

Publication Date: 14 May 2019
YSP Podcast Transcript: Episode 162. Replacing combustible cladding? The class action you need to know about

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Amanda Farmer: Hello and welcome. I am Amanda Farmer and this is Your Strata Property.

Gavin Beardsell is an Investment Manager based in the Sydney office of IMF Bentham. Gavin has over 20 years experience specialising in commercial litigation and class actions. Gavin was admitted to practise law in the UK in 1997 and gained valuable experience as a partner at the UK's largest insurance law firm, Berrymans Lace Mawer. He acted for several of the UK's leading insurers and their clients in relation to high-value claims in the High Court of Justice and the Court of Appeal. Since 2008, Gavin has practised in Australia, first as a partner at Gilchrist Connell, and then as a senior consultant at Clyde & Co where he acted for insurers and large corporations defending and advising on high profile class actions brought by shareholders, debenture holders, and other investors in the Federal Court of Australia, and the Supreme Courts of New South Wales and Victoria.

Gavin has a Bachelor of Laws with honours from Exeter University, and a post-graduate diploma in Legal Practice from the College of Law in England.

Today I am delighted to welcome Gavin Beardsell of IMF Bentham. Welcome Gavin.

Gavin Beardsell: Thanks Amanda. Pleased to be here.

Amanda Farmer: It's a pleasure to have you on the show Gavin. Our listeners have probably got a bit of a hint from the title to this podcast episode. We are going to talk about a very important piece of litigation that IMF Bentham is currently involved in that is impacting our apartment owners, residents and managers. We're definitely going to get stuck into that. But first of all, because some of our listeners may not have heard of IMF Bentham, can you let us know what it is and what is exactly that you do?

Gavin Beardsell: Yes. So IMF Bentham is a large company. It's listed on the Australian Securities Exchange. It's one of the largest litigation funders in Australia and indeed globally.

In short, what IMF Bentham does, it provides funding and project management for significant and large-scale litigation, including class actions, and particularly class actions which enable large groups of people to collectively bring their claims together, rather than pursuing them individually.

And as part of our funding, we pay for the claimants' legal costs. We also provide cover for the defendants' legal costs if ultimately the action is unsuccessful. And another key part of our funding is that we provide security for costs often where a large defendant wants some comfort of knowing that the cost will be paid if ultimately the class action is not successful for the claimants.

And our project management services can be summed up by we have a nationwide team of Investment Managers, of which I am one. And we also have a client liaison team based in Perth that provides assistance to the nationwide team of Investment Managers.

Amanda Farmer: Okay. So it is your funding that allows important, let's say, pieces of litigation to be brought before the courts by large groups of people, which is what we call class actions. So you work with a particular group or maybe groups of lawyers?

Gavin Beardsell: That's right Amanda. So for each action, whether it's a class action brought on behalf of a large number of people or a single claim brought on behalf of one claimant, there will always be a lawyer that represents the claimant or the group of claimants. And we work with a number of law firms who bring those actions.



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Gavin Beardsell: And in the case of the current combustible cladding class action, we're working closely with the lawyers, William Roberts Lawyers, and the partner there with conduct of the matter, Bill Petrovski.

Amanda Farmer: Okay. Let's get into that. What is this combustible cladding class action all about and why should it matter to the people listening to this podcast?

Gavin Beardsell: Well, breaking it down Amanda, so firstly, it is a class action, which means it's brought on behalf of a large number of people. We commenced the proceeding in the Federal Court of Australia in Sydney in February this year. So it's at a relatively early stage. The class action is brought on behalf of everybody in Australia, so it's nationwide, that has certain types of ALUCOBOND cladding fitted to their buildings within the last 10 years.

And the cladding concerned is, it's often referred to as polyethylene or PE core cladding. And the 2 products that are the subject of the class action are called ALUCOBOND PE and ALUCOBOND Plus. And it's a product liability claim against the manufacturers of those products, 3A Composites, which is a German company and Halifax Vogel Group, which is an Australian company. And in essence, what is alleged, and we will have to prove, but what we say is that the products don't comply with the Australian Consumer Law, because they're not safe and are not fit for purpose, because the polyethylene core is combustible and gives rise to a risk of fire spread and severe fire.

