



Martlet Homes v Mulalley: The Court Rules on Cladding

This article considers the High Court judgment in *Martlet Homes Ltd v Mulalley & Co Ltd* [\[2022\] EWHC 1813 \(TCC\)](#).

The parties

The claimant was Martlet Homes Ltd (“Martlet”), a subsidiary of Hyde Housing Association Limited (“Hyde”), one of the largest registered providers of social housing in the country.

The defendant was Mulalley & Co Ltd (“Mulalley”), a building contractor, that is well-known within the residential social housing sector.

The buildings

The claim concerned five concrete towers built in the early 1960s in Gosport, Hampshire. The towers were imaginatively named “Gosport Towers”. They were acquired by Martlet from the housing association that was responsible for their original construction.

The contract

Between 2005 and 2008, in common with local authority and social housing stock across the country, the towers were refurbished under a design and build contract made in 2005.

The contract took the form of the JCT 1998 Standard Form of Building Contract with Contractor’s Design, incorporating Amendments 1 to 5 and some bespoke amendments.

The contract contained the usual provisions seen in a design and build contract. Clause 2.1 placed responsibility on Mulalley for the design and execution of the works, including the completion of the design and selection of materials in accordance with the contract documents.

Clause 2.5.1 placed responsibility on Mulalley for design akin to that of an architect or professional designer.

Further, Clause 2.5.1a stated: “the Contractor hereby accepts responsibility for the design of the Works and every part thereof and for the selection and standards of all and any materials, goods and workmanship forming part thereof”. Moreover, Clause 2.5.4 made it clear that Mulalley was liable for any design obtained by others. Taking these provisions in turn:

1. As to Clause 2.5.1a, the Court said this was an “unqualified design and specification duty”.
2. As to the potential argument that Clauses 2.5.1 and 2.5.1a were inconsistent, the Court was persuaded by the proposition that where there are two design obligations with different or inconsistent standards or requirements, the lesser obligation should be treated as a minimum requirement and the higher obligation prevails (see the judgment of Lord Neuberger in *MT Højgaard A/S v E.On Climate & Renewables UK Robin Rigg East Ltd* [\[2017\] UKSC 59](#)).
3. As to Clause 2.5.4, the Court considered this to be relevant because others had input into the specification of the cladding system.

Importantly, Clause 6.1.1.2 of the contract required compliance with statutory requirements, which include the building regulations. Given the date of the works, this was the Building Regulations 2000 (“BR 2000”). This was fortified by the Employer’s Requirements which required the works to be “designed and constructed in accordance and compliance with all relevant and related Statutory Requirements, Codes of Practice, British Standards, Material Manufacturer’s and Supplier’s recommendations, Agrément Certificates, Professional or Trades or Suppliers Bodies recommendations, and the like”. Moreover, the Employer’s Requirements required conformity with, inter alia, “Building Research Establishment’s Reports”.

The external wall systems (“EWS”)

The choice of material to refurbish the external walls was an external wall insulation (“EWI”) system. Following the Grenfell Tower fire in 2017, EWI came into the spotlight.

The particular system was a proprietary system known as the StoTherm Classic render system (“Sto system”). The build-up of the EWS was as follows:

1. an inner layer of expanded polystyrene (“EPS”) insulation boards was fixed to the existing external wall with (in this case) adhesive with supplementary mechanical fixing dowels;
2. two acrylic organic² non-cementitious render coats were applied to the EPS insulation boards, with a 3mm base coat known as a StoArmat Classic and a 1.5mm top coat known as a StoStolit, with a reinforcing glass fibre mesh layer between them; and
3. horizontal mineral wool fire barriers were incorporated at each floor level above the third storey.

The EPS in this system is combustible, as is the acrylic render applied over it. The original external walls – formed of concrete – were not combustible. Therefore, the introduction of the EPS created a fire risk in relation to the spread of fire.

Following the Grenfell Tower fire, in common with other housing associations, Martlet conducted a first inspection on 23 June 2017. This revealed the existence of combustible EPS. On the same day, Martlet implemented a waking watch. This remained in place for each tower until remedial works were completed.

