



Sheena Sood The URS vs BDW ruling highlights the government's failure to formulate an effective, co-ordinated response to Grenfell

GRENFELL AWAITS A FINAL RECKONING

I visited Grenfell Tower following the fire, and what I saw will not leave me. A lot has happened since in seeking to hold those responsible to account and to avoid another such tragedy. We have seen remediation schemes up and down the country. We have seen new legislation, the government-appointed building safety regulator and chief construction adviser, and a building safety gateway regime embedded for new projects, all with a fresh impetus for safety in design and construction.

Laudable actions – but the attempts to ensure that those responsible for defective cladding foot the bill have been hard to watch. Insurers rejecting cover for fire safety claims, curtailing future exposure, senseless expenditure on legal and expert costs instead of applying this towards settlements and increased insolvencies.

I often wonder what if, following that awful tragedy, there had been a different response from government. What if, in collaboration with the construction and insurance industries, it had set up a cross-disciplinary panel of senior technical experts that had published a list of non-compliant materials and cladding systems (there are only a small number)? And what if, with the assistance of leading KCs, the government had provided guidance on apportionment of liability on a typical design and build high-rise building project – as between main contractor, cladding subcontractor, architect, fire engineer, approved inspector and product manufacturer? That panel could have also made a fair assessment to reflect the government's own responsibility for the cladding debacle: guidance on apportionment for all projects with non-compliant systems.

If that had happened and fast-track resolution guidance been published by government, not all disputes would have settled pre-litigation but it would have enabled judges, at case management conference (CMC) stage, to have called parties to account. If there were good reasons to depart from the guidance, those cases could have

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proceeded speedily, instead of the same issues being rehashed time and again, by lawyers and experts, in the tidal wave of cladding disputes that followed Grenfell. Legislation could even have made pre-action or pre-CMC mediation mandatory.

Perhaps this would have been too simplistic when, as lawyers have argued, cases are fact dependent. However, there is a typical process on a design and build high-rise project: architects provide the scheme design, specify materials or performance requirements and co-ordinate; cladding subcontractors provide the detailed design and install; fire engineers advise on fire strategy; approved inspectors certify compliance with building regulations; and main contractors supervise and manage the whole process.

The shortcomings of the government's response mean instead we have seen: delays by claimants in advancing claims as they investigate and seek to establish eligibility for funding through the Building Safety Fund; hurried implementation of the Building Safety Act 2022, which has rewritten the law on limitation and the corporate veil; and now we have the Supreme Court's decision in URS vs BDW, finding in favour of a developer that had long since disposed of its asset. Grenfell had seen commitments from some developers to

address building defects in their current stock and, on occasion, properties they no longer owned, no doubt with their reputations and the ban from building new homes in mind.

Developers have looked to recover their costs, and professional indemnity policies have fallen into view. Understandable where designs were negligent, but the difficulty is defects are rarely caused by one single thing. There are usually multiple causes: poor materials, poor design, poor workmanship, poor co-ordination and poor supervision. Despite this, the claimant can choose just one wrongdoer to pursue under the principle of joint and several liability, and through contribution claims the whole supply chain are joined if still standing. The supply chain point fingers at each other in full view of the claimant, and it has led to long, expensive disputes with settlements eventually reached because no one wants to be the first case where liability is apportioned between the project team (there is still no such UK case).

Unfortunately, the decision in URS vs BDW merely encourages pursuit of litigation, leaving important defences such as limitation, the corporate veil and the right to a fair trial in tatters. Stripping away established defences may seem right to hold parties to account, but is it getting the fair allocation of liability right or is the buck stopping with those who have maintained professional indemnity insurance because it is required or because it is good practice for a well-run business?

My experience of the construction industry is that it is full of professional people who love what they do, producing well-designed, well-constructed, safe and sustainable buildings and surrounding infrastructure. It wants to do the right thing to redress past mistakes, but it needs a proper, well thought-through and fair forum for doing so. That, in my opinion, is not litigation and the draconian force of the courts.

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