And principally what we're seeking to do on behalf of all affected property owners is recover compensation comprising the cost to remove and replace the cladding concerned. And depending on the type of building, that cost, financial cost, is likely to be significant and is ultimately born by the owners corporation, and therefore the strata unit owners in the residential strata building. But it also applies to commercial buildings and public buildings.

Amanda Farmer: Okay. Lots of questions from my part arising from that. First of all for our listeners, if you're not across the cladding issue, which if you're a long-time listener to this podcast and involved in the strata sector, you probably are. But there's a really good introduction back in episode 103, where I was talking to Lynda Kyriadakis from the ABMA. And Lynda gave, I felt, a really easy-to-understand explanation of what this cladding is and why in certain circumstances, not all, it shouldn't be on our buildings. So head back and listen to episode 103 if you want an introduction there to that.

You've mentioned there Gavin both the owners corporation being the building, let's call them, and also the owners who are your clients or William Roberts' clients or the claimants in this circumstance? Are they the buildings or are they the lot owners?

Gavin Beardsell: It's a good question Amanda. So a good example is in the current class action, there's one applicant which brings the action on its own behalf and on behalf of everybody else. And the representative applicant is an owners corporation of a residential building in Sydney.

The reason for that is typically in a residential building, the cladding is either part of the external wall or attached to an external wall, and is therefore owned by the owners corporation. So the proper claimant in that situation is the owners corporation.

And that owners corporation then seeks to recover the cost of removing and replacing the cladding, but ultimately that financial cost is borne by the strata unit owners by way of levy raised by the owners corporation. So on the one hand, the proper entity to bring the claim is the owners corporation, but ultimately the financial burden is borne by the lot owners.

Amanda Farmer: And you've mentioned there that it is a product liability claim that you're making against the manufacturers of the ALUCOBOND product. So it is not a claim against the developer or the original builder if you're in a new building and you're saying, "Well, this is a defect." It's something quite separate from that. You're actually saying, correct me if I'm wrong, "This product should never have been sold for Australian buildings."

Gavin Beardsell: That's a good summary of what we say, Amanda, and I must stress at this stage, there have been no findings by the courts, so it's allegations that we make in the court documents, but that's right.

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Gavin Beardsell: And picking up on what you say about builders and developers, it may also be open to owners corporations to pursue separate claims against builders and construction professionals as we've seen for example in the case of the Lacrosse Tower in Melbourne. But what we're doing is something different to that.

And the only thing that claimants can't do is recover the same compensation twice. So they can pursue their own separate action against builders and developers and construction professionals if they chose. They could also participate in our combustible cladding class action if they are eligible to do so. And as I said, there's no bar to participating in both, but the only thing they cannot do is recover the same compensation twice.

Amanda Farmer: Okay. What makes a building eligible to participate in this class action?

Gavin Beardsell: In the court documents, there's a definition of the group members. So the list of people that fall within this class action. And in short, that's everybody that has a property interest in a building that has ALUCOBOND PE or ALUCOBOND Plus. And that cladding was supplied within the last 10 years.

So what we do at an early stage, for everybody who has already registered with us, and for any new registrants, we ask for information that will enable us to make an early evaluation as to eligibility to participate in the class action.

So the key things that arise from that is the type of cladding that is fitted to the building and when it was supplied. I suppose they're the 2 key questions. And the current class action as I say concerns 2 ALUCOBOND cladding products. But we are investigating other cladding products, and so we're also encouraging people to register, because often building owners don't know what type of cladding they have. So the short answer to that is to register with us, and we'll help you work it out. And that will enable us to, one, determine whether or not the building's eligible to participate in the current class action. But if not, whether or not it's eligible to participate in other class actions that we're contemplating.

Amanda Farmer: And we will get into how to register and where our listeners need to go if they want to register.

