GRENFELL TOWER

Issues arising from the discovery of the combustibility of ACM cladding and claims in the Technology & Construction Court

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Call: 1997 Silk: 2019

"*She always gets straight to the key legal points. She provides good, clear written advice and is excellent on her feet. She has a well-earned and deserved reputation as a construction specialist.*" – Chambers & Partners, 2020

***"An excellent advocate – tenacious…identifying potential problems and arguments even before they arise"*; *"Tremendously bright…brings a new level of strategic thinking to the table*." – Legal 500 2019**

Clients have reported that Siân is ***"excellent – very pleasant to deal with and extremely robust and effective for her clients."*** **and** ***"a very effective, hard-working practitioner with an eye for detail and the ability to present a highly persuasive argument"*** **and "*The great thing about her is that on every occasion her advice is strong, firm and consistent, which allows us to get an excellent settlement."***

Prior to her successful first application for silk in 2018, Siân was recognised as a Leading Junior by the directories for Construction, Professional Negligence and Disciplinary. Siân Mirchandani QC has established a broad commercial practice encompassing construction/engineering, professional liability claims, insurance and disciplinary claims in court proceedings, arbitrations and adjudications.

Siân has considerable experience of claims involving professionals of all types. With her professional and scientific background, Siân relishes cases which involve scientific

aspects or technical issues, and this has led to a strong practice in the Technology & Construction Court with instructions from a wide range of construction professionals including: architects, structural engineers, civil engineers, building surveyors, approved inspectors and project managers. Siân also has considerable experience of professional disciplinary tribunals (particularly architects and building inspectors), arbitrations, adjudications and mediations.

INTRODUCTION

Grenfell Tower Fire

1 Between the placement of the first 999 call (at 00:54 hours) on 14 June 2017, and 08:07 hours, 227 people escaped from the Grenfell Tower of whom 2 later died in hospital. A further 70 people died in the Tower itself.

2 The uncontrolled spread of the fire was quickly attributed to the building's cladding, which largely comprised Aluminium Composite Material (ACM) panels, installed when the building was refurbished in 2015-2016.The ACM panels comprised two coil-coated aluminium sheets fusion bonded to the two sides of a polyethylene core.[2]

Government screening to identify tall buildings with ACM

3 On 28 July 2017, following the Grenfell Tower fire, the Communities Secretary Sajid Javid announced an independent review of the building regulations and fire safety. The announcement came as the first results of large-scale tests of building cladding systems was published, revealing that a system comprising ACM cladding with unmodified polyethylene filler (Category 3) and foam insulation, had failed the test set out in building regulations guidance. This confirmed suspicions that the building regulations may not be effective as a regime of 'quality control' for building construction.

4 The use of ACMs in the UK was not restricted to Grenfell Tower. By late 2018, the Government had identified 441 buildings over 18 metres in height which had ACM cladding systems and declared its willingness to force all landlords in the private sector to remediate their buildings swiftly.[3]

5 The Housing Minister (Kit Malthouse) stated in Oct 2018:

"*Ministers have been very clear that in the private sector it is the responsibility of the building owner, or responsible person, to fund the measures necessary to ensure the safety of residents and must do all they can to protect leaseholders from additional costs. We are encouraged by those in the sector, such as Barratt Developments, Mace,*

[2] The two key cladding products used at Grenfell Tower were: Arconic's Reynobond PE (two coil coated aluminium sheets fusion bonded to both sides of a polyethylene core) and Reynolux aluminium sheets. The insulation product (placed behind the cladding) was Celotex RS5000. An approval certificate of the Celotex RS5000 has not been published by the BBA.

[3] See *"Building a Safer Future – An Implementation Plan"* (December 2018), https://bit.ly/2RYyMuS.

Legal & General and Taylor Wimpey, who are doing the right thing and taking responsibility, and we expect others to follow their lead."

6 The Secretary of State for Housing, communities and Local Government, Robert Jenrick announced in January 2020 that new measures were going to be undertaken to improve building safety measures. Amongst his reforms, there will be a Building Safety Regulator to supervise the new regime and publish guidance for building owners.[4] His announcement came with a warning that those building owners who did not take action to remediate the unsafe ACM cladding, will be publicly '*named and shamed.'*[5]

7 The Government's approach[6] has two limbs:

(a) wholesale regulatory reform starting with an independent review – Dame Judith Hackitt's review;

(b) a building safety programme for responding to the Grenfell fire tragedy (initially by short term, interim & remediation measures).

8 The Hackitt Review: Final Report suggests that:

"subsequent events [to the Interim Report] have reinforced the findings of the interim report, and strengthened my conviction that there is a need for a radical rethink of the whole system and how it works. This is most definitely not just a question of the specification of cladding systems, but of an industry that has not reflected and learned for itself, nor looked to other sectors."

