

Construction focus: Cladding disputes - liability

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The case of *Martlet Homes Limited v Mulalley & Co Limited* [2022] concerns the use of defective cladding in high-rise tower blocks and is of particular significance as it is the first High Court judgment on a cladding system dispute following the Grenfell Tower tragedy. The judgement raises fundamental discussions on liability, duty, causation and damages which we will be exploring over the course of two articles. In this month's article, we consider liability and the scope of duty and the implications of this within the construction industry. Next month, we will focus on Davies J's analysis of causation and damages and, in particular, his finding that the claimant could recover its costs in full due to the success of the so-called 'specification claim'.

Background

The claimant, Martlet Homes Ltd, is the owner of five high-rise towers that were built in Hampshire in the 1960s. In 2005, the defendant, Mullaley & Co Limited, was contracted to refurbish the towers, including the application of external wall insulation (EWI) and rendered cladding to improve cold and damp penetration resistance. The cladding works were undertaken via a design and build contract based on the JCT 1998 Standard Form. The defendant installed cladding known as the StoTherm Classic system which consisted of an inner layer of expanded polystyrene (EPS). Given EPS was known to be a highly combustible substance, fire barriers were placed at each level above the third storey to mitigate the risk in relation to the spread of fire.

In the wake of the Grenfell Tower fire on 14 June 2017, the deadliest residential fire in the UK since World War II, the claimant undertook extensive investigations to review the fire safety of their own towers, specifically the combustibility of any cladding materials. The investigations revealed the use of combustible EPS panels as well as defects in the installation of the fire barriers and EPS insulation boards. The claimant immediately implemented a fire patrol system (the waking watch) as a precautionary measure while they undertook further reviews. Ultimately, the claimant removed the entire EWI cladding system and replaced it with a new, non-combustible, cladding system.

The claim and the judgement

The workmanship breach

The claimant's primary claim was that the fire barriers and the EPS panels had been defectively installed.

These defects negated the efficacy of the fire barriers in preventing the spread of fire and the functionality of the panels themselves. Considering the evidence of both the fire and architectural experts, Davies J found several examples of defective workmanship. The key breach was that the fire barriers and EPS panels had been fixed using a method of adhesion which had created a continuous void between the barriers, the insulation and the wall. Additionally, there were vertical gaps between the sections of the fire barriers and the stainless steel fixings used were too short to provide adequate restraint. On this basis, the fire barriers and the EPS panels failed to comply with the Building Regulations, ADB 2002, the guidance in BRE 135 and the 1995 BBA Certificate. Davies J held, based on the above findings, that these breaches 'created an obvious and serious risk of rapid fire spread'. He decided, based on the above findings, that the claimant should be successful in its claim for workmanship breaches in respect of the fire barriers and the EPS panels.

The specification breach

The claimant's alternative claim was that the cladding system failed to meet the applicable fire safety standards.

It was an express term of the Employer's Requirements in the building contract between the claimant and the defendant that the latter should:

... conform with the requirements, directions, recommendations and advice contained in the latest edition of the following publications...f) Building Research Establishment's Reports, Papers, Defects Action Sheets and the like.

with BRE 135 (2003) being the latest edition of a relevant BRE report. BRE 135 contained a recommendation that EWI cladding should not be used in buildings above 18 metres, or in residential sleeping areas unless it met the performance standard set out in Annex A of BRE 135, which would be achieved by satisfying a full-scale test (BS 8414-1) to assess the fire performance of external systems.

The claimant argued that BRE 135 created a clear performance standard for the fire safety of the cladding system and that, by failing to meet the criteria set out in Annex A, the defendant had failed to conform with BRE 135. By contrast, the defendant argued that this requirement was unclear and that, had BRE 135 intended to make the BS 8414-1 test a mandatory requirement, the testing requirements should have been made more explicit. Davies J found in favour of the claimant, holding that the defendant's failure to adhere to the Annex A performance standard testing amounted to a breach of contract in relation to specification.

The award

The claimant was awarded £8m in damages which covered the full costs of the investigations, the waking watch and the removal and replacement of the cladding system.

The standard going forward?