Are you finding that question, for those who have registered and you're then working there that question with them, do you have this cladding and was it installed within the last 10 years, is that a difficult question for buildings to answer, are you finding, or it's pretty straightforward?

Gavin Beardsell: It's mixed Amanda. Sometimes it's very easy, sometimes it's very difficult. So for example Google searches can readily determine when a building was constructed for example if it was a new build. That's one way to determine when the cladding was likely to have been supplied. There may be construction documents that are available to the building owner or the owners corporation, which we ask to be provided, again, which might shed light on the type of cladding and the date of construction.

But often, as we've seen in the LaCrosse Tower litigation, sometimes a particular type of cladding is specified in the construction documents, but ultimately, a different product is used. So we have already engaged a number of building experts to assist our funded clients, that's those who have signed up with us, to work out precisely what type of cladding they have on their building.

Amanda Farmer: And you cover the costs of that?

Gavin Beardsell: We do if the, it's a quid pro quo of signing our funding agreement. So I know we're going to talk a little about the registration process, but if ultimately an owners corporation or a building owner signs our funding agreement, that's one of the benefits.

Amanda Farmer: Okay. Are you able to say, Gavin, how many group members, how many buildings you have registered with you and involved in this class action today?

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Gavin Beardsell: Amanda, the information that all of our registrants provide to us is confidential. I mean that's another one of the benefits is, as surely you'll appreciate, often a building owner with combustible cladding wants to be compensated, wants something to be done, but doesn't want it generally to be known that the building has combustible cladding.

Well, other than our lead applicant whose identity is disclosed on the court documents, the group members, so the other buildings that participate, their identity is not disclosed generally. So I'm not at liberty to say precisely how many we've got, but what I can say is a significant number of buildings have already registered with us.

Amanda Farmer: Just on that point about not necessarily wanting to disclose publicly that your building might have this cladding in place, there is obviously a question there about devaluation of properties. Is that a component of your claim before the court? You've mentioned that you're claiming the costs of having to remove the cladding, replace it with something else no doubt, what about that potentially lost property value?

Gavin Beardsell: Principally, if the cladding is removed and replaced, then you'd expect no diminution in property value.

So as I said before, the principal compensation sought is for the cost to remove and replace the cladding. The proceedings are at relatively early stage, and it remains to be seen whether or not any individual building, if there's any diminution in property value of the building or the lots within it, because you'd expect if the cladding concerned is removed and replaced, then that would remove any claim for diminution in property value.

So presently the class action is focusing on the principal problem, which is to seek to have the remedy being the compensation to remove and replace the cladding. Perhaps I should say in that contest, we're not bringing claims on behalf of individual apartment owners, as I said, because the cladding is typically affixed to the common property, and therefore the proper claimants are the owners corporation.

Amanda Farmer: You've mentioned there Gavin this concept that there can be no double-dipping, which makes sense. We can't be compensated twice, for example by the developer and then by the manufacturer. Are you involved at all with insurers, building insurers, and are you aware, you may not be, of what their position has been when it comes to this cladding? My understanding is that there's been a bit of confusion and some gray areas in our sector when it comes to strata building insurers and the question of cladding.

Have you had any interaction with them, any involvement when you're working with these buildings?

Gavin Beardsell: Yes. Our position is that or our understanding is that a building with building insurance, the insurers will not make a payment to the building owner unless there's been some property damage, so absent a fire, so unlike Lacrosse, for most buildings that have not fortunately suffered a fire, but nevertheless may still be obliged to remove and replace the cladding, because it's for example in New South Wales, subject to the building product use ban. Those insurers whilst they won't pay to remove and replace the cladding, having been notified that a building is affected and typically we see a significant increase in insurance premiums for that building. And that is another head of compensation that we seek to recover in the class action, the increased insurance premiums.

Lacrosse by contrast, where there was a fire and therefore property damage, therefore triggering cover under the building policy, and as I understand, there was a payment made by the building's insurers which it then sought to recover by a claim against the builder.