9 In relation to the building regulations themselves, Dame Hackitt suggests that:

*"…**some of those who construct buildings treat the minimum standards in the Approved Documents as a high bar to be negotiated down, rather than genuinely owning the principles of a safe building and meeting the outcomes set out in the regulations** "*

[4] https://www.gov.uk/government/news/new-measures-to-improve-building-safety-standards
[5] http://www.ukpol.co.uk/robert-jenrick-2020-statement-on-building-safety/
[6] The Department of Communities and Local Government (DCLG) has been renamed the Ministry of Housing, Communities and Local Government (MHCLG).

THE REGULATORY CONTEXT

B4(1) 'functional' requirement

10 Requirement B4(1) of Schedule 1 to the Building Regulations 2010 provided a so-called 'functional requirement' that had to be met:

> *"The external walls of the building* ***shall adequately resist the spread of fire over the walls*** *… having regard to the height, use and position of the building."*

11 The guidance for achieving compliance with this functional requirement in B4(1) was provided by Approved Document B 2006,[7] ('**ADB**') which stated as follows:

> ***External wall construction***
>
> *"12.5 The external envelope of a building should not provide a medium for fire spread if it is likely to be a risk to health or safety. The use of combustible materials in the cladding system and extensive cavities may present such a risk in tall buildings.*
>
> ***External surfaces***
>
> *12.6 The external surfaces of walls should meet the provisions in Diagram 40….*
>
> ***Insulation Materials /Products***
>
> *12.7 In a building with a storey 18m or more above ground level any insulation product, filler material (not including gaskets, sealants and similar) etc. used in the external wall construction should be of limited combustibility (see Appendix A) …"*

12 Diagram 40 contained 5 schematic figures depicting buildings, with a key to external wall surface classification requirements. The requirements differed for buildings or parts of buildings that were less or more than 18 m height above ground and less or more than 100 cm from a boundary. Drawings 40d and 40e appeared to suggest that "Class 0 (national class) or class B-s3,d2 or better (European class)" had to be used on the parts above 18m, or all of the building if the height was above 18m, and it was less than 100cm from a boundary.[8] Diagram 40 also noted: "*The national classifications do not automatically equate with the equivalent European classifications."*

13 In Appendix A, Table A7 defines the materials of limited combustibility as follows:

> a) (National Classes) by reference to the method specified in BS476: Part 11: 1982; or

[7] Fire Safety – Volume 2 – Buildings other than dwelling houses, came into effect April 2007. https://bit.ly/2O1QLiJ.

[8] NB: Diagram 40 also noted: "*The national classifications do not automatically equate with the equivalent European classifications."*

b) (European Classes) in terms of performance when classified as class A2-s3, d2 in accordance with BSEN 13501:2007, Fire Classification of construction products and building elements, Part 1 – Classification using data from reaction to fire tests when tested to BS EN ISO 1182: 2002, Reaction to fire tests for building products – Non-combustibility test or BS EN ISO 1716:2002 Reaction to fire tests for building products – determination of the gross calorific value and BS EN 13823:2002, Reaction to fire tests for building products – building excluding flooring exposed to the thermal attack by a single burning item.

MATERIALS & CLASSIFICATIONS

14 Under the Euroclass EN13501-1 classification system, only fire rated cladding can be used on building over 18 metres high. It ranks construction materials in 7 classes with regard to their characteristics and reactions to fire. The designated classifications are as set out in table below. A1 class is the highest performance – materials with A1 classification are non-combustible and do not contribute to fire. A2 is the next class, they have limited combustibility, and make no significant contribution to fire. Classes B to F have increasing combustibility and sequentially contribute more to fire.

Class	Performance description	Fire scenario and heat attack		Examples of products
A1	No contribution to fire	Fully developed fire in a room	At least 60 kW/m^2	Products of natural stone, concrete, bricks, ceramic, glass, steel and many metallic products
A2	"	"	"	Products similar to those of class A1, including small amounts of organic compounds
B	Very limited contribution to fire	Single burning item in a room	40 kW/m^2 on a limited area	Gypsum boards with different (thin) surface linings Fire retardant wood products
C	Limited contribution to fire	"	"	Phenolic foam, gypsum boards with different surface linings (thicker than in class B)
D	Acceptable contribution to fire	"	"	Wood products with thickness ≥ about 10 mm and density ≥ about 400 kg/m^3 (depending on end use)
E	"	Small flame attack	Flame height of 20 mm	Low density fibreboard, plastic based insulation products
F	No performance requirements	–	–	Products not tested (no requirements)

15 Pre-Grenfell: if the cladding material was defined as being between A1 and A2, then it is permitted and can be used. If the materials fall within band B-F then it is banned. In order to be used, they must reach at least A2 of the Euroclass standards.

