3A Composites fires off barrage of cross-claims in cladding class action

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The number of lawyers involved in a class action against 3A Composites over allegedly combustible cladding is set to balloon, with the German cladding manufacturer lobbing cross-claims against nine different parties.

The cross-claims, filed Friday, target companies involved in the construction of The Concourse, a building located in Sydney's Willoughby City Council that was installed with 3A's Alucobond PE cladding between February 2009 and June 2011.

3A seeks contribution or recoupment from the cross-respondents in the event it is found liable.

The class action, which was launched by William Roberts Lawyers and funder Omni Bridgeway in February 2019, accuses 3A and Australian distributor Halifax Vogal Group of misrepresenting the quality of the allegedly highly flammable Alucobond PE and Alucobond Plus cladding. Both companies have denied the cladding is unsafe, saying its suitability would be subject to assessments by builders, architects or certifiers.

Builder should have ensured structure was safe, 3A claims

The cross-claims target Concourse's builder AW Edwards, architectural firms Francis-Jones Morehen Thorp and Toland, Building Code of Australia consultant Hendry Group, façade engineer Aurecon, fire engineer Arup, principal certifying authority Steve Watson and Partners, and certifiers Andrew Rys and Dr Marianne Foley.

3A contends that all these parties had a hand in the installation of the Alucobond PE cladding within The Concourse building and should be liable for any damages.

If the cladding is found to be unsafe, 3A says AW Edwards should be found to have breached its statutory duty of care by "[failing] to take any, or any adequate, steps to ensure that the Concourse as constructed complied with the Building Code of Australia". AW Edwards also should have ensured a non-defective cladding was installed on the building, 3A claims.

The builder is also accused of negligence because WCC was "vulnerable to a failure by [AW Edwards] to exercise reasonable care" in the construction of the building and hence was liable to pay for loss and damages suffered by the replacement of the defective cladding, 3A claims.

"As between [AW Edwards] and 3A, the primary liability to WCC arising out of the matters pleaded in the [amended statement of claim] by the applicant on behalf of WCC fell on [AW Edwards] and not on 3A."

Alleged breaches linked to failure to comply with BCA

3A brings similar bids to recoup any loss and damage found by the court against architects Francis-Jones Morehen Thorp and Toland as well as BCA consultant Hendry Group.

Francis-Jones Morehen Thorp and Toland's architectural drawings referred to the use of "prefinished metal cladding" like Alucobond which, if defective, meant the architects breached their duty of care to WCC, 3A claims.

"If, contrary to 3A's amended defence, the allegations … of the [amended statement of claim] are made out such that by reason of the Alucobond PE the Concourse does not comply with the BCA, then [Francis-Jones Morehen Thorp and Toland] breached [their] statutory duty of care."

As BCA consultant, Hendry Group is accused of misleading and deceptive conduct in breach of the Australian Consumer Law, Trade Practices Act or Fair Trading Act by representing to WCC that The Concourse complied with the BCA.

"[Hendry Group's] representations were false and/or misleading insofar as they related to the Alucobond PE installed on the Concourse, in that the work in constructing the Concourse, if completed in accordance with the specified plans and specifications, would not comply with the BCA," 3A says.

False statements caused defective cladding to be installed, 3A says

3A has also lobbed allegations of breach of duty of care at Aurecon and claims of negligence and misleading conduct at Arup.

"[But] for [Arup's] representations, the construction, or alternatively, the occupation of the Concourse incorporating Alucobond PE would not have commenced; such commencement being permissible only upon the issuing of a construction certificate or occupation certificate respectively," 3A says.

Dr Foley has been accused of negligence regarding fire reports created for The Concourse which claimed the building complied with fire safety regulation.

Steve Watson and Partners, as the principal certifying authority, and Rys are also accused of misleading and deceptive conduct, negligence and breach of duty in approving the building despite the inclusion of the Alucobond cladding.

"[Rys'] breach of [his] statutory duties … caused or contributed to any loss and damage suffered by WCC as alleged in [the amended statement of claim] in that but for the breach the Alucobond PE would not be installed on the Concourse," 3a says.

Cross-claims launched despite dismissal of class closure bid

The cross-claims were foreshadowed by 3A since at least late 2019, with the company seeking to close the class in order to determine which group members were involved and see which third-party professionals or tradesmen it had potential cross-claims against.

At an interlocutory hearing in April last year, 3A claimed there was a real risk its cross-claims would become time barred thanks to the six year statute of limitations and sought the class closure orders under section 33ZF of the Federal Court of Australia Act so it could quickly launch the cross-claims afterwards.

In a judgment delivered in June 2020, Federal Court Justice Michael Wigney found there was "at least some risk" that these limitations periods would bar 3A from filing some of its cross-claims.

However, the judge also found 3A's proposal would run afoul of the High Court's judgment of Brewster which found section 33ZF was limited to ensuring that "justice is done in the proceeding" in resolving issues between two parties.

"Applying the reasoning of the majority in *Brewster* to the order in question in this case, it is difficult, if not impossible, to see how a provision which is said to provide a supplementary or gap-filling power could empower the Court, at this very early stage of the proceeding, to make an order which would have the effect of barring group members who do not register by a particular date from making any claim against the respondents 'in respect of or relating to the subject matter of this proceeding' and yet disentitle them from receiving any distribution from any future settlement of, or judgment in, the proceeding," Justice Wigney wrote.

The NSW Court of Appeal's decision in Haselhurst in April 2020 which ruled against such class closure orders ensured 3A's application "was essentially put beyond doubt," the judge added.

More potential class actions to come

The Alucobond class action is being case managed alongside a second class action filed by William Roberts Lawyers in June 2019 against Fairview Architectural over its representations regarding the quality of its Vitrabond polyethylene cladding.

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

Earlier this month, a notice to group members revealed that Fairview may potentially have $190 million in insurance to cover the class action claims.

William Roberts and Omni Bridgeway 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.

A joint case management hearing has been scheduled for the 3A Composite class action with Justice Wigney on October 6.

The class actions are represented by Ian Roberts SC, Justin Gleeson SC, William Edwards, and Jerome Entwisle, instructed by William Roberts Lawyers. 3A Composites is represented by Matthew Darke SC, Amelia Smith and Lucas Shipway, instructed by King & Wood Mallesons. Halifax Vogel Group is represented by Nicholas Owens SC and Sam Adair, instructed by Sparke Helmore with Quinn Emanuel retained as strategic counsel. Fairview is represented by Adam Hochroth, instructed by Mills Oakley.

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.