Further inspections revealed the existence of workmanship issues. First, the horizontal fire barriers at each floor were inadequately fixed. It was pleaded that: (a) there were gaps between the fire barriers and substrate of between 20-40mm; (b) there were gaps in some places of up to 15mm between adjacent fire barriers when there should have been no gaps; and (c) dowels used to fix the cavity barriers were too short, insufficient in number, lacked washers and had insufficient diameter heads. Second, the EPS insulation boards were inadequately fixed to the wall behind. In particular, there was: (a) a failure to fit the insulation boards with a continuous “sausage” of adhesive around each board; and (b) the use of dowels of insufficient length.

The remedial scheme

Martlet decided to replace the entire EWS with a new non-combustible cladding system, using stone wool insulation panels. This effectively brought the EWS up to what is now the modern day standard.

The remedial works occurred without delay. Invitations to tender were issued in December 2017. A building contract with a third-party contractor, Axis, was concluded by April 2018. Practical completion of the remedial works was achieved on a tower-by-tower basis between January and July 2020.

Mulalley admitted certain workmanship breaches, but not the extent of the defects including the extent of the gaps between the fire barriers or the inadequate dowels used to affix the system. Further, Mulalley claimed that its choice of adhesive for the EPS insulation was irrelevant for fire safety purposes. Pulling this together, Mulalley ran a common defence that the installation defects did not justify the wholesale replacement of the EWS; rather, according to Mulalley, less expensive repairs could have been undertaken.

The launch of the claim

This case did not have the greatest start. First, Martlet adjudicated and was unsuccessful. Hence, Martlet issued proceedings for a final determination of the issues.

Second, by reason of the expiry of the statutory limitation period, Martlet’s claim was limited to four out of the five towers. This is because the works for one tower were completed more than 12 years before the claim was issued.

Third, the pleaded claim was initially limited to the installation/workmanship breaches in the EWS (the “installation case”). In other words, Martlet did not initially plead that the EWI cladding – as specified – did not meet applicable fire safety standards as at the date of the contract (the “*specification breach case*”). Having commenced proceedings, Martlet had to seek permission to additionally plead the specification breach case.

In February 2021, the TCC gave permission at first instance (see: [Martlet Homes Limited v Mulalley & Co. Limited \[2021\] EWHC 296 \(TCC\)](#)) for Martlet to plead the specification case. Mulalley appealed. The Appeal was held in December 2021, and the Court of Appeal handed down its judgment in January 2022, upholding the first instance decision (see [Mulalley & Co. Limited v Martlet Homes Limited \[2022\] EWCA Civ 32](#)).

Therefore, the pleaded case that eventually came before the Court was one for damages representing the cost of the replacement EWS and waking watch costs based on: (a) the installation case; or alternatively (b) the specification case. Alternatively, Martlet claimed that it was entitled to the reasonable cost of the repair works necessary to remedy the installation breaches, together with the waking watch costs for the period necessary to undertake those works. The Court observed that the position was “*highly contentious and thoroughly unclear as regards the specification case...unsurprisingly the subject of close scrutiny at trial*”.

A landmark decision?

The case has been dubbed a “landmark decision” for obvious reasons: it is the first cladding judgment. However, Martlet is, by no means, the first cladding case to have been issued in the TCC. In numerous cases, proceedings have been issued but those cases, have ultimately settled. In contrast to those cases, Martlet is the first case, of its kind, to have gone all the way to trial resulting in a reported decision.

The case is a “landmark decision” in that it provides a very detailed insight into the analysis of the Court on the issues which blight the lives of many. In particular, the judgment is a tour de force on the legal and technical issues that impact cladding claims; it is likely to be a reference point for construction lawyers everywhere. But, that is the high point of the judgment for everyone but the successful claimant. The judgment also has its limitations because every cladding case is different; from the materials used (including combinations thereof), the contract, the technical expert evidence, and the question as to whether the alleged defects were causative of the loss.

This was highlighted by the Court:

“The specification breach case is of particular interest, since it raises for determination the question whether or not the specification of combustible EW1 rendered cladding breached fire safety standards as they existed in the early to mid 2000’s, well before the Grenfell Tower fire. However, like most other similar cases this case turns very much on the specific contractual provisions and the specific fire safety standards applicable to the particular product chosen as well as on the particular cases pleaded and argued and the evidence called.”

