Neutral Citation Number: [2023] EWHC 2620 (TCC)

Case No: HT-2019-000180

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 01/11/2023

Before:

MR JUSTICE EYRE

- -

Between :

LENDLEASE CONSTRUCTION (EUROPE) LIMITED	**Claimant**
- and -	
AECOM LIMITED	**Defendant**

- -
- -

Alexander Hickey KC (instructed by **Shoosmiths**) for the **Claimant**
Lynne McCafferty KC and Matthew Thorne (instructed by **Beale Law**) for the **Defendant**

Hearing dates: 30th November, 1st, 5th, 6th, 7th, 8th, 12th December 2022 (further submissions 10th March 2023)

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

Mr Justice Eyre:

Introduction.

1. These proceedings arise out the construction of a new Oncology Centre at St James's University Hospital, Leeds ("the Project"). The Claimant ("Lendlease") contends that the Defendant ("Aecom") was in breach of its obligations to Lendlease under a contract to provide mechanical and electrical consultancy services in relation to the Project ("the Consultancy Agreement") and seeks to recover losses said to have been caused by such breaches[1].

2. The Project has already given rise to proceedings with St James's Oncology SPC Ltd ("Project Co") bringing a claim against Lendlease and the latter's parent company. Those proceedings culminated in a judgment handed down on 12th October 2022 by Joanna Smith J at [2022] EWHC 2504 (TCC). My summary of the background to the current proceedings draws heavily on the analysis undertaken by Joanna Smith J and I have adopted much but not all of her analysis and nomenclature.

3. The Oncology Centre, which is located in the Bexley wing of the hospital, is the largest oncology centre in the north of England. It contains 13 levels and has an approximate floor area of 67,300m^2 with 2,400 rooms in total and beds for 350 in-patients spread across 14 wards. Its facilities include 4 operating theatres, an intensive care unit, a high dependency unit, bunkers for radiotherapy treatment, brachytherapy, chemotherapy, imaging and radiology departments, research facilities and pharmacies. Many of these facilities use medical equipment and other machines which require an electricity supply.

4. The Project involved the design, construction, operation, and maintenance of the Oncology Centre and was undertaken pursuant to an agreement ("the Project Agreement") under the Government's Private Finance Initiative. The Project Agreement was entered on 15th October 2004 between Project Co and the Leeds Teaching Hospitals NHS Trust ("the Trust"). The Project had begun in about 2002 and Aecom and Lendlease had been undertaking work in relation to it since then. Pursuant to the Project Agreement and the other agreements to which I will now turn the Oncology Centre is operated by Project Co and maintained by Engie Buildings Ltd ("Engie").

The Relevant Contracts.

5. In addition to the Project Agreement a number of further agreements were entered on 15th October 2004. Those which are relevant for current purposes are:

   i) Project Co's engagement of Lendlease under a design and build contract ("the D&B Contract") to build the Oncology Centre.

   ii) Lendlease's engagement of Aecom under the Consultancy Agreement.

[1] The names of both parties and of some of the other companies involved in the underlying dealings have changed since the relevant agreements were first entered and I will use throughout the current names of those involved.

iii) Project Co's engagement (by way of the novation of an agreement with Lendlease) of Engie to carry out estate maintenance renewal and replacement services at the Oncology Centre over the 30 year lifetime of the PFI Project ("the EM Contract").

iv) A tri-partite agreement between Project Co, Lendlease, and Engie ("the Co-Operation Agreement") setting out their respective obligations and liabilities. This made provision for the resolution and re-allocation of claims and liabilities between those parties. As explained by Joanna Smith J the effect was that Project Co could require Engie to carry out remedial works and, if those remedial works related to defects caused by Lendlease, Engie was entitled to claim an indemnity for the cost of those works from Lendlease.

v) An agreement between Aecom and Project Co ("the Collateral Warranty") under which Aecom gave Project Co a warranty in respect of its performance under the Consultancy Agreement.

6. Lendlease and Aecom disagree about the scope of the Consultancy Agreement and Aecom's obligations under it. In short Lendlease says that Aecom was to be responsible for the design of the mechanical and electrical services in relation to the Project and to be the lead consultant responsible for the Fire Safety Strategy ("the Fire Strategy") and the design thereof. Lendlease says that it sub-contracted to Aecom its obligations to Project Co under the D&B Contract in respect of MEP services and fire safety design. Aecom says that when properly analysed its obligations under the Consultancy Agreement were rather more limited and were not an exact replication of Lendlease's obligations to Project Co. In addition in June 2005 Lendlease had engaged Rotary Yorkshire Ltd ("Rotary") as its installation sub-contractor for MEP services. A further aspect of the dispute about the extent of Aecom's obligations concerns the extent to which it was open to Aecom to leave matters of detail to Rotary.

The Procedural and Litigation Background.

7. Practical completion was certified on 14th December 2007. There followed a period of dispute between Aecom and Lendlease with the former asserting that fees were outstanding and the latter alleging defects in Aecom's performance under the Consultancy Agreement. This dispute culminated in a deed of settlement ("the Settlement Agreement") executed on 28th September 2012. The effect of that agreement on the claims now being made is in issue between the parties and will be considered further below.

8. Concerns about Plant Room 2 were first raised with Lendlease on behalf of Project Co in November 2017 but it was only in July 2018 that Project Co was advised that remedial works were necessary. Lendlease took these matters up with Aecom in 2018 initially in respect of issues which had been raised by Engie but subsequently in respect of the points being advanced by Project Co.

9. On 11th December 2019 Project Co and Engie commenced proceedings against Lendlease. Defects 1 – 9 of the Project Co action related to Plant Room 2 ("the Plant Room 2 Defects"). The Project Co claim included further defects, Defects 10 - 25, which were the same as those forming the basis of the claim by Engie.

Some of those were in respect of the MEP design while others concerned questions of workmanship.

10. By a settlement agreement of 9th November 2021, reached after a mediation, and a consequent Tomlin Order Lendlease settled the claims of Project Co and Engie in respect of Defects 10 – 25 in the sum of £2.9m. That was broken down as to £2.7m in respect of the defects with that sum being further broken down by reference to the particular defects in the amounts set out in a further schedule together with contributions of £100,000 to the costs of each of Project Co and Engie.

11. The Project Co claim in respect of Defects 1 – 9 (save for Defect 2 in respect of which the claim was abandoned at trial) proceeded to trial and as a consequence of Joanna Smith J's judgment Lendlease was found liable to Project Co in the sum of £5,048,534.39 together with costs.

12. Lendlease's claim against Aecom in these proceedings was issued on 30th May 2019. Lendlease seeks to pass down to Aecom liability in respect of matters which it contends were the consequence of Aecom's breaches of its obligations under the Consultancy Agreement. Lendlease says that the Plant Room 2 Defects were all the consequence of Aecom's breaches and that it is entitled to be indemnified in the full amount of its liability to Project Co. Lendlease maintains that Aecom was in breach by reason of the facts pleaded in respect of Defect 2 but accepts that no separate loss flowed from that alleged breach. In respect of Defects 10 – 25 Lendlease does not attribute the workmanship defects to Aecom but it does say that the latter is responsible for the defects in relation to matters of MEP design. These are said to be Defects 11, 13, 14, 15, 18, 19, 21, 22, and 23 ("the Non Plant Room 2 Defects"). Lendlease says that £2,161,000 of the sum payable in settlement of the claim relating to Defects 10 – 25 is attributable to those defects. It also claims £463,599.71 for additional design costs relating to Defects 13, 18, and 19; £62,300 in respect of Aecom design fees; £159,178.35 for management time; and £160,080 (by way of reduction of the sum of £200,000) in respect of the legal costs paid to Project Co and Engie.

13. Although Lendlease's claim was expressed in the pleadings as being in respect of breach of contract and/or negligence Mr Hickey KC made clear in opening the case that the claim being pursued now was only for the alleged breaches of Aecom's contractual obligations under the Consultancy Agreement (it being accepted that any claim in negligence would be statute-barred). To the extent that reference was made to negligence or to a breach of a duty of care that was now to be regarded as a reference to the contractual duties of care and skill which Lendlease said derived from the Consultancy Agreement.

Plant Room 2 and the Proceedings before Joanna Smith J.

14. Joanna Smith J summarised the structure and operation of Plant Room 2 together with the design specifications under the Project Agreement at [8] – [16] of her judgment. As a consequence a rather shorter summary will suffice here (though it will be necessary to consider some aspects in rather more detail when I consider the alleged defects).

15. Plant Room 2 is the central electrical and mechanical hub for the Oncology Centre. It is 1,927m² in area and contains a number of rooms or compartments. These include the following electrical plant rooms: three high voltage (HV) /low voltage (LV) transformer rooms, three LV switch rooms, two generator rooms containing a total of three generators (two in one room and one in the other), and two generator LV switch rooms. Together those rooms form the Electrical Substation and this provides the electrical supply for all the medical equipment and other facilities in the Oncology Centre. There were two mechanical risers on the external wall of the Electrical Substation.

16. The Fire Strategy underwent a number of revisions. Revision 12 ("Rev 12") was expressly incorporated into the Project Agreement. Rev 12 provided for 60 minutes' fire compartmentation around the Electricity Substation and the rooms within it, separating in particular: each of the HV/LV switch rooms, one of the generators from the other two, and the generator control panels. This appeared from the drawing accompanying Rev 12 which coloured in red (designating 60 minutes fire compartmentation) the partitions between the rooms in the Plant Room 2 and from the text of the Fire Safety Strategy document which said at section 7.5:

> "The generators shall be located within the level –1 designated plant area, contained within their own rooms. Each generator room is a 1 hour fire compartment and a separate designated fire zone."

17. There were a number of further revisions. Revision 19 ("Rev 19") was dated 19th November 2007 and so was very shortly before practical completion which was certified on 14th December 2007. An architect's drawing Rev E04 dated 20th November 2007 was attached to it. These showed the entirety of Plant Room 2 as a single fire compartment. The partitions between the rooms within Plant Room 2 were no longer marked as having 60 minute fire rating. The text of section 7.5 had been altered to remove the references to the generators being in "rooms" and to each generator room being a 1 hour fire compartment. It now said:

> "The generators shall be located within the level –1 designated plant area, contained within their own room within the main plant room area."

18. As Joanna Smith J explained the effect of these changes was that "the Electricity Substation was no longer protected by fire compartmentation from the rest of Plant Room 2 and the individual rooms within the Electricity Substation were no longer separated from each other with fire compartmentation".

19. Joanna Smith J described Plant Room 2 "as built" at [16]. In short there are dividing partition walls between the various compartments and rooms. Some of these are conventional plasterboard stud walls while others are fire-rated lightweight partition walls. However, none of these walls effect fire compartmentation between the rooms. That is because although the walls were formed to full height (subject to the point I address in the next paragraph) they all contain openings through which the ductwork containing the electrical and mechanical services passes. The openings were larger than the pipes passing through them and were not sealed nor provided with dampers which would close the openings in the event of fire or smoke. The consequence is that such fire

compartmentation as would otherwise have been provided by the partition walls was compromised.

20. There was a peripheral dispute as to whether the partitions should in fact be described as having been built to full height and if not where the responsibility lay. Miss McCafferty KC made the point that some of the walls did not extend to soffit height. Mr Hickey described the position as being that the partitions were designed so as to allow the cables to pass over the top of the walls and that the walls were not built to full height around the resulting penetrations. That accords with the description given by Mr Middleton although he criticises the failure to complete the construction around the penetrations. The dispute on this point is peripheral because it is not disputed that the partition walls did not effect fire compartmentation. This was principally because of the absence of dampers and so even if the walls had been built to full height around the penetrations there would not have been fire compartmentation. However, the fact that the walls were not completed to soffit height is potentially relevant to quantum and gave rise to a subsidiary argument about whether there was an element of double-recovery in Lendlease's figures.

21. Although practical completion of the Project as a whole was on 14th December 2007 it is apparent that Plant Room 2 had been completed some time before then. The August 2006 monthly report recorded that the B1 plantrooms were practically complete and that commissioning had commenced (and this is confirmed by the As Built Construction Programme). It is not suggested that any material alterations were made to Plant Room 2 after that and it follows that the relevant construction of that room had been completed at some point before the end of August 2006. Aecom's design had been provided to Lendlease just over a year before that in July 2005.

22. It is to be noted that although there was much focus before me on the absence of fire compartmentation Lendlease relied on other defects in relation to Plant Room 2 including the absence of a fire suppression system.

23. The circumstances in which Rev 19 came to be produced and the responsibility for it were matters of significant dispute before me and I will consider those in detail below. In short Aecom says that Rev 19 was produced to reflect the "as built" state of the Plant Room; that Aecom only learnt of the absence of fire compartmentation in Plant Room 2 when it was told of this by Lendlease in November 2007; that Rev 19 took the form it did as a consequence of Lendlease's insistence that it reflect the "as built" Plant Room; and that Aecom's reservations about this were overcome by insistence from Lendlease and confirmation that the installation in that way had been approved by Leeds Building Control. For its part Lendlease said that the absence of fire compartmentation was a consequence of the design which had been provided by Aecom and that Aecom remained obliged to advise Lendlease of Rev 19's non-compliance with the Health Technical Memoranda to which I will turn shortly.

24. At [20] – [28] Joanna Smith J summarised the process whereby concerns were raised about the lack of fire compartmentation in Plant Room 2 after deficiencies in the fire stopping in the Oncology Centre were identified in 2014. These

concerns led to Project Co's conclusion that remedial works were necessary and ultimately to Project Co's claim against Lendlease.

25. As Joanna Smith J explained at [144] Health Technical Memoranda ("HTMs") are issued by NHS Estates, an Executive Agency of the Department of Health and Social Care and are designed to "give comprehensive advice and guidance on the design, installation and operation of specialised building and engineering technology used in the delivery of healthcare".

26. Under the Project Agreement Project Co's design was to comply with the principles outlined in HTM 81 or to follow a fire-engineering approach of a standard equal to or better than that laid down in HTM 81 with HTM 2007 and HTM 2011 and BS7671 being relevant in relation to the reliability and integrity of the electrical supplies.

27. In summary Project Co's case before Joanna Smith J was that its obligations to the Trust had been passed down to Lendlease and that Lendlease was in breach because the construction of the Oncology Centre did not comply with HTM 81 or the other applicable HTMs. The nature of Lendlease's obligations was not in dispute before Joanna Smith J. Rather Lendlease contended that Rev 19 represented an adequate fire-engineered approach in respect of Plant Room 2 and to the extent which the approach departed from the requirements of the Project Agreement or the D&B Contract it was one which had been approved by Project Co and the Building Control officers of Leeds City Council. As Joanna Smith J pointed out Lendlease's focus on its fire strategy defence did not assist in relation to those elements of Project Co's claim which were concerned with issues of business continuity in respect of which HTM 2007, HTM 2011, and BS 7671 came into play.

28. It was common ground between the experts before Joanna Smith J that the Plant Room 2 did not comply with HTM 81: principally but not only because of the removal of the fire compartmentation in that room. Joanna Smith J concluded that Rev 19 did not amount to a justified fire engineering approach which provided a standard equivalent to or better than that of HTM 81. That conclusion was part of the detailed analysis undertaken by Joanna Smith J at [173] – [243]. In the course of that analysis Joanna Smith J considered whether Rev 19 had been approved by the Trust, Project Co, or the Building Control officers. That exercise had to be based solely on the documents because there had been no evidence before Joanna Smith J from any of those who had been involved in the matter in the period leading up to the adoption of Rev 19. The judge concluded that neither the Trust nor Project Co had approved Rev 19.

29. At [206(2)] Joanna Smith J found that by his email of 29th October 2007 Nigel Brown of Leeds Building Control had agreed that there was no need to provide compartmentation or separation between the individual rooms within Plant Room 2. However, she said that this was not to be seen as indication of the approval of a fire engineering approach and that there was no evidence that Mr Brown "understood, acknowledged, or agreed" that Rev 19 involved a derogation from HTM 81. Joanna Smith J accepted Project Co's argument that Mr Brown's email amounted to "an exercise in retrospective approval for construction decisions that the email exchanges indicate were in `conflict with the drawn requirements'". In

any event, as explained at [227] – [229] Joanna Smith J found that neither Mr Brown's email nor the issue of a Building Regulations Completion Certificate had any contractual significance as between Lendlease and Project Co.

30. Not only was Joanna Smith J not assisted by witness evidence on these matters but she was addressing the position as between Lendlease and Project Co. I, however, have heard the evidence of Derek Middleton who was involved on behalf of Aecom in the events leading up to Rev 19 and have heard argument on behalf of Aecom. Moreover, Aecom was not a party to the proceedings before Joanna Smith J. The issue for me in relation to Rev 19 is the responsibility as between Lendlease and Aecom for the Fire Strategy as contained in that document and the associated drawings. It follows that Joanna Smith J's analysis can provide me with little assistance on this question.

31. As I have explained above Joanna Smith J gave judgment for Project Co in the sum of £5,048,534.39 and costs. There was an issue before Joanna Smith J as to the proper breakdown of the sums claimed by Project Co as the costs of the remedial works between the different defects. As she explained, at [365]- [366], having found that all the defects alleged had been established Joanna Smith J did not need to address this question. I will consider below the extent to which I need to address the breakdown of the sums.

The Issues.

