CONTRACTOR'S ATTEMPT TO PASS ON LIABILITY FOR FIRE SAFETY DEFECTS FAILS

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WHAT HAPPENED?

In *Lendlease Construction (Europe) Limited v. Aecom Limited [2023] EWHC 2620 (TCC)*, the Technology and Construction Court ("TCC") dismissed a claim by Lendlease to pass on its liability to Aecom, its mechanical and electrical consultant, that resulted from disputes arising out of the construction of a new Oncology Centre (spanning 13 floors and 67,300m2) at St James's University Hospital in Leeds. Mr Justice Eyre concluded that:

> "The construction of the Oncology Centre did not comply with HTM 81 as well as other applicable Health Technical Memorandums relating to fire safety."

- the consultancy agreement was not back-to-back with Lendlease's obligations on the project;
- two prior settlement agreements (one with Aecom and one with Engie Buildings Limited ("Engie"), settling a different case) undermined Lendlease's claims; and
- the limitation period had elapsed. This conclusion was reached despite the judge generously overlooking some mistakes with the execution of the deed and extending the limitation period from six to twelve years.

This loss is a significant blow to Lendlease who just last month was ordered to pay £5m to St James's Oncology SPC Limited ("St James") because the construction of the Oncology Centre did not comply with HTM 81 as well as other applicable Health Technical Memorandums relating to fire safety. Lendlease had also settled a separate case with the hospital's maintenance contractor, Engie, for approximately £3m.

The remainder of this article will briefly analyse what went wrong for Lendlease and highlight what lessons other contractors/relevant parties can learn from this case.

WHY WAS THE CONSULTANCY AGREEMENT NOT BACK-TO-BACK?

The judge considered the extent to which Aecom's obligations to Lendlease reflected those of Lendlease upstream to St James.

Lendlease was obliged to achieve a particular outcome and comply with the relevant standards set out in the Employer's Requirements. However, the judge pointed to clause 4.01 of the consultancy agreement and determined that Aecom was not under the same obligation:

"Notwithstanding any other clause in this Agreement or the Principal Agreement or term implied by statute or common law, the Consultant shall not be construed to owing [sic] any greater duty in relation to this Agreement than the use of necessary reasonable skill, care and diligence pursuant to this Clause 4.01."

Therefore, the consultancy agreement did not operate to pass Lendlease's obligations down to Aecom.

DID AECOM HAVE A CONTINUING OBLIGATION?

"The consultancy agreement did not contain any express requirement for Aecom to review its design after construction or the Plant Room as constructed."

Mr Justice Eyre then considered whether Aecom had a continuing duty to review matters and/or to advise and/or warn Lendlease of any issues after having provided its original design. Lendlease's argument was that Aecom should have warned that the fire strategy and configuration of Plant Room 2 in Rev 19 were not compliant with good practice nor with the applicable standards.

However, the judge did not agree. It was determined that where the contractual obligation is solely to provide a design, the contract is unlikely to be interpreted as imposing an obligation on Aecom to review the design after it has been supplied.

The consultancy agreement did not contain any express requirement for Aecom to review its design after construction or the Plant Room as constructed. Further, the judge concluded that the deviations from the fire safety standards were subsequent to Aecom's initial work and outside of its scope.

HOW DID THE SETTLEMENT AGREEMENTS UNDERMINE THE CASE?

Settlement Agreement with Aecom

The judge considered the scope of the claims covered by a preceding settlement agreement with Aecom and whether the alleged defects on which Lendlease now relied were precluded as they had already been compromised.

He concluded that the agreement released Aecom from any liability to Lendlease in respect of defects existing at the date of the settlement agreement provided that Lendlease knew or ought to have known of the defect. It was implicit that as well as knowing of the defect it was necessary that Lendlease knew or ought to have known that the defect related to a matter for which Aecom was responsible.

Therefore, the vast majority of Lendlease's claims against Aecom had already been finally resolved by way of the settlement agreement and could not now be relitigated.

Settlement Agreement with Engie

With the sums paid to Engie by way of their settlement agreement, the central dispute was as to whether these sums were recoverable by Lendlease from Aecom.

"This case provides useful guidance as to what should be considered in this kind of multi-party dispute, which includes the drafting of the original legal agreements."

The judge was satisfied that Lendlease had shown that it was reasonable to enter into a settlement agreement with Engie. However, Lendlease failed to demonstrate that the settlement figure was reasonable. The judge recalled "*the low hurdle that has to be surmounted to show that a settlement was in a reasonable figure. However, [it was] concluded that in respect of a number of the defects Lendlease has failed to surmount that hurdle*".

The lack of supporting evidence was lamented. Lendlease's argument that the settlement figure was lower than Engie's claimed figure and was not enough by itself to justify the reasonableness of the settlement figure. Consequently, these costs were not recoverable against Aecom.

WHAT MISTAKES WERE MADE WITH THE DEED AND WHY HAD THE LIMITATION PERIOD EXPIRED?

Aecom advanced two limitation defences:

- the consultancy agreement operated as a contract rather than a deed meaning that the relevant limitation period was six years and all claims had expired; and
- even if the consultancy agreement was a deed and the relevant limitation period was twelve years, then the claims were still statute-barred, because the cause of action accrued more than twelve years before the commencement of proceedings on 30 May 2019.

Mr Justice Eyre decided that the consultancy agreement took effect as a deed even though it was incorrectly executed. Those errors were that:

- the wrong signature block had been used and the signatures were in a section where a company seal was required, but none was affixed; and
- it was also signed by two people purporting to execute it as a deed of a company by signing as directors, but the signatories were not actually directors.

It was concluded that the intention was to execute the document as a deed and the signatories had the apparent authority and approval of the company, notwithstanding the technical deficiencies.

However, the judge followed the decision by Mr Justice Ramey in *Oxford Architects v Cheltenham Ladies College [2006] EWHC 3156 (TCC)* and concluded that a contractual time limit for bringing claims by a certain date did not override the statutory limitation period of twelve years without the document clearly intending to do so. Accordingly, the limitation period for the claims had elapsed.

WHAT CAN WE LEARN FROM THIS CASE?

This case provides useful guidance as to what should be considered in this kind of multi-party dispute, which includes the drafting of the original legal agreements. The parties should also pay close attention to whether documents have been properly executed and give specific regard to prescribed obligations.

Secondly, there needs to be a clear paper trail of the intent and considerations of settlement agreements, so that it is apparent to all what is being compromised and any subsequent claims can be justified.

With the benefit of hindsight, potentially all three reasons why Lendlease's claim failed could have been avoided if the consultancy agreement and relevant settlement agreements had been drafted differently.

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