Fortunately for Martlet, it succeeded on the specification breach case. Therefore, Martlet was entitled to recover the costs of the replacement scheme. Further, subject to a small reduction, Martlet was entitled to the costs of the waking watch. However, the outcome might have been very different. If Martlet had succeeded only on the installation breach case, it would have only been entitled to recover the reasonable costs of the repair scheme and not the costs of the replacement scheme. This alternative potential outcome captures one reason why so many cladding cases have settled and not reached the courts. However, if Martlet had only succeeded on its installation case, it would have still been entitled to claim for the costs of the waking watch, albeit for a lesser period of time.

What did the Court decide?

In relation to the technical aspects of the case, the Court decided, in summary:

- A contractual requirement to comply with building regulations constituted a strict obligation.

- The ‘black letter’ of the technical guidance to the building regulations was the means of determining compliance with the functional requirements.
- Unintended voids in the EWS required the installation of cavity barriers. Elsewhere in the EWS, incorrectly installed cavity barriers constituted installation breaches.
- The BBA certificate was of limited assistance, and did not demonstrate compliance with the functional requirements of the building regulations.
- Due to an absence of evidence of compliance with the building regulations and the accompanying technical documents, the cladding system failed to satisfy functional requirement B4(1).

The remainder of this article considers, in some detail and quoting the most important paragraphs from the judgment, the Court’s decision in relation to the single most significant issue in this case, whether the cladding system (if installed without defects) complied with requirement B4(1) of the building regulations and the related technical guidance.

Interpretation of building regulations

The Court observed that the provisions of the building regulations (and the associated technical guidance), is intended, are read and relied upon by a wide variety of people from fire safety consultants, to small builders, to private individuals, to lawyers. The Court said that “*the proper interpretation of these provisions is to be found primarily from the words used*”.

In relation to interpretation of the building regulations, expert evidence ought only be necessary to explain: (a) technical terms, which are not obvious or adequately explained in the material itself; or (b) how the provisions were understood by those involved in the design and specification of external cladding systems when considering the “professional negligence” aspect of a case. This was a matter further considered by the Court (see below).

Scope of the building regulations and approved documents

The judgment contains a comprehensive overview of BR 2000 and Building Regulations 2010 (“BR 2010”) and Approved Document B 2002 (“ADB 2002”) and 2006 (“ADB 2006”). The Court made a number of observations, which will be of interest to those bringing and defending cladding cases.

Requirement B4(1)

In relation to requirement B4(1), the parties to cladding disputes often argue about the interpretation of requirement B4(1). The Court ultimately considered this requirement by reference to technical guidance and the evidence in the

case. But, before doing so the Court briefly commented on its wording

“84. It is clear in my view that the spread of fire over the walls covered by B(4)(1) was not limited to spread over the top of the walls and encompassed the spread of fire across the face of the walls in any direction.

85. It is also clear in my view that the use of the words “adequately” and “having regard to the height, use and position of the building” shows that it is a question of fact and degree in any particular situation what was required to achieve this objective. It is worth noting that Sir Martin Moore-Bick, the chairman of the Grenfell Inquiry considered this question in his Phase 1 report at chapter 26, saying (at 26.4) that “although in another context there might be room for argument about the precise scope of the word.”

ADB 2002

Turning to ADB 2002, the Court focused on two points of interest. First, Diagram 40 is *“an example of the Building Regulations Guidance suggesting either compliance with the specific provisions or undertaking – and passing – a full scale test.”* As to the full scale test, ADB 2002 made express reference to *“BRE Fire Note 9 Assessing the fire performance of external cladding systems: a test method (BRE, 1999)”*. This was a forerunner and in substantially the same terms as BS 8414-1:2002. Second, the Court identified that paragraph 13.7 of ADB 2002 references BR 135 (1988). But, the online version of ADB 2002, which became available in 2003, stated that the reference to *“BR 135 (1988)”* should be added to by the words *“(replaced by the 2nd edition 2003)”*. Therefore, the Court identified that *“An issue which arises is whether the reference to BR 135 (1988) was superseded once it was replaced by BR 135 (2003)”*. The Court stated:

