond if there had been a fire on these premises which had caused property damage,” said Sexton.

The barrister argued that the risk of property damage occurring to the building was “not the same as property damage”.

“The risk of something happening is not the same as that having occurred,” said Sexton.

“In this case [the damage] hasn’t actually occurred...this is a product which is separated from the building itself.”

The cladding ‘works’ despite risk of fire, Vero argues

Sexton argued there was no damage in installing the cladding because it achieved the purposes for which it was installed, being to protect the building from weather and to “look good”.

“The product works. The only issue is the safety factor which means the product should be removed,” said Sexton.

“There isn’t any bright line that as soon as you scratch the surface installing the defective equipment, this type of policy responds.”

Fairview’s website lists more than 50 projects in Australia that used Vitrabond, 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.

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.

In May, ASX-listed funder Omni Bridgeway sold a 30 per cent stake in the class action against Fairview Architectural and the [class action](#) against Halifax Vogel Group (HVG) and 3A Composites for \$19.5 million to Gerchen Capital Partners.

The Fairview class action is represented by Peter Braham SC and Jerome Entwisle, instructed by William Roberts Lawyers. Vero is represented by Julian Sexton SC and Christine Ernst, instructed by Moray & Agnew. The defendants in the class action against Halifax and 3A Composites are represented by King & Wood Mallesons and Wotton & Kearney.

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](#).