32. The principal issues to be considered are as follows. As will be seen there are various sub-issues underlying the principal issues.

i) The nature of Aecom's obligations to Lendlease and their relation to the latter's obligations to Project Co. This will involve consideration of the extent of Aecom's design responsibility and the extent to which it is answerable for the consequences of the actions of Rotary (although in light of the conclusions reached on a number of the other issues rather less will turn on the latter point than appeared to be likely at one stage); the extent to which Aecom's obligations to Lendlease reflected those of the latter to Project Co including the issue of the extent to which Aecom was obliged to achieve a particular outcome or attain a particular standard as opposed to exercising reasonable care and skill (and the extent, if any, to which there is a difference between obligations so described); and whether Aecom had a continuing duty to review matters and/or to advise and/or warn Lendlease whether after having provided its design originally or upon being asked to provide Rev 19.

ii) Whether and if so to what extent the claim is statute-barred. There are two aspects of this issue. The first is a matter of the construction of the Consultancy Agreement. It will be necessary to consider whether the Consultancy Agreement took effect as a deed and whether, if it did not take effect as a deed, it nonetheless provided for a limitation period of 12 years. It is not suggested on behalf of Lendlease that the claim was brought within time if the limitation period is one of 6 years. The second aspect arises from Aecom's contention that even if the relevant limitation period is one of 12 years significant parts of the claim are statute-barred. For Aecom Miss McCafferty says that Lendlease's causes of action in respect of the Non-Plantroom 2 Defects all arose before 30th May 2007 and that in respect of the Plantroom 2 Defects all save those resulting from the

issuing of Rev 19 on 19th November 2007 are statute-barred. In this regard the outcome will depend in part on the conclusion reached as to the nature of Aecom's duty and in part on that reached in respect of the origin of and responsibility for Rev 19 and it will need to be considered after the resolution of those questions.

iii) The proper interpretation and, accordingly, the effect of the Settlement Agreement. It will be necessary to consider the scope of the claims covered by that agreement; whether the alleged defects on which Lendlease now relies ought reasonably to have been known to it at the time of the agreement; and, if so, whether the agreement precludes the bringing of a claim in respect of those defects.

iv) The origin of and the responsibility for Rev 19 together with its relation to the as-built state of Plant Room 2. The conclusion on this issue will affect the determination of the obligations owed by Aecom at that time and consequently whether there was a breach of such obligations. As noted above the conclusion on this issue will also be relevant to Aecom's limitation defence.

v) There is a limited issue as to contributory negligence. Aecom contends that Lendlease was contributorily negligent by reason of the omission of internal fire walls enclosing the G2 generator panel in Plant Room 2. This is advanced as a defence in respect of Defects 1 and 1C and I will consider it in relation to those.

vi) The determination of liability and quantum in respect of each of the particular alleged defects in light of the conclusions reached on the preceding issues. In addition to the points already noted in relation to liability and limitation Aecom takes issue with the quantum of the claim. In that regard it will be necessary to consider the effect of the settlement with Engie of the Non-Plant Room 2 Defects and of the judgment of Joanna Smith J in relation to the Plant Room 2 Defects.

The Principal Relevant Provisions of the Consultancy Agreement.

33. The recital to the Consultancy Agreement defined the "Principal Agreement" as the D&B Contract. The interpretation provisions at clause 3.04 provided in commonplace terms that the headings in the Consultancy Agreement were "for convenience only and shall not affect its interpretation".

34. Clause 1.01 of the Consultancy Agreement provided that:

> "The Consultant shall be deemed to have notice of and shall observe the Employer's Requirements and/or the Project Agreement and/or the Principal Agreement to the extent the same shall have been issued to the Consultant by the Contractor and to that extent shall be deemed to have full knowledge of the terms and conditions of the Employer's Requirements and/or the Project Agreement and/or the Principal Agreement. To the extent of the obligations of the Consultant as set out in this Agreement, the Consultant shall ensure that no act, default or omission of the Consultant shall cause or contribute to any breach by the Contractor of any of its obligations contained in the Employer's Requirements and/or the Project Agreement and/or the Principal Agreement."

35. Clause 1.02 said:

> "In consideration of the Consultancy Fee set out in the First Schedule, the Contractor appoints the Consultant as the Structural and Services Engineer on the terms set out below for the provision of Consultancy Services referred to in the Second Schedule and in particular, in connection with the Principal Agreement to be entered into with the SPV by the Contractor at Financial Close."

36. By clause 2.16 "design" was defined as:

> "The calculations, drawings, specifications, plans, advice, submissions and other documents prepared by the Consultant in accordance with the Second Schedule."

37. By clause 2.19 the "design team" was defined as:

> "The team comprising the Contractor, the Consultants with design responsibility and all Subcontractors with design responsibility."

38. Clause 4.01 provided a warranty in these terms:

> "The Consultant warrants that he has exercised and will exercise all reasonable skill care and diligence in conformity with the normal professional standards of a consultant holding himself out as a competent consultant experienced in the provision of such services for projects similar in scope and complexity to the Works and having regard for the dates and periods stated in the Contract Programme and Design Service Programme and duties herein described and will comply in all respects with the requirements of the local authority, statutes, regulations, and codes of practice in force and relevant to the design of the Works, including but not limited to fire, health and safety. 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 any greater duty in relation to this Agreement than the use of necessary reasonable skill, care and diligence pursuant to this Clause 4.01."

39. Clause 6.01 stated that:

> "The Consultant shall act upon all written instructions issued by the Contractor as soon as reasonably practicable, including but not limited to any variation in relation to an addition, modification, deferment, omission, reduction from or substitution of any of the Consultancy Services. Any adjustment to the Consultancy Fees for any such variation shall be ascertained in accordance with Clauses 5.13 or 5.14 as appropriate."

40. Clauses 6.04 and 6.05 stated:

> "6.04 The Consultant shall exercise all reasonable skill, care and diligence to see that there will not be recommended or selected in relation to the Consultancy Services, or post completion commissioning or in the rectification of any defects which are required under the Contract to be carried out, materials which are generally known to be
>
>> 6.04.1 deleterious to health and safety or the durability of the building and/or other structures and/or facilities and/or finishes and/or plant and machinery forming part of the Works in the particular circumstances in which they are used or
>>
>> 6.04.2 which are otherwise not in accordance with the Building Research Establishment Digest, British Standards, equivalent European or International standards recognised in the United Kingdom, Codes of Practice or
>>
>> 6.04.3 which do not otherwise accord with established and accepted UK building and/or established and accepted UK engineering practice or

> techniques current at the date of recommendation or selection as the case may be."

> "6.05 The Consultant shall inform the Contractor forthwith in the event of the Consultant becoming aware that any materials which are not in accordance with Clause 6.04 above. This clause does not create any additional duty for the Consultant to check the work of others which is not required by this Agreement."

41. Under the heading "consultant to comment on drawings, specifications, and designs" clause 6.08 provided that:

> "Where necessary the Consultant shall comment upon such drawings, specifications, agreements and the like as may be received by the Consultant from other Consultants, the Contractor, Subcontractors or other specialists which touch or concern the Consultancy Services and provide such comments within 5 Working Days of receipt by the Consultant, or as otherwise agreed with the Contractor. The Consultant's comments shall not relieve the party who has produced or caused to be produced on their behalf the drawings, specifications, agreements and the like in respect of the Works of any liability in respect of the same, and the Consultant shall not be liable for the same."

Clause 6.12 said:

> "6.12 In performing the Consultancy Services, the Consultant shall:
>
> 6.12.1 insofar as it is within its control or the control of any specialist subconsultant, subconsultant or other person engaged by the Consultant in connection with the provision of the Consultancy Services, provide advice, documents (including designs, drawings, information and specifications), consents, comments, approvals, instructions, certificates and reports promptly, efficiently and in good time in accordance with the Construction Programme and the Design Service Programme (as developed from time to time) and advised by the Contractor. The Consultant shall not be responsible if the Consultancy Services are not completed within the required timescales to the extent that the same is due to the negligence or default of others, save for any specialist subconsultant, subconsultant or other person engaged by the Consultant in connection with the provision of the Consultancy Services. If the performance of the Consultancy Services is delayed, the Consultant shall use its best endeavours to expedite the provision of the Consultancy Services in order to recover the delays without any additional cost to the Contractor save to the extent that the the performance of the Consultancy Services is delayed due to the negligence or default of others, in which case the provisions of clause 6.01 shall apply, and the Consultant shall be entitled to payment in accordance with clause 5.13, but in doing so the Consultant shall at all times comply with its obligations under this Consultants Agreement. For the avoidance of doubt the Consultant's liability in respect of delay related costs shall only apply if and to the extent that the Consultant has failed to exercise reasonable skill and care as set out in clause 4.01 or the Consultant has committed an error or omission.; and
>
> 6.12.2 The Consultant shall have due regard to the Employer's Requirements (as developed or amended from time to time) and shall immediately advise the Contractor (with reasons) if the Consultant considers that any of the objectives and requirements in the Employer's Requirements are not reasonable or attainable."

42. Clause 6.14 provided for Aecom to advise as to the making of applications in these terms:

> "The Consultant shall advise the Contractor in writing in accordance with the Contract Programme and Design Service Programme whenever it is necessary for the Trust SPV Contractor to make applications for approval under Building Acts, Regulations and other statutory requirements as are necessary for the performance of the Works, provided always that the Consultant shall advise the Contractor of the need to make such applications on a date which, having regard to the Completion Date is neither unreasonably distant from nor unreasonably close to the date on which it is necessary for the Contractor to receive such approvals. Following advice from the Consultant, the Contractor shall instruct the Consultant to make the necessary applications for approval under Building Acts, Regulations and other Statutory Requirements."

43. By clause 6.19 the parties acknowledged that Lendlease had relied and would be relying on Aecom's expertise in the provision of the Consultancy Services.

44. By clause 8.01 the architect was designated as the Lead Designer as follows:

> "The Architect shall be responsible for the co-ordination and integration of all design Information provided by the Design Team the Contractor pursuant to the Principal Agreement including the issue of all drawings and other detail and will be deemed to be the Lead Designer."

45. Mr Hickey relied on clauses 14.01 and 14.06 in support of his argument that the Consultancy Agreement provided for a 12 year limitation period and I will address them in the context of that argument.

46. The Consultancy Services were set out in the Second Schedule to the Consultancy Agreement. Section 5 was the "Building Services Engineering Consultant – Schedule of Duties" and appendix 3 to that addressed the "Fire Engineering Consultancy Services". The schedule contained three matrices setting out in tabular form the responsibilities of the different participants at different stages in the Project. Thus Matrix 1 identified which consultant or consultants had responsibility to "lead and coordinate", "design and draw", "advise and sub-coordinate", or "coordinate" at different stages. There were a number of respects in which Aecom was designated as responsible to lead and coordinate. Matrix 2 similarly addressed responsibility for coordination of design. Matrix 3 addressed "MEP Services Installation Design Activities". It did so in three columns: "Design Activity", "Responsibility", and "Additional Explanation". The Responsibility column was broken down into three further columns: "Designer", "Installer", and "Other" with boxes entered to indicate which of those had responsibility for which matters in the Design Activity column.

47. Paragraph 1.11 of Section 5 provided that the "allocation of design responsibilities" was to be in accordance with specified BSRIA Technical Notes and with Matrix 3. Paragraphs 2 and following then set out the services to be provided broken down by stages. It is relevant to note that Aecom had extensive responsibilities at all stages. Paragraph 6 detailed Aecom's responsibilities in the "Post Contract Pre-Construction and Construction Period". The thirty-one used sub-paragraphs are to be read as a whole but the following are of particular note:

> "6.1 Regularly review and update a Design Programme for the issue of information and submissions for approval including all builder's work requirements throughout the duration of the Contract. Issue a schedule of all building services drawings and

other information to be provided for the Works, including a building services design drawings register."

6.2 Update the information provided in the previous Stage so that the building services designs and specifications are compliant with those defined in the Contract.

6.3 Re-evaluate the building services design and consider alternative products and materials and value engineer the design with the other members of the Design Team, sub-contractors carrying out design and the Contractor to ensure the most economical design solution, subject to the constraints imposed by the Accommodation Output Specification. Participate in Value Engineering workshops if required.

6.4 In conjunction with the Contractor and other Consultants, agree and confirm design and co-ordination responsibilities for each proposed sub-contract element.

…

6.6 Provide when required relevant drawings, specifications and schedules for the tendering and/or placing of sub-contract orders for the building services works.

6.7 When required certify compliance of the design and specifications with all relevant current legislation. Advise on and assist the Contractor to obtain any necessary derogations.

6.8 Review, comment upon and liaise with the Lead Designer to assist him co-ordinating the building services subcontractors' designs and production information, and advise on non-compliance with the brief and design programme requirements. Review and comment upon whether the detailed design developed by the design and install sub-contractors complies with the construction sequence, temporary works requirements and methodology as determined by the Contractor's Construction Programme and is within the cost allowance in the Contractor's Proposals. Encourage value engineering by Sub-contractors.

…

6.10 Advise the Contractor of any variations arising from the sub-contractors' designs, assist in their evaluation, and advise on their impact on the other building elements.

6.11 Liaise with the Lead Designer to assist him co-ordinate and ensure that sub-contractors' designs are fully co-ordinated with the design by the other Consultants and respect the tolerances defined by the lead Consultant at trade and zone interfaces.

…

6.13 Continue discussion with Statutory, Fire and other Regulating Authorities and advise the Contractor and other Consultants regarding the placing of orders for incoming Statutory Services. Provide the necessary information to enable the Architect to secure the clearance of Town Planning matters, Building Regulations and any other regulatory approvals.

6.14 Provide such further information as is reasonably requested to enable sub-contractors to complete their design and installation drawings.

6.15 Comment on the sub-contractors' design progress and attend meetings with the Contractor, Sub-Contractors, the Design Team, the SPV and/or the Trust as reasonably necessary

…

> 6.22 At suitable intervals inspect the Works by performing a construction quality audit role and report to the Contractor on areas of non-conformance to the specified standards and in addition, when required, advise on the progress of the Works.
>
> …
>
> 6.26 Maintain awareness of the site developments and check and confirm that the Operating and Maintenance Manuals and As-Installed Drawings prepared by sub-contractors are in accordance with the requirement of the Planning Supervisor for inclusion in the Health and Safety File and EC requirements.
>
> …
>
> 6.28 On completion of the Works or each phase of the Works prepare in conjunction with the Contractor and other Consultants a schedule of defects and inspect/approve the making good of such defects.
>
> …"

48. Attached to the Schedule there was a document entitled "HTM 81 and Approved Document B Advice". This also set out Aecom's responsibilities broken down by stages. It began with this preamble:

> "The [Aecom] design brief currently allows for providing the lead and assisting the Architect in designing the fire safety strategy to comply with the brief. The further advice covers specialist advice relating to its application, and liaison with Building Control to ensure that the design approach adopted is compliant with the latest recommendations of HTM 81 and Approved Document B."

49. In the detailed design stage Aecom was to:

> "Liaise with Building Control or their approved Inspectorate to assist with HTM 81 and the AD issues raised during detailed design.
>
> Attend meetings with Building Control during detailed design to clarify design principles.
>
> Assist the team with the submission of the Part B compliance documentation and comment on the proposed content.
>
> Respond to queries raised by Building Control during the detailed design and construction period relating to HTM 81 and the AD."

50. In the construction stage Aecom was to "liaise with the Architect as required to see that the detailing is being constructed in accordance with the requirements."

The Approach taken to Assessment of the Evidence.

51. As explained above the Consultancy Agreement was signed in September 2004 with some of the relevant dealings having preceded that. Practical completion was in December 2007. The Settlement Agreement was made in September 2012. The issues with which I am concerned were first raised with Lendlease on behalf of Project Co in 2017 and they were not raised with Aecom until the following year. As will be seen there were further difficulties beyond those which would inevitably flow from evidence being given about matters after such an interval.

52. Alan Avey was Lendlease's sole lay witness. He is a commercial director of Lendlease and he did not become involved in issues relating to the Project until May 2016. Not only did Mr Avey lack any personal knowledge of the relevant dealings but he has also been unable to talk to anyone who had been involved in them on behalf of Lendlease. Although it has been possible to identify a number of the employees of Lendlease who were involved in the period from 2004 to 2007 none of them are still working for Lendlease. Other than initial enquiries some years ago made to one of those former employees Lendlease has not sought to obtain information from them.

53. For Aecom David Burton had some although limited involvement in the preparation of designs in the period October 2004 to July 2005 and some occasional involvement for a period thereafter. He had no further dealings in relation to the Project until he became involved in investigating the claims being made against Aecom in 2018.

54. Derek Middleton was Aecom's Project Director in respect of the Project and gave direction to Aecom's team. He accepted that he would have seen most but not all of the emails, correspondence, and other documentation about the Project at the time. He left the employ of Aecom in April 2012 returning in June 2015. However, it was not until 2019 that Mr Middleton was asked to cast his mind back to the relevant events with a view to addressing the contentions made by Lendlease. Understandably in the course of his evidence Mr Middleton accepted that there were matters he could not recall.

55. Christopher Taylor is an associate director of Aecom but he did not begin working for them until 2014 and had no involvement in the matters giving rise to the claim. Mr Taylor was engaged from 2019 onwards in investigating the matters raised by Lendlease. His evidence consisted almost entirely of the conclusions which he had reached as a result of those investigations. It related to two matters: the resilience of the domestic hot water systems (Defect 15) and the sizing of the condensate pipework (Defect 13). As to the former it was non-expert opinion evidence and has played no part in my conclusions. As to the latter in part the evidence recorded the respects in which the installation on site differed from Aecom's drawings. Although this was technically opinion evidence it was non-contentious because it was common ground that the installation differed from Aecom's drawings. The further points which Mr Taylor made as to the adequacy of Aecom's design and the potential cause of the venting which was being encountered were non-expert opinion evidence and I have taken no account of it.

56. John Hopkinson was Aecom's Lead Fire Engineer and had considerable involvement in the relevant dealings. Not only has he been retired from Aecom for some years but when he was last in contact with Aecom he was said to have been elderly and not in good health. Against that background Aecom had not sought to obtain evidence from him.

57. Michael Cooper and Garry Palmer signed the Consultancy Agreement on behalf of Aecom. Neither of those gentlemen gave evidence before me. The explanation given for this was that they had ceased to work for Aecom some time ago. In the case of Mr Palmer that was in September 2010.