“...there is no question of BRE 135 (1988) having been entirely superseded by BRE 135 (2003) so far as ADB 2002 was concerned. The architect experts agreed in their joint statement that, by virtue of...the Employer’s Requirements, they would have expected the 2003 version to have been the version followed at the time of this project. This would clearly make sense in the real world, in the context of decisions being taken by responsible and substantial employers and design and build contractors with access to professional advice, such as was the case on this project. It can scarcely be supposed that such persons should be required to ignore the new BRE report in favour of the old BRE report just because the Approved Document had not been updated following the change. Whilst a strict approach would normally be taken to statutes and statutory instruments, there is no reason to adopt the same approach to what is, after all, no more than statutory guidance. It follows that whilst, strictly speaking, the defendant ought to continue to have regard to BRE 135 (1988), because that was still the version referred

to in ADB 2002 as at the time of the contract, it would be unrealistic to criticise it for following the updated requirements, directions, recommendations and advice contained in BRE 135 (2003) insofar as they overtook what was in BRE 135 (1988). It follows that I must consider each in turn but...place more weight on the most recent version insofar as there is any important difference, especially when that is what the contract itself required the defendant to do.”

BR 135 (1988)

In relation to BR 135 (1988), the Court outlined the diverging views of the parties and commented that the wording of BRE 135 (1988) *“is not a masterpiece of clarity”*. The Court rejected Martlet’s case that BRE 135 (1988) required Mulalley to undertake a full scale test before specifying the Sto system:

“The requirement for a full-scale fire test was only applicable in the limited cases specified [in BRE 135 (1988)].”

BR 135 (2003)

In relation to BR 135 (2003), having provided a commentary on its provisions, the Court explained that *“it is important not to confuse...general and specific design principles with performance standards. The latter were contained in Annex A, headed “the performance criteria and classification method of BS 8414-1:2002”*”. The Court concluded that BRE 135 (2003) and Annex A created a performance standard which was to be assessed through tests undertaken in accordance with BS 8414-1. In common with BRE 135 (1988) the Court identified a certain lack of clarity in BRE 135 (2003).

ADB 2006 (including paragraph 12.7 and “limited combustibility” insulation products)

In 2006, ADB 2006 came into effect. Whilst it did not apply to the works or the issues in the case, it appears that Martlet placed reliance on its terms. This is because of the *“irony that, if the date of submission [of the initial Building Regulations notice] had been only three months later, the defendant would not realistically have been able to propose the use of the StoTherm Classic system for the Gosport towers without departing from the guidance in ADB 2006.”*

The real interest in ADB 2006 is the fact that it introduced the much discussed paragraph 12.7 which states that *“in a building with a storey 18m or more above ground level any insulation product ... used in the external wall construction should be of limited combustibility (see Appendix A) ...”*. The Court commented on the general effect of this provision and its application of the facts to the case:

“141. This is a clear and mandatory, design and specification requirement which had no equivalent in ADB 2002.

Since the EPS insulation panels forming part of the StoTherm Classic system were not of limited combustibility as specified by Appendix A it was no longer possible to install that system on tall buildings such as the Gosport towers. In short, under ADB 2006 it was no longer possible to use combustible insulation panels unless the EWl system of which they formed part had passed a BS 8414- 1 full-scale fire test.

142. The claimant seeks to minimise this change as doing no more than clearly spelling out a prescriptive “linear” route to compliance whilst retaining the alternative of using a system that met the performance criteria in BRE 135 (2003). I am unable to accept this submission. In this respect, at least, there was a fundamental change from the previous regime as provided for by ADB 2002 and BRE 135 (2003). Whilst I accept their alternative submission that the scheme provided for by ADB 2002 and BRE 135 (2003) cannot be construed as meaning that whatever is not expressly prohibited is permitted, I am unable to accept that the introduction of an express prohibition, where none previously existed, is anything other than a significant change.

[...]

144. ...in the absence of any express contractual provision the claimant is unable to advance any case to the effect that the defendant was under any duty under the contract to revisit the specification for the towers after April 2007 or to comply with the Approved Documents in force at the time of practical completion, even if different from those in force at the time of the contract or the time the works commenced.”

