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

The First Decision from the TCC on Fire Safety (External Wall Insulation or "EWI") following Grenfell

Summary of the Facts

Following investigations carried out after the tragic Grenfell Tower fire, the Claimant ("Martlet") discovered fire safety defects in the external walls of five of its high-rise towers in Gosport, Hampshire. The towers had been the subject of extensive refurbishment between 2005 and 2008 by the Defendant design and build contractor ("Mulalley") who had installed the StoTherm Classic external wall insulation system on them.

The system comprised combustible expanded polystyrene (EPS) insulation, fire breaks and an overcoat of render. Martlet's investigations found that both the fire breaks and the EPS had been defectively installed and, having taken expert advice, Martlet decided to replace the Sto system with a non-combustible external wall insulation system ("the replacement scheme"). Martlet claimed from Mulalley the cost of the replacement scheme and the costs of providing a waking watch as a fire safety precaution until the towers had been made safe.

Mulalley denied liability on the basis that the real cause and justification for the remedial works and the waking watch was Martlet's realisation, triggered by the Grenfell Tower fire, of the risk posed by the fact that the Sto system, being combustible, did not meet the heightened fire safety standards which had come into force after the works had been completed and which were further heightened as a result of the Grenfell fire.

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

In response, Martlet contended that the Sto system did not meet applicable fire safety standards as at the date of the contract ("the specification breach case").

Martlet's entitlement to advance the specification breach case by way of amendment has already been the subject of a decision by the Court of Appeal in January 2022: see [2022] EWCA Civ 32.

Summary of the Judgment

HHJ Stephen Davies (sitting as a High Court Judge) considered the Building Regulations 2000 and 2010, BRE 135 (1988 and 2003 editions), Approved Document B (2002 and 2006 editions) and the BBA Certificates relating to the system (produced in 1995, 2007, 2012 and 2017). Having done so, he decided that:

1. Martlet succeeded in proving both the existence of the installation defects and the specification breach case.

2. As regards the specification breach case, it was not sufficient for Mulalley to rely on the 1995 BBA certificate, which was the certificate in force at the time. The Sto 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 (albeit it was not demonstrated that the Sto system would have failed a BS 8414 test). 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 cost of the replacement scheme.

4. However, 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.

5. The waking watch costs were recoverable. They were not too remote and in any event were recoverable as a reasonable step taken in mitigation of the far greater loss which would have flowed from an evacuation of the towers.

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