58. I am satisfied that all the lay witnesses were seeking to give honest accounts of the matters in their statements and when cross-examined. As already explained only Mr Burton and Mr Middleton had any personal involvement in the relevant dealings. They were giving evidence about events several years ago in circumstances where they had dealt with numerous other matters in the intervening period and where they had not had to cast their minds back to the events of 2004 - 2007 until 2018, in the case of Mr Burton, and 2019, in that of Mr Middleton.

59. The difficulties inherent in that exercise of recollection were compounded by the gaps in the documentary record. It is a commonplace that contemporaneous documentation will typically provide a better guide to a judge determining past events than the evidence of those seeking to recall the same events after a passage of time. However, in this case care is also needed in drawing inferences from such documents as are available. Mr Avey explained that his evidence was based on incomplete records. Lendlease had searched for documents dating back to the time with which the dispute is concerned but a number of potential relevant documents are missing. In particular Lendlease has not been able to find either its commercial file for the Project; nor the final account; nor any instructions issued to Lendlease in respect of the works forming the subject matter of Defects 1 – 9. The documentation relating to the genesis of Rev 19 is also incomplete though as will be seen below I am satisfied that such documentation as there is shows adequately what happened in that regard.

60. Aecom's witnesses were similarly working on the basis of incomplete records. Aecom's involvement in the Project had been managed from its Altrincham office. However, that office was closed in 2010 or 2011 several years before this dispute arose. The difficulty of obtaining documents was compounded by the fact that at the time of the closure of the Altrincham office Aecom had been in the process of changing from hard copy to electronic records and that it had been unable to access the tape system on to which the electronic records from the Altrincham office had been downloaded. Nigel Hodgson, a commercial director of Aecom, explained that in those circumstances Aecom had worked on the basis of such hard copy documents that it could find in such archive boxes as it could recover.

61. In addition Aecom said that it had been hampered by Lendlease's refusal to allow it independent access to the BIW system on which documents had been stored electronically. This was a digital document management platform operated by Lendlease. In the course of the Project those involved were given access to this and had the opportunity to upload documents onto the platform and to download those which had been uploaded by others. Lendlease did not include the platform in its disclosure and refused to give Aecom access to it. At the Costs and Case Management Conference Lendlease explained to me that this was because it believed all the relevant documents which would be found on a search of the platform would be thrown up by other searches. I have no doubt that was Lendlease's genuine belief at the time. On that basis I declined to order disclosure of the platform. I do not propose to speculate on whether a search of that platform would in fact have revealed further relevant documents still less as to the content of such documents. It suffices to note that the parties and the court had to approach the case without the assistance of a complete documentary record.

62. The position, therefore, is the only lay witnesses who were able to speak of relevant matters from their personal recollection were having to do so after the passage of a considerable period of time and in circumstances giving rise to understandable difficulties of recollection. In addition, the documentary record was incomplete and documents which are likely to have existed at the relevant times were not before the court. In light of that background I must exercise considerable caution in my approach to making findings of fact. I must have regard to inherent likelihood and to the inferences which can properly be drawn from the documentary record but in doing so I must guard against speculation; must be cautious in determining what was or was not inherently likely; and must be alert to the possibility that contemporaneous documents which are no longer available might if they had been before the court have changed the picture apparently shown by those which are available.

63. The need for that approach is reinforced by the fact that both Mr Middleton and Mr Burton showed a degree of inflexibility in the giving of their evidence.

64. In the case of Mr Burton this was shown by the manner of his insistence that Aecom's responsibility for design only extended to the end of RIBA Stage E and that the division between the RIBA stages governed the allocation of responsibility between Aecom and Rotary. I will consider below whether that is the correct interpretation of the Consultancy Agreement. For present purposes the relevance is that Mr Burton was unwilling to engage with points made by reference to material suggesting a different analysis and that this was coupled with a downplaying of the extent to which Aecom retained a responsibility for or involvement in the work after its design had been produced. I remind myself that Mr Burton's involvement in the Project was limited and that he was being asked about matters which occurred at a time when that involvement had become no more than occasional. Nonetheless, I formed the impression that Mr Burton had come to a particular view and was unwilling to engage with any potential alternative interpretation of the material.

65. Mr Middleton for his part was at times somewhat defensive. He was, for example, reluctant to accept that contemporaneous documents which were most naturally read as expressing criticism of or concern about Aecom's performance should be read in that way. Similarly although conceding he was not a fire engineer he was resolute in resisting the suggestion that there might not have been compliance with HTM 81. At other points (an example of which is his evidence about an email exchange in August 2006 which I will consider below) his evidence was at least in part an exercise in the subsequent rationalisation or justification of what he believed had happened or had been meant rather than one of recollection. I remind myself of the considerable caution which must be exercised in drawing any conclusions based on the demeanour of a witness. In addition I take account of the fact that Mr Middleton's stance appeared in part to result from understandable frustration at being questioned in detail about the meaning or effect of documents prepared several years ago including documents of which he not only had not been the author but which he had not seen at the time.

66. I am satisfied that these witnesses were not seeking to conceal material from the court nor deliberately to tailor their evidence. Rather this inflexibility appears to me to have been the consequence of the witness in question having come to a

particular conclusion as to what happened (and having done so against the background of the difficulties to which I have referred) and then being unable or unwilling to contemplate a different interpretation of the history. Although this stance was understandable and without any malign intent it did mean that care was needed in assessing the weight which could be placed on their evidence.

67. Although it was not at the forefront of either side's case Mr Hickey and Miss McCafferty both at various points submitted that inferences adverse to the other side should be drawn from the fact that potential witnesses had not been called or that documents which might be expected to have been available were not before the court. The questions of whether an inference and if so what inference is to be drawn from the absence of a witness are to be approached as matters of common sense and rationality and as being determined by the context and the particular circumstances (see per Lord Leggatt in *Efobi v Royal Mail Group* [2021] UKSC 33, [2021] 1 WLR 3863 at [41]). To the extent that authority is necessary for the proposition that the same approach is to be taken to the absence of contemporaneous documents see per Lewison LJ in *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [5].

68. Here for the reasons and in the circumstances I have already described both sides had incomplete documentary records and any witness would have been seeking to recall the relevant events after a substantial passage of time. Both sides had chosen not to seek to trace or to call potential witnesses who had left their employment. In the light of those matters I am satisfied that it would not be appropriate to draw inferences adverse to either party in the sense of inferring that the reason a particular person was not called as a witness was because of a concern that if called that person would have given evidence adverse to the case of that party. It is apparent that the potentially missing witnesses were not called for entirely different reasons and that in very large part the parties did not know whether the missing witnesses could give any relevant evidence let alone what that evidence would have been. Similarly with regard to the inadequacies of the documentation I will not draw inferences adverse to either party from the absence of particular documents. I will also seek to guard against speculating on the existence or contents of documents which were not before the court though the documents which were available do enable some inferences to be made as to the likely contents of some of the missing documents.

69. Paul Bradley, Chris Jones, and David Somerset gave expert evidence for Lendlease in the action before Joanna Smith J. In that action they expressed opinions supporting the sufficiency of Plant Room 2 and challenging the quantum of Project Co's claim. They also gave expert evidence for Lendlease in the hearing before me and were supportive of Lendlease's contentions that there were defects and that these were attributable to Aecom. Miss McCafferty was critical of this. In particular she criticised the approach which had been taken for example by Mr Jones in advance of Joanna Smith J's judgment of saying that he reserved the right to align his opinion with that of the judge. Miss McCafferty said that by aligning their evidence with the approach adopted by Joanna Smith J the experts were failing to give properly independent expert evidence and went as far at points to say that the experts were changing their evidence to suit the changed position of Lendlease. I am satisfied that in general Miss McCafferty's criticism both over-

stated and over-simplified the position and that Lendlease's experts were not giving evidence contrary to their true opinions in order to advance their client's case. An expert witness must maintain his or her independence and express frankly his or her true professional opinion. If that opinion remains it cannot be expressed differently just because a judge in a different case has disagreed with it. However, an expert is entitled to revise his or her opinion in light of a judge's finding as to what is or is not required in order to comply with particular regulations or equivalent regulatory standards. In the context of this case the experts were entitled to take account of the judgment of Joanna Smith J in those regards. That judge having found that aspects of the installation did not comply with HTM 81 the experts were entitled to accept that as a definitive assessment of the position and to revise an earlier opinion that there had been compliance. In addition reflection on points made in cross-examination or by another expert or the assessment by a judge can entirely properly lead to a revision of an opinion. Indeed an expert witness would not be fulfilling his or her duty to the court if he or she failed to reflect on such points and on the earlier judgment. I formed the impression that this was in most respects what had happened here subject to the qualifications in respect of particular aspects of the evidence which will appear in my treatment of the defects.

70. The fact that a particular expert for Lendlease had earlier expressed a different opinion from that now being advanced may nonetheless be relevant in two respects. First, it may introduce an element of doubt as to which of the different opinions is correct and so give weight to competing expert evidence for Aecom. Second, to the extent that Aecom's obligations are found to have been to exercise due care and skill rather than to achieve a particular result then it may be relevant that the approach taken by Aecom accorded with that which Lendlease's expert witness had previously regarded as appropriate.

The Limitation Defence based on the Consultancy Agreement.

71. Aecom advances two limitation defences. The first is that the Consultancy Agreement operated as a contract but not as a deed with the consequence that the relevant limitation period is 6 years from the date of the accrual of Lendlease's cause of action meaning that every part of the claim is statute-barred. The second is that even if the relevant limitation period is one of 12 years significant parts of the claim are nonetheless statute-barred because the cause of action in relation to them accrued more than 12 years before the commencement of proceedings on 30th May 2019.

72. Lendlease says that the Consultancy Agreement was a deed with the consequence that the limitation period is 12 years from the date of the accrual of the cause of action. Alternatively, it says that even if it took effect as a simple contract the Consultancy Agreement properly interpreted provided for a 12 year limitation period. I will address that alternative argument at this stage as part of my consideration of the effect of the Consultancy Agreement. Lendlease also denies that any parts of the claim are statute-barred taking issue with Aecom's case as to the date of the accrual of the relevant causes of action and I will consider that issue and Aecom's second limitation argument below after having considered the questions of the nature and extent of Aecom's duty and of the origins of and responsibility for Rev 19.

73. Accordingly, I turn to the question of whether the Consultancy Agreement took effect as a deed.

74. The Consultancy Agreement is drafted as a deed and clause 24.0 is an attestation clause in the format necessary for the execution of a deed. It provided for execution by each of Lendlease and Aecom to take place in one of two ways. One was execution by the affixing of the relevant party's common seal in the presence of either two directors or a director and the company secretary. The other was by the document being expressed as being executed by the company as a deed and signed by two directors or by a director and the company secretary.

75. Lendlease executed the Consultancy Agreement in the latter form by the signatures of two directors coupled with the expression that it was being executed by Lendlease as a deed.

76. When Mr Cooper and Mr Palmer signed the Consultancy Agreement on behalf of Aecom they did not sign in the section asserting that the agreement was being executed as a deed by Aecom acting by two directors but in the signature block above that. This was the section providing for execution by the affixing of Aecom's common seal in the presence of two directors. The signatures of Mr Cooper and Mr Palmer, accordingly, purport to be the signatures of persons witnessing the affixing of Aecom's common seal. That seal was never affixed to the Consultancy Agreement. It is to be noted that a footnote to the phrase "executed as a deed by the consultant" had been inserted before the signing of the agreement. That footnote stated that "the named directors are Michael Cooper and Gareth Jones". It is also to be noted that the prepared text alongside the space where Mr Palmer signed read as "director/company secretary" and that the words "company secretary" were deleted in manuscript leaving "director" as the description next to Mr Palmer's signature.

77. As at October 2004 neither Mr Cooper nor Mr Palmer was a statutory director of Aecom. Mr Cooper had been a statutory director but had resigned from that position in November 2003 when there was a rearrangement of Aecom's board with a reduction in the number of statutory directors. Mr Cooper had then been appointed a special director of Aecom. Mr Palmer had never been either a statutory director or a special director of Aecom. He had described himself as having been a director of Aecom from January 2004 in a subsequent LinkedIn profile and had been described as such in a magazine article of March 2006 based on an interview with Mr Palmer.

78. David Burton and Derek Middleton were cross-examined about the role which Mr Cooper had in 2004. They explained that Mr Cooper was in charge of Aecom's Altrincham office together with Gareth Jones (the other person named in the footnote in the Consultancy Agreement). Although Mr Burton was not able to say what, if any, difference in authority there was between Mr Cooper and Mr Jones Mr Middleton's evidence was to the effect that Mr Cooper was the boss at Altrincham. In that capacity Mr Cooper was in charge of Aecom's involvement in the Project. Mr Middleton accepted that Mr Cooper had the authority within Aecom to sign contracts of the nature of the Consultancy Agreement. He also accepted that this was a high level of authority. Neither of those witnesses was asked about the role of Mr Palmer.

79. Nigel Hodgson gave evidence of Aecom's current approach to the role of directors. In short it no longer has employees designated as special directors. However, there are a number of persons who hold powers of attorney by virtue of which they are able to execute deeds on behalf of Aecom. Mr Hodgson began working for Aecom in 2014 and was not able to give evidence about the arrangements in 2004. Similarly Alan Avey who was Lendlease's sole lay witness did not have any involvement in these matters until 2016 and so was not able to speak from his own knowledge as to the events leading up to the Consultancy Agreement.

80. Although Aecom has established that neither Mr Cooper and Mr Palmer was a statutory director at the time he signed the Consultancy Agreement it has not been suggested that either was acting other than properly when he did so. There is no suggestion that Aecom was not content for them to sign the Consultancy Agreement let alone that either was in some way acting on a "frolic of his own" when he did so. It is also to be noted that the contention that the Consultancy Agreement did not operate as a deed was advanced for the first time in the context of this dispute. Aecom did not at any earlier stage set out the position which it has now adopted namely that because Messrs Cooper and Palmer were not statutory directors the Consultancy Agreement did not operate as a deed but because they had authority to enter contracts on behalf of Aecom it instead took effect as a contract. Indeed the denial at [19] of the Defence that the Consultancy Agreement was a deed was followed, at [20], by the admission that "the parties proceeded and contracted on the terms of that document".

81. Miss McCafferty said the point was in reality a short and straightforward one. The Consultancy Agreement was not executed as a deed by the affixing of Aecom's common seal because the seal was not affixed. Nor was it executed as a deed by being expressed to be executed as such by Aecom and being signed by two directors. As neither Mr Cooper nor Mr Palmer was a statutory director of Aecom their actions could not have the effect which the actions of a director would have had. In addition Miss McCafferty said that when signing the Consultancy Agreement Messrs Cooper and Palmer were not purporting to execute it by their signatures but rather were purporting (by reason of the place in the document where they signed) only to witness the affixing of the common seal. In those circumstances the Consultancy Agreement simply was not a deed.

82. Lendlease's pleaded case in this regard was set out thus at [5] of the Reply:

> "The Consultancy Agreement was signed by Mr Cooper and Mr Palmer on the basis that they were held out by AECOM as directors with actual or ostensible authority to bind the company: they were the representatives of AECOM involved with the closing of the deal for AECOM's appointment. These gentlemen were also held out as directors in the Deed of Collateral Warranty provided to Project Co. as set out in paragraph 3 hereinabove. There was no affixation by common seal upon the Consultancy Agreement because it was not intended that AECOM would affix a common seal. Rather the signatures of Mr Cooper and Mr Palmer were (incorrectly) put in the signature box for the common seal rather than, as intended, in the box for the signature by two directors, being the alternative recognised means for a company executing a Deed".

83. I will consider below Mr Hickey's elaboration of Lendlease's position.

84. The requirements for execution of a deed by a company in October 2004 were set out in sections 36A and 36AA of the Companies Act 1985 and section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.

85. Section 36A provided that:

"(1) Under the law of England and Wales the following provisions have effect with respect to the execution of documents by a company.

(2) A document is executed by a company by the affixing of its common seal.

(3) A company need not have a common seal, however, and the following subsections apply whether it does or not.

(4) A document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company.

(5) A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed.

(6) In favour of a purchaser a document shall be deemed to have been duly executed by a company it if purports to be signed by a director and the secretary of the company, or by two directors of the company, and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, to have been delivered upon its being executed".

86. Section 36AA provided as follows:

"(1) A document is validly executed by a company as a deed for the purposes of section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989, if and only if –

(a) it is duly executed by the company, and
(b) it is delivered as a deed.

(2) A document shall be presumed to be delivered for the purposes of subsection (1)(b) upon its being executed, unless a contrary intention is proved".

87. Finally, section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 stated:

"(2) An instrument shall not be a deed unless –

(a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and
(b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties…"

88. The effect of section 1(2)(b) of the 1989 Act and section 36AA(1) of the 1985 Act is that valid execution is necessary for a document to take effect as a deed executed by a company. The conditions for valid execution are set out in section 36A of the 1985 Act. Subsection 36A(5) deals with the effect of documents executed by a company and so is dependent on the provisions in subsections (2) and (4) addressing what is required for a document to be executed by a company. Aecom's common seal was not affixed to the Consultancy Agreement and so subsection (2) does not come into play. Lendlease did not suggest that it was a purchaser for the purposes of section 36A and did not seek to rely on subsection (6). Accordingly, the question of whether the Consultancy Agreement took effect as a deed turns on the operation of subsection (4).

89. In the course of preparing this judgment it occurred to me that section 741(1) of the 1985 Act might be relevant to this issue. This provides that in the Act "'director' includes any person occupying the position of director, by whatever name called". I invited and received helpful further submissions on this point from both parties. In the light of those I am satisfied that this provision does not advance matters. It is concerned with the situation in which there is a person who is exercising the role in the corporate governance of a company which could properly only be performed by a director formally constituted as such. Although there will be a variety of circumstances in which a person can be found to be occupying the position of a director for these purposes it is clear that they do not include someone who is performing a lesser role even if that person is concerned in the management of the company at a high level and clothed with substantial authority (see *Re Hydrodam (Corby) Ltd* [1994] BCC 161; *HMRC v Holland* [2010] UKSC 51, [2010] 1 WLR 2793; *Re UKLI Ltd* [2013] EWHC 680; and *Smithton Ltd v Naggar* [2014] EWCA Civ 939, [2015] 1 WLR 189). The evidence did not come close to establishing that either Mr Cooper or Mr Palmer performed a role of the necessary kind. At its highest the evidence showed that Mr Cooper was in charge of Aecom's Altrincham office but that was not akin to directing the affairs of the company or even of a part of the company in the way in which a statutory director would be entitled to act.

