

Combustible cladding class action wins ‘fresh start’ with new mediator



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A judge has granted a bid for a new mediator in a class action over allegedly combustible cladding, agreeing with the applicant that a “fresh start” may be beneficial.

Federal Court Justice Michael Wigney on Monday signed off on the class action’s pick of the Hon. Patricia Bergin AO SC to oversee a second mediation, after the applicant expressed “strident opposition” to another round with the Hon. Peter Jacobson.

The William Roberts Lawyers-led class action against German cladding manufacturer 3A Composites and supplier Halifax Vogel Group centres on Alucobond polyethylene cladding, which is installed in countless buildings across Australia.

A mediation with Jacobson that took place earlier this year failed to yield a settlement. William Edwards KC for the class action said Monday that a “fresh start” with a new mediator was most likely to result in a more productive mediation than the one that occurred with Jacobson.

Edwards said it would be “inappropriate” to get into why the mediation failed and why the class action strongly opposed another mediation with Jacobson, although he made clear the applicant did not wish to disparage Jacobson.

“My clients have a real difficulty with proceeding with Mr Jacobsen....It’s a case where a fresh start...is appropriate,” Edwards said.

In siding with the applicant, Justice Wigney said the choice had nothing to do with the expertise and experience of the respective mediators and that no inference should be drawn from the lack of a settlement resulting from the mediation with Jacobson.

“At the end of the day I have to make a choice as to what is most likely to result in an effective and efficient mediation,” Justice Wigney said.

“Ultimately, it will be a very finely balanced decision.”

The judge said he favoured the appointment of Bergin as mediator “simply because it is perceived that there may be some possible advantages from a fresh approach and fresh identity being involved in the mediation”.

Counsel for 3A Composites, Lucas Shipway, said his client favoured another go at mediation with Jacobson, saying there had been a “significant investment” in the first mediation with Jacobson, which lasted two days, and that Jacobson was acquainted with the “personalities” and “dynamics” in the case.

“That investment will be of further value if Mr Jacobson is engaged again.”

“Miss Bergin can’t be situated in the same way as Mr Jacobson is.”

In reply, Edwards said all those things may be “counterproductive” if Jacobson was appointed mediator, again noting that the first mediation had failed.

Prior to the mediation, Justice Wigney rejected the class action’s bid for sales figures to estimate the value of their claims, siding with Halifax in finding the data could lead to the owners’ overestimating class member losses.

While the judge accepted he had power under section 23 of the Federal Court of Australia Act to compel production of the figures — despite their lack of relevance to the case — he said he was not persuaded to exercise his discretion given the evidence by Halifax about the unreliability of the numbers.

The figures, which represent the raw quantity of cladding sold in Australia between 2009 and 2019, include material not used in building facades, cladding that would not need to be removed even if found to be unsuitable, and offcuts, Justice Wigney found.

Owners could be led to “materially overestimate” the value of their claims, which would give rise to an asymmetric bargaining position in mediation, the judge said, though he acknowledged the applicants sought the documents for the bona fide purpose of assessing any offers to resolve the case.

The court heard in December that the applicant wanted the sales figures from Halifax to get a “ballpark” estimate of the quantity of cladding supplied in Australia before mediation.

The class action seeks damages for buildings fitted with the cladding between February 2009 and February 2019. Damages include the cost of replacing the cladding with suitable material and any other costs required to make a building fire safe. A two-month trial is scheduled for August 2024.

A second class action targets the defunct Fairview Architectural, alleging the company misrepresented the quality of its popular but alleged highly flammable Vitrabond polyethylene cladding.

Both cases were filed 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.

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 polyethylene.

The class action against Halifax and 3A Composites is represented by William Edwards KC and Jerome Entwisle, instructed by William Roberts. Halifax is represented by Sam Adair, instructed by King & Wood Mallesons. 3A Composites is represented by Lucas Shipway and Amelia Smith, instructed by Wotton + Kearney.

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](#).