Fire risk – defective cladding litigation heats up

By Sam Dorne

In England and Wales, the Technology and Construction Court in *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWHC 1813 (TCC) (14 July 2022) has released the first decision arising out of a defective cladding dispute following the Grenfell Tower tragedy. A raft of disputes has arisen in the UK regarding unsafe combustible cladding. This decision is likely the first of many, and will be highly illustrative for parties engaged in any cladding dispute.

Background

On 14 June 2017, a high-rise fire ripped through the 24-storey Grenfell Tower block of flats in West London resulting in 72 deaths and more than 70 people being injured. A small electrical fire started on the fourth floor before spreading rapidly up the Tower's newly installed defective exterior cladding and insulation.

As part of the national response, investigations were carried out which revealed that a large number of these high-rise buildings had been clad in dangerously combustible materials. Other fire-safety issues were also identified, such as missing cavity barriers around windows and a lack of fire barriers.

Unsurprisingly a number of disputes have arisen from this, with Martlet Homes being the first test case that has worked its way through the courts.

Martlet Homes Ltd v Mulalley & Co Ltd

Martlet Homes Ltd (**Martlet**) owns a high-rise tower block in Gosport. Between 2006 and 2008 Mulalley & Co Ltd (**Mulalley**) installed a new cladding system called the StoTherm Classic render system.

The contract stipulated that Mulalley was responsible for the design and execution of the works, including completing the design and selecting the specifications.

The contract also required compliance with the Building Regulations as well as provisions in relation to statutory requirements, codes of practice, British Standards and, most notably, the *latest requirements, directions, recommendations and advice*.

Post-Grenfell a number of defects were identified with this cladding, and Martlet removed the combustible cladding and replaced it with a new, safe, system.

A claim for over £8 million was brought against Mulalley for the cost of installation of the new cladding as well as the costs of having a Waking Watch – whereby trained personnel monitor the building 24/7 to allow the residents to remain in the unsafe building while the remedial works are carried out.

The claim and defence

Martlet's claim was two-fold. First, that there were "installation breaches" where broad issue was taken with the workmanship of the cladding. The second alleged breach consisted of a "specification breach" whereby the cladding failed to comply with the Building Regulations at the time of the contract, so Mullaley was in breach of contract.

To the first charge, Mulalley admitted that while some of the workmanship was defective, these breaches did not justify the actual replacement works carried out or the need for a Waking Watch. To the second charge Mulalley denied that the cladding was non-compliant at the time of installation.

Its position was that the real cause of the replacement works was the increased fire safety standards following Grenfell and argued that a more limited repair scheme was the extent of its liability.

The decision

The Court found that while there were installation breaches the loss would be confined to a repair scheme only. Damages for the full replacement scheme would not have been recoverable.

The Court also upheld the specification breach, and Martlet was therefore able to recover the cost of the full replacement scheme.

In reaching this decision the Court made a number of findings.

The relevant standards to apply

Various technical standards which will be relevant to many in the construction industry dealing with similar cases, including the Building Regulations 2000 and the related Approved Documents, which provide practical guidance with respect to the requirements of any provision of building regulations, were examined.

Of relevance in this case, Approved Document B contained a paragraph 13.7 in connection with external wall construction which provided that *advice on the use of thermal insulation material is given in the BRE Report Fire performance of external thermal insulation for walls of multi-storey buildings (BR 135, 1988)* (which had been updated to BR 135 2003 and which was accepted by the parties as being the applicable version).

Mulalley argued that there was no Specification Breach as BR 135 (2003) was not mandatory and it was reasonable for Mulalley to rely on a *British Board of Agreement Certificate* that was available for the StoTherm system.

The Court held that the BRE 135 (2003) created a performance standard which was to be found in its Annex A and which was to be assessed through the tests to be undertaken in accordance with BS 8414-1.

The BS 8414-1 test is where the cladding system is built in mock-up form and set fire to, thereby exposing it to a severe fire to see how it copes.

A reasonably competent designer specifier should have been aware that BRE 135 (2003) contained advice to avoid specifying a product such as the StoTherm system (which contained combustible insulation and combustible render) for a high-rise residential building unless there was evidence that it met the Annex A performance criteria via a BS 8414-1 test. They would not have been satisfied that the StoTherm system conformed with all of the general and system specific design principles contained within BRE 135 (2003).

Although BRE 135 (2003) wording is advisory and not mandatory, the Court held that the advice contained a clear recommendation and that any reasonable contractor would comply with said advice.

The Court concluded that Mulalley had failed to follow the advice, and that failure to comply with BRE 135 recommendations also amounted to a failure to comply with functional requirement B4(1) of Schedule 1 of the Building Regulations. This meant that Mulalley was in breach of its contractual requirement to comply with statutory requirements.

Causation and the "but for" test

In order for loss to be recoverable, the party seeking the remedy must show that the breach caused the loss. In other words the loss would not have been incurred were it not "but for" the breach. Mulalley's position was that the but for test could not be satisfied because the cladding would have been replaced anyway due to the changed fire-safety landscape since the Grenfell tragedy.

However, Martlet's position was that the correct

legal test was not the "but for" test; instead, the "effective" cause test should apply to this case. The Court agreed with Martlet that the effective cause test was correct here. Whilst the breach had to be an effective cause of the loss, it did not have to be the only cause.

The "everyone is at it" defence

Whilst the Court wrestled with whether the correct standards of the time had been complied with, it had no time in dispensing with the submission from Mulalley that it was common practice to use the StoTherm system across the industry, by citing from an often used precedent that *a defendant is not exonerated simply by proving that others … [were] … just as negligent*.[1]

Conclusion

Parties need to take stock of the decision handed down in Martlet, and it will no doubt provide some degree of comfort to building owners and their tenants going forward. The Court adopted a generous and wide scope of enquiry. If the Court has evidence that industry best practice standards or recommendations were not met and that things could have been done better, then the contractors will more likely find themselves on the losing side of many of these claims. Of course, every case is fact specific – but when engaged in these disputes, and certainly where the courts are concerned, one would be best advised to steer clear of the defence that everyone else was doing it.

ABOUT THE AUTHOR

Sam Dorne is a member of the NZDRC's Knowledge Management team and provides technical support to the Building Dispute Tribunal. Sam recently returned back to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.

1 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.