

Publication Date: 11 August 2020
**YSP Podcast Transcript: Episode 226. Cladding class action against momentum:
register now**

Listen to this podcast episode [here](#).

Intro: Welcome to Your Strata Property, the podcast for property owners looking for reliable, accurate and bite-sized information from an experienced and authoritative source. To access previous episodes and useful strata tips, go to www.yourstrataproperty.com.au.

Amanda Farmer: Hello and welcome to this week's podcast episode. I am your host, Amanda Farmer and its great to be back here with you for another week in strata.

This week, my guest is Gavin Beardsell. Gavin is an Investment Manager based in Omni Bridgeway's Sydney office responsible for managing funding opportunities in Australia and New Zealand. Gavin is currently managing Omni Bridgeway's investments in a range of funded legal claims in Australia and New Zealand. This includes the combustible cladding class actions.

Combustible cladding, some words that many owners corporations across the country will be feeling a little nervous about when they hear them. Gavin has over 25 years' experience in commercial litigation and class actions in particular. As a partner at the UK's largest insurance law firm, BLM, he acted for several leading UK 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, as a Partner at Gilchrist Connell and then as Senior Consultant at Clyde & Co. He has acted for insurers and large corporations defending or advising on high profile class actions brought by shareholders, debenture holders and other investors in the Federal Court, and the Supreme Courts of NSW and Victoria.

Now, I first chatted to Gavin back in Episode 162 when the combustible cladding class action was just kicking off in our Federal court. This is a product liability claim against the manufacturers of certain types of combustible cladding installed on our strata buildings. Gavin shares with us the current status of the legal proceedings. What has happened since we last spoke over a year ago.

He lets us know that registrations are now opened for a second class action. So if your building was not able to be part of the class action we are talking about last year, listen closely and see if you might fit the description for this new class action. Gavin tells us how can your experts' fees paid for you and we'll tell you where you need to go to register to be part of this class actions. If you have or you suspect you have these specific types of combustible cladding installed on your building.

Now, there are a few links that we talked about during the episode and you will find those over on the website: www.yourstrataproperty.com.au/podcasts. You'll see this episode number 226, that sounds like a lot, doesn't it? Doesn't feel like it. Plenty more to come. I'll take you over now to my chat with Gavin Beardsell.

Gavin, welcome to the show.

Gavin Beardsell: Thanks, Amanda. Thank you for having me back.

Amanda Farmer: Indeed. You are back. We last chatted back in Episode number 162 which is over a year ago now. And we were chatting about some very important litigation that is going on that owners who are in buildings with combustible cladding need to be aware of.

So you reached out to me, Gavin, very helpfully, and let me know that there were some updates on that litigation. Let's assume that we have some listeners who may not have been with us since Episode 162. Can I ask you to give us a quick summary of what all this is about? What does Omni Bridgeway do? And what's all the litigation about?

Gavin Beardsell: Well, when we last spoke in May last year, the company was called IMF Bentham Limited. And since then, we've changed our name. So it's the same company, but we've changed our name to Omni Bridgeway Limited. And we're

Publication Date: 11 August 2020
**YSP Podcast Transcript: Episode 226. Cladding class action against momentum:
register now**

still listed on the Australian Securities Exchange as we have been since 2001 and in short the name change is explained by we merged with a Dutch-based litigation funder, Omni Bridgeway, and ultimately decided to take its name for our global business.

And in essence, what we do at Omni Bridgeway is we provide finance to claimants to bring their claims worldwide. And there's really 3 components to our financing. First, we finance the legal costs of pursuing the claims. So we pay the claimant's legal costs. We provide cover for adverse costs in the event that the claim is unsuccessful and the claimant is ordered to pay the defendant's costs.

And we also provide security for the defendant's costs if we're ordered to do so by the court. So that's the essence of what Omni Bridgeway does. And in short, we're funding at the moment two open class combustible cladding class actions in the federal court of Australia. And these actions are brought on behalf of building owners, owners corporations, and public bodies across Australia. And the two actions are against manufacturers of certain combustible cladding products.

