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Unsafe Cladding following the Grenfell Tower fire: what is it and who pays to remove it?

Adam Gadd

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Grenfell Tower Fire

- In the early hours of Wednesday 14 June 2017 a fire broke out in the kitchen of Flat 16, Grenfell Tower, North Kensington.
- The fire escaped from the kitchen into the external envelope of the building. The building was constructed of reinforced concrete, to which there had recently been added a cladding system comprising insulation boards attached to the outside of the concrete structure.

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Grenfell Tower Fire

- The insulation boards were protected from the weather by aluminium composite material (ACM) rainscreen panels which contained a polyethylene core.
- Polyethelene is a highly combustible substance
- The material from which most of the insulation boards were made, polyisocyanurate foam, was also combustible.

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Grenfell Tower Fire

- The kitchen fire within flat 16 was extinguished within minutes of the arrival of firefighters
- However by that time the fire had escaped into the cladding where it spread rapidly up the outside of the building
- Within 20 minutes a vertical column of flame had reached the top of the building on the east side from where it progressed around the rest of the structure so that within a few hours the whole building had been engulfed

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Grenfell Tower Fire

- 72 people died
- 227 people escaped from the Tower

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Unsafe cladding

- Since the Grenfell Tower fire, a total of 486 high-rise buildings have been found to contain ACM cladding, which the first phase of the Grenfell Inquiry identified as being the leading cause of the fatal fire's spread.

- Of these, 318 have now fully completed work, while a further 57 have completed work but are still waiting for building control sign-off.

https://www.insidehousing.co.uk/news/news/more-than-100-buildings-with-grenfell-style-cladding-yet-to-complete-work-nearly-five-years-after-tragedy-75689

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Building Safety Fund

- The government announced the Building Safety Fund (Fund) in March 2020 to fund the remediation of cladding on high-rise residential buildings (buildings over 18 metres)

- The Fund meets the cost of addressing life-safety fire risks associated with cladding in high-rise residential buildings, where the building owner or developer can’t afford do so

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Building Safety Fund

- The Fund is open for new applications from responsible entities of private or social sector buildings that meet the following criteria:
- Buildings that are 18 metres or above (with 30cm tolerance),
- Buildings have at least one qualifying residential leaseholder (with the exception of social-sector landlords applying due to financial viability concerns)

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Building Safety Fund

- The building must have cladding, as defined in the PAS 9980:2022 code of practice

- The buildings must have a Fire Risk Appraisal of External Wall construction (FRAEW) following the PAS 9980:2022 methodology which recommends actions to address fire risks to life safety presented by the external wall system.

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The Building Safety Act 2022

- The Building Safety Act received Royal Assent on 28 April 2022
- The Act includes measures to protect qualifying leaseholders from the costs of cladding remediation. It will also implement a number of policies aimed at improving the regulation of building safety in England.

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The Building Safety Act 2022

- Funding will be made available via the BSF for buildings which meet the eligibility criteria

- This includes funding for works that leaseholders would be obliged to pay for under their lease terms but who now qualify for protection from cladding remediation costs

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The Building Safety Act 2022

Part 2: The Building Safety Regulator

- Regulator's objective is to secure the safety of people in and around buildings and improve the standard of building, and with primary duty to facilitate building safety in higher-risk buildings.
- Any prescribed decision of the regulator is to be capable of review and then appeal to the FtT though the details will need Regulations to be made by the Secretary of State.

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The Building Safety Act 2022

Part 5: cladding and other costs

- The Part which deals with liabilities for costs of relevant defects which causes a risk to safety from fire or building collapse), with liability intended to be cast upon developers first, then manufacturers, then freeholders, then leaseholders last.

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The Building Safety Act 2022

Part 5: cladding and other costs

- No tenant of a qualifying lease will be liable to pay a service charge in respect of cladding remediation or relevant legal or professional services. Otherwise, service charges are excluded for costs of relevant measures relating to relevant defects for which the landlord or its developer associate is responsible.

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The Building Safety Act 2022

Part 5: cladding and other costs

- New s20D of the Landlord and Tenant Act 1985 imposing on landlords an obligation to take reasonable steps to ascertain whether monies for remediation works can be obtained by grant or from a third party, or else remediation costs can be disallowed from service charges.

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Martlet v Mulalley

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

- Martlet Homes Limited (Martlet) owns five tower blocks in Gosport which were refurbished by Mulalley & Co Limited (Mulalley) in the mid-2000s. That work included the installation of external wall insulation rendered cladding.
- Post-Grenfell, Martlet discovered fire safety defects in all five blocks, including:
- inadequately installed fire barriers at each floor (particularly poor/inadequate fixing and gapping)
- inadequately fixed insulation boards, and
- A combustible external wall insulation (EWI) rendered cladding system.
- After extensive investigations and expert advice, Martlet eventually decided to remove the entire EWI cladding system and replace it with a new non-combustible cladding system using stone wall insulation panels instead of EPS insulation panels.

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Martlet v Mulalley

- Martlet looked to recover the costs of this replacement scheme from Mulalley. The claim was close to £8m and included:
- the costs of investigating and remedying (by removal and replacement), combustible external wall installation rendered cladding (originally installed by Mulalley between 2005 and 2008), and
- providing a waking watch as a fire safety precaution until the EWI cladding had been removed.
- Mulalley argued that Martlet should only be able to recover the cost of repairing the installation issues, which did not include replacing the EWI cladding system.