While not directly applicable to the issues in the case, this line of analysis is of considerable interest. This is because the requirement for insulation to be of limited combustibility, on buildings of 18 metres in height or more, is an issue in a substantial number of cladding cases. Here the Court could not be clearer: paragraph 12.7 represents a “clear and mandatory, design and specification requirement” unless the cladding system passed a full-scale test.

BR 2010

The Court also briefly considered BR 2010. This was because by the time the remedial works were undertaken BR 2010 had come into force. The Court made two interesting observations. First, the requirements had not materially changed since BR 2000. Second, remedial works in relation to the installation defects alone (had they been undertaken) would not have triggered BR 2010 because it would not have been a material alteration (for the purposes of building regulations) as the remedial works would not result in: (a) a compliant building no longer complying; or (b) a previously non-compliant building being more unsatisfactory.

BBA Certificates

Mulalley relied on the contents of BBA Certificates in relation to the Sto system. This was because the introductory wording to AD7 in respect of Regulation 7 of BR 2000 made it clear that a certificate of compliance, such as a BBA certificate, might be used as an aid to establish the suitability of a material for use for a specific purpose. The Court concluded that: “The BBA Certificates cannot be said to amount to a form of “guarantee” or “passport” to compliance with the Building Regulations.”

Mulalley also referred the Judge to observation by HHJ Richard Seymour QC sitting as a High Court Judge in Skinner v Crest Nicholson Residential (South) Limited [2003] EWHC 2984 (TCC), that “a certificate of the Board is generally considered evidence that a product used in accordance with the methodology set out in the certificate is a suitable one to use for the application the subject of the certificate”.

On that the Court considered that “the BBA Certificate is simply one of a number of such specified aids. It has no more intrinsic weight than any other of the aids mentioned.”

As is often the case, there was more than one BBA Certificate for Sto systems. One certificate was issued in 1995 and another in 2007 in relation to other Sto systems. As to the statements in the 1995 certificate, the Court reached the following view:

“154. I agree with the defendant that this section makes it clear that the system met the requirements of B4(1) as a whole and not solely in relation to Class 0. Nonetheless, it seems to me that on a fair reading it did no more than adopt the recommendations in the concluding section of BRE 135 (1988) on the basis of the narrow reading that all was required in such a case was the inclusion of fire barriers. There is no basis for considering that any further tests were undertaken, as is apparent from the summary of technical investigations referred to at p.7 of the certificate. I agree with the claimant, and the defendant did not seriously submit to the contrary, that the 1995 BBA Certificate cannot be read as if it was a guarantee that the StoTherm Classic system complied with requirement B4(1).

155. I am prepared to accept the evidence of the defendant’s experts that in the real world professional designers would place great weight on the existence of such a certificate and that this is undoubtedly relevant when considering the case for breach of the “professional negligence” obligation in clause 2.5.1 of the contract. However, I do not regard this evidence as of any significant weight as regards the strict design and materials obligations in the contract.”

Advice Note 14

Advice Note 14 was issued by the Department for Communities and Local Government (as it was then known) on 11 December 2017. It applied to buildings greater than 18m in height and expressed the views of an expert advisory panel that the “*clearest ways of ensuring an external wall system adequately resists external fire spread are to use materials either of limited combustibility, or an external wall system which can be shown to have passed a large scale test conducted to the BS 8414 standard*”.

Contrary to submissions by Mulalley, the Court did not consider Advice Note 14 to be relevant noting it to say very little beyond ADB 2006 which “*advised building owners to carry out checks to see if the external wall system did either use materials of limited combustibility or materials which had passed a BS 8414-1 test*”. It did not direct, advise or recommend that an existing EWS should be removed and replaced. For those who did remove and replace their EWS, the Court stated that it was not saying that a responsible body in the claimant’s position should not have done so.

Analysis of Breaches

The Court considered the installation breaches and then the specification breaches.