90. Thus Miss McCafferty said that the Consultancy Agreement was not executed as a deed for the purposes of subsection 36A(4) for two reasons. First, it was not signed by two directors or by a director and the company secretary. Second, it was not expressed as being executed by Aecom. In the latter regard Miss McCafferty emphasised the positioning of the signatures of Messrs Cooper and Palmer saying that they were not purporting to execute the document by signing it but were instead purporting only to witness the affixing of the common seal.

91. Mr Hickey said that Mr Cooper and Mr Palmer had been held out as directors of Aecom and as having the necessary authority to bind Aecom. In those circumstances it was not open to Aecom now to say that the Consultancy Agreement was not a deed. Mr Hickey submitted that it sufficed for the purposes of section 36A(4) of the 1985 Act that the persons signing as directors had been held out as directors and had authority to bind the company and it was not necessary that they should be statutory directors of the company in question. Mr Hickey relied on the decisions of the Court of Appeal in *Freeman & Lockyer v Buckhurst Part Properties (Mangal) Ltd* [1964] 2 QB 480 and *Hely-Hutchinson v*

Brayhead [1968] 1 QB 549. He said that the effect of these was that a person held out as being a director will have the authority which that person would have had if formally appointed and would do so even if the holding out was by way of implication rather than express.

92. In addition Mr Hickey emphasised the two other documents which Mr Cooper and Mr Palmer had executed at the same time as they signed the Consultancy Agreement. Those were the Collateral Warranty agreement which Aecom made with Lendlease and Project Co and the agreement it made with the Trust, Lendlease, and Project Co. Mr Cooper and Mr Palmer signed each of those. In each case they signed alongside wording stating that the document was being executed and delivered as a deed by Aecom acting by two of its directors or by a director and its company secretary. Neither of those documents contained any alternative section providing for any of the parties (save for the Trust in respect of the latter agreement) to execute the deed by the affixing of a common seal. All the parties other than the Trust executed or purported to execute both those documents by the signature of two directors. Mr Hickey said that the actions of Messrs Cooper and Palmer in relation to those documents were mirrored by their actions in relation to the Consultancy Agreement and that in respect of all the documents they signed as directors executing them as deeds on behalf of Aecom. There is force in this point but its relevance is limited. The actions of Messrs Cooper and Palmer in relation to those documents are indeed relevant as an indication of how they were signing and purporting to sign connected documents at the same time as they signed the Consultancy Agreement. As will be seen these actions provide some assistance in determining what those gentlemen were intending and purporting to do when they signed the Consultancy Agreement. However, there was no suggestion before me that there had been an issue about whether those documents took effect as deeds nor that there had been reliance on their nature as deeds. The actions of Messrs Cooper and Palmer in relation to them do not assist, other than by way of background, with the crucial question of the effect in relation to the Consultancy Agreement of the signatures of persons who were not directors of Aecom.

93. In response Miss McCafferty said that the authorities on which Mr Hickey relied only went as far as to establish that a contract was binding on a principal if entered by an agent with actual or ostensible authority. They did not impact on the question of the circumstances in which a document would take effect as a deed and did not negate the requirements laid down in the 1985 Act. In those circumstances and in light of Aecom's acceptance that the Consultancy Agreement was a binding contract she said that they did not further Lendlease's case. In addition Miss McCafferty returned to her point that Mr Cooper and Mr Palmer did not purport to execute the Consultancy Agreement by signing it but were instead only signing as witnesses to the affixing of the common seal. Miss McCafferty contended that in circumstances where Lendlease had not sought rectification of the Consultancy Agreement it was not open to it to argue that those gentlemen had purported to execute the agreement. Further Miss McCafferty submitted that the evidence did not establish that Messrs Cooper and Palmer had been held out as statutory directors of Aecom as opposed to being persons with authority to enter contracts on its behalf.

94. I have no hesitation in concluding that when Mr Cooper and Mr Palmer signed the Consultancy Agreement they were purporting to execute it as a deed. That conclusion follows from considering the attestation clause in its context and realistically. There is no need for Lendlease to seek rectification in that regard. There was never any intention that the Consultancy Agreement should be executed by the affixing of Aecom's common seal. There was no evidence to the effect that such was the intention and it would have been inconsistent with the approach taken to the other documents executed at the same time. The reality is that Messrs Cooper and Palmer signed in the wrong place on the Consultancy Agreement. They signed in the section immediately below that where Lendlease's representatives had signed. That happened to be the section providing for execution by the affixing of the common seal with the signatures purporting to be those of the persons witnessing that affixing. The intention had clearly been to sign in the section below that one and so in the section providing for execution by the signature of two directors. The alternative interpretation of the actions of Messrs Cooper and Palmer would involve them purporting to witness something which had not happened. It would, moreover, involve them in having done so in a formal document. That would be at the very best sloppy practice and in reality improper conduct. The conclusion that they signed in the wrong place by error is consistent with there having been an error of the kind which can readily be understood to have been made when a number of documents were signed at the same time. It is also consistent with the actions of Messrs Cooper and Palmer in respect of the related documents signed at the same time. It is also a markedly more likely explanation than that there was the improper conduct which would be involved on the alternative approach. Miss McCafferty sought to finesse this difficulty by saying that I should proceed on the basis that the document indicates an intention for execution to be by affixing of the common seal and that when signing Messrs Cooper and Palmer had merely anticipated this being done. However, this does not solve the problem. Not only is there no evidence that the intention was for the common seal to be affixed (indeed the execution by signature of the other agreements signed on the same day is a potent indication to the contrary) but the impropriety would remain. On Miss McCafferty's approach Messrs Cooper and Palmer had purported to witness something as having been done which had not been done and that would still be improper even if, as to which there is no evidence, they expected it to be done subsequently.

95. I have reflected on whether the fact that the footnote saying that the named directors were Michael Cooper and Gareth Jones was a footnote to the section providing for execution by the affixing of Aecom's common seal should lead to a different conclusion. The positioning of the footnote does provide some support for the view that execution by the affixing of the seal was contemplated but in the absence of further explanation it cannot alter the conclusion flowing from the analysis I have just set out.

96. The question, therefore, becomes one of the effect of a document which has been signed by two persons purporting to execute it as the deed of a company by reason of signing as directors in circumstances where those persons were not directors but where the company was content that they were authorised to enter the agreement on its behalf. It is of note that although Lendlease has asserted that Messrs Cooper and Palmer were "held out by Aecom as directors with actual or ostensible

authority to bind the company" it has not pleaded any reliance on that holding out nor in terms asserted any form of estoppel arising from that.

97. In *Freeman & Lockyer* the court was concerned with whether the defendant was bound by the actions of Mr Kapoor. The defendant had not appointed a managing director but Mr Kapoor had acted as such with the knowledge of the board of the defendant. Mr Kapoor's actions in engaging the plaintiff to act for the defendant were within the ordinary ambit of the authority of a managing director and in those circumstances the defendant was bound by his actions.

98. At 488 – 489 Willmer LJ explained why the contention that Mr Kapoor had actual authority was untenable and that the issue was whether he had ostensible authority.

99. At 492 Willmer LJ summarised the effect of the decision in *Biggerstaff v Rowlatt's Wharf Ltd* [1896] 2 Ch 93 as being that a company is bound by the actions of persons who act on behalf of the company with the knowledge of the directors provided they act within the limits of their apparent authority.

100. At 494 - 495 Willmer LJ explained decisions on which the defendant had relied thus:

> "In the circumstances the three decisions relied on by the defendants are to my mind no more than illustrations of the well-established principle that a party who seeks to set up by an estoppel must show that he in fact relied on the representation that he alleges, be it a representation in words or a representation by conduct. That this is so is, I think, made clear by the judgments in *Houghton's* case itself. Thus Bankes L.J., after referring to the rule in *Mahony's* case, went on to say that "…in order to establish a case which falls within the rule it is essential that the person who claims the benefit of it must prove that he relied upon the ostensible authority which he sets up…".

101. Pearson LJ summarised the position in these terms at 498:

> "The ground of the judge's decision in favour of the plaintiffs is stated in these two sentences of his judgment: "In my judgment a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority, and strangers dealing bona fide with such persons have a right to assume that they have been duly appointed…In my opinion in the present case Kapoor was acting as managing director, certainly as a director acting for the company with the knowledge of his board, and I hold that the company is bound by his action in employing the plaintiffs. He cited *Biggerstaff v Rowatt's Wharf Ltd. (per* Lopes L.J.) and *British Thomson-Houston Co. Ltd. V. Federated European Bank Ltd (per* Scrutton L.J.).
>
> In my view the decision of the judge was correct. On the facts as found the plaintiffs were entitled to rely on Kapoor's ostensible authority to give them instructions on behalf of the company because there was a holding out of Kapoor by the company as its agent to conduct its business within the ordinary scope of that business. The expressions "ostensible authority" and "holding out" are somewhat vague. The basis of them when the situation is analysed, is an estoppel by representation. The agent professes to act on behalf of the company, and he thereby impliedly represents and warrants that he has authority from the company to do so: *Firbank's Executors v Humphreys.* We are concerned in this case only with the representation, and not with the warranty which in some other case might give to the other contracting party a

> right of action for damages for breach of warranty. In this case the company has known of and acquiesced in the agent professing to act on its behalf, and thereby impliedly representing that he has the company's authority to do so. The company is considered to have made the representation, or caused it to be made, or at any rate to be responsible for it. Accordingly, as against the other contracting party, who has altered his position in reliance on the representation, the company is estopped from denying the truth of the representation".

102. At 502 – 506 Diplock LJ addressed the circumstances in which a company could be bound by the actions of a person acting with apparent or ostensible authority. He explained that the actions of a company in permitting a person to act in the management or conduct of its business could operate as a representation that the person had authority so to act and that an estoppel could arise when another party acted upon the representation by entering a contract with the person to whom the representation related.

103. Diplock LJ summarised the effect of his analysis of the law thus at 505 – 506:

> "If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown:
>
> (1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
> (2) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
> (3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
> (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent".

104. In *Hely-Hutchinson* the Court of Appeal concluded that the effect of the trial judge's findings of fact was that the defendant's agent had actual authority. In those circumstances the question of ostensible authority did not have to be considered. However, it is of note that at 593A – D Lord Pearson agreed with Diplock LJ's analysis in *Freeman & Lockyer* adding that the necessary representation could be found from the action of a board of directors in "placing the agent in a position where he can hold himself out as their agent and acquiescing in his activities".

105. My understanding of the effect of the decision in *Freeman & Lockyer* is that where a person is held out as being in a particular position or as having particular authority on behalf of a company an estoppel can arise preventing the company from denying that such a person has the authority normally associated with that position. There must be a holding out and reliance upon it but it is clear that both will be readily inferred. The holding out can be by placing the person in such a position that he or she is able to represent him or herself as having the authority in

question. Similarly, the necessary reliance can take the form of entering a contract on the basis of the agent's asserted authority.

106. Miss McCafferty contended that the approach set out in *Freeman & Lockyer* was confined to contracts and could only have the effect of causing a particular transaction to be regarded as a contract made by a company. I do not accept that the principle is so narrowly confined. Rather it is concerned with the circumstances in which a company can be estopped from denying that actions were taken with its authority.

107. There are potent factors in favour of each side's analysis of the issue of whether the Consultancy Agreement took effect as a deed.

108. I have rejected the contention that Messrs Cooper and Palmer were simply signing as witnesses to the affixing of Aecom's common seal. I have found that they signed the Consultancy Agreement expressly on the footing that they were executing it as a deed on behalf of Aecom. In the light of that Aecom's stance involves it in resiling from the actions of those gentlemen in circumstances where it is not suggested that they were acting improperly or had gone outside the scope of their authority. There is an artificiality in the contention that Aecom is bound by the Consultancy Agreement as a contract because Messrs Cooper and Palmer had authority to enter such a contract on Aecom's behalf but not bound by that agreement as a deed because they were not statutory directors of Aecom. The Consultancy Agreement was expressed to be a deed and was structured as such with provisions, such as clauses 14.03 and 14.06, which were readily compatible with the agreement taking effect as a deed and which were clearly incorporated on that footing. In effect Aecom was seeking both to approbate and to reprobate the agreement. It accepted that it was bound by the Consultancy Agreement as a contract and took the benefits of performing under it but now seeks to avoid the consequences of an intrinsic part of the arrangement namely its status as a deed.

109. However, it has to be remembered that the rules governing the execution of deeds are laid down by statute. This is because of the special nature of deeds of which a longer limitation period is one aspect. It was the intention of Parliament that if a document was to take effect as a deed executed on behalf of a company then the specified conditions had to be satisfied including execution by a director and the company secretary or by two directors. A party can be estopped from relying on a non-compliance with the requirements of a statute but a real degree of care is needed before it can be appropriate to find such an estoppel. The requirements of statute that specified formalities are necessary for a document to operate against a company as a deed are not to be readily circumvented.

110. There is very limited evidence of the actual position and role of Mr Palmer. In addition and more significantly there is no evidence of actual reliance by Lendlease on the representation that Messrs Cooper and Palmer were directors of Aecom. Indeed, at [5] the Reply does not in terms assert either an estoppel or reliance. In that regard I must remember that the issues between the parties are to be seen as having been defined in the pleadings. In context, however, it is clear that [5] was intended to be an invocation of the approach explained in *Freeman & Lockyer* and that it was understood as such by Aecom. In addition I am satisfied that it is appropriate to infer both representation and reliance in circumstances

where both Mr Cooper and Mr Palmer expressly signed as directors a document which was predicated on the execution on behalf of Aecom being by directors of that company and the terms of which made it clear that it was being entered on that basis; where Aecom had placed those gentlemen in positions where they were able and expected to perform in that way; and where the parties thereafter proceeded on the basis that their dealings were governed by the Consultancy Agreement.

111. The central factor is the artificiality of Aecom's position. It accepts that Messrs Cooper and Palmer had authority to act as they did and that "the parties proceeded and contracted on the terms of [the Consultancy Agreement]". It is not open to Aecom to accept that it was bound by the actions of Messrs Cooper and Palmer and then to adopt an unrealistic stance as to the nature of those actions or as to their effect. I have already explained my conclusion that there was no intention that the Consultancy Agreement should be executed by the affixing of Aecom's common seal. It follows that when Mr Cooper and Mr Palmer signed the Consultancy Agreement they were intending to execute a deed on behalf of Aecom. They were not acting improperly in relation to Aecom in doing so but were indeed doing what they were expected to do. As I have already noted the necessary representation and reliance can readily be inferred here. In those circumstances it is not open to Aecom to contend that the Consultancy Agreement was not a deed. It follows that the applicable limitation period in respect of claims asserting a breach of that agreement is one of twelve years from the date of the accrual of cause of action.

112. Lendlease's alternative argument was that even if the Consultancy Agreement was a simple contract it operated as an agreement that a 12 year limitation period would nonetheless apply. In the Reply, at [6] – [10], it was said that there was "an express contracting-out and ouster" of the six-year limitation period flowing from section 5 of the Limitation Act 1980 and an express agreement of a limitation period of 12 years "for the bringing of claims in contract or breach of statutory duty under or in respect of the Consultancy Agreement". This conclusion was said to be the consequence of the effect of clauses 14.03, 14.06, and 16.06 of the Consultancy Agreement together with the provision deeming that Aecom was aware of the terms of the Design and Build Contract. In his opening submissions Mr Hickey refined this argument saying that the effect of clauses 14.03 and 14.06 was that the parties had "expressly agreed that any claims in contract could be brought by way of proceedings within 12 years of practical completion".

113. Miss McCafferty says that this is not a proper reading of the Consultancy Agreement. Instead the provisions on which Lendlease relies are to be seen as agreeing a contractual long stop date for claims but without ousting the statutory limitation period which is otherwise applicable.

114. Miss McCafferty said that the argument now being advanced by Lendlease was the same as that which was rejected by Ramsey J in *Oxford Architects Partnership v Cheltenham Ladies College* [2006] EWHC 3156 (TCC), [2007] BLR 293. Mr Hickey responded by saying that the terms of the Consultancy Agreement were different from those of the agreement which Ramsey J had been considering and that the approach which had been taken to the latter terms was not applicable to the terms of the Consultancy Agreement. Although that was the main thrust of Mr

Hickey's contentions in respect of *Oxford Architects* he went further saying that to the extent that it was necessary I should decline to follow the approach adopted there.

115. In *Oxford Architects* Ramsey J was considering Article 5 of the relevant RIBA conditions of engagement. This provided in summary that "No … proceedings … shall be commenced against the Architect after the expiry of six years … from the date of Practical Completion". In that case the relevant causes of action had accrued in July 1998 but practical completion had not been until 25th November 1998. The issue was whether a claim commenced on 24th November 2004 (and so more than six years from the accrual of the cause of action but less than six years from practical completion) was statute barred.

116. Ramsey J concluded that Article 5 provided a contractual time limit for bringing claims but that it did not prevent reliance on a statutory limitation period if that expired before the contractual time limit. At [15] – [21] Ramsey J contemplated the possibility of parties agreeing terms which provided for a claim to be brought at a particular time even if, absent such agreement, the claim would be statute-barred at that time. However, he explained, at [19], that "clear words" would be needed for an agreement to be interpreted as having such an effect and, at the end of [19], said that "express words" would be needed for agreement to have the effect of precluding reliance on a defence under the Limitation Act.