Following the Grenfell tragedy, there are indications of an attempt to move towards a dichotomy in fire engineering standards: a pre-Grenfell and a post-Grenfell approach, with Grenfell causing a 'changed fire-safety landscape' and a greater appreciation of fire engineering in the context of a complex regulatory framework. Given that *Martlet Homes* is likely to be followed by a raft of further cases dealing with disputes over cladding systems, it was important for Davies J to deal with the legal standards to be adhered to by contractors in the face of such uncertainty.

In a construction contract, the question of whether there has been a design or specification breach requires a consideration of professional negligence - ie, whether the designer (the defendant in this case) has discharged its duty to exercise the requisite standard of care in carrying out the design, whether that duty is imported by the common law or the express terms of the contract. The test for a breach of duty in this context was established in the landmark case *Bolam v Friern Hospital Management Committee* [1957].

In *Bolam*, it was held that a doctor will not be guilty of negligence if it can be shown that they:

... acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.

In his judgment, Davies J makes explicit reference to the 'Bolam' test following the defendant's suggestion that designers regularly specified the EWI cladding system that was chosen, even for high-rise residential towers, due to its reputation and the valid BBA Certificate (a product conformity certification produced by The British Board of Agrément). Davies J held (in para 271) that:

... the argument that "everyone else was doing it" does not, on a proper application of the 'Bolam' principle, operate as a get out of jail free card.

In this respect, Davies J holds the defendant to a higher standard than that set out in *Bolam*. The 'Bolam' principle appeals to an objective standard that merely looks at what a 'responsible body' deem acceptable. Nonetheless, in the case at hand, the defendant had advanced the argument that they had acted in accordance with a practice accepted as proper given other fire engineers had been specifying EWI cladding systems, without carrying out investigations, on the basis of the valid BBA Certificate. Despite a 'responsible body', a group of qualified fire engineers, engaging in this practice, Davies J still considered it unacceptable. In doing so, he appears to appeal to a standard that goes beyond the 'Bolam' principle where what a 'responsible body' are doing must also be

considered reasonable and appropriate which, thus, incorporates a subjective angle into the standard applied.

In *Bolitho v City & Hackney Health Authority* [1997], which built upon the 'Bolam' principle, it was held that, even if a practice is accepted by a responsible body, it must still be '*logically defensible*'. The defence must be reasonable and responsible, and a judge is permitted to decide between two conflicting expert opinions on this basis. In his judgment, Davies J refers to *Knightsbridge Development Ltd v WSP UK Ltd* [2014] in which it was held that for the 'Bolam' principle to exonerate a defendant, there must be (as per para 120):

... evidence of a responsible body of opinion that has identified and considered the relevant risks or events and which can demonstrate a logical and rational basis for the course of conduct or advice that is under scrutiny.

In declaring that this observation is correct, Davies J goes further than the 'Bolam' principle and begins to appeal to a 'Bolitho' standard in that a defence must demonstrate logic and rationale.

Davies J's findings in relation to the BBA Certificate applies the higher 'Bolitho' standard of proof. Despite the defendant's assertion that it was reasonable to rely on a BBA Certificate in specifying the EWI cladding given this was an industry wide approach, Davies J held that the defendant must be required to show that it was reasonable to do so within the context of the works. The defendant, although purporting to act in accordance with industry standards, had no rational or logical basis for relying on the BBA Certificate. In other words, while the defendant may well have been acting in accordance with a practice accepted as proper by a body of design specifiers in the art of cladding design, given the complexities of a high-rise residential building, the defendant had to go over and above just relying on the Certificate by looking at the regulatory framework and testing requirements in their entirety.

Why is this case important?

This case is the first of, what is likely to be, a raft of post-Grenfell judgments dealing with fire safety and cladding claims. While each claim will turn on its specific facts, this case reiterates the importance of reviewing the applicable regulatory framework in its entirety; a contractor must not consider any one standard or requirement in isolation.

In arriving at his view on the standard of care, as discussed above, Davies J made three particular conclusions in respect of a contractor's duties within the regulatory framework, which are expanded upon below:

- contractors cannot rely on the issue of a BBA Certificate as evidence that they have complied with Building Regulations;
- a reasonably competent designer must be aware of the most recent authoritative guidance; and
- what is not expressly prohibited within the regulatory framework cannot be assumed to be acceptable.

