

# Inspection obligations during the course of the works: Points to think about for Architects and Project Managers in light of Grenfell and COVID-19

by Claire King

If the Grenfell Inquiry has taught us anything it is that every professional at all stages in construction needs to take their duties seriously in order to avoid such a disaster occurring again. The Grenfell disaster was contributed to, in part, by a failure of those charged with inspecting the works (including Building Control) to do so properly and thoroughly.<sup>1</sup> However, COVID-19 and the resulting lockdowns will only have increased the difficulties in ensuring that such inspections are carried out in accordance with an underlying appointment, the common law position and the applicable duty of care.

In this article we provide a refresher of some of the basic principles governing inspections carried out by Architects and Project Managers during the course of the works, how such duties may be impacted by COVID-19 and the realities of relying too heavily on Building Control to ensure everything is safe.

## General principles governing inspection duties

*What does your appointment say?*

It goes without saying that the first place an Architect or Project Manager should look to determine the scope of their duties in terms of inspection, is their appointment. For example, an appointment providing for supervision from an Architect or Project Manager (now much rarer) is providing for a much higher level of involvement on a day-to-day basis than a mere reference to “inspection”. In particular, it would imply that the individual or business carrying out that role is on site for all or most of the time, whilst inspections are by definition limited in number, frequency and duration.<sup>2</sup> Likewise the appointment should also clarify which elements of the works are perhaps being inspected by others (such as the mechanical and electrical consultant) and therefore the extent to which the professional can rely on their inspections of those works.

### *The McGlenn principles*

However, the case of *Ian McGlenn v Waltham Contractors Limited*<sup>3</sup> lays down some useful general principles that will be taken into account when a court needs to determine if an Architect or Project Manager has fulfilled their inspection duties.<sup>4</sup> These principles are worth keeping in mind at the beginning of a project, both in terms of working out what should go into an appointment in the first place and also in terms of planning out what inspections need to be carried out and when.

1. See “Grenfell Tower: 16 council inspections failed to stop the use of flammable cladding”, *The Guardian*, 21 June 2017. See also “Shockingly poor workmanship went ‘unchecked’ in Grenfell cladding system, inquiry hears”, *Inside Housing*, 23 June 2020.
2. See Jackson & Powell on Professional Liability, 8th edition, chapter 9, “Construction Professionals”, section 4, 9-176. See also *Rowlands v Callow* [1992] 1 N.Z.L.R 178 at 197.
3. EWHC 149 (TCC).
4. See Jackson & Powell on Professional Liability, 8th edition, chapter 9, “Construction Professionals”, section 4, 9-189.

These principles are as follows:

**(a) The frequency and duration of inspections should be tailored to the nature of the works going on at the site from time to time.**

The traditional approach of having pre-determined meetings which occur every week or month at a set time is unlikely to be sufficient. For a start, a contractor will know that at other times his work will remain safe. Inspections must also be tailored to the importance of a particular stage. For example, they may need to be more frequent at a difficult stage of the works or timed to coincide with particular events on site. Finally, if a contractor has a poor reputation or track record then inspections will need to be carried out at random and uninvited to ensure they cannot be avoided.

**(b) Depending on the importance of the particular element or stage of the works, the inspecting professional can instruct the contractor not to cover up the relevant elements of the work until they have been inspected.**

The Judge in *McGlinn* noted, however, that this should not necessarily have happened if the inspections had been timed properly in the first place. This presents a difficult dilemma for the Architect if they have missed a key element of the works due to poorly timed inspections.

**(c) The mere fact that defective work is carried out and covered up between inspections will not automatically amount to a defence to an alleged failure on the part of the Architect to carry out proper inspections.**

This will depend on a variety of matters, including the inspecting professional's reasonable contemplation of what was being carried out on site at the time, the importance of the element of work in question, and the confidence they may have had in the contractor's overall competence. If, for example, there is a history of poor workmanship and defects in the works carried out in the early stages of the works it would be incumbent on that professional to perhaps increase their level of inspections.

**(d) If the element of the work is important because it is going to be repeated throughout one significant part of the building, then the inspecting professional should ensure that he or she has seen that element of the work in the early course of construction/assembly so as to form a view as to the contractor's ability to carry out that particular task.**

This would include for example the installation of a proprietary system such as perhaps the proper method for installing a specific dry lining system. In Grenfell's case it would have included ensuring that the cavity barriers in the windows were properly installed (or installed at all).

If these things are installed properly the first time, then the professional may gain some level of confidence that they will be installed properly again. Conversely if it is not, inspections may need to be increased.

**(e) Reasonable examination of the works does not require the inspector to go into every matter in detail.**

The Judge in *McGlinn* noted that it is almost inevitable that some defects will escape an Architect's or Project Manager's notice. The question is whether this was due to a failure to ensure inspections were carried out in accordance with the principles above or because, despite everything, they were simply not there at the crucial moment.