What went wrong…

16 Requirement B4(1), and paragraphs 12.5 and 12.6 of ADB were concerned with surface spread; paragraph 12.7 and Appendix A of ADB were concerned with combustibility, particularly for insulation and filler materials (but these were just examples). The wording of paragraph 12.5, ought to have meant that these two aspects of fire safety – surface spread and limited combustibility – were treated as linked to each other. Instead, compliance with surface spread and Diagram 40 requirements for classification has been treated as compliance with ADB and the Building Regulations.

17 Furthermore, under the Regulatory Reform (Fire Safety) Order 2005, building owners, employers and occupiers are under a legal duty to assess the risk of fires in all buildings. Indeed, this does not apply to private dwellings, but per Article 31(10) and Article 6, the statutory instrument is applicable to communal parts of residential properties where those parts of the premises (hallways, staircases etc.) are by used by the occupants in more than one dwelling. Therefore, this is another regulation which will have to be borne in mind for those whom it may affect.

18 The government are set to clarify this however with the Fire Safety Bill 2019-2021, which will require residential building owners to consider the risks of external cladding. It's first reading was on the 8th of September in the House of Lords. There has yet to be a general debate in the House of Lords on the Bill, as the first reading is just a formality that signals that the Bill is now about to go through the process of the House of Lords.

GRENFELL TOWER INQUIRY

Phase 1 Report

19 In his Phase 1 report, issued October 2019 Sir Martin Moore-Bick found:

> *"26.4 **… there is compelling evidence that requirement B4(1) was not met in this case. It would be an affront to common sense to hold otherwise**. Although in another context there might be room for argument about the precise scope of the word "adequately", it inevitably contemplates that **the exterior must resist the spread of fire to some significant degree appropriate to the height, use and position of the building. In this case … it is clear that the walls did not resist the spread of fire. On the contrary, they promoted it** …"*

Phase 2

20 Phase 2 of the inquiry is currently ongoing. Module 1, which focuses on the 2015-16 refurbishment, is what the inquiry is dealing with, as of now. It will then go onto the cladding products themselves, the testing/certification and product marketing. This is expected to be covered between November 2020 and January 2021.

21 Who is to blame?

THE PAST REVISITED

1973

22 There was an early indication of the potential problems associated with cladding in the Summerland Leisure Centre fire disaster in 1973, which lead to 50 deaths and 80 injured. The fire spread to the roof, where there was a transparent acrylic sheet material called Orgolas, once the fire had reached this point it spread rapidly. However, the flammable cladding was one of the many reasons why there were so many fatalities in this fire. Thus, despite a public inquiry, the cladding was only regarded as a contributing factor to the fire and the loss of human life.

1990s

23 By the early 1990s, the use of composite sandwich panels as a covering for internal insulation was widespread in the food industry. These panels were typically aluminium (occasionally steel) faced and had a combustible expanded polystyrene foam core. Their use waned after a succession of catastrophic fires including:

(a) The Sun Valley Poultry fire in 1993 in which two firefighters were killed and £80m of property and BI losses were incurred;

(b) A fire at Pride Valley Foods in Durham in 1995. In subsequent litigation,[9] the project manager was found to have been negligent in failing to advise Pride Valley as to the characteristics of EPS panels;

(c) A fire in January 1998 in Southall. In the subsequent litigation,[10] the architects were found negligent for failing to advise the owner to fit fire-resistant panels; and

(d) There were also a further 30 reported fires in the UK involving composite panels in the 1990's[11].

[9] ***Pride Valley Foods v Hall & Partners*** [2000] EWHC 106 (TCC).
[10] ***Shaib Foods v Paskin Kyriakides*** [2003] EWHC 142 (TCC).
[11] Probyn-Miers "*Fire-Risks From External Cladding Panels – A Perspective from the UK"* (2016) < https://www.probyn-miers.com/perspective/2016/02/fire-risks-from-external-cladding-panels-perspective-from-the-uk/>

24 By the late 1990s, the propensity of EPS panels to promote the spread of fire was sufficiently well-known that they were no longer being specified for internal use within food plants. The 'tail' of catastrophic fires and associated litigation took until the mid-2000s to work itself through the Courts.

1999 – Garnock Court, Ayreshire

25 Following a 1999 fire in a residential building called Garnock Court in Irvine, Ayrshire the House of Commons Environment, Transport and Regional Affairs Committee conducted an investigation into cladding materials. Its report will doubtless be scrutinised during Phase 2 of the Grenfell Inquiry and may well be seen as a missed opportunity.