But in our class action, fortunately there have been a limited number of fires to date, principally we're looking to recover the cost of replacing the cladding on behalf of buildings that have not suffered a fire. No fire damage, and therefore they're not entitled to turn to their own insurers and recoup the cost of replacing the cladding.

Amanda Farmer: And that in itself is a huge cost. I mean I've just seen colloquially and some buildings that have contacted me,

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showing me some of the quotes that they've obtained. For some large buildings or buildings that have multiple towers if you like, we're talking millions of dollars, this is huge money.

Gavin Beardsell: That's correct Amanda, and again, as part of our registration process for everybody who registers, that's further information that we ask, not only type of cladding and who's supplied it and when, but have you received any notice from any local authority, in effect requiring the owners corporation to take action. And that action can have multiple steps, but ultimately ending with quotations for the cost to remove and replace the cladding. And depending on the building, we've seen quotations ranging from \$500,000 to multi-millions of dollars.

Amanda Farmer: And it's scary stuff. And that is why I believe it's so important that buildings and managers who are listening to this episode understand what it is that IMF Bentham and William Roberts Lawyers are doing with this class action.

Now let's get into that registration process. What do our buildings do if they want to register?

Gavin Beardsell: Visit our website, www.imf.com.au. And on that website, there's a dedicated page for the combustible cladding class action. That firstly provides further information about the class action and possible other class actions, as I've outlined today. But then there's a link to register anybody's interest.

I should stress that that registration is one, confidential, and two, it's with no obligation. So there's no financial obligation to anybody who registers their interest.

Once interest has been registered by providing us with some basic information, our client team in Perth will then send on a confidential basis an information pack to every registrant. And that pack contains a number of documents, including our funding agreement, William Roberts retainer and cost agreement, and a document that we prepared which answers a number of frequently asked questions. So another benefit of registering with no obligation is to provide our, be provided with further information about what we're doing.

And then upon the receipt of the confidential information pack, we encourage people to sign up, and when I say sign up, I mean sign the funding agreement and sign William Roberts' costs and retainer agreement, and then return them to us. That's all explained as part of the process online.

And just to stress there that a question that we've been frequently asked is well, what obligation do I have once I've signed up?

Well, what we're finding is people are signing up and some have ALUCOBOND and some do not. For those that do not have ALUCOBOND, the PE and Plus products, they're of course not eligible to participate in the current class action. There's no financial obligation on those people who for whatever reason we assessed are not eligible to participate. So there's no down side as it were by signing up.

But if somebody signs up and they don't have ALUCOBOND, it may be that they have another product that we are also investigating. And once somebody signs up and becomes a funded client of IMF, we have building experts who will assist us at no cost to the owner, to determine what type of cladding is fitted to the building, to assessed eligibility to participate in the current class action or any others. So that benefit is at no cost to the signed up owner.

So the process in short is online registration and sign up, and then our client team will assist me to collate the information so we can work out eligibility to participate.

Amanda Farmer: Okay. And it is buildings Australia-wide so it doesn't matter where you are, head over and check out that registration link. I will put a direct link to the registration page in the show notes for this episode. So you'll also find it over at www.yourstrataproperty.com.au/podcasts where you see this podcast episode.



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Amanda Farmer: Now a question which may be answered in your material Gavin or is one of your frequently asked questions, what steps does a building need to take, and I'm recognising this is going to be probably different in each jurisdiction to legally engage you or it's probably William Roberts more appropriately to represent them in this action? And I'm thinking general meetings, resolutions.

Gavin Beardsell: Certainly in the case of a residential strata building with an owners corporation, there is a process. The process varies from State to State, but again, William Roberts can assist because that's a legal process. They can assist with providing some guidance on the process in any particular jurisdiction. So for example in New South Wales, William Roberts assisted our representative applicant's owners corporation with the process, which resulted in then a meeting of the committee and resolutions were passed which enabled the owners corporation to then enter into our funding agreement and William Roberts' costs and retainer agreement.

So yes, there is a process, but it typically involves notice of a meeting, a meeting, a quorum, a vote, and then signing up.

