3A Composites challenges commonality in cladding class action

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3A Composites has slammed the pleadings in a class action against it over allegedly combustible cladding, questioning whether the stated common issues are actually common to all group members.

During a case management hearing on Tuesday, 3A barrister Matthew Darke SC flagged deficiencies with the common questions in the William Roberts-led class

action, but wasn't ready to argue the matter should not move forward as a class action.

The product liability class action alleges German cladding manufacturer 3A and Australian distributor Halifax Vogel Group misrepresented the quality of the allegedly highly flammable Alucobond cladding.

A 'deeply unsatisfactory' situation

Darke said the pleadings were "deeply unsatisfactory" given that none of the five common questions were common to all group members, including whether the acceptable quality guarantee in the Australian Consumer Law applied to the cladding and whether group members suffered loss as a result of this cladding being installed in their buildings.

The questions raised considerations that were individual to each group member relating to the building type and the supplier of the cladding, for example, Darke told Federal Court Justice Michael Wigney.

"We have a situation at the moment where the common questions that have been raised are not common questions at all," he said.

"Your case at present is essentially that … if you're right the proceeding shouldn't proceed as a representative proceeding at all?" Justice Wigney asked.

"That's a possibility. That's where one could end up," Darke replied.

Darke said the class action should be given time to rectify the commonality problem. He urged the court to refrain from making discovery orders sought by the class until this occurred.

"The pleading is framed so as to advance the claims of the applicant and all of the group members. The consequence of that is that this pleading can't provide the touchstone for general discovery of the kind the applicant seeks," the barrister said.

Dependent on the cladding

Justice Wigney gave his "first blush" thoughts about the common questions.

"It seems to me fairly fundamental to resolve any issues that do exist for common questions before parties are put to the considerable expense of discovery," the

judge said.

Barrister for the class, Ian Roberts SC, rejected the need for this, saying those arguments were informed by 3A's own defense, which claimed that any non-compliance with the Building Code of Australia was due to how individual apartment blocks were built that used the cladding.

"That informs what the respondents are saying … because they say it depends on who designed it and how they designed it. Our submission is it doesn't matter because it depends on the PE core," the barrister said.

Roberts instead argued expert evidence should be filed first, saying this would provide further information that would allow the class to refine the common questions later on.

"We'll be in a much better position to reformulate it in a more accurate way once the expert evidence has been served," he said.

"We don't need to do it now and it's going to be unproductive to do it now because we're going to have to come back and do it again [after the expert evidence]."

Justice Wigney opted to park the discovery orders and ordered the parties to confer on the commonality issue, with a hearing to be scheduled if a resolution could not be reached.

"I'm persuaded that the issues between the parties are significantly at loggerheads [and] I think this really is something that needs to be nutted out before we go much further," the judge said.

"I do think that we should resolve the issues that obviously exist between the parties around common questions at this stage. That's not to say you won't have to do it again in the future once the evidence is sorted," he told Roberts.

A case for more class actions?

The Alucobond class action is being case managed alongside a second class action filed by William Roberts Lawyers last month against Fairview Architectural over its representations regarding the quality of its Vitrabond polyethylene cladding.

The case, which was filed June 13, is being funded by IMF Bentham and seeks compensation for the cost of replacing the cladding and costs associated with making any affected buildings safe.

William Roberts and IMF Bentham are continuing to investigate possible class actions against other polyethylene core cladding manufacturers, but have confirmed they are not pursuing claims against any other third 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 percent 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, 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. Fairview was represented by Pat Zappia, QC, Tony Thomas and Madeline Hall, instructed by Colin Biggers & Paisley.

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.

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