26 As part of a refurbishment process the exterior wall of the building was fitted with glass reinforced polyester plastic sheet (unplastisized polyvinyl chloride or uPVC). While noting concerns with the risk of unexpectedly rapid spread of fire involving cladding systems, the Committee concluded that the evidence it had seen did not suggest that the majority of the external cladding systems currently in use in the UK posed a serious threat to life in the event of fire.[12]

27 A question arose as to whether this was a fire actually involving external cladding. For example, Mr Buntain, a witness to the inquiry and technical manager of a company specialising in the development, manufacture and installation of insulated cladding systems, said:

"*I think it is important from the outset that we clarify what the situation is with regard to the Irvine block. The Irvine block was not overclad. The Irvine block is a block of concrete common throughout the whole of the United Kingdom. It is made of concrete and it is as non-combustible perhaps as you can get within the building industry. It certainly will not catch fire.* ***It was not overclad by any material at all. It had had its windows replaced by the local authority using a plastic window and it was the full height plastic window units within the block at Irvine that caught fire and the panels below the window, but not overcladding which the building is assumed to have had by some people.*** *It was not overclad. It had a composite window unit which caught fire".*

28 However, in its final report, the Committee said:

[12] https://publications.parliament.uk/pa/cm199900/cmselect/cmenvtra/109/10907.htm

"There was some disagreement between our witnesses as to whether the pre-formed 'in-fill' system of the type involved in the fire at Garnock Court constituted 'external cladding' or not. However, whether or not the industry regards these systems as 'cladding' is in our view immaterial. ***Approved Document B should make it clear that any addition to the outside of a building which has the potential to lessen its resistance to external fire spread is subject to the Building Regulations and therefore to the guidance contained within that document****".*

2004/2005

29 A subsequent parliamentary inquiry carried out by the Environment, Transport and Regional Affairs Select Committee after the 1999 fire, resulted in Scotland enacting legislation to replace the previous system of building control that had been followed for over 40 years. On the 1st May 2005, the Building (Scotland) Regulation 2004 and Building (Scotland) Act 2003 came into force, to deal with this risk of spread of fire due to cladding on external walls.[13] At Schedule 5, Section 2.7 headed "*Spread on External Walls"* provides:

"Every building must be designed and constructed in such a way that in the event of an outbreak of fire within the building, or from an external source, the spread of fire on the external walls of the building is inhibited".

30 The Committee noticed that there was a wide variety of External Cladding systems, which served separate distinct purposes, e.g. increasing external wall insulation or weather protection. Furthermore, it was estimated that around 500 residential towers were fitted with external cladding. In evidence, the Fire Brigades Union, the Loss Prevention Council (technical advisers to the insurers industry) suggested that the guidance administered through Approved Document B is not necessarily adequate for ensuring fire safety of external cladding systems. Peter Field, of the Building Research Establishment also stated that the guidance "is far from being totally adequate". It was further asserted that the classifications of "limited combustibility" and the small-scale tests which are conducted to assess this do not properly evaluate the performance of real life cladding systems in a fire situation.

2009 - Lakanal House, Camberwell

31 A similar incident to the fire at Grenfell Tower happened in Camberwell in 2009, where six people died with a further 20 injured. An investigation carried out by London Fire Brigade showed that Lakanal House was identified to be at risk of fire spread because of the cladding used. Southwark Council pleaded guilty to four charges concerning the

[13] https://www.building.co.uk/focus/cladding-the-new-rules/1000582.article

breach to safety regulations. This incident highlighted the growing issue with ACM cladding in high rise residential buildings.

2016 - Shepherd Bush fire

32 The fire started in the kitchen of a two-bedroom flat on floor 7 and spread rapidly up the façade to floor 11. This was consequently spoken about in a presentation called *"Tall Building Facades*" by the LFB Fire Safety. This was also referred to in Phase 1 Report of Grenfell. Amongst other recommendations and conclusions at the presentation, it was noted that the external envelopes of buildings should not contribute to a fire in the building or along the façade. Further, it was identified that there wasn't a great understanding in the industry of the fire performance of the materials that were being used on the exterior panels of high rise buildings.

2019 – Barking and Bolton

33 Despite Grenfell Tower fire in June 2017, despite the earlier cases and the committee investigations and reports there have been two fires in 2019 which were allegedly made worse by the presence of exterior cladding.

(a) (9 June 2019) A fire at De Pass Gardens, Barking, involved ThermoWood cladding, which is banned for use in buildings over 18m high; due to its Class D rating.

