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Insights

AMENDING CLADDING CLAIMS OUTSIDE THE LIMITATION PERIOD. (E)PS, WAS IT EVER REALLY COMPLIANT?

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Post Grenfell, many building owners have discovered fire safety defects that need to be remedied. The question is: who should pay?

As has been widely reported, the answer to this is rarely straightforward. There are variety of reasons for this, one of the main ones being that many of the claims against those who carried out the works subsequently found to be defective are now time-barred.

The government is trying to address this issue by extending the limitation period for claims made under the *Defective Premises Act 1972* (DPA) although as *my colleagues discussed*, claims under the DPA are far from straightforward. A simple *extension of the DPA limitation period* may not be the panacea to the defects crisis that some commentators suggest.

So what should a claimant do if recourse under the DPA is (for whatever reason) not for them and they find themselves running up against a time bar?

The recent case of *Mulalley & Co Ltd v Martlet Homes Ltd* provides some ideas. Let's take a closer look.

BACKGROUND

The claimant, Martlet (owner), owned five high-rise towers. The previous owners had employed the defendant, Mulalley (contractor), to carry out refurbishment works. These included the design and installation of an external wall cladding system (STO system), which involved expanded polystyrene (EPS), external wall insulation, horizontal fire barriers and an overcoat of render. Practical completion was achieved between December 2006 and April 2008.

Following the Grenfell Tower fire, the owner discovered major fire safety defects. In December 2019, it brought an action against the contractor for *negligence* and *breach of contract*, claiming damages for remedial works and a waking watch.

The owner faced problems with its claim, which will be familiar to many claimant building owners:

- The owner was almost out of time. The defective works were identified just prior to the expiry of the contractual *limitation period*. One tower had to be excluded from the claim because the works had been carried out too long ago.
- While the works in dispute did not comply with the 2018 version of the Building Regulations, according to the contractor they did comply with the *Building Regulations* current at the time they were carried out. How could the contractor be negligent if that was the case?

CREATIVE SOLUTIONS?

It is worth spending a moment looking at how the owner tried to overcome these hurdles as these tend to be the big stumbling blocks in fire safety claims.

A new claim in the Reply

To overcome the Building Regulations issue, in its Reply, the owner brought the "selection of combustible insulation" claim. Here it alleged that the selection of the EPS cladding was itself a breach of contract, because it did not comply with the relevant Building Regulations in place at the time.

In response, the contractor applied to strike out this claim arguing that it raised a new claim and this cannot be done in a Reply.

This creative solution gained little traction with the court, who agreed with the contractor and refused to allow the owner to plead this claim in its Reply.

Amending the particulars of claim outside the limitation period

The owner also applied to *amend* its original particulars of claim outside the limitation period.

Section 35 of the *Limitation Act 1980* provides that:

> "*… any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced… on the same date as the original action*."

Such claims are not permitted after the expiry of the limitation period unless:

> "*… the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made*."

The contractor objected to the owner amending its particulars of claim, on the basis that such amendments constituted a new cause of action that did not arise out of the same or substantially the same facts as had been pleaded in the original particulars of claim (in other words, the workmanship issues).

ISSUES

Having dismissed the new claim in the Reply, the focus for the court was whether the particulars of claim could be amended outside the limitation period. The issues were:

- Did the proposed amendments constitute a new claim?
- Did the new claim derive from the same or substantially the same facts already in issue?

JUDGMENT AT FIRST INSTANCE

The court at first instance ruled in favour of the owner.

In relation to whether the amendments amounted to a new claim, the court considered the facts and noted that the original design claim related to the efficacy of the fire barriers being compromised by air gaps and the use of inadequate fixings. By comparison, the proposed amendment claimed that the use of combustible EPS insulation boards was itself a breach of contract. The judge was satisfied that the amendments constituted a new claim.

On the second issue, the court considered the proposed amendment to have arisen from substantially the same facts as put forward by the contractor in its defence and therefore exercised its discretion to permit the amendments to the original particulars of claim.

COURT OF APPEAL DECISION

The contractor appealed the decision, so the Court of Appeal reconsidered these questions.

Did the proposed amendments constitute a new claim?

Yes.

Although the Court of Appeal considered that there was a strong case to say that the amendments did not amount to a new cause of action, it concluded that the selection of combustible insulation claim was a new cause of action for the following reasons:

- The claim was a contingent claim. Without the proposed amendments, the contractor would have had a complete defence.
- Practically, the existing claim related to workmanship and the implementation of design choices, whereas the “combustible insulation” claim related to design choices.
- The nature, scope and extent of the amendments were sufficiently different from the original claim to deem it a new claim.

Did the claim arise out of the same or substantially the same facts as already in issue?

Again, yes.

Before considering the defence, the court considered that the new cause of action arose out of the same or substantially the same facts set out in the original particulars of claim.

The court ruled that the case was always that the STO system, particularly the EPS insulation, was defective and had to be replaced. There was sufficient overlap between the originally pleaded case, which addressed both workmanship and design (focusing on workmanship), and the amended case that again pleaded both workmanship and design (but emphasised design).

In considering the defence, the court determined that the amended claim "flows naturally" from the defence. The contractor had expressly pleaded that the EPS insulation complied with Building Regulations in force at the time and the court considered that the owner would be deprived of a fair trial if it was unable to argue this issue. Lady Justice Andrews noted that:

> *"… it would be invidious if a defendant, having deliberately put in issue the compliance of the building design with the Regulations in force at the time of construction, could escape the consequences of an adverse finding on that issue by using limitation as a shield against a claim relying upon the non-compliance."*

The court acknowledged that the new claim would likely give rise to some additional investigation, but did not consider that this in itself could be a bar to the conclusion that the new claim arose out of the same or substantially the same facts as were already in issue.

FINAL THOUGHTS

Ignore limitation periods at your peril.

Although the courts allowed the owner to introduce the new claim, it is clear that claimants should consider the viability of all claims as soon as possible and make their case in advance of limitation expiry.

The trial, on the amended particulars of claim, is due to be heard in March 2022. The case comes at a pivotal moment with great legislative change regarding the future of cladding claims. As mentioned above, it is proposed that the *Building Safety Bill* will extend the limitation period under the DPA from six to 30 years. Arguably, following this case, the courts have also extended the limitation period for claims of this type by allowing claims to be amended once issued, outside the limitation period.

It is anticipated that many contractors will put forward the defence that the cladding used was compliant with the Building Regulations in place at the time of contract. It will be interesting to see the outcome of the case once the parties have amended their respective pleadings, so watch this space!

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MEET THE TEAM

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