117. Although Ramsey J was concerned with the particular effect of Article 5 it is clear that he was setting out his understanding of the approach to be taken to such clauses more generally and, in particular, the circumstances in which an agreement could properly be interpreted as removing a right to rely on a statutory limitation defence. I am not bound to follow Ramsey J's approach but unless the position in *Oxford Architects* is properly distinguishable from the circumstances of this case I should do so as a matter of judicial comity unless I am convinced that it is wrong (Robert Goff LJ per curiam in *R v Greater Manchester Coroner ex p Tal* [1985] QB 67 at 81A-B) or that there is a powerful reason for not doing so (Lord Neuberger in *Willers v Joyce (No2)* [2016] UKSC 44, [2018] AC 843 at [9]).

118. In her closing submissions Miss McCafferty referred to two instances in which she said other courts had accepted that Ramsey J's approach correctly expressed the law. However, on closer analysis I do not find that they have quite that effect. In *Cameron Taylor Consulting Ltd v BDW Trading Ltd* [2022] EWCA Civ 31, (2022) 200 Con LR 32 the Court of Appeal was considering the question of whether designers "owed some sort of continuing duty to review their design, even after construction was complete" and Ramsey J's decision was cited for the proposition that there was no continually accruing cause of action in that regard (see at [47] per Coulson LJ). The court was not considering the question which is in issue here. In *Larkfleet Ltd v Allison Homes Eastern Ltd* [2016] EWHC 195 (TCC), [2016] BLR 172 Fraser J concluded that the provision he was considering was not akin to that with which Ramsey J had been concerned in *Oxford Architects* (see at [46] and [47]). The provision in question before Fraser J was not addressing limitation but was instead providing for an assumption of responsibility. It is right to note that Fraser J clearly assumed that the *Oxford Architects* approach was correct in respect of provisions of the type to which it applied but in light of the conclusion

he reached as to the wholly different nature of the provision with which he was concerned he did not need to address the point further.

119. However, subject to one qualification not only am I not convinced that Ramsey J's understanding of law was wrong but rather I am satisfied that it correctly set out the approach to be taken. The qualification is that Ramsey J's judgment was before the clarification of the approach to the construction of contracts provided by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 explaining the approach taken in *Rainy Sky v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 and *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. The effect of that clarification was to focus attention on the natural and ordinary meaning of the words used when seen in context and having regard to the purpose of the provision and of the contract in which they appear (see, for example, the explanation given by the then Chancellor in *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821 at [18]). In the light of that clarification it is no longer appropriate to require express words for a particular effect to be achieved. Instead the court is to construe the provision in question so as to give effect to the parties' intention as disclosed by the language read in context. It is conceivable that the result of that exercise could be a finding that reliance on a statutory limitation defence was precluded by a contractual provision even though the provision being construed did not use express words to achieve that effect. However, the practical consequences of the difference between the approach set out by Ramsey J and my qualification of that approach are likely to be minimal. In construing a provision so as to give effect to the parties' intention as disclosed by the language read in context the court will consider it inherently less likely than otherwise that the parties intended to agree terms departing from the norm for arrangements of the relevant kind. A provision to the effect that the statutory limitation period is being disapplied and replaced with terms enabling an action for breach to be brought outside that limitation period would be a significant departure from the norm. It is, accordingly, a provision of a kind which the court will regard as less likely than otherwise to have been the parties' intention. It follows that although express words are not required as a matter of law for a provision to have that effect it is unlikely that such an effect will be achieved other than by the use of clear language such as can only properly be interpreted as having that effect.

120. I turn to the provisions of the Consultancy Agreement. Mr Hickey relied in particular on clauses 14.03 and 14.06.

121. Clause 14.03 was a warranty by Aecom that it would:

> "maintain Professional Indemnity Insurance from commencement of the provision of the Consultancy Services until 12 years after the Actual Completion date for the works for a limit of Indemnity of not less than [20,000,000] Twenty Million Pounds for each and every claim against any legally enforceable costs, claims, charges or expenses including but in no way restricted to liability of the Contractor to the SPV and the SPV to the Trust arising from any breach by the Consultant of the Consultant's obligations pursuant to this Agreement or other act, omission, neglect or default by the Consultant in relation to or in any way connected with the Works …"

122. Clause 14.06 provided that:

> "No action or proceedings under or in respect of this Agreement in contract or for breach of statutory duty shall be commenced against the Consultant after the expiry of 12 years after the Completion Date for the Works."

123. Those provisions appeared in a document which was expressed to be a deed and which on that footing envisaged a limitation period of 12 years. Those clauses do not contain express words disapplying a six year limitation term. It would be surprising if such express words had been used in a document purporting to operate as a deed.

124. Clause 14.03 imposes a particular obligation to maintain insurance for the period of 12 years from the Actual Completion Date. As such it is consistent with a 12 year limitation period but it is not directed at determining the limitation period applicable to claims under the Consultancy Agreement.

125. Clause 14.06 is a provision of a familiar type. It identifies a long-stop date after which no proceedings can be commenced. Save for the reference to twelve rather than six years it is in materially the same terms as the provision considered by Ramsey J in *Oxford Architects*. I am satisfied that it is to be interpreted in the same way as Ramsey J interpreted the provision in that case namely as providing a protection against claims brought after a certain date but not as extending the period in which claims which would otherwise be statute-barred could be brought.

126. Even when regard is had to the qualification I have applied to the approach of Ramsey J with the consequences that clear or express words are not needed as a matter of law and that the effect of the provisions is to be derived from construing the language used in the context of the document as a whole the Consultancy Agreement cannot be read as extending the time for bringing claims. For Lendlease's contention to be correct the Consultancy Agreement would need to be interpreted as providing that even in the event that it only took effect as a contract the relevant limitation period for bringing claims was nonetheless to be one of twelve years either from the accrual of cause of action (as is asserted in the Reply) or from Practical Completion (as was asserted in Mr Hickey's opening). Moreover, that period would need to be subject to the effect of clause 14.06 imposing a period of twelve years from the Completion Date defined as the date for completion set out in the Project Agreement. The language of the Consultancy Agreement cannot support such an interpretation. In reality Lendlease's case in this respect amounted to a contention that a term should be implied into the Consultancy Agreement in circumstances where the preconditions for the implication of such a term did not exist and had not been pleaded or alleged.

127. It follows that if my conclusion on the first of the limitation arguments is wrong and the Consultancy Agreement did not take effect as a deed then Lendlease is not assisted by its alternative argument. If the Consultancy Agreement is solely a contract it cannot be interpreted as providing for a greater limitation period than six years with the consequence that in those circumstances a claim brought more than six years after the accrual of the relevant cause of action would be statute-barred.

The Nature and Extent of Aecom's Obligations under the Consultancy Agreement.

128. The parties were in dispute as to Aecom's obligations in a number of different respects.

The Replication of Lendlease's Obligations to Project Co.

129. First, it is necessary to consider the extent to which Aecom's obligations to Lendlease replicated the latter's to Project Co and the separate but related issues of whether Aecom was required to perform its obligations so as to achieve a particular standard or instead to exercise reasonable care, skill, and diligence and whether there is a difference between those latter two formulations.

130. At [24] the Amended Particulars of Claim invoked clause 4.01 and pleaded that Aecom was "obliged to exercise reasonable skill, care, and diligence in performing the Services". However, reference had already been made to clause 1.01 and at [41] the effect of that was said to be that Aecom "was required to observe the Employer's Requirements and the Project Agreement and to ensure that it did not place Lendlease in breach of the said agreements".

131. Before me Mr Hickey's submissions appeared at times to conflate the issues I have identified at [130] above but they must be addressed separately.

132. To what extent were Lendlease's obligations to Project Co stepped down to Aecom with the consequence that Aecom was obliged to achieve the outcome which Lendlease had contracted to achieve under the D&B Contract? In that regard, as Joanna Smith J explained at [110], although Lendlease was not a party to the Project Agreement the effect of the D&B Contract was that "Lendlease assumed the obligations, risks, and liabilities of Project Co under the Project Agreement".

133. The answer to this question turns on the interplay between clauses 1.01 and 4.01 and their proper interpretation when seen in the context of the Consultancy Agreement read as a whole. In that exercise I must look to the terms of that agreement and I did not find the authorities to which Mr Hickey referred me on this point of assistance as I will now explain.

134. The particular contract under consideration in *MT Hojgaard A/S v E.ON Climate & others* [2017] UKSC 59 contained two distinct requirements but they were both in a section of the contract which was expressly said to impose minimum requirements. It was in those circumstances that it was held that the less rigorous of the two standards was to be seen as the minimum with the effect that compliance with the more rigorous was still required. It is right to note that Lord Neuberger (with whom the other members of the court agreed) said that he would have reached the same conclusion even without that express reference. He explained this by reference to the cases he had considered at [37] and following. Those had been cases in which courts had to address contracts containing two terms one of which required an article to be produced to a specified design and the other of which required that article to "satisfy specified performance criteria". In such cases the courts were "generally inclined to give full effect to the requirement that the item as produced complies with the prescribed criteria [sc as to performance]" – see at [44]. Such cases where there is a contrast between express requirements for a specified design and for the achievement of specified performance criteria

are very different from the circumstances of this case. Moreover, Lord Neuberger made it clear that the actual outcome will be a matter of interpretation of the particular terms of the contract in question in light of the facts of each case.

135. The view as to the effect of *Hojgaard* expressed by HH Judge Stephen Davies in *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWHC 1813 (TCC) at [52] does not change that assessment. Although the matter had clearly been the subject of submissions at some point in that case Judge Stephen Davies was, at [52], commenting on the appropriateness of a concession. It is apparent that Judge Stephen Davies regarded the matter as one of contractual interpretation and as such dependent on the particular terms. At most he was saying that treating the less demanding of two inconsistent design obligations as imposing a minimum standard rather than as qualifying the more demanding made "more sense".

136. The decisions in *Consultants Group International v John Worman Ltd* (1985) 9 Con LR 46 and *Costain Ltd v Charles Haswell & Partners Ltd* [2009] EWHC 3140 (TCC) were concerned with the interpretation of particular contracts and I do not understand the judges in either case to have been purporting to lay down rules of general applicability. It is also of note that in *Costain v Charles Haswell* the deputy judge found that while one of the competing clauses was a general provision relating to all the services provided the other was limited to "one particular part of the Consultant's obligations" (see at [53]): a situation very different from that of the current case.

137. I turn, therefore, to the terms of the Consultancy Agreement. Clauses 1.01 and 4.01 are not readily to be seen as laying down competing requirements for a specified design and for specified performance criteria of the kind to which Lord Neuberger referred in *Hojgaard* nor can they readily be seen as setting out inconsistent design obligations.

138. In my judgement the final sentence of clause 4.01 is of particular significance. This says in clear terms:

> "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."

139. It is necessary to seek to give effect to that provision. To conclude, as Lendlease says I should, that by virtue of clause 1.01 Aecom was obliged to achieve the outcome that Lendlease was for its part obliged to achieve under the D&B Contract (and as a consequence to achieve the outcome that Project Co was required to achieve under the Project Agreement) would involve reading this sentence in clause 4.01 as saying "notwithstanding any other clause in this Agreement <u>save for clause 1.01 of this Agreement</u> or the Principal Agreement …". There is no basis for such a reading when the more natural reading is to see this clause as having the effect which it purports to have and as being a qualification on the duties which would otherwise be owed by Aecom under other provisions including clause 1.01. That reading does not do violence to clause 1.01 nor deprive it of effect because that clause still takes effect as imposing an obligation on Aecom albeit that what is required is subject to the qualification imposed by clause 4.01.

140. In his opening submissions at [146] Mr Hickey contended that there were two parts to clause 4.01. He referred to the passage in the clause where Aecom warranted that it would "comply in all respects with the requirements of the local authority, statutes, regulations, and codes of Practice in force and relevant to the design of the works including but not limited to fire, health, and safety". Mr Hickey said that this echoed clauses 1.01 and 6.04 and that the former of those required Aecom to observe the requirements laid down by the Trust. I will deal below with the argument that the clause imposed two separate requirements: at this point it suffices to say that I do not accept that the passage on which Mr Hickey relied can properly be read as imposing an obligation on Aecom to achieve the outcome which Lendlease was contracted to achieve. The words in question have a sensible meaning independent of the terms of the D&B Contract or the Project Agreement neither of which are referred to in them. I do not read these words as echoing the provisions in different terms in clause 1.01. They are in similar terms to those used in clause 6.04 but those in turn do not refer to achieving the outcome which Lendlease was contracted to achieve under the D&B Contract.

141. It follows that the Consultancy Agreement did not operate to step down to Aecom Lendlease's obligations to Project Co.

The Effect of Clause 4.01 of the Consultancy Agreement.

142. I turn to the question of whether clause 4.01 took effect to require Aecom to achieve a particular standard or solely to exercise reasonable care and skill. I do not agree that the clause can properly be read as imposing two separate requirements such as to require an analysis along the lines adopted in *Hojgaard* of seeing one as imposing a minimum requirement without qualifying the other. It is possible to read clause 4.01 as containing distinct warranties but this is somewhat artificial and it is better read as imposing a single standard. This is particularly so in light of the final sentence and its effect as I have already noted of qualifying all the obligations under the Consultancy Agreement.

143. The better reading is to see the passage which Mr Hickey characterised as a separate warranty or a separate requirement as setting the context in which the question of what is required in order to perform with reasonable care, skill, and diligence is to be addressed. That context is highly significant. It is formed by the matters of which Aecom was to have knowledge by reason of clause 1.01 and by the need for compliance with the standards set out in clause 4.01. To those are to be added the express reference to HTM 81 and to Approved Document B in the document accompanying the Second Schedule of the Consultancy Agreement. It is in that setting that the points made by Judge Stephen Davies in *Martlet v Mulalley* at [265] and by the editors of *Jackson & Powell* on *Professional Negligence (9th ed)* at 9-122 and 9-123 become relevant. A failure by Aecom to comply with the standards laid down by the applicable regulations and in particular to produce a design satisfying the requirements of HTM 81 is to be seen as a failure to exercise reasonable care, skill, and diligence in the absence of a compelling explanation to the contrary. Save to a limited extent in respect of some of the defects that is not really in issue here. Aecom's case was that the design it produced satisfied the requirements of HTM 81 and to the extent that there was non-compliance this was because of the actions of others for whom it was not

responsible or arose out of matters outside the scope of the works to be undertaken by Aecom and the scope of those works is the question to which I will now turn.

The Scope of Aecom's Design Obligations.

144. The next respect in which there was dispute as to the extent of Aecom's obligations related to the scope of Aecom's design obligations. This question is conveniently considered alongside that of the extent to which Aecom was required by the Consultancy Agreement to advise in relation to the work of others and the consequences of such advice (although that aspect overlaps with the issue of the duty to review which I will consider in the next section).

145. At points in the evidence and submissions Aecom's stance seemed to be that its responsibility was limited to the preparation of a design to the end of RIBA Stage E and to providing support thereafter as to the interpretation of that design with clause 6.08 having the effect that Aecom bore no responsibility for comments made or advice given in relation to drawings or similar material prepared by others. Aecom's case was not in reality being put that starkly. Nonetheless it continued to emphasise that it was Rotary rather than Aecom which produced the Stage F design and that Aecom had no responsibility for deficiencies in design produced by Rotary. In addition Aecom continued to stress the relevance of clause 6.08.

146. Miss McCafferty was right to say that the terms of Lendlease's subsequent agreement with Rotary could not affect the proper interpretation of the Consultancy Agreement. Accordingly, if on a proper interpretation of the agreements there was a gap between the responsibilities of Aecom and Rotary that could not be filled by an artificial reading of the Consultancy Agreement so as to extend Aecom's responsibilities. Nonetheless, I find that Aecom's role and responsibilities were more extensive than it now contends. That role and those responsibilities are to be deduced from the terms of the Consultancy Agreement and in this regard the Schedule of Duties and the matrices as contained in the Second Schedule are of crucial importance. These do not define Aecom's responsibilities by reference to the RIBA Stages but by reference to particular tasks (in the Schedule of Duties and in Matrix 3) and by reference to particular functions (leadership, design, and coordination) in relation to aspects of the construction works (in Matrix 1). In addition a number of the sub-paragraphs of paragraph 6 of the Schedule of Duties refer to matters going beyond the preparation and handing over of Aecom's design and envisage a continuing involvement thereafter (which in reality Aecom accepted to be the position).

147. It follows that the question of whether Aecom was responsible under the Consultancy Agreement for a particular alleged defect can only be answered by determining how the defect came about and considering against those provisions where responsibility was allocated by the agreement. However, in that exercise it has to be remembered that the documents are to be read as a whole. In particular there was force in Miss McCafferty's submission that the matrices do not stand alone but are to be seen in the context of the Schedule of Duties which identified the tasks which Aecom was to undertake in relation to particular periods. It follows that there could be periods when the time for Aecom to perform the activity identified in a particular part of a matrix had passed.

148. Aecom would not be responsible for the faulty implementation of its design if that implementation was by others and the fault was not due to the design itself provided that Aecom neither controlled the implementation nor was allocated with responsibility for it by the Consultancy Agreement. It is, however, clear that Aecom did exercise some control over the implementation of its design and over the work undertaken by Rotary. At [179] and following below I have rehearsed the terms of exchanges in June and August 2006 between David Dean of Aecom and Gavin Don of Rotary. That exchange shows Aecom controlling the way in which the design was being implemented. The tenor of that exchange goes beyond advice or support and makes it clear that Aecom in the person of Mr Dean was telling Rotary it need not install dampers around the ductwork passing through the partitions in Plant Room 2. As a matter of basic principle Aecom's actions after the Consultancy Agreement are not material to the proper interpretation of that agreement which depends on the meaning of the words used when read in the context of the circumstances at the time. The relevance, however, of the August 2006 exchange is that it will not be open to Aecom to say that a particular defect was the consequence of the way in which Rotary implemented Aecom's design if Aecom caused Rotary to act in that way. Such direction by Aecom of the manner of implementation must be taken as an acceptance that the manner of implementation was appropriate and in accord with its design.

