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CLADDING AND FIRE SAFETY: MORE REACTION TO MARTLET V MULALLEY

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SUMMARY

Martlet Homes Ltd v Mulalley & Co Ltd is the first decision from the TCC on fire safety defects following the *Grenfell Tower* tragedy. This decision is highly significant for the construction industry, given the number of similar cases which are either progressing through the courts or at the pre-action stage. Although the judge emphasised the fact-specific nature of the dispute, this decision provided some insight on the court's likely approach to some of the significant issues that affect cladding disputes.
This blog considers some of the key takeaways from that decision in further detail.

Background

In summary, following the Grenfell tragedy, the building owner (Martlet) carried out a fire safety review of its high-rise residential towers, discovering that the cladding system installed by the design and build contractor (Mulalley) between 2005 and 2008 included combustible expanded polystyrene (EPS) insulation boards. Serious installation defects were also discovered, most significantly with the installation of the fire barriers.

The TCC found in favour of Martlet in relation to both the workmanship defects (the installation case) and the design defects (the specification case). Consequently, Martlet was entitled to *damages for the entire costs* of the remedial works, which involved the full replacement of the façade, and the cost of the waking watch.

Breach of Building Regulations and associated materials

As part of his judgment, the judge considered various provisions of the *Building Regulations* and other associated materials, which is well worth a read, ultimately finding that Mulalley was in breach of contract for failing to conform with the recommendation and/or advice contained in Building Research Establishment (BRE) report, BRE 135 (2003):

- Mulalley had a strict obligation to ensure the buildings complied with Building Regulations current at the time of entry into the contract (Building Regulations 2000).
- Requirement B4(1) (as we all well know by now) requires the external walls of the building to adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building.
- The Approved Document B (ADB) in force at the time was ADB 2002. While ADB 2002 did not contain an express requirement that the insulation panels had to be either non-combustible or of limited combustibility, this did not mean that it could be assumed that there was no restriction at all regarding their use.
- It was instead necessary to refer to the advice given in BRE 135 (2003). In this case, the Employer's Requirements contained a specific obligation on Mulalley to conform with the requirements and advice in any BRE reports. The judge interpreted BRE 135 (2003) as containing a clear recommendation and/or advice that a contractor considering specifying combustible cladding for a high-rise residential building should not specify a system which did not meet the performance standard in Annex A of BRE 135 (2003)(by way of a BS 8141-1 test) unless they could be satisfied from other sources that the system would adequately resist the spread of fire over the walls.
- In this particular case, there was no evidence that the cladding had been subjected to such a test, nor was there any evidence that Mulalley had concluded that the chosen cladding so obviously complied with fire performance design principles that compliance with the Annex A performance standard was not required. Mulalley was therefore in breach of contract in failing to conform with the recommendation and/or advice contained in BRE 135 (2003).

The judge noted that his interpretation of the various provisions was found primarily from the words used rather than expert evidence, on the basis that the provisions are intended to be read and relied on by a wide range of people involved in the construction sector.

The obligation to use reasonable skill and care

The terms of the contract in this case meant that Mulalley had an "unqualified design and specification duty" and a strict obligation to comply with statutory requirements (which included Building Regulations) and with the requirements, directions, recommendations and advice contained in the latest edition of, among other things, BRE reports. The court found that Mulalley was in breach of these obligations. The strict obligation to comply with Building Regulations is part of the *standard JCT terms*, and parties to a design and build contract often seek to extend the contractor's overall liability for design beyond reasonable skill and care.

However, the court also briefly considered whether Mulalley was in breach of its obligation to carry out the design with reasonable skill and care.

Mulalley had argued that it was reasonable at the time for a professional designer to specify the chosen cladding system on the basis that it was a well-known and widely used system which had a valid British Board of Agrément (BBA) certificate, and its use was not expressly prohibited for high-rise residential buildings at the time.

The judge was critical of the "everyone else was doing it" defence and held that, on a proper application of the principle established in *Bolam v Friern Hospital Management Committee*, it does not operate as a get out of jail free card. A defendant is not exonerated by simply proving that others were just as negligent.

The judge also held that, as at the date of the specification of the chosen cladding system, any reasonably competent designer and specifier could not simply have relied blindly on the BBA certificate as a form of "guarantee" or "passport" to compliance with the Building Regulations. A reasonably competent designer could not have failed to be aware of the most up to date and authoritative report on the matter which, at the time, was BRE 135 (2003).

Remedial works: replacement vs repair

This judgment also considered a building owner's choice between replacing or repairing a defective cladding system.

Mulalley argued that Martlet's decision to replace rather than repair the cladding system was taken on the basis of a post-Grenfell concern over the presence of combustible insulation within the system, rather than as a result of the installation defects. It therefore failed the *"but for" test* for causation.