Amanda Farmer: Yes. I am not aware, maybe you are Gavin, has there ever been a class action headed by a strata building, an owners corporation, or body corporate?

Gavin Beardsell: Not that I'm aware of, Amanda. This is Australia's first combustible cladding class action. I don't know whether or not there have been class actions not involving combustible cladding brought by an owners corporation. But certainly it's a first in relation to combustible cladding.

Amanda Farmer: Yes, and it does open up those questions about retainers and authority and instructions that I'm sure you're all having lots of fun with there with William Roberts trying to work through all that.

Gavin Beardsell: Yes. Well, that's really what we're here for. So unlike, say, a shareholder class action where it's a more straightforward signing up process, for buildings with an owners corporation, the process is less straightforward, but nevertheless, there is a process, and we're finding that it can be achieved in a relatively short timeframe with some guidance.

Clearly there are claims against builders and developers that are brought by individual buildings. So they have been through that process to pursue their own litigation, and indeed may be currently doing so about cladding. So whatever the process is, it can be achieved.

Amanda Farmer: Yes, for sure. Now, what happens if a building is not registered with you, but does have ALUCOBOND cladding, do they get the benefit should you be successful in this litigation?

Gavin Beardsell: The short answer to that is it will depend. The class action has been commenced as an open one. And what that means is it's brought on behalf, as I say, of all affected buildings as defined in the court papers. And that means everybody is in, unless they opt out. And there's a statutory right to opt out. And later in the proceedings, there will be a court-approved notice, which has to be sent to all of the members of the class directly or indirectly by way of advertisement if we don't know at that time precisely who is in the class, advising them as to their right to opt out.

And if they opt out, then they're no longer in. But if they don't opt out, they remain in the proceeding and ultimately, the court may require a formal registration process where building owners have to put their hand up to say, "Here I am and I wish to participate in any settlement." But we're nowhere near that process yet.

So I expect at some point the court will require building owners to reveal themselves to us. But this is why we're preempting that with our own registration process. So we encourage people to register with us, so we know that you exist now rather than later.

And this is one of the problems that has arisen from there being presently no publicly available list of affected buildings in Australia. And there are moves afoot for there to be such a publicly available register. But in the meantime, there isn't. So the only

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way we can find out about affected buildings is on an ad-hoc basis from what we read in the press. But principally by encouraging people to register, and then we know that their building exists and they will be registering with us automatically, we're aware of their details to include in any resolution process down the track.

Amanda Farmer: Yes. From my perspective, I don't see a down side in engaging in that registration process, taking that first step if you're aware that you have some kind of PE cladding installed or you're just not sure. That sounds like a good first step to me and to start engaging in that investigation process, and to open up the conversation if you're a lot owner or a committee member, and you want to find out more with no obligation, it sounds like a good way to do it then to get that information pack to then be able with your strata manager, with your fellow committee members, and see if you are able to take the next step.

Gavin Beardsell: That's it. And that's really on a final note, we encourage people to register or if they've got any further questions, just to contact us directly. But the registration process is confidential with no obligations. So I encourage people to continue to do that.

Amanda Farmer: Well, thank you so much Gavin for taking the time to talk to us today. When I discovered you out there, I shifted a few things around to make sure we could talk as quickly as possible, because I'm sure it's important that you get these registrants on board, as soon as you can.

As I said, I will put a link in the show notes to where you need to go to find out more about the class action and to register. Is there anything that you want to add, Gavin, before we wrap up?

Gavin Beardsell: I think that's covered it all Amanda. I just like to thank you for giving us this opportunity to make more people aware that this class and possible other class actions in relation to combustible cladding are being investigated by us and William Roberts. And really the point that you touched on just to confirm, regardless of whether or not you know what type of cladding you've got, register with us and we'll help you work it out.

Amanda Farmer: It sounds good. Thanks Gavin.

Gavin Beardsell: Thanks Amanda.

Outro: Thank you for listening to Your Strata Property, the podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode via the show notes at www.yourstrataproperty.com.au.

You can also ask questions in the comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?