**(f) The Architect does not guarantee that their inspection will reveal or prevent all defective work. It is not appropriate to judge an Architect's performance by the result achieved.**

The mere presence of defects does not mean that an Architect or Project Manager has breached their appointment by failing to exercise the requisite skill and care. However, equally it is important to an Architect to certify anything appropriately to reflect their inspection mandate.

*But my fee doesn't cover that*

Problems often occur where the fee agreed for an Architect's or Project Manager's inspections is not perhaps as high as they would like. This in turn can lead to a reduction in the number of inspections, rushed inspections or a more junior and perhaps less qualified team member carrying out this function. This then results in defects being missed because they are covered up between inspections or defects that would be obvious to a more qualified individual being missed.

The problem for those carrying out the inspections is that their obligations are not always in line with the fees agreed. If things go wrong and serious and/or widespread defects are discovered in the completed works, the level of the fee will not act as a defence where the scope of the duty of care and level of inspections required is clear. The moral of that dilemma is clear – if the fee doesn't allow you to exercise the inspection role provided for within the agreement then don't take on that duty.

*Records, records and records*

Finally, there is one key rule not covered in *McGlinn* which every inspecting professional needs to bear in mind. That is namely the need to keep records of what has been seen, how any defects or temporary disconformities have been dealt with, and if there are continuing issues with workmanship how the concerns that should arise as a result of

this have been alleviated. All too often in defects claims you see in retrospect concerns being raised at some stage only for the inspecting party to be told it's all been dealt with and the trail then runs cold. What any professional needs to do when they are aware of issues is to follow the train of inquiry and satisfy themselves that they have had their concerns properly addressed. If there are issues, then these should obviously be shared with the employer. Any concerns and how they are dealt with also need to be recorded in writing.<sup>5</sup>

### How is COVID-19 likely to impact on inspections?

The problem for those carrying out inspections during the COVID-19 pandemic is that while construction works continue, inspections of those works will also need to continue. This was particularly difficult during the first lockdown and it remains to be seen if the quality of construction work (where construction continued) suffered as a result of this. However, the principles above still need to be taken into account despite any COVID-19 difficulties.

This means, for example, it is important that sufficiently qualified individuals still carry out key inspections where required even though older staff may sometimes be more at risk. If they are unable to because, for example, they are shielding, then ways around the problem will need to be thought about. Could a more junior team member, for example, video the relevant works and the senior team member look at them remotely? Early or late site visits when sites are less crowded may even assist in ensuring inspections aren't predictable.

### But Building Control have signed it off?

Another common refrain we hear, from both clients and professionals, when defects come to the surface after practical completion is *"but Building Control signed it off"*. The very real limitations of building control came out starkly in the Grenfell Inquiry where the Approved Inspector in question was overworked, unqualified to understand what was happening in relation to the cladding and, ultimately, signed off on work that was fundamentally unsafe.

When asked, for example, *"Do you accept that your failure to identify the missing cavity barriers generically around the windows on this building was a fundamental failing on your part?"*, the local authority appointed Approved Inspector answered:

*"I should have checked. As I say, I saw the other ones and I didn't feel it was necessary to have a window exposed."*

What is more, where a local authority Approved Inspector is used to inspect the works there will be very limited recourse against them for any losses resulting if they fail to spot defects during site inspections or they approve defective works. This is due to the

5. See Martin Ewen, "What are the inspection obligations of consultants during the works and in the run up to practical completion?" at the Fenwick Elliott Seminar What Lies Behind? presented by Nicholas Gould, Claire King and Martin Ewen.

infamous case of *Murphy v Brentwood*<sup>6</sup> which limits a defective building owner's right to claim damages in tort from a local authority building control inspector. This is on the grounds that such losses constitute "pure economic loss" (unless of course the defects result in death or personal injury).

Even where private Approved Inspectors are used so there is a direct contractual link allowing recovery of damages for any breaches, their terms and conditions tend to be unhelpful. Approved Inspectors are by definition carrying out a statutory role focused on safety. In reality then it is more likely that other inspecting professionals' PI insurance will end up on the line than that of Approved Inspectors.

### Overview

Grenfell should quite rightly serve to highlight to all professionals the care that needs to be taken at each stage of the construction process to ensure that buildings are defect free and, even more importantly, safe. The McGlenn principles provide a useful guide as to how the court expects Architects (and those with similar inspection functions such as Project Managers) to approach their inspections during the course of the works, although obviously the terms of any underlying appointment will also impact on this.

What is clear is that inspections need to be planned properly so that they are not just a "tick box" exercise. The inspections carried out need to stand the best chance they can of ensuring any defects are actually picked up and can be rectified. The difficulties in achieving this have no doubt been exacerbated by COVID-19. As such, even more care and planning will be required to ensure that they are carried out properly and with the requisite skill and care.

6. [1991] UKHL 2.

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