

Martlet Homes Ltd v Mulalley & Co Ltd [2022] EWHC 1813 (TCC)

In the early 2000s, the five tower blocks in Portsmouth known as Gosport Towers were in a somewhat tired and sorry state. Their owners, the Kelsey Housing Association, took the expensive decision to refurbish the buildings comprehensively. Its public-spirited decision proved to be ill-fated.

Many will remember the events of 14 June 2017, when a fire in a fourth floor flat kitchen of Grenfell tower engulfed the 23-storey tower block within a matter of minutes. The fire spread so quickly due to the building's cladding. Panels made from aluminium and plastic installed on the outside of the tower to make it warmer and drier were highly combustible and not fitted correctly. The result was tragedy. 72 people died. The fire also provided a focus for a range of social, economic and political issues.

Thousands of individuals are still living in buildings with similar cladding and defective fire barriers. At present, 486 high-rise buildings have been identified as containing combustible cladding. This includes the Gosport Towers. In a recent TCC Judgment following a trial, HHJ Stephen Davies had to determine who should be held liable for the costs incurred for investigating, monitoring and removing/repairing the cladding.[1]

His judgment is of great importance to the construction industry and its insurers. In a precedent setting decision, the Judge provides clear guidance on the courts' assessment of the law of causation and what "caused" the cladding to be replaced.

Background

The refurbishment in the early 2000 included the application of so-called EWI cladding to the towers. This incorporated expanded polystyrene (EPS) insulation, a combustible material, along with fire barriers. The focus at that time was to improve the tower block's resistance to cold and damp penetration. The works were undertaken by the defendant, Mulalley & Co Ltd, under a design and build contract made under seal with Kelsey.

The Claimant, Martlet, acquired the Gosport towers from Kelsey in 2017. Following an investigation carried out immediately after the Grenfell tower fire, Martlet identified the combustible EPS insulation boards and also concluded that the fire barriers were seriously defective.[2]

Martlet commenced proceedings against Mulalley in 2019. It alleged that:

- the horizontal fire barriers at each floor level were inadequately fixed; and
- the EPS insulation boards were inadequately fixed to the wall behind.[3]

Martlet expanded its claim during the case to argue that Mulalley was liable for the selection of the EPS insulation did not meet the fire safety standards in force at the date of the contract.[4]

Whilst Mullaley admitted that some of the cladding had been defectively installed, its case was that the Claimant had overreacted due to the events at Grenfell in June 2017, and that it was not reasonably necessary to monitor and replace the cladding. Mullaley argued that far more limited remedial works could have resolved the issues.[5]

Breach of contract: Installation and specification

The contract required Mulalley to comply with all relevant statutory obligations, codes of practice, British standards (“BS”), and building research establishment (“BRE”) reports. The central question for the Court was whether the cladding complied with the Building Regulations 2000.[6] In particular, did the external walls of the towers adequately resist the spread of fire, having regard to its height, use and position.

The Judge approached this question by considering whether Mulalley had followed the guidance set out in BRE 135 (2003). That report stated that combustible cladding should not be used on high-rise residential tower blocks unless it satisfied a performance standard in the BRE applying the test method set by BS 8414-1.[7] There was no evidence suggesting that Mulalley had conducted such a test. Whilst the court accepted that, in certain circumstances, a contractor might not need to carry out its own fire performance tests on cladding materials, the Judge held that in this case such a test was necessary.[8] Mulalley’s cladding system had only been certified in the form of a 1995 British Board of Agreement (“BBA”) certificate, which was not sufficient to comply with the Building Regulations.[9]

Therefore, the cladding failed to comply with Sch.1 B4(1) of the Regulations and Mulalley was found in breach of the contract specifications.

Additionally, the Judge held that Mulalley had breached its duty to exercise reasonable skill and care in its design of the cladding.[10] A reasonable competent specifier could not have “relied blindly” on the BBA certificate, because industry standards matters had moved on since then. Instead, a reasonable designed would have followed the clear recommendation and advice in the BRE 135 (2003) to avoid specifying a combustible cladding product unless there was evidence that it met the performance criteria via a BS 8414-1 test.