(b) (15 November 2019) A fire broke out at a student residence in Bolton (which was not more than 18m high) which was clad with flammable material. Eye-witnesses reported that the rapid rise of the fire was due to its external cladding.

UK EXTANT GUIDANCE

34 One might be forgiven for thinking that the fires alone highlighted that there were serious issues with the use of ACM cladding. However this was not the case. Leading researchers, as well as insurers, were becoming concerned with its use:

(a) (1997) In Publication No 3/97 commissioned by the Home Office Fire Research and Development Group *"An initial Review of the Fire Safety of Large Insulated Sandwich Panels*". There was a Brigades response to The Home Office questionnaire, which suggested that it was concerned about the risk to life with using plastic foam cored sandwich panels and questioned whether it would send its firefighters if a building is extensively coated in the cladding where no one was inside.

(b) (2000) A paper by Dr Gordon Cooke: "*Sandwich Panels for External Cladding – fire safety issues and implications for the risk assessment process*" noted that sandwich panels with combustible cores can contribute to the severity and speed of fire development.[14]

(c) (2003) May 2003 "*Technical briefing: Fire Performance of Sandwich Panel Systems"* held by the Association of British Insurers noted that whilst:

"*Sandwich Panels do not start a fire on their own…where the ignition source is sufficiently large, or where the contents of the building are already burning, some panel systems may make a significant contribution to this*"[15].

(d) (2008) A paper (delivered by the author of BR 135) *"External Fire Spread – The testing of building cladding systems"* which referred to the potential for fire to spread via cladding systems;

(e) (2013) BRE report BR 135 "*Fire performance of external thermal insulation for walls of multistorey buildings"* (3rd edition BRE (2013)) which likewise noted the critical importance of cladding systems in relation to the spread of fire.

(f) (2014) The 2014 Iteration of Risk Control Document 7 *"Recommendations for hot work"* (a supporting document for the Fire Code, published by the Fire Protection Association on behalf of RISCAuthority), which alluded to the possible combustibility of the filler in sandwich panels.

35 In February 2016, UK-based forensic architects Probyn-Miers published an article on their website which commented on the succession of fires in high-rise buildings in Dubai and elsewhere, and explicitly linked those fires to the ones at Sun Valley and Sahib Foods.[16] Probyn-Miers specifically noted that the fire behaviour of composite core materials and fixing systems was common to both internal structures and external cladding.

36 It was further noted in the article that insurers minds in the 1990's began to change as cover was more difficult to obtain and if they did, those premiums would be very expensive. This was presumably because of the ever-increasing amount of fires which were exacerbated by ACM cladding being present in the 1990's, an early recognition by those in the industry of the inherent issues with the cladding.

[14] Eurisol UK mineral Wool Association, November 2000.
[15] http://www.bre.co.uk/filelibrary/rpts/sandwich/ABIsandwichPanels.pdf
[16] https://bit.ly/2RsU58I.

THE GLOBAL POSITION

37 Before 2017, the use of ACM cladding had been implicated for promoting rapid fire spread in a number of well-publicised fires overseas. These included:

(a) **Wooshin Golden Suites Fire** (Marine City, Busan, October 2010);

(b) **Mermoz Tower** (Roubaix, May 2012);

(c) **Tamweel Tower** (Dubai, November 2012);

(d) **Lacrosse Building** (Melbourne, November 2014);

(e) **The Torch** (Dubai, February 2015);

(f) **The Address** (Dubai, December 2015).

SOME FEATURES OF THE TCC LANDSCAPE

Cast list

38 The potential litigants in claims relating to cladding are a wide and diverse group:

(a) building owners, leaseholders, freeholders; prop co; management companies;

(b) developers, building companies, contractors, sub-contractors;

(c) architects, façade consultants, building inspectors, fire safety consultants;

(d) insurers: warranty providers, building insurers, professional indemnity insurers;

(e) Others: lenders, product manufacturers, guarantors

Nature of claims

39 The claims are like webs – catching all who stray near. The bases for the claims: contract, tort, statutory duty via Defective Premises Act 1984 (DPA) and Civil Liability (Contribution) Act 1978. Also possible claims under leases against landlords and pursuing duty to warn against manufacturers (and designers?)

Test cases or ad hoc?

40 How will these cases play out? Ad hoc or test cases? It wouldn't be surprising with the inception of a Building Safety Regulator if there is a test case brought, due to the sheer amount of buildings which are reported to have exterior cladding to the building and with the inevitable backlog of cases due to COVID-19 for perhaps years to come, it would bring certainty to the situation. At the moment, there is no sign of such a case.