Installation breaches

In relation to the provision of fire barriers, the Court identified that the architectural and fire engineering experts agreed that:

1. Mulalley fixed the fire barriers to the substrate using a ‘dot and dab’ method of adhesion, which left a continuous void between the barrier and the wall, negating the effectiveness of the fire barrier;
2. there were vertical gaps between sections of fire barrier;
3. the stainless steel fixings (or dowels) were too short to provide adequate restraint; and
4. the defects in the installation of the fire barriers meant that, as-built, the works did not comply with: (i) BR 2000; (ii) the guidance in ADB 2002; (iii) the guidance in BRE 135 (2003); or (iv) the 1995 BBA Certificate.

On these issues, the Court held:

“In such circumstances I am satisfied that the claimant has fully made out its case as regards the installation breaches in relation to the fire barriers. Although the claimant was put to proof as to number and extent of the number of dowels in my judgment the evidence is sufficient for me to conclude that this was a significant and serious problem. I am also satisfied that the defects

in relation to the dowels did have an effect on their ability to withstand force, as evidenced by the observation in the Sto report...Given the damning evidence as to the overall quality of the installation of the fire breaks and the absence of any evidence to the contrary from the defendant, it is reasonable to conclude, and I do, that this was not an isolated but rather a widespread breach.”

In relation to the EPS insulation boards, Mulalley admitted, in its Defence, that they were not fixed by a continuous band of adhesive around the perimeter and that the dowels used as supplementary mechanical fixings were too short. Further, the architectural experts agreed that:

1. the EPS insulation boards were fixed by ‘dot and dab’ adhesive without a perimeter band (or sausage) of adhesive, which was not in accordance with the Sto installation requirements and created a continuous void between the insulation and the wall;
2. the mechanical fixings were not adequately embedded in the backing wall; and
3. as a result of the defective fixing of the EPS insulation, the works as built did not comply with (i) BR 2000; or (ii) the 1995 BBA Certificate.

On this issue, the Court was satisfied that “*the claimant has fully made out its case as regards the installation breaches in relation to the EPS insulation boards*”.

In relation to the unintended void between the fire barrier and the wall, the Court concluded that:

“174. This was clearly a very serious breach, in that the fire safety strategy...was based on the assumption that the fire barriers would prevent or at least materially restrict the rapid spread of fire across the external walls of the block even though, as in this case, the insulation panels were made of combustible EPS and the render finish was organic. If a continuous void is left behind the fire barriers then a fire can bypass the fire barriers and thus create an obvious and serious risk of rapid fire spread.

[...]

182. In my judgment, the essential question is whether there is a good fire safety reason for cavity barriers to be provided in such circumstances. The specific point which I need to consider is whether the presence of this unintended concealed void creates a fire safety risk which needs to be addressed by the provision of cavity barriers even though: (a) there would be no void behind the fire barriers; and (b) a void would be formed in any event through melting of the adhesive and EPS insulation panels in the event of exposure to a fire.

183. As I have said, if there was no void behind the fire barriers that would prevent the spread of fire behind the fire barriers within the inadvertent cavity behind the EPS insulation panels. However, is that enough? In my view the defendant's further argument that a void would be created anyway in the event of a fire already melting the EPS insulation boards should not detract from the importance of there being no void before such a fire could become established. It is well-established that the presence of pre-existing voids, especially in concealed areas, allows small, localised fires to spread rapidly and dangerously, especially through cavities through service penetrations and around windows into such voids. ADB 2002 explains the greater risk of danger in case of concealed fire spread. It specifically requires cavity barriers at the edges of cavities, including around openings in all cases of dwelling houses, flats and other residential buildings. Mr Geddes accepted that cavity barriers would have been required around service penetrations.

184. It therefore appears to me that the claimant has established on the balance of probabilities that cavity barriers would indeed be reasonably required around windows and service penetrations and at compartment walls for good fire safety related reasons. The defendant, having admitted a breach and having admitted that the consequence is the creation of unintended concealed voids in the external wall, has failed to satisfy me that it is not reasonably necessary to take steps to address this obvious fire safety risk."

Specification Breaches

The starting point for the Court was to consider the case on an alternative and hypothetical or "counter-factual" basis, namely that the Sto system was installed without the installation defects.