So in the first action, which is called the Alucobond class action, that action concerns 2 Alucobond products, Alucobond PE and Alucobond PE and Alucobond Plus, PE meaning polyethylene. And in that action, there were 2 defendants, the German manufacturer, 3A Composites GmbH and the Australian importer Halifax Vogel Group.

In the second class action, the Vitrabond proceeding, that concerns 2 Vitrabond products PE and FR, and there was one defendant in that proceeding, the Australian importer, Fairview Architectural, and the number of those claims made in those proceedings, it's alleged, it will have to be proved, that the products are not of acceptable quality under consumer protection legislation and the class action seek money compensation from those manufacturers for things like the cost to remove and replace the cladding, additional building insurance premiums, and other associated costs incurred as a result of the cladding. For example, many building owners and owners corporations have had to incur significant consultants fees to investigate what cladding they have on their building before they can decide what remedial action to take.

Amanda Farmer: We did talk back in Episode 162 about the quantification of those claims. And we touched on all of those different heads of loss if you like, the buildings may be able to claim for. Are you at a stage where you're quantifying those? Do we know how much money we're talking about here? Do you have a figure for the average owners corporation? What they're looking to receive, should these claims be successful or are we not at that stage yet?

Gavin Beardsell: That process is ongoing and it's been ongoing since the actions were commenced last year. As you know, Amanda, there's no publicly available register of cladding, affected buildings in Australia. So the quantification process involves building owners and owners corporations registering with us. And then once we are in communication with them, they can fill in a questionnaire or an online registration form and provide details not only about what cladding they have or think they might have, but also provide an early indication of the losses that they've suffered.

So we're in the process of collating all that data. We haven't yet collated the data for all affected buildings and so we presently can't say what the total value of all the claims is or indeed precisely how many buildings are in the class actions. But in a recent court judgment, Justice Wigney said that there was evidence that there were more than a thousand affected buildings. So just to give you some idea of what, although it has not been finally determined, the likely size of the class.

Amanda Farmer: Yes. I imagine it's quite a scary claim for these manufacturers or their insurers. And that's something to be clear about. This is a claim, not against builders, not against developers. These are the manufacturers. And I think you mentioned there, too, Gavin, an importer of these cladding products on the basis that they don't comply with consumer protection legislation because they have this combustible PE core.

Gavin Beardsell: That's it in a nutshell, Amanda. To put it another way, the core of these products contain polyethylene, which is combustible. The percentage content of polyethylene varies between the products, but in short, polyethylene is combustible and it's therefore alleged, as I say, I stress must be proved that as a result of the core's combustibility, the products are not safe and are

Publication Date: 11 August 2020
**YSP Podcast Transcript: Episode 226. Cladding class action against momentum:
register now**

not fit for purpose and therefore not of acceptable quality.

And more recently, the court gave permission to expand the claims and so the product liability claims under the Australian Consumer Law are still in the proceedings, but additionally, there are now claims for misleading or deceptive representations which are alleged to have been made by the manufacturers about these products.

And tell me this, those representations were made to who?

Gavin Beardsell: Well, again, it's alleged, have to be proved, but it was made to the industry, the construction industry at large. As you rightly said a moment ago, these are not claims made against builders and developers and other building professionals. But we say that the promotional literature that was issued by them, the manufacturers, was seen and relied upon by many in the building industry. And those misleading or deceptive conduct claims are made in addition to what we call the product liability claims, the acceptable quality provisions of the Australian Consumer Law and Trade Practices Act.

Amanda Farmer: Okay. Of interest to me from the legal perspective, this not being an area in which I practice, this misleading and deceptive conduct claim. You don't have, as I think I've heard, claimants from the building and construction industry. These are claimants and the ultimate recipient of the product, if you like, the consumer is the claimant. There is a connection there between the ultimate recipient of the product, the consumer, and this alleged misleading and deceptive conduct on the part of the manufacturer. That's interesting to me.

Gavin Beardsell: Yes. Well, what we've been trying to emphasise from day one is when we speak to building professionals, whether they be builders or the developers or anybody else in the building industry, in the supply chain, at first, there was a belief that they might be our target, they're not, on the contrary. So we now, actually, now we've explained to builders and developers and the like that the claims are not made against them. We're actually encouraging them to assist us because of course, they are the very people who are aware which buildings have these products on.