(a) Premier Inn cases: a number of claims have been made by the hotel operator against the contractor, McAleer & Rushe. The main claim is between Premier Inn and McAleer. However, the contractor has brought additional claims against: the cladding subcontractors (who were charged with design); the architects (design co-ordination); the fire safety consultants and the approved inspector. These cases are heading for trial from January 2021.

(b) Leaseholder claims: a group of about 80 leaseholders (flat owners) of New Capital Quay are suing the building contractor (Galliard Homes) and the developer (Roamquest – a company linked to Galliard Homes) following the discovery of ACM cladding and combustible insulation in tower blocks above 18m tall. The NHBC warranty has responded and remediation works are underway. The claims concern the uninsured losses, including loss by reason of being unable to freely realise the stigma-free value of their flats during the remediation and/or any following period of blight, as described in *Rendlesham Estates Plc v Barr Ltd* [2015] 1 WLR 3663, paragraphs 283 to 300 by Mr Justice Edwards-Stuart, former presiding judge of the TCC.

Claims against building companies and contractors

41 The Defective Premises Act 1972 will be centre stage for claims brought by owners/leaseholders against building companies and contractors for they "[take] *on work for or in connection with the provision of a dwelling"* and consequently owe the statutory duty: "*to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner…so that as regards that work the dwelling will be fit for habitation when completed."*

42 The statute provides:

a. At section 1(1):

"*A person **taking on work for or in connection with** the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion of enlargement of a building) **owes a duty** –*
(a) if the dwelling is provided to the order of any person, to that person; and

(b) without prejudice to paragraph (a) above, ***to every person who acquires an interest (whether legal or equitable) in the dwelling;***
to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner…so that as regards that work the dwelling will be fit for habitation when completed*."*

b. At Section 1(2):

"*A person who takes on any such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it properly in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by subsection(1) above except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty."*

c. At Section 1(4):

"A person who—
(a) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; or
(b) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment;
arranges for another to take on work for or in connection *with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work."*

Claims against architects

43 Retained by the building company or the contractor as his agent, the architect will owe contractual obligations (to act with the skill and care to be expected of a reasonably competent architect). No absolute duty or warranty, but duties relate to design, design co-ordination and inspections.

44 There is a co-extensive duty in tort to contractual counterparties. Limited scope for duties in tort relating to economic loss, essentially only if:

(a) physical damage or injury; or

(b) assumption of responsibility (*Hedley Byrne*);

(c) relying on a negligent mis-statement in a certificate, e.g. Professional Consultant's Certificate or PCC, (*Hunt v Optima*).

45 Breach and defences to breach: whilst contractors may try to rely on Section1(2) of the DPA, professionals will be turning to these cases and raising a defence of 'acceptable practice' or 'prevailing view' in the profession or industry:

(a) *Bolam v Friern Barnett Hospital Management Committee* [1957] 1 WLR 582: Not guilty of negligence if they have acted in accordance with a practice that is accepted as proper by a responsible body of persons skilled in that area.

(b) *Bolitho v City and Hackney Health Authority* [1998] AC 232: "*if..the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable and responsible."*

(c) *Edward Wong v Johnson* [1984] AC 296. Solicitors held to be liable for negligence because there was an obvious risk that could have been guarded against, so though the practice was almost universal, ***it was neither reasonable nor responsible.***

(d) *Adams v Rhymney Valley* [2001] PNLR 4, CA. Even though the local authority did not consult the responsible bodies of professional opinion about the design of the window (it replaced push button release lock with key lock) it was sufficient that they adopted a design which would have been supported by a body of responsible professional opinion.

(e) O'*Hare and another v Coutts & Co [2016] EWHC 2224 (QB)*, the Bolam defence was abandoned in a financial advice claim. In that case, the Judge took the view that the focus should be on what the claimant, as an informed investor, should have been told, rather than whether what was advised was in accordance with practice. A potential analogy arises here, i.e. what an informed buyer could have been expected to be told by the architect/manufacturer/building inspector, rather than what was in accordance with practice.

46 There is also a statutory duty under DPA 1972. An architect would meet the requirement for Section1(1): "*a person taking on work for or in connection with the provision of a dwelling*" but is unlikely to be a person falling within Section1(2).[17]

[17] See *The Imperial College of Science and Technology v Norman & Dawbarn (a firm) [1986] 8 Con LR 107*, for a case concerning the failure by an architect to take reasonable care in design and supervision not to prevent water penetration behind the tile cladding.

47 The court has also clarified that section 1 of the DPA 1972 encompasses all building work, which isn't only the improper carrying out of that work but also the failure to carry out any remedial work. [18][19]

How far does the architect's liability extend?

