

Combustible cladding defendants may drag engineers, certifiers into class action



The June 2017 fire that ripped through the 24-storey Grenfell Tower in London resulted in 72 deaths and left many homeless.

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German-based cladding manufacturer 3A Composites has foreshadowed potential cross claims against third party engineers and certifiers in one of two class actions brought over allegedly dangerous combustible cladding used in countless buildings across Australia.

3A Composites was [dragged into the William Roberts Lawyers-led product liability class action](#) last month, alongside Australian distributor, Halifax Vogel Group. The statement of claim filed in February alleges the companies misrepresented the quality of the allegedly highly flammable Alucobond cladding.

Halifax Vogel has [denied the material itself was unsafe](#), instead saying its suitability for use in certain buildings would depend on an assessment by a builder, architect or certifier. William Roberts has confirmed they are not pursuing claims against any other third parties.

In a case management hearing on Monday, counsel for 3A Composites, Matthew Darke SC, said the way the applicant's case was framed necessarily opened the door for cross claims for contribution from third parties.

"The applicant alleges that no matter how the Alucobond cladding was used, buildings to which it was fitted did not and could not satisfy certain requirements in the building code – it is an all or nothing case," Darke explained.

"We intend to deny that allegation, but if it's correct, then any loss suffered by the group members may have been contributed to by fire engineers or other professionals who wrongly certified that the buildings did satisfy the requirements of the building code in regard to fire resistance," Darke said.

Time running out for cross claim limitation periods

Darke demanded information from the applicant regarding potential third parties, noting that limitation periods were quickly expiring.

"We wrote to the applicant seeking certain information to enable us to identify cross claims for contribution that we might have in relation to the claims of the applicant and [other] group members... we've had no response to date," Darke said.

"The difficulty arises in part because of the very lengthy ten year claim period the applicant has chosen... it is arguable that time may be near to running out for the purposes of limitations periods applying to statutory contribution claims against such third parties.

"To take NSW as an example, the applicable limitation period is a maximum of four years from the expiry of the limitation period for the group members' claim against the third party. If the group members' claim is in negligence and accrued in 2009, which is the start of the claim period, then its limitation period will expire in 2015 and the limitation period for any statutory contribution claim will expire sometime this year."

Justice Michael Wigney noted the urgent nature of the request given that potential limitation periods in relation to group members whose identity is not yet known could be passing. Darke confirmed that some limitation periods had at least arguably already passed.

Counsel for the applicants Ian Roberts SC agreed to provide an explanation to 3A Composites within a week, but said they had taken the view that a response was unnecessary because "the problems [3A Composites] identified were more apparent than real".

Darke also read out a statement on behalf of 3A Composites for the purposes of German law, formally objecting to the jurisdiction of the Federal Court of Australia and asserting that the steps taken in the proceedings were merely precautionary without prejudicial effect.

Second class action fears being "hamstrung" by parallel proceedings

The Alucobond class action is being case managed alongside a [second class action filed by William Roberts Lawyers last month](#) against Fairview Architectural, arguing similar misrepresentation in relation to the quality of its Vitrabond polyethylene cladding.

Roberts indicated that the applicant would be proposing that evidence in one class action be evidence in the other, at an appropriate time in the future.

"There are many aspects to the products that are common, the combustibility for example, compliance with the codes, and so on... they may give rise to evidence that's common to both our proceedings and I would regard that as suitable to be treated as evidence in the other," Roberts said.

"And as to being heard together, that would probably be a matter that will depend on final common questions. That's something for further down the track."

Counsel for Fairview, Pat Zappia QC, indicated that they were content to have the matters case managed together for present purposes, but "didn't want to be hamstrung by what's preceded [them] in the Alucobond proceeding". He sought extra time to file their defence.

Justice Wigney ordered the parties to return for an update on August 27.

William Roberts and IMF Bentham are continuing to investigate possible class actions against other polyethylene core cladding manufacturers, but confirmed they are not pursuing claims against any other 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 per cent PE. In Victoria, orders to remove and replace flammable cladding have been issued to owners of several buildings.

The class was represented by Ian Roberts SC instructed by William Roberts Lawyers. 3A Composites was represented by Matthew Darke SC, instructed by King & Wood Mallesons. Halifax Vogel Group was represented by Nicholas Owens SC with Nuala Simpson, instructed by Sparke Helmore with Quinn Emanuel retained as strategic counsel. Fairview was represented by Pat Zappia QC with Tony Thomas, instructed 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 ACN 111 935 963](#).

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