Mulalley’s defence to this issue was of wider interest. It relied on what amounted to ‘market practice’ in the construction industry at that time. As “everyone else” was specifying the cladding system, Mulalley was entitled to do so also. The Judge concluded that this argument amounted to an inversion of the *Bolam* principle which amounted to a suggestion that, if poor practice was sufficiently widespread this would act as a “get out of jail free card” for all contractors. In dismissing this argument, the Judge relied on the analysis of Edwards-Stuart J in 199 Knightsbridge Development Ltd v WSP UK Ltd, who stated that “A defendant is not exonerated simply by providing that others ... [were] ... just as negligent.”[11]

Causation: a battle of two tests

The central issue on causation concerned the test to be applied: was this the “but for” test or the “effective cause” test?[12] His Honour Judge Stephen Davies stated that the answer for determining which test should apply may be influenced “*by the question as to what is the loss which is the subject of the enquiry*”.[13] Mulalley argued that the loss was Martlet’s cost of replacement of the cladding.[14] However, the Judge disagreed, stating that this was “*the wrong starting point*”, and held that, as in most construction cases, the loss will be the cost of the works necessary to reinstate or repair the defective work, as the proper measure of damages is diminution in value, even if measured by the reasonable cost of repairs (following *Coles v Hetherington*).[15]

His Honour Judge Stephen Davies also went on to consider the element of ‘fault’ and its relationship to causation, citing Hobhouse LJ in *County Ltd v Girozentrale Securities*:

“In nature there are certain conditions which must exist for an event to occur. The presence of oxygen is a necessary condition of a fire but no one, save when it was necessary to do so in a scientific context, would describe it as a cause. Similarly, if responsibility for an event is to be attributed to a human agency, then the character of the contribution made by that human agency has to be evaluated. The state of mind of the human agent is in most cases an important consideration,

as are the standards of conduct which we expect of such a person. Conduct which contains no element of fault will not without more be treated as a cause in law. Such conduct, to be treated as a cause, must be of such a character as to negative the responsibility of some earlier actor for the consequences of his fault, typically on the basis that the later causative conduct was outside the contemplation of the previous party. In the legal analysis, the concepts of contemplation and foreseeability interact with concepts of standard of conduct.”[16]

His Honour Judge Stephen Davies held that “*if one adopts a definition of loss that focusses on the existence of a real loss in legal terms, rather than on specific expenditure for a specific purpose, it is plain that the claimant suffered a loss as a result of the defective installation*”. [17] The defects significantly increased the fire risk at the Gosport towers. Remedial action was needed to address those defects.[18]

However, Martlet also became aware of the necessity to take remedial action to address the combustibility of the cladding.

The combination of these two issues legitimised Martlet’s decision to replace the cladding. This radical step was the only plausible way to deal with both problems that were discovered at around the same time.[19]

As a result, the Judge found that the “effective cause” test for causation was the appropriate test over the “but for” test. The latter test would have forced the Claimant to make a choice between two equally inconvenient solutions caused separately by two unrelated causes.[20]

Concluding remarks

This case highlights, perhaps on many levels, the importance of acting in accordance with industry standard specifications and regulations at all times, and the danger of relying on earlier industry standards to comply with later guidance. The decision also demonstrates the courts’ reluctance to accept a general industry practice as a defence to non-compliance.

Notably, this judgment grapples and seeks to resolve complex causation difficulties in TCC litigation, where the remedial solution for individual defects may not meet the mischief of the defects when viewed holistically. Arguably, this judgment has lowered the threshold for proving whether two unrelated situations give rise to the same remedial action.

[1] *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWHC 1813 (TCC), paras 11-13.

[2] *ibid*, para 23.

[3] *ibid*, para 30.

[4] *ibid*, paras 68-75.

[5] *ibid*, para 31.

[6] [Building Regulations 2000 Sch.1 B4\(1\)](#)

[7] n 1, paras 203-229. The performance standard is set out at Annex A to BRE 135 (2003).

[8] *ibid*, paras 230-257.

[9] *ibid*, paras 258-259.

[10] *ibid*, para 271.

[11] [2014] EWHC 43 (TCC) at [106].

[12] *ibid*, para 281.

[13] *ibid*, para 288.

[14] *ibid*.

[15] *ibid*. *Coles v Hetherington* [2013] EWCA Civ 1704

[16] *County Ltd v Girozentrale Securities* [1996] 3 All ER 834, para 858a-c.

[17] n 1, para 291.

[18] *ibid*.

[19] *ibid*, para 291.

[20] *ibid*, para 292.