48 *Bellefield Computer Services Ltd v E. Turner & Sons Ltd [2002] EWCA Civ 1823* provides some clarity on this. In a claim against the defendant building contractor for faulty construction which led to a fire, the contractor claimed a contribution against a firm of architects who had prepared designs for the works. The contractor claimed that the architect's design of the firewall had been negligent. The architect was retained for partial services not the full design service. The issue which needed to be decided was given that scope of retainer, what losses was the architect liable for? It was held by the court that the scope of the retainer was for drawings which outlined the design of the firewall and being available for consultations, but this did not include supervising the construction of the work or stating whether the firewall should conform to applicable specifications.

Claims against building inspectors / certifiers

49 The building inspector or 'Approved Inspector' will have signed up for a list of services to be provided. The terms of engagement will vary but in general the building inspector agrees to carry out the services contracted for to a standard that is: "*with reasonable skill, care and diligence'* and may also expressly contract to do so "*in accordance with the Code of Conduct for Approved Inspectors"*, which is published and updated by the Construction Industry Council.

50 A purchaser of a flat, expecting to get a Building Control Final Certificate from an Approved Inspector is likely to be able to say they *"relied on*" that certificate. The Approved Inspector must be taken to have known that any person buying, with the benefit of that certificate, would rely upon it for the purposes of their decision to buy: a duty of care would arise, via the '*assumption of responsibility'* route.

51 However, in contrast to architects, there is no basis for a claim under DPA 1972 against building inspectors after the Court of Appeal decision in *Lessees and Management Company of Herons Court v Heronslea Ltd and others* [2019] 1 WLR 5849; [2019] EWCA

[19] *Andrews* v. *Schooling & Others* [1991] 1 WLR 783.

Civ 1423. Their role is "*essentially the negative one of seeing that no work is done which contravenes building regulations…not the creation of a dwelling".*

Claims against fire safety consultants

52 If a fire safety consultant was engaged, there will be a similar list of services to be provided which usually are set out within the terms of engagement or fee agreement. This is the basis for a claim in contract, with a co-existent duty of care in tort (usually requiring the use of reasonable skill and care). The critical service that is almost invariably provided is advice on a Fire Strategy, and where the option for building regulations compliance is chosen to be via the 'fire engineering route', the fire safety consultant will be required to advise on an alternative way of complying with the building regulations and fire safety legislation. Part of the role involves giving advice, on request or otherwise, to the other professionals, particularly the architect.

Claims against manufacturers of the materials

53 The various manufacturers of the ACM cladding could also find they may face claims that they had a duty to warn the customers of the fire hazard of using such cladding on (at least) the taller buildings. There may be arguments by the manufacturers that at the time of manufacturing and subsequently selling the products in the 1990s, the danger was not clear. However, if there is a clear indication of serious danger relating to the products, the manufacturer may find itself under a duty to warn those who will have bought the product or have been affected by it retrospectively.

54 For example, in *E Hobbs (Farms) Ltd v Baxenden Ltd*[20], the defendant manufacturers were found to be liable in negligence for selling flameproof wall-coverings which were discovered afterwards to be more flammable than initially thought. Sir Michael Ogden QC held that the manufacturers should have brought this to the attention of their previous customers; their duty to warn did not cease when the goods were sold. If the manufacturer became aware of any potential risk of injury to past customers then it should have taken steps to warn them of this.

55 The vexed question is <u>when</u> should each of the product manufacturers be considered to have met the requirements for triggering this duty to warn? When should they have brought to the attention of their past customers that there were potential fire safety issues with ACM cladding or the insulation they had sold?

56 Arguably the earliest date is that of the fire in 1999 at Garnock Court, Ayrshire, which led the Scottish Government to enact legislation to counter the issue of combustible cladding. Following the Grenfell Tower fire, the Scottish Government stated that no

[20] [1992] 1 Lloyds Rep 54.

local authority or social high rise domestic properties in Scotland have been extensively clad in ACM since the legislation was brought into force in 2004.[21]

57 If 1999 was not a clear enough indication that the manufacturers should have made its customers aware of the flammability of ACM, then the fire at Lakanal House in 2009, where 6 people died and a further 20 injured, 2009 is a further compelling date.

58 The subsequent inquest into these deaths found that the cladding panels (HLP window panels were used on Lakanal House, despite it being reported that no HPL cladding product has ever passed official safety tests BS8414)[22] that had been fitted as part of a refurbishment several years prior to the fire enabled the fire to spread more rapidly. Indeed, this was considered a serious failure on the part of Southwark Council building design services, its contractors and the subcontractors. HHJ Kirkham, the Assistant Coroner, made several recommendations. One of the main recommendations was the need to make building regulations and Document B easier to use. She held that:

"During these inquests we examined Approved Document B (2000 edition incorporating 2000 and 2002 amendments) ("AD B"). I am aware that AD B has subsequently been amended, and believe that a further amendment is due to be published soon. The introduction to AD B states that it is "intended to provide guidance for some of the more common building situations" However, AD B is most difficult to use. Further it is necessary to refer to additional documents in order to find an answer to relatively straightforward questions concerning the fire protection properties of materials to be incorporated into the fabric of a building".