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Martlet v Mulalley

Martlet's primary case

- Fire barriers and installation not properly installed (ie not fixed, gaps in the barriers, wrong type of dowel used)
- BUT if only installation issues they could be remedied by more limited repair work

Martlet's secondary case

- Mulalley had breached the contractual specification in its choice of EWI for the external wall system
- BUT the EWI rendered cladding had been installed in the mid-2000's, well before the Grenfell Tower fire; it was therefore far from clear whether, at the time of construction, such systems were actually prohibited (or even advised against).

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Martlet v Mulalley

HHJ Stephen Davies found that:

- 2003 BRE Report contained a recommendation and/or advice that the default position for an EWI should be that it should not be specified for use in these buildings, unless it could be shown to meet the Annex A performance standard in accordance with the test method set by BS8414-1.

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Martlet v Mulalley

HHJ Stephen Davies found that:

- Judge noted that the BRE report advice contained a “clear recommendation” and a “strong exhortation” and that any reasonable contractor would comply with it.
- The Court concluded not only that Mulalley had failed to follow the advice, but that that failure also amounted to a failure to comply with functional requirement B4(1) of Schedule 1 of the Building Regulations which meant that Mulalley was also in contractual breach to comply with statutory requirements.

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Martlet v Mulalley

HHJ Stephen Davies found that:

- Judge noted that in many similar cases, defendants often argue that at the time of construction no one involved in the design or specification of the building knew that there were any issues with the system - but this type of argument, he said, was “not an answer” to this type of claim.

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Martlet v Mulalley

- Mulalley tried to argue that similar systems had passed BS8414-1 tests, but the judge was not impressed with this argument, and essentially said that only a test of that particular system would 'be sufficient'

- The fact that the EWI system had a BBA[2] Certificate did not mean that the system is compliant with Building Regulations

- The defendant's experts argued that the BRE 135 (2003) did not require a B8414-1 test as long as the system that contained the EPS had BRE 135 complaint fire-barriers. The judge said that this was wrong and 'too simplistic'.

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Martlet v Mulalley

- As is common in these types of cases, Mulalley also tried to argue that the decision to replace the EWI rendered cladding system (rather than repair the defects) was due to the 'changed fire-safety landscape' post-Grenfell

- This argument failed. The judge emphasised that, as long as the defendant's breaches are an effective cause of the loss, then that is sufficient; they do not have to be the only cause

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Martlet v Mulalley

The judge also made the following comments in relation to recovery for remedial works:

- The Court will be slow to criticise a claimant who has undertaken remedial works due to the fact that another party is in breach. This is particularly so when the claimant has to make an urgent decision, or make a decision with incomplete information, as was the case here.
- The burden is on the claimant to show that the remedial works it embarks upon are reasonable.
- 'Reasonable' does not necessarily mean 'cheapest'. A key pointer to reasonableness is whether the claimant followed expert advice in deciding upon a particular remedial solution - although this is not conclusive and will not apply if the advice is negligent.

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Martlet v Mulalley

The judge also made the following comments in relation to recovery for remedial works:

- In this case the court had regard to the fact that Martlet was doing "the right thing as regards residents' safety" and "that it was obvious from an early stage that the safest thing would be to remove the defective fire barriers and to remove the combustible EPS insulation from the towers".
- The claimant should consider any remedial proposals put forward by the defendant but is not bound to accept them, particularly if they do not fully address all the defects. In this case, Mulalley proposed an injection of adhesive into the firebreak cavities. Martlet considered this but rejected it on the basis that it was not sufficient, and the court agreed with this.
- A claimant should make sure that it keeps a proper paper trail of its decision-making processes, particularly in relation to remedial solutions- this will help evidence the 'reasonableness' of its decision making. It is important to ensure, however, that there is no suggestion of 'retro-engineering' a decision.

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Martlet v Mulalley

The judge also made the following comments in relation to recovery for remedial works:

- If Mulalley had produced a BS 8414-1 test that showed that the system was compliant, then Martlet would have had to take this into account when making its decision whether to replace, and if it had carried on with replacement regardless, then it would probably not be able to recover the replacement costs.
- Equally, if Mulalley had suggested a BS 8414-1 before Martlet had made its decision, then Martlet would be expected to defer its decision until the outcome of the test was known.

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Adam acts in a wide range of property disputes including real estate transactions and commercial and residential landlord and tenant issues. He regularly advises landlords, tenants, landowners and developers on matters such as, leasehold enfranchisement, leasehold disputes whether business or residential including variation and interpretation, procedural aspects of property litigation, easements and tortious actions arising out of land. He has substantial experience in civil fraud cases particularly in relation to commercial leasehold matters and acts at short notice in cases requiring tight deadlines such as injunctive relief and requests for landlord's consent.

He has acted for and against estate agents in actions including commission on conveyances and leasehold renewals. He has particular expertise in professional negligence actions against conveyancers.

He is a speaker at Pump Court Chambers Annual Property Seminar and records webinars for Lexis Nexis on commercial property issues.

He is currently instructed as counsel to the Grenfell Tower Inquiry.