149. As to clause 6.08 that does not operate to remove Aecom's obligation to exercise reasonable care, skill, and diligence when commenting on the work of others. The effect of the provision is that Aecom must exercise reasonable care and skill in the making of the comments but what is required in order to constitute such care and skill is to be judged in the context of the comment being made on a drawing or other document produced by another and not on the footing that Aecom had the responsibility which it would have had as the author of the document in question. When in clause 6.08 it is said that Aecom "shall not be liable for the same" the words "the same" refer to "the drawings, specifications, agreements and the like" and not to Aecom's comments. This follows from the fact that the words "the same" are used twice in the last sentence of clause 6.08 and on each occasion they must be referring to the same thing. This means that by commenting Aecom does not assume an author's responsibility for the document in question such as to be liable for the document. It does not mean that Aecom is not liable for its own comments. The duty to exercise reasonable care and skill remained in respect of such comments. In addition, as Mr Hickey rightly emphasised, this provision was concerned with comments on drawings or other documents for which Aecom was not responsible. It did not operate to reduce Aecom's responsibility for such documents it produced itself or for which it otherwise had responsibility under the terms of the Consultancy Agreement.

150. It follows that it will be necessary to consider the question of responsibility separately in respect of each defect where that is in issue. It will be necessary to consider the nature of the defect and its cause to see where responsibility lies under the Consultancy Agreement. This will require cross-referencing to the terms of the agreement and in particular of the Second Schedule. The short point is that it is not possible to draw a bright line distinction between the production of the design to Stage E and the implementation of that design with Aecom having responsibility for the former but not the latter.

A Continuing Duty to Review, Advise, or Warn.

151. Finally, although there is here some overlap with the preceding issue, I turn to consider the extent to which Aecom had a continuing duty to advise or to warn Lendlease or to review the state of the works. It will be convenient to consider alongside this issue the question of when the cause of action in respect of a breach by Aecom of its obligations will have arisen as a matter of law.

152. Lendlease's case as advanced in the Amended Particulars of Claim was that Aecom should have warned Lendlease that the Fire Strategy and the configuration of Plant Room 2 in Rev 19 were not compliant with good practice nor with the applicable HTMs. As pleaded the failure to give such a warning was advanced as being a matter of negligence rather than as a breach of a specific term of the Consultancy Agreement. In the Amended Reply Lendlease pleaded at [54] that:

> "AECOM was, and should have been, involved in the process of what was being built within plantroom 2, which was the product of their design development, and their obligations as fire engineer meant that they should have been involved in making sure that what was built was compliant with the Applicable Standards."

153. Lendlease had sought permission for an amendment which would have included as part of that paragraph an averment that Aecom had a continuing duty up to practical completion to review its design and to advise of any non-compliance. In my ruling of 22nd November 2022 I had refused permission for that amendment on the basis that if it was a confirmation of Lendlease's existing case it was unnecessary and that if it was a fresh allegation this was not permissible in the Reply. Although the copy of the Amended Reply in the electronic bundle contained the sentences which I had directed should be struck out the pleading is to be considered as if they had been struck out.

154. In his written opening submissions Mr Hickey set out a review of the terms of the Consultancy Agreement. He said that this "amply demonstrated" that:

> "AECOM was required to do the detailed design of the substation and its configuration, to make itself familiar with what was being installed in the substation to ensure that it was compliant with Applicable Standards and to review and validate that it was compliant or if not to advise and warn Lendlease. AECOM's obligations were continuing ones right up to Practical Completion."

155. That contention was principally but not solely based on the terms of the Second Schedule. The point was amplified in Mr Hickey's oral opening where he said that the Fire Strategy was not finalised until Rev 19 was produced and that this meant that Aecom had a continuing obligation until then. In his closing submissions Mr Hickey said that there was a continuing duty on Aecom "to do their design, to do their fire strategy, and to complete so that [Lendlease] was not put in breach" of its obligations. He characterized the compilation of Rev 19 as having been Aecom's "last opportunity" to have remedied matters.

156. Miss McCafferty combined her submissions on this point with those as to the scope of Aecom's design obligations and limitation. She said that there was no continuing duty to warn or advise and that any cause of action against Aecom accrued when it handed over its design to Lendlease for construction in July 2005 alternatively when construction of Plant Room 2 began in June 2006.

157. Mr Hickey and Miss McCafferty both referred to *Emden's Construction Law* at 27-5 emphasising different aspects of the summary provided there. I turn to the authorities underlying that passage.

158. The claim in *New Islington & Hackney Housing Association Ltd v Pollard Thomas & Edwards Ltd* [2001] BLR 74 had been brought against architects who had been appointed to design and supervise the construction of a number of properties. The proceedings had been commenced more than six years after practical completion but less than six years after the issue of the certificate of making good and the final certificate. The issue was whether the proceedings were statute-barred and it was in that context that the claimant had asserted that the defendant "had a continuing duty to check and review their design until their retainer was terminated".

159. At [13] Dyson J explained that "the starting point must always be the terms of the contract of engagement."

160. At [14] the judge said:

> "I accept the proposition that, although it is necessary to look at the circumstances of each engagement, a designer who also supervises or inspects work will generally be obliged to review that design up until that design has been included in the work: see *Jackson and Powell on Professional Negligence* 4th Edition para 2-17. In a number of cases, it has been held that this duty continues until practical completion: see Chelmsford District Council v TJ Evers (1983) 25 BLR 99, 106, *Equitable Debenture Assets Corporation Ltd v William Moss Group Ltd* [1984] 2 Con LR 1, 24 and *Victoria University of Manchester v Hugh Wilson* [1984] 2 Con LR 43, 73."

161. However, at [15] Dyson J explained that the scope of the duty needed to be considered in more detail and that it was necessary to consider what the duty to review the design entailed and when an architect would be in breach of that duty. In particular it was necessary to consider the extent to which an architect had a duty to review the design once the relevant structure had been designed and constructed. At [16] Dyson answered that question thus:

> "In my view, in the absence of an express term or express instructions, he is not under a duty specifically to review the design of the foundations, unless something occurs to make it necessary, or at least prudent, for a reasonably competent architect to do so. For example, a specific duty might arise if, before completion, the inadequacy of the foundations causes the building to show signs of distress; or if the architect reads an article which shows that the materials that he has specified for the foundations are not fit for their purpose; or if he learns from some other source that the design is dangerous. In such circumstances, I am in no doubt that the architect would be under a duty to review the design, and, if necessary, issue variation instructions to the contractor to remedy the problem. But in the absence of some reason such as this, I do not think that an architect who has designed and supervised the construction of foundations is thereafter under an obligation to review his design."

162. At [20] having reviewed a dictum of Sachs LJ in *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862 which he described as the foundation of the statement that an architect had a continuing duty to review his design Dyson J said that:

> "In my judgment, the duty does not require the architect to review any particular aspect of the design that he has already completed unless he has good reason for so

> doing. What is a good reason must be determined objectively, and the standard is set by reference to what a reasonably competent architect would do in the circumstances."

163. It is also relevant for current purposes to note that in *New Islington* the claimant had to establish that there was a continuing duty to review after practical completion and so there was no live dispute as to the existence or otherwise of a duty to review before practical completion.

164. In *Oxford Architects* Ramsey J was also concerned with an architect's firm which was engaged to provide services during the course of construction. At [23] and [24] the judge drew a contrast between the position of a contractor engaged to "carry out and complete" works and an architect engaged solely to produce a design which was issued to a contractor for construction. In the latter case "it is difficult for a continuing duty to arise during the period of construction". However, there "may be a continuing duty" where the engagement of the architect "includes services during the period of construction"

165. In *Oxford Architects* the architects' duties went beyond design and included administration of the terms of the building contract and oversight of the work being done. It was in those circumstances that the architects had a duty to review the design. However, it is to be noted that at [26] and [27] Ramsey J explained that the duty "in relation to the period of construction" was that identified by Dyson J in *New Islington*.

166. At [29] Ramsey J addressed the accrual of a cause of action for breach of such a duty of review thus:

> "The continuing duty does not, however, give rise to a single and continually accruing cause of action. Rather, a different cause of action accrues at various stages. Thus, the cause of action for a failure properly to review the design is a different cause of action from a failure to provide a proper design in the first place. The causes of action will therefore accrue on different dates."

167. The claim in *Cameron Taylor Consulting Ltd & another v* BDW *Trading Ltd* [2022] EWCA Civ 31 was put in negligence. However, it is of note for current purposes that at [47] Coulson LJ said:

> "There used to be a suggestion that designers owed some sort of continuing duty to review their design, even after construction was complete. This so-called 'duty to warn' was almost always raised by claimants in order to try and avoid limitation difficulties. However the notion has fallen out of favour in recent years, and the duty has been said to arise only when something occurs to put the designer on notice that a review is required: see *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd* (2000) 85 ConLR 194 at 202, [2001] BLR 74 at 80. There is no continually accruing cause of action: see *Oxford Architects Partnership v Cheltenham Ladies College* [2006] EWHC 3156 (TCC), [2007] BLR 293. In any event, Mr Hargreaves confirmed that this was not how he put BDW's case on this appeal."

168. My understanding of the effect of those authorities is as follows. The determination in each case is to be based on the terms of the contract in question. Where the contractual obligation is solely that of providing a design the contract

is unlikely to be interpreted as imposing an obligation on the designer to review the design after it has been supplied. Where there are duties going beyond the provision of a design there can be a contractual obligation to review the design. The extent to which the duties go beyond the provision of a design and the nature of the further duties will be highly relevant factors in considering whether there is a duty to review. Where there are such further duties the court can find that there is an obligation on the designer to review the design up to the time it is incorporated in the construction. In such cases the duty will be, as Ramsey J explained, the *New Islington* duty to review when there is a good reason such as would prompt a reasonably competent professional of the relevant discipline to engage in a review. A contract can be interpreted to provide for this same duty of review to continue up to the time of practical completion. However, this is a step further than the duty to review in the period between provision of the design and construction. As a consequence there will be cases where properly interpreted the contract gives rise to a duty up to the time of construction but where that duty does not continue after incorporation of the design in the construction. Where there is such a contractual duty of review the cause of action in respect of a failure to undertake a review will accrue at the time the review should have been made. When considering whether the contract is such as to give rise to a duty to review after provision of a design it is to be remembered that in *New Islington* and *Oxford Architects* Dyson and Ramsey JJ were concerned with architects whose contractual obligations involved not only the provision of a design but the subsequent oversight of the construction. The obligation to review is not confined to such cases because all will turn on the effect of the particular contract but the facts of those cases do indicate the type of circumstances in which the contract will be found to have given rise to a duty to review.

169. In the light of that analysis I return to the circumstances of the current case and to the terms of the Consultancy Agreement. Aecom was not a pure designer and it had obligations and responsibilities which continued after the provision of its design. However, it was not in the position of an architect, such as those in *New Islington* and *Oxford Architects,* responsible both for design and for overseeing the construction as a whole. Even on Lendlease's case the obligations which Aecom had after providing its design were obligations of review and coordination rather than control. It is to be remembered that the Consultancy Agreement expressly designated the architect as the Lead Designer.

170. The construction of Plant Room 2 was completed by the end of August 2006 (although the exchange between Mr Dean and Mr Don suggests that it remained incomplete at the start of that month). At [54] the Amended Reply alleges that Aecom had a duty to ensure that as built the Plant Room was compliant with HTM 81 and the other applicable standards. Such a duty would go beyond the review by Aecom of its design and would extend to oversight of the work of others. Even though Aecom's duties did not end with the provision of the design in July 2005 I find that, subject to the dealings in relation to Rev 19, the contract is not to be interpreted as imposing an obligation to oversee the work of others to ensure that there was compliance with the HTMs. Nor is it to be interpreted as imposing on Aecom a duty to review the work of others with a view to providing Lendlease with unsolicited advice as to the compliance of such work with the applicable standards. Even if there was such a duty the cause of action in respect of a breach

would have accrued at the date of breach which would at the latest have been the completion of the construction by the end of August 2006. Similarly if Aecom had a duty to review its design before the completion of the construction then that duty would only have arisen when there was a good reason to review and again any cause of action for breach would have accrued by the end of August 2006.

171. The question then becomes one of whether Aecom had any continuing duty of review after the Plant Room had been built. It is to be noted that although paragraph 6 of the Schedule of Duties provides for Aecom to undertake work on the completion of the construction the tasks in question are limited and specific. Thus at paragraph 6.28 there is a particular limited obligation and, similarly, parts 4 and 5 of Matrix 3 identify limited specific responsibilities resting on Aecom.

172. The Consultancy Agreement did not contain any express requirement for Aecom to keep its design or the Plant Room as constructed under review after the construction. I find the agreement is not to be read as giving rise to such a duty. Even if there was such a duty the obligation to review would only be triggered if there were a good reason such as to call for a review. Such a good reason would have to be pleaded and proved. Lendlease does not suggest that there was such a trigger other than the need to provide the final version of the Fire Strategy to enable practical completion to be certified: a need which led to Rev 19.

173. The position, therefore, is that even on the interpretation most favourable to Lendlease in the period after the construction of the Plant Room (and so after August 2006 at the latest) there was no duty on Aecom to review the Plant Room design or construction nor to warn Lendlease as to non-compliance with HTM 81 unless the circumstances leading to the compilation of Rev 19 brought such a duty into being. Aecom was clearly acting pursuant to the Consultancy Agreement when it provided Rev 19 and so it becomes necessary to consider how Rev 19 came about and the consequences of that for Aecom's obligations.

The Origin of and Responsibility for Rev 19.

174. There was considerable debate in counsel's written and oral submissions as to how the terms of Rev 19 came about and the issue took up a significant part of the cross-examination of Mr Middleton. I am satisfied that on analysis it is clear what happened; how the revision was made; and why it was made in the terms it was. Once those matters are determined the relevant questions will become, first, that of determining the consequences of the findings as to the genesis of Rev 19 for the obligations owed by Aecom in October and November 2007 and, then, that of assessing the effect of that determination on the claim as a whole.

175. Lendlease's case as to the origins of Rev 19 and the reasons why there was not fire compartmentation of the rooms within Plant Room 2 has developed in the course of the proceedings and there was further development during the hearing. Initially it was being said that it had been necessary to remove walls because Aecom's original design configuration did not provide sufficient space for the generators which were to be installed. At times in the evidence there was a degree of confusion as to whether reference was being made to the physical removal of the partitions or to the removal of a partition's status as a fire-rated division. Some of Mr Middleton's answers in cross-examination appear to have been addressed to

the former basis but in closing Mr Hickey clarified that Lendlease's case was being put on the latter basis. A development of this point was that the size of the rooms meant that for there to be adequate ventilation of the generators there could not be fire compartmentation. As it stood by the end of the hearing Lendlease's position was that Rev 19 reflected Plant Room 2 as it had been built. Fire compartmentation between the internal rooms was not possible because of the number and nature of the penetrations which were needed in the partition walls. That, in turn, was said to be a consequence of Aecom's design and the provision which Aecom had made for the routing of services which had determined the number and scale of the openings in the walls. When it supplied Rev 19 to Lendlease Aecom should have advised that the Fire Strategy was neither compliant with HTM 81 nor an adequate fire engineered alternative with the consequence that it did not satisfy Lendlease's obligations to Project Co. Mr Hickey submitted that the court should proceed on the footing that if such advice had been tendered Lendlease would have acted on it and would have caused the configuration of Plant Room 2 to be altered at that stage so as to achieve compliance with its obligations. The development of Lendlease's case is understandable in circumstances where it was not drawing on the recollection of those involved in these dealings on its behalf but was rather putting forward a case based on the incomplete documentary record. I will consider below the extent to which it is open to Lendlease to advance its case on the footing of what it would have done if it had been given such advice by Aecom.

176. Aecom's position was that reference to the earlier email correspondence about the movement of walls was a red herring because there had in fact been no physical movement of the relevant partitions or rather that to the extent that one had been moved it had been replaced with a partition maintaining the same division in a slightly different position. It said that it had not been aware until October 2007 that the fire compartmentation provided for in the earlier versions of the Fire Strategy had not been put in place. It does not accept that the providing of routes and the necessary penetrations for the services prevented fire compartmentation saying that this was a failing in the course of construction rather than of its design. It was instructed to revise the Fire Strategy to accord with the "as built" position and did so only after direction to that effect from Lendlease accompanied by confirmation that the approach adopted had been approved by Leeds Building Control. As explained above Aecom does not accept that the Consultancy Agreement imposed any continuing duty to advise about these matters but says that in any event Lendlease made it clear that it was not seeking advice but was requiring Aecom to provide the revised Fire Strategy.

177. Mr Hickey referred me to a number of email exchanges from June 2004 to June 2007. Most of these were well before the compilation of Rev 19 was being considered and a considerable number were from the time before the construction of Plant Room 2 had been completed. I did not find those exchanges of assistance in determining how or why Rev 19 came to be drawn up in the terms it was. I am satisfied that the explanation for those matters is to be found in consideration of the exchanges in October and November 2007.

178. However, the exchange in June and August 2006 between David Dean, Aecom's Senior Mechanical Engineer for the works, and Gavin Don of Rotary is of significance.

179. On 15th June 2006 Mr Don emailed Mr Dean in relation to the subject "Switch rooms in P2" saying:

> "Just a reminder, you were going to email me to explain why I didn't need to install the dampers to ductwork passing in and through this area."

180. It seems that there had been no response to that email because on 3rd August 2006 Mr Don emailed again asking "can you confirm this." Mr Dean then replied the same day saying:

> "LBS wanted the plantroom i.e. PR2 as a separate compartment.
>
> The electrical rooms are fire hazard rooms within the compartment and the ducts pass through the rooms with no take-offs and therefore do not require to be dampered.
>
> This was discussed and agreed with Nigel Brown, LBS."

