Cladding maker 3A Composites points finger at third parties in class action defence

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German cladding manufacturer 3A Composites has denied that its cladding is unsafe and caused class members loss and damage, instead pointing the finger at unknown third parties and arguing the Federal Court does not have jurisdiction to hear the matter.

3A Composites was dragged into the William Roberts Lawyers-led product liability class action in June alongside Australian distributor Halifax Vogel Group. The statement of claim filed in February alleges both companies misrepresented the quality of the allegedly highly flammable Alucobond cladding.

Halifax Vogel itself 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.

3A also followed this theme in a defence filed Monday, pointing the finger at the faults of "third party products" and representations and denying any liability over the allegedly dangerous combustible cladding.

The conduct of unknown third parties

In its defence, 3A denied that its own cladding, sold under the Alucobond PE and Alucobond Plus brands, was not of acceptable or merchantable quality.

Further, the company claimed that if the court found the products did not comply with the acceptable quality guarantee, the reason this was so was "because of an act, default or omission of, or any representation made by, a person or persons (whose identity is presently unknown to 3A) not being 3A or an employee or agent of 3A".

It made similar arguments regarding the guarantee of merchantible quality, saying that any non-compliance in this area, if found by the court, was due to "an act or default of any person or persons (whose identity is presently unknown to 3A) not being 3A or a servant or agent of 3A, occurring after the Relevant Alucobond Products have left 3A's control".

3A claims the Australian Consumer Law therefore does not apply for group members' claims of loss and damages and that it is not liable to pay compensation.

"[3A] denies that any person (whether or not a group member) has suffered loss or damage as a result of the failure of Alucobond Plus [or Alucobond PE] to meet the 'applicable requirements' as pleaded in the SOC."

Time barred and out of jurisdiction

3A also challenged the court's jurisdiction to hear the matter.

"All steps taken by 3A in these proceedings are taken under the reservation that 3A does not accept the jurisdiction of the Federal Court of Australia and are taken merely as a precaution without prejudicial effect and do not constitute, nor should they be understood or interpreted as constituting, an acknowledgement or acceptance by 3A of the jurisdiction of the Federal Court of Australia.

"3A reserves it (sic) rights to raise the lack of jurisdiction as well as further and additional objections should recognition and enforcement proceedings be initiated in Germany or any other jurisdiction."

The company also alleges the lead applicant and group members are time barred from seeking compensation for loss and damage, saying they ought to have known by February 14, 2016, at the latest, of any deficiencies, which 3A denies, with its cladding.

This date is three years before William Roberts filed its proceeding. By section 273 of the ACL, a lawsuit cannot be brought more than three years after the date on which group members became aware of any non-compliance with consumer guarantees, 3A said.

The firm pointed out that more than three years had passed since this matter first emerged in 2014 with the Lacrosse Tower fire in Melbourne.

"The Applicant and Group Members were aware, or ought reasonably to have become aware, that the Acceptable Quality Guarantee had not been complied with by reason of information in the public domain concerning the fire at Lacrosse Tower on La Trobe St, Melbourne on 25 November 2014 and the public hearings of the Senate Economic References Committee inquiry into non-conforming building products in November 2015," the firm said.

More potential class actions to come

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.

A joint case management hearing has been scheduled for both class actions with Justice Michael Wigney on August 27.

The class actions are represented by William Roberts Lawyers. 3A Composites is represented by King & Wood Mallesons. Halifax Vogel Group is represented by Sparke Helmore with Quinn Emanuel retained as strategic counsel. Fairview is represented 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.

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