Contractors cannot rely on the issue of a BBA Certificate as evidence that they have complied with Building Regulations

The defendant argued that it was reasonable for a professional designer to specify a cladding system on the basis that it had a valid BBA Certificate. Davies J found that, following the introduction of ADB 2002 and BRE 135 (2003), as per para 266:

... any reasonably competent designer and specifier could not simply have relied blindly upon the 1995 BBA Certificate.

BBA Certificates are not a 'guarantee' that the Building Regulations have been complied with because any competent designer should carry out their own investigations and consider the Certificate alongside other resources. In specifying a cladding system that contained EPS without carrying out investigations, the defendant was in breach of its contractual obligation to exercise the same degree of reasonable skill and care in its design of the work as would an architect or any other professional designer. This finding operates as a cautionary tale to contractors to not rely on BBA Certificates alone, but to do further due diligence on any specified product.

A reasonably competent designer must be aware of the most recent authoritative guidance

As aforementioned, the Employer's Requirements to the Building Contract required the defendant to conform with advice in any BRE report. BRE 135 (2003), the most recent report at the time of the works, advised that variations in material selection and design of cladding systems in high-rise residential buildings can 'only be assessed by full-scale testing', referring specifically to BS 8414 in the footnotes. Davies J interpreted this advice as a 'strong exhortation' that a contractor must not specify a system which has not met the performance standard in Annex A to BRE 135 (2003), by way of a BS 8141-1 test, unless the contractor is satisfied that the system would adequately resist the spread of fire. Davies J rejected the defendant's argument that similar systems had passed the BS8414-1 test, holding that each system requires a unique assessment to show it complies with the performance standard. Moving forward, contractors must ensure that the correct level of testing is carried out and that the most recent reports have been scrutinised.

What is not expressly prohibited within the regulatory framework cannot be assumed to be acceptable

Finally, ADB 2002 was referred to as an example of the documents within the regulatory framework encompassing the duties and requirements of designers. It was found that although ADB did not contain an express requirement that the insulation panels had to be non-combustible, or even of limited combustibility, this did not mean that it could be assumed that there was no restriction on the combustibility of insulation panels. This is a clear transition from the widely held view that ADB is the pinnacle piece guidance on fire engineering and, as such, it can be treated as conclusive when assessing liability. Therefore, the guidance to contractors must be that whatever is omitted or not expressly prohibited by ADB 2002, and presumably all further iterations, cannot therefore be automatically construed as being acceptable.

Summary

A holistic approach when considering regulatory framework is essential. Moreover, design and build contractors cannot shy away from their responsibilities as qualified designers by seeking to rely on what others in the industry may be doing.

Conclusion

This judgment is both extensive and significant. Whereas this article has focused on the liability perspective, next month's article will look at the quantum and causation angles.

It should offer comfort to building owners who, in the wake of Grenfell, embarked on expensive works to remove and replace cladding systems following reports on their safety and combustibility. Davies J's findings in relation to the standard to be applied to any alleged design breaches, and his assertion that 'everyone else was doing it' is not a defence, creates a clear line of argument for prospective building owner claimants. Additionally, this judgment mitigates the development of a pre- and post-Grenfell approach to fire engineering due to the judge's findings that fire engineers were never able to rely merely on ADB or a BBA Certificate. Instead, contractors must be careful to review the regulatory framework in its entirety, as well as constantly considering what is reasonable in the context of the project.

Cases Referenced

- Bolam v Friern Hospital Management Committee [1957] 1 WLR 583
- Bolitho v City & Hackney Health Authority [1997] 3 WLR 1151
- Knightsbridge Development Ltd v WSP UK Ltd [2014] EWHC 43 (TCC)
- Martlet Homes Limited v Mulalley & Co Limited [2022] EWHC 1813

Citation reference:

Dan Cudlipp, Phoebe Jackson and Emma Forsyth, 'Construction focus: Cladding disputes - liability', (November 2022 #402) *Property Law Journal*, <https://www.lawjournals.co.uk/2022/11/01/property-law-journal/construction-focus-cladding-disputes-liability/>, see footer for date accessed