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Construction Law Update

D&B contractor liable for the cost of replacing defective cladding in the TCC's first substantive decision post the Grenfell tragedy.

Judgment has very recently been handed down by HHJ Stephen Davies in *Martlet Homes Limited v Mulalley & Co. Limited*, the first substantive Judgment from the TCC on defective cladding since the Grenfell tragedy in 2017. In associated Court of Appeal proceedings earlier this year, Lord Justice Coulson commented on the case's wider significance to the construction industry.

The claim in this case raised fundamental legal questions as to the cause of a claimant's loss where combustible cladding was replaced in a post-Grenfell context, and whether or not a historically installed cladding system using expanded polystyrene (EPS) insulation complied with building regulations in force at the time the works were carried out. It also raised an important point concerning the recoverability of 'waking watch' costs.

Summary of the Facts

By a JCT design and build contract entered into in 2005, Mulalley was engaged to carry out extensive remedial works to five tower blocks in Gosport, Hampshire. These works included the re-cladding of the towers, for which Mulalley selected the Sto Therm Classic cladding system, comprising EPS insulation under a render overcoat.

On inspection post 2017, the cladding system was found to contain a number of defects, including defectively installed fire barriers and fixings together with a method of installing the EPS panels that contravened both the cladding manufacturer's instructions and the current BBA certificate ("**the installation defects**").

As a result of these defects, Martlet decided to remove and replace the entire cladding system with a non-combustible alternative (the "**replacement scheme**"), and pending replacement it implemented a waking watch patrol to mitigate the fire safety risks until the works had been completed.

Martlet issued proceedings against Mulalley in the sum of c.£8million; being the cost of the replacement scheme and for providing the waking watch. Please note these were the costs associated with four of the five towers as the claim relating to the fifth tower was statute-barred. That position may well have changed as a result of the recently introduced provisions of the Building Safety Act 2022.

Mulalley denied liability on the basis that the real justification(s) for the replacement scheme and introduction of the waking watch were Martlet's post-Grenfell concerns over the presence of combustible insulation in the cladding system i.e. that the Sto system, being combustible, did not meet the heightened fire safety standards which had come into force following the completion of the works and post the Grenfell fire.

Mulalley also contended that the only work necessary to rectify the installation defects involved effectively cutting out and replacing the fire barriers and installing additional dowels through the EPS system and re-rendering ("**the repair works scheme**").

In response, Martlet argued that the combustible insulation material in the cladding failed to meet the functional requirements of the building regulations at the time it was installed, and this justified replacement ("**the specification breach case**").

Summary of the Judgment

As well as hearing from a host of independent experts, HHJ Stephen Davies comprehensively reviewed and considered applicable guidance and regulation(s) including the Building Regulations 2000 and 2010, BRE 135 (1988 and 2003 editions), Approved Document B (2002 and 2006 editions) and the applicable BBA certificates relating to the Sto render system (produced in 1995, 2007, 2012 and 2017).

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Having done so, he confirmed the following: -

1. Martlet succeeded in proving the existence of the installation defects.

2. Martlet also succeeded on the specification breach case. In this regard it was not sufficient for Mulalley to rely on the 1995 BBA certificate, which was the certificate in force at the time. The Sto render system should not have been used in the absence of any evidence which showed that it met the performance standards in Annex A of BRE 135 (2003 edition) in accordance with the test method set by BS 8414. There was also no evidence that the system satisfied all of the general and system specific design principles found in BRE 135 (2003).

3. Martlet was therefore entitled to recover damages by reference to the significant cost of the replacement scheme.

4. Had Martlet only succeeded in proving the existence of the installation defects, it would only have been entitled to recover damages by reference to the cost of the repair works scheme. This was because the relevant loss was suffered when the works were handed over as practically complete (with the installation breaches present and unremedied). Any loss due to subsequent legislative changes post Grenfell would have been causally irrelevant to this.

5. Finally, and importantly, it was determined that waking watch costs were recoverable. They were not too remote.

Analysis

This Judgment, combined with the very recent changes to limitation periods introduced by the Building Safety Act 2022, will no doubt have very significant implications for the construction industry.

If you would like to discuss any issues or concerns arising out of this Judgment with one of our specialist construction solicitors, please do not hesitate to contact us.