181. It is not self-evident what Mr Dean meant when he said that the electrical rooms were "fire hazard rooms within the compartment". One interpretation is that he was saying that although Plant Room 2 was to be seen as a separate compartment these rooms were nonetheless to be separated by fire compartmentation but that Leeds Building Control had agreed that there did not need to be dampering of the duct work. Alternatively was he saying that the only fire compartmentation needed was around the perimeter of the single compartment formed by the Plant Room? The former interpretation fits better with the reference to "fire hazard rooms" but the latter accords better with the reference to the Plant Room being a "single compartment".

182. Mr Middleton said that the former was the correct interpretation. He said that there had been agreement with Leeds Building Control that within clusters of rooms otherwise separated by fire compartmentation throughout the Oncology Unit there did not need to be dampers around the ductwork provided that there was such dampering around the perimter of the cluster of rooms.

183. I asked Aecom's fire expert, Stephen Morgan, if he could assist with the reference to fire hazard rooms. He explained that HTM 81 contained a list of rooms which were within areas considered to be a higher fire risk though he said that an electrical switch room would not normally be characterised as a room but rather as a compartment. Mr Morgan's evidence provided some support for the latter interpretation of Mr Dean's comments but he gave the impression that such usage in connexion with Plant Room 2 could not readily be seen as an application of HTM 81. In addition it is not clear that Mr Dean who was not a fire engineer was adopting the language of HTM 81. Support for the former interpretation came in Mr Morgan's evidence that a view could be taken that the generator sets did not each need to be in a fire compartment provided they were as a group in such a compartment.

184. It is to be noted that Mr Middleton said that he had not seen this exchange in August 2006. I accept and take account of that but nonetheless his evidence in relation to this exchange was delivered in an unimpressive manner. Mr Middleton insisted that the reference was one of general application and failed to accept that in context the exchange was clearly about Plant Room 2. In addition (although I

accept that he was not asked about this in terms) he gave the impression of attempting to have matters both ways. He did not acknowledge that the lack of dampering compromised the fire compartmentation between the rooms and then seek to say that this had been agreed with Building Control. Rather he placed the emphasis on the adequacy of the compartmentation around the cluster of rooms while at the same time invoking the approval of Leeds Building Control. The impression I formed was that Mr Middleton was seeking to rationalise an exchange which he had not seen at the time. That said the interpretation which Mr Middleton advances does make the best sense of Mr Dean's references both to the Plant Room as a "separate compartment" and to the electrical rooms being "fire hazard rooms".

185. In any event what is clear is that this exchange shows Aecom telling Rotary in terms that there was no need to install dampers to the ductwork passing through the partitions between the separate rooms in Plant Room 2 and saying that this course had been approved by Leeds Building Control. I will consider the relevance of this exchange further below.

186. The history showed that there had been interactions between Aecom and Leeds Building Control in the course of the works. By way of example, there was substantial involvement on the part of Aecom in a meeting at the offices of the building control team in November 2003. In addition the email exchange of August 2006 to which I have just referred appears to result from direct dealings between Aecom and Leeds Building Control though that does not necessarily follow from the terms of the exchanges. However, those previous dealings between Aecom and Leeds Building Control are of limited assistance in determining which party in fact engaged with Leeds Building Control in the autumn of 2007: an issue on which I find the exchanges at that time of greater assistance.

187. Although the documentary record is incomplete I am satisfied that at least the majority of the relevant exchanges from October and November 2007 were before me. There were clearly some gaps in the paper trail. In addition it is apparent that there will have been internal exchanges on both sides and with others which are no longer available. It is likely that there were also conversations between the parties and others. Nonetheless, a number of continuous email chains were available. The exchanges which are before the court show a clear and coherent picture. I am satisfied that it is safe to draw conclusions on the balance of probabilities from that material as to the parties' dealings. In particular there is no basis for believing that such documents as were missing or evidence of any further conversations would change that picture materially nor that they would lead to a different conclusion as to the origins of and responsibility for Rev 19.

188. The exchanges of October and November 2007 are to be read in context. The following aspects of that context are relevant. First, the construction of Plant Room 2 had been completed by the end of August 2006. Second, up to the time of Rev 19 all the drawings and every revision of the Fire Strategy had respectively shown the partition walls as effecting 60 minute fire compartmentation and had referred to this in the text of section 7.5. These had included the "issue for construction" drawing E-02 of 5th July 2006; the "draft final construction" drawing E-03 of 1st October 2007; and Rev 17 of the Fire Strategy dated 13th June 2007. Finally, there must be regard to the exchange in August 2006 between Mr Dean and Mr Don.

189. The following exchanges in October and November 2007 are of particular note.

190. On 5th October 2007 Simon Vaughan of Lendlease emailed Nigel Brown of Leeds Building Control copying in Mr Middleton and others. The email said that it was recording points which had been discussed at a meeting that morning and that in relation to Plant Room 2 Mr Brown had accepted that there was no need to provide separation between the rooms in the Plant Room and that the one hour fire separation would be provided by the perimeter of the Plant Room. Mr Middleton was asked to revise section 7.5 of the Fire Strategy and the accompanying drawings because they were contrary to what had been agreed with Mr Brown. Mr Middleton responded saying that he did not agree with "most of what was 'agreed' [presumably at the meeting] or interpreted" and saying that any necessary modifications could be "picked up in the final 'as fitted' fire document"

191. Mr Middleton's reply led to a series of terse and somewhat ill-tempered exchanges. Mr McGrath of Lendlease said that the document needed to be updated so that practical completion could be certified and that he had been asking Mr Middleton for this "for months". He asked Mr Middleton to "issue the amendments to allow PC to take place". Mr Middleton replied saying that the document would not be signed off; denying that there had been delay; and that he would review matters when he got other opinions. Mr McGrath replied to this by criticising Mr Middleton for being unhelpful; accusing him of being "more interested in task avoidance"; and saying to him "you obviously have no idea what is installed". He went on to say that the document needed to be updated and that the drawings and the Fire Strategy document were in conflict.

192. Mr McGrath's email was sent at 10.40am on 8th October 2007. Mr Middleton replied in the following terms 10 minutes later:

> "Totally disagree with your comments, I could just amend the doc against the e mail as instructed but you are asking [Aecom] to advise you and when we do we do it with the intent that we are protecting the scheme, it is only [Lendlease's] view we are in task avoidance mode. In two years time when the fan is full, and no one has an audit trail, [Aecom] are your first port of call, all we are doing is trying to apply something other than a knee jerk reaction. And quick cost fix.
>
> We have your overall interests in mind !!"

193. Mr McGrath replied simply saying that Mr Middleton's response had "verified my earlier statement". To that Mr Middleton said "we will advise what we see is the correct course of action as and when all the details are tabled".

194. On the same day Mr Hopkinson emailed Mr Middleton saying that Mr Brown had asked Mr Hopkinson to ring him and seeking Mr Middleton's authorisation to do so.

195. On 29th October 2007 Mr Vaughan forwarded to Mr Middleton and SanChan Kwan of the architects an email from Mr Brown of the same date in which the latter confirmed his agreement to the points which Mr Vaughan had made in his email of 5th October 2007. It is of note that Mr Brown had been in email correspondence with Mr Vaughan and had not copied any others into the exchange. Mr Vaughan referred Mr Middleton to Mr Brown's email describing it as Mr Brown's confirmation "on the items which have been under discussion

recently". Mr Vaughan then asked that Mr Middleton and Mr Kwan "update the fire strategy document and drawings as required."

196. On 19th November 2007 Mr Middleton sent Rev 18 of the Fire Strategy to Lendlease. Mr Vaughan responded questioning the extent of the revisions as follows:

> "… you have not revised sections 7.5 or 8.2.1 following Nigel's confirmation that the horizontal fire shutter separating B2/B1/ L0 and the generator rooms in B1 plant need not be in their own 1hr compartments.
> Please advise when you can revise and reissue."

197. Mr Middleton replied asking why section 7.5 needed amending adding "you built the walls at 1 hour, it was the med gas room which we derated". This is powerful contemporaneous evidence that until 19th November 2007 Mr Middleton believed that there was one hour fire compartmentation around the rooms housing the generators. This interpretation of the email in relation to Mr Middleton's knowledge is not undermined by the exchange between Mr Dean and Mr Don in August 2006 which I have considered above and the consequences of which I will have to consider further below. It is clear from the email that Mr Middleton believed that there was 1 hour fire compartmentation around the rooms as built. On the balance of probabilities and again by reference to the tenor of the email I find that this was because he was unaware of the lack of dampering around the ductwork rather than because he believed that in the light of the approval from Building Control the absence of dampering was not inconsistent with 1 hour fire compartmentation.

198. Mr Vaughan replied thus:

> "The walls to the HV/LV/Generators are not fully fire stopped due to the amount and type of penetration. So we leave no room for being picked up on, it was agreed that the perimeter of the B1 plantroom would be the line of fire separation from the corridor, therefore please amend the document."

199. Mr Middleton responded simply saying "ok" and Rev 19 in the form I have described at [17] and following above followed later that day.

200. Mr Middleton was the only witness who could speak from his own recollection as to what had happened in October and November 2007. As explained above he was giving evidence in 2022 about those dealings and about earlier exchanges in circumstances where the documentary record was incomplete and where he had been first asked about these matters in 2019. I bear those factors in mind together with those which as I have explained at [66] above necessitate a degree of caution in assessing Mr Middleton's evidence. Nonetheless, I am satisfied that his account of the dealings in the autumn of 2007 was in accord both with the surviving documents and with inherent likelihood and was substantially correct.

201. It is to be remembered that construction of Plant Room 2 had been completed over a year before these exchanges and that the belief Mr Middleton expressed in his email of 19th November 2007 was a belief as to the built state of Plant Room 2. It is also of note that the exchanges in October and November 2007 were in the context of getting matters in order so that Lendlease could obtain a certificate of practical completion of its works.

202. Reading the email exchanges in light of those matters and of the evidence of Mr Middleton I find that Aecom revised the Fire Strategy to accord with the "as built" configuration of the Plant Room and did so after direction from Lendlease to do that. Those engaged in that exercise on behalf of Aecom were unaware that the partitions in Plant Room 2 lacked the 60 minute fire rating provided for in the earlier versions of the Fire Strategy until Mr Vaughan explained this on the afternoon of 19th November 2007. Aecom had initially been reluctant to make the revision but it had done so after it had been assured that the installation had been approved by Leeds Building Control in the person of Nigel Brown. Even then the final revision of section 7.5 of the Fire Strategy document was only made after Mr Vaughan's explanation and request on 19th November 2007. Although there was contact between Aecom's Mr Hopkinson and Leeds Building Control that was not material to what happened and the work at that time of liaising with the latter; of persuading Mr Brown to the extent that was necessary; and of obtaining approval of the installation had been undertaken by Lendlease. Aecom did not advise Lendlease as to the compliance or otherwise of Rev 19 with HTM 81 or the requirements of the Project Agreement. In that regard Lendlease made it clear that it was not seeking advice from Aecom about these matters. Instead Lendlease was focused on what was needed to obtain the certificate of practical completion. It pressed for Aecom to revise the Fire Strategy in the way it requested and in the course of doing so overrode the reservations expressed by Mr Middleton.

203. Although that finding flows from my own assessment of the material in light of the oral evidence and the submissions made to me it is noteworthy that Joanna Smith J came to substantially the same conclusion on her reading of the documents: see at [206(4)].

204. I will now turn to consider in light of those factual findings and my conclusions as to the nature of Aecom's obligations under the Consultancy Agreement the questions of what duty Aecom owed in respect of the compilation of Rev 19 in November 2007 and whether there was a breach of such a duty.

Aecom's Obligations in November 2007 in relation to and as a consequence of Rev 19.

205. Assuming for this purpose that Rev 19 and the configuration of Plant Room 2 as depicted were not compliant with HTM 81 and the other requirements did Aecom have a duty to advise Lendlease of this and to warn of the non-compliance?

206. Stephen Morgan was Aecom's fire engineering expert witness. He accepted that a reasonably competent fire engineer exercising due care and skill should have advised that Rev 19 was not compliant with those requirements. It is, however, to be remembered that Lendlease's claim is now advanced only on the basis of a breach of the terms of the Consultancy Agreement and that Lendlease has accepted that it is unable to pursue a negligence claim. The relevant question, therefore, is whether Aecom had an obligation under that agreement to advise or warn in November 2007. If there was such an obligation then Mr Morgan's evidence would be highly relevant to the question of the advice which should have been given but it cannot determine the effect of the Consultancy Agreement.

207. Whether Aecom had a contractual duty to warn or advise such as is asserted depends on the role which it was being asked to perform in the particular

circumstances. As explained above I have found that in October and November 2007 Aecom was being instructed to revise the drawing and the Fire Strategy so as to accord with the as built configuration of Plant Room 2. It was not asked to provide advice and the reservations it expressed were overridden and met with the response that the manner of installation had been approved by Leeds Building Control. Aecom was being required to perform this exercise so that practical completion could be certified.

208. The particular factual circumstances are of central importance in determining what Aecom had to do in accord with the Consultancy Agreement. In the circumstances appertaining in October and November 2007 the Consultancy Agreement did not require Aecom to advise on the compliance of Plant Room 2 with HTM 81 and the other requirements nor to warn that the installation was non-compliant. For Aecom to have done so would have amounted to a direct contradiction of the instructions which were being given. Applying the analysis I have set out at [152] and following above for there to have been such an obligation there would have to have been both a duty continuing beyond the time of construction to that of practical completion and a trigger for a review of matters by Aecom. I have already explained why there was not such a duty. In addition even if there had been such a duty the instruction to revise the Fire Strategy would not have operated as a trigger for Aecom to review its design. That is because the instruction was not for a general revision in such terms as Aecom using its expertise found fit but rather for the alteration of particular passages of the text and particular aspects of the drawing in ways specified by Lendlease.

209. It is somewhat artificial to approach the issue by reference to an obligation to review. That is because in reality the question is not whether Aecom should have reviewed its own earlier design. Rather it is whether a duty to warn arose when Aecom was instructed to revise the Fire Strategy in this way and in the circumstances as they were in October and November 2007. However, the result is the same whichever way the question is framed. I find that in light of the clear instructions which were given to Aecom and the terms in which they were expressed by Lendlease there was no duty to advise as to the wisdom or otherwise of what was to be said in the revised Fire Strategy nor to warn as to the non-compliance of that and the configuration of the Plant Room. The short point is that having given the instructions which it did and having done so in terms which made it clear that it was relying on its own judgement and on that of Building Control Lendlease cannot say that the Consultancy Agreement obliged Aecom either to decline to give effect to those instructions or to warn as to the consequences of complying.

210. I have reflected on the comments made by Mr Middleton in his email of 8th October 2007 which I have quoted at [193] above. Those comments do not alter my analysis. They are to be read in the context of the ill-tempered exchange with Mr McGrath and were made within 10 minutes of receipt of the email from Mr McGrath. They were not a considered assessment of the position. It is in any event apparent that despite Mr Middleton's reference to advice Lendlease was not in fact asking for advice from Aecom but for the latter to draw up the documents in a particular way.

211. Although Mr Middleton did not know that the partitions were not fire-rated until he was told this on 19th November 2007 by Mr Vaughan Aecom did know this or rather knew that dampers had not been fitted to the openings for the duct work. Indeed the absence of dampers was because of the instruction which Aecom, through Mr Dean, had given to Rotary in August 2006. Such knowledge might very well have been relevant if Aecom had an obligation to advise Lendlease in November 2007 but it does not give rise to a duty if there is not otherwise one under the Consultancy Agreement. To the extent that Aecom was in breach of its contractual obligation to exercise reasonable care and skill by giving that instruction to Rotary the cause of action in respect of that breach accrued in August 2006.

212. It follows that Aecom was not in breach of its obligations under the Consultancy Agreement in producing Rev 19 in the terms it did nor in failing to warn Lendlease that the resulting Fire Strategy was not compliant.

The Causative Effect of Rev 19.

213. At [49] the Amended Particulars of Claim said that "such defects, breaches, and remedial works" were the result of Aecom's breach of the terms of the Consultancy Agreement. That was a reference back to both the Plant Room 2 Defects and the Non-Plant Room 2 Defects; to the breaches of Lendlease's obligations to Project Co; and to the works necessary to remedy the defects.

214. In his closing submissions Mr Hickey put matters in a rather different way. He said in the following terms that advice from Aecom would have led to a reconfiguration of Plant Room 2 before it was handed over to Project Co:

> "14. It is obvious that had Aecom acted with reasonable skill and care, it should have drawn attention to the deficiencies in the solution adopted, and in consequence plantroom 2 would not have been handed over in a defective and compromised state.
>
> "15. Had that occurred, a major redesign would have been necessary of the electrical distribution within the substation, to the fire-rating of the walls, the introduction of a fire-suppression system and modifications to the ventilation for the generators. This is in effect what the Trust's remedial scheme is now having to do".

215. That line of argument was foreshadowed to some extent in the Amended Reply at [55] where it was said that Aecom's breach of its design obligations "caused Lendlease to hand over a non-compliant plantroom 2 which resulted in Lendlease incurring loss and liability to Project Co". However, even that does not put the case in quite the way Mr Hickey ultimately advanced it.

216. The point is academic in light of the conclusion I have reached as to whether there was a breach by Aecom in November 2007 but even if I had not reached that conclusion I would had considerable reservations as to whether it was open to Lendlease to put its case in this way.

217. The contention that Lendlease would have acted in a different way if Aecom had warned as to Rev 19 should have been expressly pleaded and supported by evidence. The pleading at [55] of the Amended Reply does not spell out what Lendlease would have done differently. There was also no evidence on the point.

This is not surprising given that Mr Avey was not involved in matters in 2007 and there was no other evidence from those who had been involved at the time. The conclusion as to what Lendlease would have done if given advice by Aecom is far from self-evident. The tone and content of the email exchanges in October and November 2007 are such that at the very least there is scope for question as to whether Lendlease would have acted on such advice.