The judge found that although the remedial solution necessary to remedy the installation defects was different from the one required to address the combustible cladding, Martlet's decision to replace the cladding was the only sensible way to address both issues at that time. In reaching this decision, he applied the *effective cause* test for causation in place of the "but for" test. As the installation breaches were an effective cause of the loss suffered that led to the decision to replace the cladding, Mulalley was liable for such loss.

As part of his reasoning, the judge noted that the courts are generally reluctant to criticise, with the benefit of hindsight, the reasonableness of a claimant's remedial works. This is particularly so when the remedial works are undertaken with the benefit of professional advice. The judge was persuaded that Martlet's decision to replace the cladding was taken with the benefit of professional advice from its consultants, despite the fact that it was obvious that there were those within Martlet who clearly favoured the replacement scheme from the very outset.

However, the judge expressed the view that, had Martlet succeeded on its installation (workmanship) case but failed to demonstrate the specification (design) breaches, then it would have only been able to recover the costs of the repair option and not the full replacement costs.

Waking watch costs

As has become commonplace post-Grenfell, Martlet had put in place waking watch patrols until the EPS cladding had been removed from each of the towers. Mulalley claimed that these waking watch costs were too remote to be recovered as damages. The judge rejected this argument, awarding Martlet substantial costs for the waking watch for the following reasons:

- The requirement for a temporary solution pending a permanent solution was "a natural or a reasonably contemplated consequence" of the breaches.
- The combination of the use of combustible EPS insulation and the seriousness of the installation defects made this a very serious case.
- The implementation of a waking watch was required and/or endorsed by the local fire rescue service and the fire safety consultants.
- Any reasonably prudent contractor would have been very concerned about the risk from the fire barriers being rendered ineffective by defective installation even before Grenfell.
- The implementation of a waking watch was a reasonable step taken in mitigation of the far greater loss that would have flowed from an evacuation of the towers.

Mulalley had argued that before the Grenfell Tower fire, there was no widespread use of a waking watch and that this concept only arose due to a change in the overall fire strategy for tower blocks following the Grenfell tragedy. The judge accepted that prior to Grenfell, there was no widespread knowledge or understanding within the construction sector that the risk to fire safety, where combustible external cladding had been used on a high-rise residential tower block, was so great that a waking watch would be required until it was removed. However, the judge found that this lack of knowledge was a result of a culture of endemic complacency within the construction sector. A sensible company in Mulalley's position would have appreciated that, in the face of serious fire safety defects, temporary measures would be required to ensure the safety of building residents until remedial works could be carried out.

Time bar

It is worth noting that the parties accepted that, in relation to one tower, the claim was time barred as the works were completed more than 12 years before the claim was issued. Contractual claims in relation to that tower will continue to be time barred, but there might be the possibility of bringing claims under the *Defective Premises Act 1972* (DPA 1972) with the new limitation periods introduced by the *Building Safety Act 2022* (BSA 2022).

It is also notable that claims were not advanced under the DPA 1972 in this case. There could be a number of reasons for that, including that such claims would have been time barred when the claims were commenced (because the changes to the limitation period for DPA claims in respect of

dwellings completed before 28 June 2022 from 6 years to 30 years had not come into effect at that point). Alternatively, prior to the amendments made by the BSA 2022, the claimant might have considered that the DPA 1972 did not apply to refurbishment works such as those undertaken by Mulalley to fix the cladding to the existing towers. This position has now changed with the addition of *section 2A* to the DPA 1972, which expressly extends the DPA to work in relation to any part of a relevant building (rather than just work for the provision of a dwelling).

Conclusion

There are many takeaways from this interesting and significant judgment, but ultimately this decision has shown that the TCC will take a strict view on an external wall system's compliance with Building Regulations in force at the time of construction.

The situation in which the parties found themselves is not at all unusual. Many building owners have taken steps to remedy the defects first, and then sought to recover the costs of doing so afterwards. This is not surprising given the life safety risks at stake, as well as the reputational risks of doing nothing. Building owners who find themselves in this position will take comfort from this case. Claims against developers and landlords in respect of building safety risks will now also be able to rely on the *building liability orders* and remediation orders brought into force by the BSA 2022, which will aid with the recovery of the costs of remedial works.

While cladding disputes will ultimately be assessed on a case-by-case basis (as the judge was keen to stress in this case), this decision provides some much needed guidance on some of the significant issues, which I imagine we may be talking about for some time.

This article first appeared on the Practical Law Construction blog dated 24 August 2022.

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MEET THE TEAM

Charlotte Mears

London

charlotte.mears@bclplaw.com

+44 (0) 20 3400 3639