So what we're now finding to get some traction with not only builders and developers, but, for example, strata managers who have portfolios of cladding affected buildings and really encouraging people to participate. And it may be that building owners and owners corporations can also pursue other third parties. But if you like, in that sense, it gives them 2 options: participate in the class actions or pursue their own separate claims.

But the essential difference between those is that we provide the funding for the class actions, but the building owners and owners corporations would need to finance their own separate claims against anybody else they wanted to or alleged was liable to pay compensation to them.

Amanda Farmer: Yes. Okay. And we are going to let our listeners know where they need to go to find out more and in particular, to register if they haven't already to be part of these actions. When we were chatting last year, Gavin, I think it was only a couple of months in the claim had been filed in the federal court.

It's now been running for over a year. And I know as well as any other litigation lawyer how slow things can move in our courts. And I imagine Covid has caused some further delays. But I do understand there have been some developments in the Alucobond class action in particular. What's been happening there and where are we at?

Gavin Beardsell: Well, first Amanda, I'm pleased to say that Covid-19 has not caused any delay in the combustible cladding class actions. On the contrary, the federal Court of Australia has got good technology and has been able to conduct case management hearings virtually. So whilst hearings are not taking place in person, they have taken place. And the proceeding is moving on. Yes. Okay. And we are going to let our listeners know where they need to go to find out more and in particular, to register if they haven't already to be part of these actions. When we were chatting last year, Gavin, I think it was only a couple of months in the claim had been filed in the federal court.

Publication Date: 11 August 2020
**YSP Podcast Transcript: Episode 226. Cladding class action against momentum:
register now**

Amanda Farmer: It's now been running for over a year. And I know as well as any other litigation lawyer how slow things can move in our courts. And I imagine Covid has caused some further delays. But I do understand there have been some developments in the Alucobond class action in particular. What's been happening there and where are we at?

Gavin Beardsell: Well, first Amanda, I'm pleased to say that Covid-19 has not caused any delay in the combustible cladding class actions. On the contrary, the federal court of Australia has got good technology and has been able to conduct case management hearings virtually. So whilst hearings are not taking place in person, they have taken place. And the proceeding is moving on.

Most recently in the Alucobond class action, the German manufacturer 3A Composites failed in its attempts to shut down the class action in its entirety and also failed in its attempt in the alternative to limit the number of affected persons who are entitled to participate by trying to restrict the class action to certain Australian jurisdictions. So I'm pleased to say those attempts failed.

And thirdly, 3A Composites also failed in its attempt to disentitle any person who failed to register from participating in any settlement or judgment if the class action is successful. So putting that all together, it means that all of the group members in the Alucobond proceeding are free to continue their claims for compensation against 3A and HVG.

Amanda Farmer: Excellent. And are you at the stage where you are now as the applicants, as the claimants, presenting your case to the court? What's happening next in those proceedings?

Gavin Beardsell: No. In the Alucobond proceeding, any initial trial is some way off. The parties are presently in a conferral process, which I expect will ultimately lead to a court-approved notice to be sent to the group members in the Alucobond proceedings, similar to the notice that has already been approved by the court and sent to the group members in the Vitrabond proceeding. So we haven't quite got there yet, Alucobond proceeding, hope that we will do so shortly. But in the meantime, a notice has been approved by the court and gone to the group members in the Vitrabond proceeding.

Amanda Farmer: Okay. So we're talking about 2 different class actions here, aren't we? The Alucobond and then the Vitrabond. Some buildings, strata buildings may have the Alucobond product on their building, may have the Vitrabond product on their building. How do they know? How do they know if they have it? And how do they know which one they have? Does it matter at this stage? What do you suggest to listeners who are just hearing about this for the first time, they know they've got some kind of combustible cladding, what's your recommendation to them?

Gavin Beardsell: It's a very good question, Amanda. And the short answer is, many building owners and owners corporations don't know precisely what combustible cladding product is on their building. So, for example, we've seen cases where a particular cladding product is specified in construction drawings. But in fact, a different product is ultimately used. And indeed, a good example of that is the Lacrosse tower in Melbourne.