In order to answer whether the specified system (without installation defects) complied with functional requirement B4(1) of the building regulations, the Court considered it necessary to do so "with reference to the relevant approved documents and thus, as necessary, to the guidance referred to in such documents".

Starting with BR 135 (2003), the Court held that whilst BR 135 (2003) introduced a performance standard in Annex A when read with BS 8414-1, this did not require every EWI system to meet that performance standard. This is because BR 135 (2003) stated that adoption of the performance standard is a matter for regulators and specifiers. However, the Court held that:

"...by stating that the risk from rapid fire spread was considered to be unacceptable in the case of high-rise buildings and sleeping areas it is plain...that the suggestion that the performance standard "could

be adopted" in such cases passes beyond mere suggestion into positive recommendation and advice."

On this basis, the Court considered "the defendant was plainly in breach of contract in failing to follow such recommendation or advice and that is the end of the matter." The Court found that "a specifier considering specifying combustible cladding for a high-rise residential building should not specify a system which did not meet the Annex A performance standard unless they could be satisfied from other sources that it would adequately resist the spread of fire over the walls".

Drawing these strands together the Court held that:

"213the combined effect of all of this was that BRE 135 (2003) did contain a recommendation and/or advice that the default position for a system such as the StoTherm Classic system, comprising a combination of combustible thermoplastic EPS insulants and an organic surface render, which thus created an obvious fire risk and a heightened fire risk for high-rise residential tower blocks, was that it should not be specified for use in such buildings unless it had been shown to meet the Annex A performance standard in accordance with the test method set by BS 8414-1.

[...]

216. It follows in my judgment that it would simply not have been possible, once BRE 135 (2003) had been published, for the conscientious specifier to have satisfied himself that the StoTherm Classic system could properly have been specified in this case for these five high-rise residential tower blocks without having met the Annex A performance standard.

217. I accept that an EWI cladding system based on EPS insulating panels and organic render with fire breaks was not unique at the relevant time and nor did it exhibit dramatic variations in material selection or design from others available on the market. However, and nonetheless, in my judgment the specification of a system such as the StoTherm Classic system, with its own unique combination of specific materials and its own specific design, did involve a sufficient variation in material selection and design that it was necessary to demonstrate compliance with the Annex A performance standard via a BS 8414-1 test if intended for use in high-rise residential tower blocks. In my view this obligation could only have been avoided had the StoTherm Classic simply been a revision of an existing system which had already been shown to meet the Annex A performance standard and BS 8414-1 and where it could be clearly seen that the revision did not introduce any additional fire risk.

[...]

222. *I do not accept that it was sufficient for the defendant - or to whomever it delegated this responsibility - simply to rely on the fact that the StoTherm Classic system had a BBA certificate. As I have already said, it is apparent from a reasonably careful reading of the BBA certificate that it based its certification on little or nothing more than the fact that the specification included fire barriers. That was not enough to give comfort that there was no need to show that it satisfied the Annex A performance standard. That was particularly so given that the BBA certificate dated from 1995 and, as at the date of the contract, had not been updated post the introduction of BRE 135 (2003)."*

Compliance with Requirement B4(1)

Following a detailed consideration of the technical guidance applicable to BR 2000, the Court reached a short, but definitive conclusion on compliance with requirement B4(1) given the failure to comply with BRE 135 (2003):

"259. ...given that as at the time the defendant supplied and installed the StoTherm Classic system: (i) there was no evidence that it had satisfied the Annex A performance criteria through a BS 8414-1 test; and/or (ii) there was no evidence that it satisfied all of the general and system specific design principles found in BRE 135 (2003); and (iii) the BBA Certificate then in force for the system did not in fact demonstrate or seek to demonstrate compliance with these requirements, the system failed to satisfy functional requirement B4(1)."

"Everyone else was using it"!

Contractors faced with the strict obligation to comply with the building regulations will often defend the claim by reference to a particular cladding system:

1. being a well-known and widely used system by a well-regarded manufacturer;
2. being supported by a BBA certificate or similar; and
3. not being expressly identified as prohibited by the building regulations or other approved documents and guidance.

