



Replacing combustible cladding: should insurers be footing the bill?

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Claims against insurers



- Claims for replacement of defective cladding should be brought under latent defect insurance policies.
- Why can't claims be pursued under ordinary property policies?
 - Absence of *damage*.
- Latent defect policies provide cover in the event of an inherent defect in the design, or materials which become apparent after practical completion.
- What are the advantages of pursuing claims under these types of policies?
 - They are straightforward (in principle);
 - They work on a “*non-fault*” basis i.e. the policyholder does not need to establish any wrongdoing;
 - They provide a single point through which to recover the costs of repairing a building following the discovery of an inherent defect.

Latent Defect Insurance

The trigger for coverage

“The Insurer will cover...rectifying work...which has been affected by [a condition requiring immediate remedial action to prevent imminent danger to the health and safety of the occupants and caused by a defect in the design, workmanship, material, components of the Structure]...”
(CRL 10 YEAR POLICY)

“[The insurance will cover] repair or replacement to the Works caused by any present or imminent danger to the physical health and safety of the occupants of the Premises and where such repair or replacement is required to comply with the Building Regulations that applied at the time of construction or conversion ...”
(BLP BUILDING DEFECTS INSURANCE)

“If there is a present or imminent danger to the physical health and safety of the occupants of your Home because it does not comply with the Building Regulations that applied to its construction...we will pay the Cost of the necessary repairs”
(NHBC BUILDMARK)

Latent Defect Insurance

The trigger for coverage



Generally speaking, to come within the insuring clause the policyholder must show:

- (1) A non-compliance with the relevant Building Regulations which applied at the time of construction / conversion;
- (2) That the defect causes a present or imminent danger; and
- (3) The loss is not otherwise excluded by the Policy.

Latent Defect Insurance Breach of Building Regulations



Why aren't insurers paying?

- **Non-compliance with Building Regulations.** The hindsight argument. Insurers are saying that the issue should be determined based on what was known and acceptable practice at the time. As Lord Denning famously stated: *"We must not look at a 1947 accident with 1954 spectacles"*.
- **Present or imminent danger.** The arguments that:
 - If there was a present or imminent danger then the properties would all have been evacuated;
 - Even if there had been a present or imminent danger, the presence of a waking watch has removed the danger.
- **A sense of grievance.** Early pronouncements from politicians following the Grenfell tragedy regarding the role of the insurance market, made without consultation, made insurers more resistant than they may have been otherwise.

Present or imminent Danger



Zagora Management Limited & Others v Zurich [2019] EWHC 140 (TCC)

*“In my view this is a classic case where the ordinary and natural meaning of the language used directs the result. **A present danger is one which is actually occurring at the time in question, even if it is not known about.** An example would be if the supports of a tread in a fire escape staircase had so decayed that the tread was liable to collapse if used by occupants evacuating the building. **An imminent danger is one which is not present but which requires something else to happen which can properly be said to be imminently about to happen.** An example would be if the supports of the tread in the above example had almost but not quite decayed so that at some stage in the near future the tread was liable to collapse. In contrast, if the supports of the tread were liable to decay due to, for example, damp conditions within the staircase, but had not actually decayed to the point where it could be said that there was any imminent danger of collapse, that would not fall within the scope of the cover.” (Our emphasis)*

Exclusions



Consequential Loss or Indirect and/economic loss

“This policy does not indemnify Loss to the extent that it is caused by ... Any loss such as loss of enjoyment, use, income, business opportunity, inconvenience, distress or any other indirect or economic loss of any kind or description whatsoever other than as provided elsewhere in this Policy.”

- This means that losses other than the costs of repairing/replacing the defective cladding itself would not be covered.

Government to speed up cladding replacement



- On 9 May 2019, the government announced its intention to step in and fund the replacement of unsafe ACM cladding on private residential buildings.
- Communities Secretary, Rt Hon James Brokenshire MP, said:-

“Although temporary measures are in place to ensure people living in these buildings are safe, too many owners are treating this as a permanent fix. Others are trying to pass on the costs to residents by threatening them with bills running to thousands of pounds.”

“While some building owners have been swift to act, and I thank them for doing the right thing, I am now calling time on the delay tactics of others. If these reckless building owners won’t act, the government will.”

The Cladding Remediation Fund



Ministry of Housing,
Communities &
Local Government

Private Sector ACM Cladding Remediation Fund

Full Fund Application Guidance

The eligibility criteria (July 2019):-

- Funding is available for the benefit of leaseholders in residential buildings over 18m in height.
- Applicants will need to confirm that they are replacing unsafe cladding with materials of limited combustibility.
- MHCLG expects building owners to *“actively identify and pursue all reasonable claims against those involved in the original cladding installations, and to pursue warranty claims where possible”* (our emphasis).
- *“MHCLG does not rule out seeking an assignment of relevant rights of action where it considers it would be appropriate to do so”*

QUESTIONS?



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