Gavin Beardsell: So in short, what we're saying to affected people is register your interest with us, even if you don't know what product you have or if you suspect it might be Alucobond or Vitrabond. Register with us in any event. And then if for all those building owners and owners corporations who sign up with us, if they sign up, we will pay for a building expert to assist in determining which product is on the building and therefore, to determine eligibility to participate in the class actions.

And even if it ultimately turns out that the product is not one, the subject to the 2 class actions and therefore, the owner is not eligible to participate, there's no financial cost to that building owner. So we're really encouraging as many people as possible to sign up and then we can assist them. We can do a number of things in conjunction with a building expert.

We can look at photographs and construction documents, but ultimately if there's still uncertainty as to the type of product, then it may require a building owner to remove one or more panels from the building if they haven't already done so. As the court approved notice in the Vitrabond proceeding makes clear, it may be that on the back of the panel, there are some markings which identify the cladding product. So there's a number of things that can be done. And if people sign up with us, we'll help them to work

Publication Date: 11 August 2020
**YSP Podcast Transcript: Episode 226. Cladding class action against momentum:
register now**

out what they've got on their building.

Amanda Farmer: Okay. Sounds like a win-win there or a no lose, perhaps.

Gavin Beardsell: Indeed.

Amanda Farmer: Okay. Well, let's be a little bit clearer here now for our listeners as to what they need to do, where they need to go. There is, as I understand it, an online registration form on Omni Bridgeway's website, and we will put the link to that in the show notes for this episode. So you want to go over to yourstrataproperty.com.au/podcasts. Look for this episode with Gavin, Episode number 226, and in the show notes under this episode, you will see a link there.

Gavin Beardsell: There are actually now three links, Amanda. There's one for the Alucobond proceeding, one for the Vitrabond proceeding and a separate link for the New Zealand, which I know we're going to talk about, the potential New Zealand combustible cladding action.

Amanda Farmer: Perfect. Okay. So we will put each of those separate links in there, identifying what they are each for. Let's get into New Zealand, what's happening over there?

Gavin Beardsell: In New Zealand, we're not as far advanced as in Australia. So we intend to commence, haven't yet commenced, a New Zealand combustible cladding class action which will be similar to the actions that have already been commenced in Australia. So similar allegations about the Alucobond PE and Alucobond Plus products.

The stage we're at at the moment is we've been signing up many New Zealand building owners. So we've had a very good response to that. There were many building owners in New Zealand who want to participate in this proposed New Zealand action. Our focus at the moment is working with the lawyers Russell McVeagh in Auckland to find a representative plaintiff, somebody who will bring the proceeding on their own behalf and on behalf of other cladding affected New Zealand building owners.

And as soon as we've found that representative person, the proceeding will be commenced in the High Court in New Zealand. And in the meantime, similar to in Australia, we continue to encourage New Zealand owners who have or think they might have combustible cladding on their buildings to register with us on our website again, so that we have been in contact with them and we can help them in the same way as the Australian building owners to work out what cladding is on their buildings and determine their eligibility to participate in the proposed New Zealand action.

Amanda Farmer: Excellent. Well, we certainly do have many New Zealand listeners. So there is a link there in the show notes specific to New Zealand buildings. Now, tell me if I'm right here, Gavin, a building that has these products installed does not necessarily need to be registered to benefit from any favorable decision here. But it sounds to me like there are some significant benefits to being registered with you. Is that right?

Gavin Beardsell: That's correct, Amanda. What the court recently decided is that in effect, that there's no obligation to register because they are open open class proceedings, brought on behalf of all affected building owners nationwide. There's no obligation to register, but they are encouraged to do so. So there's no penalty as it were or sanction if they don't. But they're encouraged to do so. Whether now or later, at some point, if there is a resolution, a successful resolution of the proceeding, then any person who wants to participate in and receive some money from the class action, if it's successful, will need to stick

Amanda Farmer: That's it.

Gavin Beardsell: So there's that ultimate benefit if the class action was successful. But another benefit of registering early, as I say, if a person signs up with Omni Bridgeway, they'd have the benefit of a building expert paid by Omni Bridgeway to assist to

Publication Date: 11 August 2020
**YSP Podcast Transcript: Episode 226. Cladding class action against momentum:
register now**

determine what cladding they have on their building. Also, the sooner we know about people, in the absence of a publicly available register, the sooner we know about people and their information is provided to us on a confidential basis, then the sooner we can start working with them, not only to determine their eligibility to participate.