It is of interest that Mulalley ran this defence and it was rejected by the Court. The Court accepted Martlet's argument that the behaviour of others does not amount to a "get out of jail free card". The Court dealt with these points as follows:

"219. *The facts of this case do however illustrate why... it is not an answer for the defendant simply to say that at the time no-one involved in the design or specification of high-rise residential buildings appears to have believed that StoTherm Classic*

system could not have been specified for such buildings because it had not been shown to pass a BS 8414-1 test. This is aside from the simple point that it is not a defence to the strict contractual obligations in play in this case - even if it was a defence to the reasonable skill and care obligation - to say that the industry as a whole appears to have failed to heed the content of BRE 135 (2003) and to re-assess such systems in the light of that content..."

[...]

266. *In this case I am satisfied that as at the date of the design and specification of the StoTherm Classic system for this project any reasonably competent designer and specifier could not simply have relied blindly upon the 1995 BBA Certificate, since they must have known that matters had moved on since then in terms of the introduction of ADB 2002 and BRE 135 (2003) of which they ought to have been well aware.*

267. *For the reasons already given, I am satisfied that any reasonably competent designer specifier could not have failed to be aware at the time that BRE 135 (2003) - as the most up to date and authoritative report on the topic - contained a clear recommendation and advice to avoid specifying a product such as the StoTherm Classic system with a combination of combustible EPS insulation and combustible organic acrylic 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. At the very least in my judgment they would have needed to ask the question of the supplier and, if the answer came that it had not passed a test to BS 8414-1, to have sought and obtained satisfactory confirmation that it otherwise met the requirements of functional requirement B4(1). Here, for the reasons I have given, they could not have been satisfied that the StoTherm Classic system conformed with all of the general and system specific design principles contained within BRE 135 (2003).*

[...]

271. *I am also conscious that it is contrary to the evidence of the defendant's experts that at the time the typical designer specifier would regularly specify the StoTherm Classic system even for high-rise residential buildings on the simple basis of its being a well-known system which had a valid BBA Certificate whose use was not expressly prohibited at the time on such buildings. However, I accept the claimant's argument in closing submissions 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. Following the*

analysis of Edwards-Stuart J in 199 Knightsbridge Development Ltd v WSP UK Ltd [2014] EWHC 43 (TCC), at paragraphs 101 to 120, for the Bolam principle to operate to exonerate a defendant, there must be “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” (paragraph 120). “A defendant is not exonerated simply by proving that others ... [were] ... just as negligent” (paragraph 106). Both of these observations would apply in this case.”

Causation and Quantum

The Court set out a detailed examination of the authorities relating to causation and the limits on a claimant’s ability to recover its losses.

This included an analysis in relation to reasonableness, mitigation, betterment and remoteness of loss.

Ultimately, the Court held that that Martlet was entitled to the costs of the replacement EWS and the waking watch. Mulalley accepted that if Martlet succeeded on its specification breach case it did not need to advance a case on causation in relation to the waking watch claim. However, there would be a need to address causation had it only succeeded on the installation case.

Dealing with that issue (although not required to do so), the Court identified that by the date that Martlet decided to implement the waking watch (23 June 2017), initial inspections had revealed that the towers were clad with combustible EPS cladding and voids had been identified behind the EPS panels at one of the towers.

The Court rejected Mulalley’s submission that it was necessary for Martlet to prove that it knew about the installation defects and took them into account as a dominant cause of its decision to implement the waking watch on 23 June 2017. The Court held that Martlet’s limited knowledge of the issues at the time, including the fact that not all installation defects were known, was sufficient and was an effective cause of the decision to implement the waking watch.

Conclusion

This is a case that offers something to all parties involved in cladding cases, whether claimant or defendant.

For some claimants, deciding whether to litigate it may offer vindication for a decision to fight, notwithstanding the inherent risks of litigation. For others, it may endorse the approach being taken or provide food for thought on how to proceed.

For defendants, it may cause them to reconsider their strategy. Some may become all the more aggressive in an attempt to mask the inadequacies of their case. Others may take a more pragmatic approach and re-evaluate their position.

While this may not be a ‘one size fits all’ landmark decision, it is helpful decision which provides a detailed and informative insight as to the likely approach of the Court on the fire safety requirements of the building regulations in relation to cladding systems.

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