

## Cladding in court: Martlet Homes v Mulalley & Co



In July, the Technology and Construction Court (the “TCC”) issued its first judgment on defective combustible cladding since the Grenfell Tower disaster in 2017. This landmark decision will be supported by building owners in the UK, many of whom have, until now, had to bear the cost of dealing with unsafe cladding. The judgement stands as a marker setting out the approach which is likely to be adopted by the courts on future cladding cases.

### Background

In 2005, Mulalley & Co Limited (the “Defendant”) were appointed under a building contract to re-clad the exterior of five high rise residential tower blocks in Gosport, Portsmouth (the “Blocks”). The contract was based on the JCT 1998 Standard Form of Building Contract with Contractor’s Design, incorporating a bespoke schedule of amendments.

The Defendant chose a StoTherm Classic K cladding system to clad the Blocks which consisted of an inner layer of expanded polystyrene insulation boards (EPS) fixed to the existing external walls of the Blocks. The system also incorporated the use of mineral wool fire barriers to mitigate the fire risk of EPS which is a combustible substance.

Following the Grenfell Tower disaster in 2017, Martlet Homes Limited – a company forming part of a large housing association group, and the owner of the tower Blocks (the “Claimant”), investigated the Blocks and found that the cladding system incorporated the combustible EPS insulation boards. Their investigations also revealed installation defects including defectively installed fire barriers that contravened manufacturer instructions.



## Arguments put forward

The Claimant claimed that:

1. the installation was defective as the fire barriers and EPS boards were inadequately fixed to the walls (the workmanship breach) ; and
2. the Defendant's specification of EPS insulation was a breach of contract and Building Regulations (the specification breach).

As a result of defects discovered, the Claimant decided to remove and replace the entire cladding system installed by the Defendant and subsequently proceeded with a claim for £8 million associated with the costs of the works. In addition, the Claimant also claimed damages for the costs of implementing a "waking watch" patrol in the Blocks as a temporary safety measure pending the removal of the cladding.

The Defendant argued that the decision to undertake the replacement of the cladding was taken on the basis of post-Grenfell concerns regarding the presence of combustible cladding rather than due to any defects in the Defendant's workmanship and that there was therefore no causative link between the installation defects and the loss sustained by the Claimant in deciding to replace the cladding as a whole rather than simply rectify the defects.

On the specification point, the Defendant argued that they had complied with building regulations as evidenced by the issue of a BBA (British Board of Agrément) certificate for the cladding system and that the system and materials which they specified was not therefore a breach of their obligations in the building contract.

## The Judgment

HHJ Stephen Davies held in favour of the Claimant, as follows:

### Workmanship breach

The Judge was satisfied that the Claimant had made out its case regarding the workmanship breaches concerning the installation of the of the fire barriers and EPS insulation boards.

### Specification breach

The Judge found that the claimant's use of the StoTherm cladding system (which incorporated combustible EPS panels) was both a breach of contract and a breach of the building regulations in force at the time.

The Judge held that:

- any reasonably competent contractor would have known that the guidance found in BRE 135 (2003) contained a clear recommendation to avoid specifying a cladding system such as that used in this case unless there was evidence that it met the Annex A performance criteria via a BS 8414-1 test; which was not the case here.
- the Defendant could not simply rely on the fact the StoTherm system had a BBA certificate – it did not act as a "passport" to compliance with building regulations.
- there was no merit in the Defendant's argument that the StoTherm System was typically used on similar buildings at the time. He accepted the Claimant's argument (at 271) that the fact "everyone else was doing it" was not a "get out of jail free" card for the Defendant.

## Damages

The Claimant was awarded substantial damages (approximately £8 million) for the full cost of the removal of the cladding system and replacement with a non-combustible alternative.

It is, nevertheless, worth noting that the Judge took the view that if the Claimant had only succeeded in its defective workmanship claim and not the specification claim then the Claimant would have only been entitled to cover the costs of rectifying the defects to the cladding in situ and not the cost of replacing the cladding in its entirety.

Importantly the Judge awarded damages which included the Claimant's costs in maintaining a waking watch concluding that the loss sustained was not too remote to be recovered by the Claimant and reasoned that a sensible company in the Defendant's position would appreciate that temporary measures such as this would be needed to ensure the safety of residents until remedial works could be carried out.

## Conclusion

Whilst it is clear that each dispute will turn on its own facts, this decision by the TCC highlights that:

- The TCC will take a strict approach in relation to determining whether a cladding system's complied with Building Regulations in force at the time of its construction
- Contractors cannot rely on the issue of a BBA Certificate as a guarantee that they have complied with Building Regulations
- There may be some respite for contractors who can evidence compliance with BS 8414 and BRE135 tests as the Judge recognised that in a case such as this the only way of clearly demonstrating compliance or non-compliance with the performance standard is to carry out at BS 8414 test.
- Claimants of successful cladding claims have a good chance of recovering their reasonable costs incurred in maintaining waking watches whilst the safety risks arising as a consequence of the defective cladding are resolved.

## How we can help

If you'd like further advice on any of the points raised, please contact a member of our [construction team](#).

Read our latest guidance in relation to the [Building Safety Act 2022](#), including what you need to know both now and for the future.

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