But if they are eligible, working out what their losses are, whether it's replacing the cladding or some remedial measures to, for example, upgrading fire suppression systems. We've seen some significant increase in building insurance premiums, charged to prudent building owners who've disclosed to their insurers that their building has combustible cladding. So a number of benefits by registering early. But you're correct, there's no obligation to do so, but you've got to be in it to win it as it were.

Amanda Farmer: Yes, indeed. And it sounds to me like these buildings that are in this unenviable situation have a few avenues to pursue here. This is one of them and nothing to lose by going all in, doing the best you can to try and get some form of compensation or be in the queue to get some form of compensation here for being in this difficult situation not of your making.

Gavin Beardsell: Yes, there really is no downside to an affected building owner registering to participate in the class action. Their position cannot be made any worse than they're already in is another way of putting it. So it's really register to have the opportunity to, if there is a successful resolution of the class action, ultimately, to have the opportunity to benefit from that, regardless of whether or not they might want to do something else. If they think that they have a remedy or a right to compensation from a person other than the manufacturers. So they can, if you like, hedge their bets and do this and anything else.

Amanda Farmer: Yes. And it's important to point that out. And we did talk about that back in Episode 162 that there is no right to double dip or to be double compensated. But if you want to cover your bases, as you say, Gavin, then this is a good way to do it. So head over to the show notes in this episode, yourstrataproperty.com.au/podcasts, you'll see Gavin's smiling face there and the links that we've been talking about to register wherever you are, Australia or New Zealand, you can jump on in there.

Now, I did want to cover off with you, Gavin, there has been ... You mentioned the importer Fairview Architectural. I understand they're involved in the Vitrabond class action. And you've given me the heads up that they have recently gone into administration. What does that mean for that class action?

Gavin Beardsell: In short, Amanda, what it means is Fairview's external administration means that for the time being, the class action against Fairview is stayed. And so the representative applicant, the lead applicant in the Vitrabond class action has immediately made an application to the court, seeking the court's permission to continue the action against Fairview. Now, that application has not been heard and determined, but the application has been made.

But an allied to that, the lead applicant has also sought production of Fairview's insurance policies, which respond or might respond to the claims made in that proceeding. And so there's a couple of issues for the court to determine, in due course. But ultimately, subject to the court's permission, the Vitrabond lead applicant wishes to consider Fairview's available insurance policies to then review the decision to continue the proceeding against Fairview or in the alternative, to bring a direct claim against Fairview's insurers.

Amanda Farmer: Yes, well, it is complex litigation all around and there is a real bonus there for buildings to have that litigation funded for them and to have a single representative. The firm that is running this in the court, the lawyers running this in the court, Gavin?

Gavin Beardsell: In Australia, William Roberts Lawyers.

Amanda Farmer: Still William Roberts.

Gavin Beardsell: William Roberts Lawyers in Sydney, Bill Petrovski is the lead partner and for the proposed action in New Zealand, it's Russell McVeagh Lawyers in Auckland.

Publication Date: 11 August 2020
**YSP Podcast Transcript: Episode 226. Cladding class action against momentum:
register now**

Amanda Farmer: Okay, excellent. Well, I will look forward to continuing to be updated by you Gavin, so that we can share those updates with our listeners. But definitely, getting yourself registered if you suspect that you have this cladding on your building is the very next step that I'd be recommending. Anything you want to leave us with Gavin, any final contacts for our listeners to have before we wrap up?

Gavin Beardsell: Thank you, Amanda. Ultimately, there are websites there for people to use, but if they'd like to contact me directly with any of their queries at gbeardsell@omnibridgeway.com. I'm the Investment Manager at Omni Bridgeway that's responsible for these class actions. I'd be happy to help.

Amanda Farmer: Excellent. Thank you. Thanks for your time. Gavin, keep up the good work and maybe chatting to you again in 12 months' time, maybe by then an outcome from these proceedings, who knows.

Gavin Beardsell: You never know Amanda. Thanks again for having me back.

Amanda Farmer: Thank you.

Gavin Beardsell: Bye.

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?