59 It would be interesting to assess whether the manufacturers could be seen as liable for their failure to warn of the combustibility and the dangers of using the cladding in high rise buildings.

60 The succession of fires in Dubai which involved ACM cladding starting from 2012 made it absolutely plain that by 2012 there were known dangers and fire safety risks arising from the use of ACM cladding, with insulation, on high-rise buildings. Despite this, Grenfell Tower was clad in 2015/16.

61 Could architects or building inspectors be under this duty to warn? The suggestion from the court would be against imposing "*novel and burdensome obligations"* to warn of risks discovered after they carried out the work.

[21] https://www.gov.scot/publications/grenfell-responding-in-scotland/
[22] https://bit.ly/3i5RHi9

62 The families of the victims and survivors of the Grenfell Tower fire have launched a civil complaint in Pennsylvania, USA against manufacturers Arconic and Saint-Gorbin,(the manufacturer of the Celotex insulation product) for punitive and compensatory damages for wrongful death. It will be interesting to watch the developments of this case across the Atlantic.

What about landlords?

63 *Credit Suisse v Beegas Nominees Ltd [1994] 4 All ER 803* could prove to be an important case in this respect. It was held that an obligation on the landlord to 'keep the building in good and tenantable condition' required the replacement of leaking cladding (due to a design defect) with a totally new cladding system. Such claims, of course, depend on the wording of the lease. The lease may provide a means for tenants to push for replacement of cladding and other fire safety-related defects, relying on the landlord's similar obligations for repair and maintenance of the fabric of the building.

64 However, the successful claim against the landlord may end up a pyrrhic victory because (subject to lease terms) landlords can re-charge such costs via the Service Charge. A number of tenants who faced claims for the cost of cladding replacement (or related costs like 'waking watch') have challenged the landlord's attempts to recover these costs via their Service Charge. Such matters come before the First Tier Tribunal (Property Chamber) or 'FTT'. The FTT will not concern itself with questions of morality, or who 'ought' to pay - whether or not the cost of replacing the cladding is recoverable by that route will depend on the construction of the leases.

(a) *E&J Ground Rents No 11 LLP v Various leaseholders* (FTT), unreported, 24 January 2018) a landlord provided a "waking watch" service. FTT: landlord's actions complied with its obligations; costs of the waking watch were reasonable so recoverable through the service charge.

(b) *Pemberton Reversions (5) Ltd v Various leaseholders*(FTT), unreported, 18 July 2018) the landlord replaced non- compliant cladding (at £3m cost) and sought to recover through the service charge with costs of waking watch (c. £10,000 for each leaseholder). FTT: as a matter of contract, the lease provisions permitted recovery of the sums claimed; the moral position was not a matter for the tribunal.

WHAT DOES THE FUTURE HOLD?

65 Defendants to litigation may wish to challenge Sir Martin Moore-Bick's decision in the Grenfell Tower Inquiry that paragraph B4(1) of Schedule 1 to the Building Regulations was breached. Technically, they would be entitled to do so, since his decision is neither binding nor admissible in any civil proceedings.[23] It is, however, difficult to imagine that any Court would come to a different conclusion.

66 An Australian judgment in 2019 in litigation arising out of the 2014 Lacrosse Building fire addressed (albeit largely within the framework of applicable local law) many of the issues likely to face professionals who may be implicated in any decision to install ACM cladding with a combustible core.[24] The fire engineer, the certifier and the architects were found to be have breached contractual obligations. This decision rings true to the decision in *Edward Wong v Johnson*. Despite the practice being commonly used amongst the profession, if it is deemed irresponsible or unreasonable, you will not escape a finding of breach of duty.

67 Sir Martin Moore-Bick's closing remarks in the section of his first report dealing with compliance with the Building Regulations encapsulate the key challenge to be faced by professionals in the UK:

> *"26.7 A separate question is* ***how those responsible for the design and construction of the cladding system and the work associated with it, such as the replacement of the windows and infill panels, satisfied themselves*** *that* ***on completion of the work the building would meet requirement B4(1).*** *That is a matter for investigation in Phase 2."*

68 In any given case, much will rest on the answer to that question.

SXMQC
30 September 2020.

[23] See ***Hollington v Hewthorn*** [1943] 1 KB 587.
[24] https://bit.ly/2RQEAGt.