218. In addition there would be consequences for the way in which Lendlease's loss was to be assessed. Lendlease has sought recovery of the sums for which it is liable to Project Co and to Engie pursuant to Joanna Smith J's judgment and the settlement respectively. However, if there had been a reconfiguration in 2007 as a result of Lendlease acting on advice from Aecom then Lendlease would have incurred considerable expense at that stage. It would be necessary to explore how much of that expense would have been borne by Lendlease rather than recovered from others at that time and for credit to be given for the resulting sum against the sums now being claimed.

The Statutory Limitation Defence.

219. The effect of the conclusions reached thus far is that the Consultancy Agreement took effect as a deed. There is, therefore, a twelve year limitation period running from the accrual of the cause of action in respect of any breach of that agreement. These proceedings were commenced on 30th May 2019. As a consequence the claim is statute-barred save to the extent that it is founded on a cause of action accruing on or after 30th May 2007.

220. Limitation having been put in issue it is for Lendlease to establish that the claim in relation to the defects on which it relies is not statute barred (see *Cartledge v Jopling & Sons* [1962] 1 QB 189 per Harman LJ at 202 and Pearson LJ at 208 and *London Congregational Union Inc v Harriss & Harriss* [1988] 1 All ER 15 per Ralph Gibson LJ at 30d-j). That is to be done by pleading and proving the date of the act or omission which is said to give rise to the cause of action.

221. Where the claim is for a failure to review or to advise in breach of a contractual obligation to review or advise each such failure will give rise to a separate cause of action and each such cause of action will accrue when the failure occurs.

222. The cause of action for a claim in negligence based on defects in a design for construction accrues when the negligence first causes damage. As Coulson LJ explained in *Cameron Taylor Consulting* at [45] this will be when the "relevant defective design [is] incorporated into the building" and "in practical terms that will happen when a drawing containing the relevant defective design was issued to the contractor for construction purposes and the contractor then builds in accordance with that drawing". At [46] Coulson LJ explained that this was because by itself a defective drawing proved nothing but that what mattered was what happened to it after drawn.

223. A cause of action in negligence is only complete when the negligent act or omission has caused damage. However, a cause of action for breach of contract accrues on the date of breach. It would, therefore, appear to be the case that a contractual cause of action for a defective design will accrue when the design is

handed over to the contractor for construction even if construction is not completed until substantially later. However, as was the position in *Cameron Taylor Consulting* nothing turns on that point in this case and I will proceed on the basis that the cause of action in respect of a claim for defective design accrued at the latest when the construction in accord with such design was completed.

224. Here Aecom's obligations went beyond the mere provision of a design and as I have explained above there were continuing responsibilities going beyond the provision of the Stage E design. However, I have found that Aecom did not breach its obligations in the dealings connected with Rev 19 in October and November 2007. I have also found that Aecom did not have any duty to review its design or to undertake coordination or its other related tasks after the time when construction was completed. In respect of Plant Room 2 that was by the end of August 2006 at the latest.

225. I will apply the analysis underlying that conclusion when I address the defects separately below so as to consider whether the cause of action in respect of any of them accrued after 30th May 2007. It will, however, be seen that the claims both in respect of the Plant Room 2 Defects and the Non-Plant Room 2 Defects are statute-barred no relevant act or omission having occurred after 30th May 2007.

226. In that regard I note at this stage that what is necessary for such accrual is an act or omission after 30th May 2007 which was in breach of Aecom's contractual obligations and which was causative of the defect. In his written opening Mr Hickey gave as an example showing that Aecom was still providing services after May 2007 an email sent by Derek Elliott of Lendlease to Mr Middleton on 19th December 2007. However, that does not advance matters. It appears to show Mr Elliott asking for Mr Middleton to provide answers to queries which had been raised about the construction. This does indeed show that correspondence was continuing at that time but that did not without more trigger an obligation to review. What is necessary is for Lendlease to show acts or omissions in breach of contract causative of the particular defects and establishing those matters requires more than the fact of correspondence unless the terms of the correspondence constitute a breach causative of the defect.

227. My conclusion as to limitation is determinative of the claim. However, as the matter has been fully argued I will address the further lines of defence together with the issues of breach and quantum albeit rather more shortly.

<u>The Effect of the Settlement Agreement.</u>

228. The following provisions of the Settlement Agreement are relevant:

229. Recitals A, C, and D said:

> "(A) Lend Lease appointed AECOM to undertake various civil, structural, mechanical and electrical and related services in connection with the development of new facilities and the consolidation of existing facilities at the Leeds Oncology Hospital PFI Project (the "**Project**") under an appointment contract dated on or around 15 October 2004 (the "**Appointment**");"

> "(C) Lend Lease has made various claims against AECOM for loss and damage incurred due to alleged deficiencies in certain services performed by AECOM under the terms of its Appointment"
>
> "(D) AECOM has made various claims against Lend Lease in respect of unpaid fees owing by Lend Lease to AECOM for services performed under the Appointment;"

230. By clause 2.1 "Notified Claims" were defined as:

> "(i) AECOM's claims for payment in respect of the consultancy services provided by AECOM pursuant to the Appointment, including AECOM's claims for fees set out in AECOM's fee claim breakdown dated August 2008 and AECOM's additional fee claim submission dated December 2010 (and updated/re-submitted in July 2011); and
>
> (ii) Lend Lease's claims relating to alleged deficiencies in certain services performed by AECOM, as set out in the claim documents submitted by Lend Lease relating to: the Haematology Ward; Chilled Beams; Kitchen Wards; Beverage Bay; Temporary Process Cooling; Plant Room Ventilation; Major Equipment Rooms Electrical Distribution; Fire Alarm Cause & Effect; Aseptic Pharmacy; Linac Chambers Electrical Distribution System; Medical Gases and Vacuum Services; Connections to Washing Machines, Tumble Dryers and Dishwashers; Extract Ventilation Systems - Dirty Extract Fans."

231. The same clause defined "Latent Defects" as:

> "…any defects that may become manifest and/or are notified to Lend Lease after the date of this Agreement and which arise out of or in connection with AECOM's provision of services pursuant to the Appointment and in respect of which Lend Lease would be entitled to bring a claim up to the expiry of the limitation period in accordance with the Limitation Act 1980. For the avoidance of doubt, Latent Defects excludes the defects notified to AECOM in the Notified Claims and any defects which are known or ought reasonably to have been known to Lend Lease as at the date of this Agreement."

232. Clause 3.1 stated:

> "The Parties agree that the terms and conditions of this Agreement are in full and final settlement of the Notified Claims and any other claims and counterclaims, liabilities or debts (of whatever nature) which are known to the Parties or which ought reasonably to have been known to the Parties as at the date of this Agreement arising out of or in connection with AECOM's provision of services pursuant to the Appointment. For the avoidance of doubt, AECOM shall remain liable in respect of Latent Defects."

233. Also of note is clause 5.1 effecting a release in these terms:

> "In consideration of the payment of the Lend Lease Settlement Sum and the AECOM Settlement Sum and the Parties' compliance with the terms and conditions of this Agreement, the Parties agree to waive and unconditionally and forever release each other, their insurers, their parents, subsidiaries, affiliates and associate companies (included but not limited to their respective directors, officers, employees, agents, successors, assigns and heirs) from (a) the Notified Claims and/or (b) any other claims and counterclaims, liabilities or debts (of whatever nature) which are known to the Parties or which ought reasonably to have been known to the Parties as at the date of this Agreement arising out of or in connection

with AECOM's provision of services pursuant to the Appointment. For the avoidance of doubt, this release shall not extend to AECOM's liability in respect of Latent Defects."

234. For Lendlease Mr Hickey placed considerable emphasis on the reference in the Settlement Agreement to "claims". He contended that the Settlement Agreement should be read as addressing claims which were in existence at 28th September 2012. Such claims would be caught by the Settlement Agreement provided that the party in question ought reasonably to have known of them at that time. I disagree and I am satisfied that the Settlement Agreement had a wider effect.

235. The Settlement Agreement needs to be read as a whole and realistically. Mr Hickey's approach failed to take account of: the references to "liabilities"; the definition of "Latent Defects" with the exclusion from that category of defects of which Lendlease knew or ought to have known at the time of the agreement; and the clear intention that clause 5.1 should effect a release for the future. When the Settlement Agreement is read properly with due weight given to those matters its effect is clear. It operated to release any liability which Aecom would otherwise have 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 in question. 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. However, for current purposes the significant point is that the focus is on the defects and the liability arising from them rather than on claims in existence at the date of the agreement.

236. The Settlement Agreement is, therefore, a complete defence in respect of any claim based on a defect which existed at that date and of which Lendlease knew or ought to have known. Aecom accepts that the Settlement Agreement is not a defence to the claim based on defects 13, 18, and 23 but does rely on it in relation to the other defects. It will be necessary to consider for each of those defects where Aecom does rely on the Settlement Agreement whether Lendlease knew or ought reasonably to have known of it as at 28th September 2012. The question of whether Lendlease ought reasonably to have known of a particular defect is to be determined objectively but it is to be remembered that as Aecom is asserting the defence the burden of showing the requisite actual or constructive knowledge lies on Aecom.

The Consequences of the Judgment of Joanna Smith J.

237. Lendlease says that the effect of the principles identified by Clarke J in *The Sargasso* [1994] 1 Lloyds LR 412 is that although I am not bound to adopt Joanna Smith J's quantification of the loss caused by the alleged breaches I should do so unless that quantification is contradicted by fresh evidence or there are other exceptional factors justifying a departure from her quantification. Mr Hickey accepted rightly that Lendlease had to prove that Aecom's breach was the cause of the former's liability to Project Co but said that once that had been done the amount awarded in the "upstream" proceedings should be taken as the measure of loss subject to limited exceptions. For its part Aecom says that the effect of the decision of the Court of Appeal in *Ward & others v Savill* [2021] EWCA Civ 1378 is that notwithstanding the judgment of Joanna Smith J Lendlease must prove in

this action all the elements of its claim including the amount of the loss caused by Defects 1 - 9.

238. In *The Sargasso* the plaintiff, Stargas, asserted that the defendant was in breach of a time charter and that this breach had caused the plaintiff to be in breach of a voyage charter with another party. The claim for breach of the voyage charter had gone to arbitration with an award being made against Stargas. Stargas then sought damages in the amount of the arbitration award saying that this should be seen as the measure of its loss in the absence of evidence of a failure to mitigate or of the arbitration award being perverse. The defendant said that the arbitration award was inadmissible as evidence of the plaintiff's loss (save to provide a cap on the recoverable amount) alternatively that it was no more than *prima facie* evidence of the loss.

239. Clarke J said that if the matter were free from authority he would accept that the amount of the arbitration award was to be seen as the measure of the plaintiff's loss. This was because it was within the parties' contemplation that a breach of the time charter by the defendant would put the plaintiff in breach of the voyage charter and that the liability in the amount of the arbitration award was to be seen as having been caused by the defendant's breach. Clarke J considered that this would be so even if the arbitration award had been made after an error of fact or law.

240. Clarke J then considered the authorities noting that although there was none which decided the precise point there had been a number where similar issues had been considered.

241. Clarke J said that the decision in *The Vasso* was to be seen as the application of a particular rule of construction in respect of the construction of contracts of guarantee. The rule that a surety was not bound by the amount of an arbitration award in favour of the creditor against the debtor whose liability had been guaranteed was a consequence of that rule of construction. It arose because in the absence of express words a debtor's liability to the creditor was not relevant to the surety's separate liability to the creditor. It was, accordingly, not a rule of general applicability.

242. Clarke J considered *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314 where the Court of Appeal had been concerned with the effect of a settlement agreement. Clarke J said there were material distinctions between cases where liability was fixed by agreement and those where it was determined by an arbitration award. At 424 he said:

> "In my judgment there are significant differences between the case where the plaintiff's liability is fixed by agreement and the case where it is fixed by an arbitration award. In the case of an agreement the amount depends entirely upon the decision of the parties to agree to a particular sum, whereas in the case of an arbitration award the amount depends upon the determination of the arbitrators. Thus in the case of an agreement it makes sense to hold that the agreement is at best prima facie evidence of the plaintiff's loss and to impose on the plaintiff the burden of pleading and proving that the settlement was reasonable. That is in my opinion the effect of the decision in *Biggin v. Permanite*. In the case where the plaintiffs liability is determined by an award I can see no reason why the plaintiff should not

say that his liability has been so determined and why he should not be able to rely upon the award without more to establish the amount of his liability, leaving it to the defendant to show, if he can, that the plaintiff has failed to mitigate his loss or that the award is (in the relevant sense) unreasonable or perverse.

…"

243. As a result Clarke J concluded that the authorities did not require a different conclusion from that which he would have reached if the matter had been free from authority. Accordingly, he found that the applicable rule was that the plaintiff was entitled to recover damages in the amount of the arbitration award unless the defendant proved that it had failed to take reasonable steps to mitigate its loss or "that the award was such that no reasonable arbitrators could reach on the evidence or was in some other respect perverse."

244. Mr Hickey says that a judgment reached after a contested trial is to be seen as carrying rather more weight than an arbitration award and that the approach set out in *The Sargasso* applies *a fortiori* to such a judgment.

245. At one point in his submissions Mr Hickey characterised the decision in *The Sargasso* as considering the effect of foreign judgments and proceeded to say that the same approach should be applied to judgments of the courts of England and Wales. I do not understand that to be the effect of *The Sargasso*. Clarke J considered the effect of the approach taken to a foreign judgment in *Grebert-Borgnis v J & W Nugent* (1885) 15 QBD 85. Clarke J said that he saw the force of the submissions made by the defendant before him that the same approach should be taken to judgments (whether English or foreign) and to arbitration awards but he concluded that the decision in that case did not preclude the approach which he proposed to adopt. This was because the argument addressed to him had not been considered there. I do not understand Clarke J to have been seeking to set out the law as to the effect of foreign judgments and still less that of an English judgment.

246. Miss McCafferty invoked the approach in *The Vasso*. In that regard, however, Clarke J's analysis of that approach as being confined to the construction of contracts of guarantee is compelling. As Clarke J explained in *The Sargasso* it can readily be seen how and why there is such a rule of construction in respect of such contracts and the rationale for that rule is not more generally applicable.

247. However, the core part of the argument for Aecom was the invocation of the decision in *Ward & others v Savill*. In earlier proceedings against different defendants the claimants there had obtained a declaration that they, the claimants, had been induced to invest in particular schemes by deceit; that they had a beneficial interest in the monies which had been paid over; and that they were entitled to trace into property acquired with that money. The claimants sought to say against the defendant that as a result of the declarations in the earlier proceedings they had a beneficial interest in monies they had paid over and that they were entitled to trace into property representing the proceeds of those monies including into property held by the defendant. At first instance the deputy judge had concluded that the declarations in the earlier proceedings had not taken effect *in rem* and so could not be relied upon by the claimants to establish their beneficial interests in the relevant funds.

248. The Court of Appeal considered whether the earlier declarations had been a judgment *in rem* but it also considered the defendant's alternative argument that the earlier declarations had no effect against her because she had not been a party to the proceedings in which they had been made.

249. At [34] Sir Julian Flaux C (with whom Elisabeth Laing and Warby LJ agreed) set out the statement of principle enunciated thus at 596 – 597 of *Hollington v Hewthorn* [1943] KB 587.

> "…
>
> A judgment obtained by A against B ought not to be evidence against C, for, in the words of the Chief Justice in the Duchess of Kingston's Case (I), "it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore.... the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers." This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case. A judgment, however, is conclusive as against all persons of the existence of the state of things which it actually affects when the existence of that state is a fact in issue. Thus, if A sues B, alleging that owing to B's negligence he has been held liable to pay *xl*. to C, the judgment obtained by C is conclusive as to the amount of damages that A has had to pay C, but it is not evidence that B was negligent: see *Green v. New River Co.* (I), and B can show, if he can, that the amount recovered was not the true measure of damage.
>
> …"

250. The Chancellor said that the principle remained good law. At [82] he explained that the penultimate sentence of the quoted passage created a narrow "carve-out" from the general principle. The Chancellor accepted counsel's submission that "the amount of damages awarded in the first proceedings would be an incontrovertible fact in the second proceedings which could not prejudice a party to the second proceedings who had been a stranger to the first proceedings".

251. The Chancellor explained the effect of the *Hollington v Hewthorn* principle in the circumstances of *Ward & others v Savill* thus at [92] and [93]:

> "The appellants should be required to plead and prove all the elements of their case against the respondent that they have a beneficial interest in her property, in the same way as the claimants in *Calyon* were required to establish against the bank their title to the collection. Nothing in Patten LJ's analysis of the legal effect of rescission in his judgment in *Independent Trustee Services* supports the appellants' case that they can rely upon the Butcher Declarations against the respondent without having to plead and prove all the elements of their case against her that they have a beneficial interest in her property."

> "Accordingly, applying both the rule in *Hollington v Hewthorn* and the wider principle enunciated in *Gleeson v Wippell*, I consider that the respondent is entitled to require the appellants to plead and prove all the elements of their case against her and that they cannot simply rely upon the Butcher Declarations against her."

252. Mr Hickey said that in *Ward & others v Savill* the Court of Appeal was dealing with very particular circumstances which were well-removed from those of the present case with the consequence that that authority was distinguishable and the approach taken there was not applicable in the current case.

253. It is right that the factual circumstances in *Ward & others v Savill* and the use which was sought to be made of the earlier judgment there were very different from those of this case. That is not, however, a complete answer. What is significant is that in *Ward & others v Savill* the Court of Appeal said that the principle in *Hollington v Hewthorn* remained good law and was of general applicability.

254. The question, therefore, becomes one of the operation of that principle in the circumstances of this case. In that regard the extent and effect of the "carve-out" contained in the principle becomes a matter of importance. Although the "carve-out" was said to be a narrow one the Chancellor did not suggest that it was not applicable in an appropriate case. In the light of that the language of [92] and [93] of *Ward & others v Savill* is to be seen in context. There was no question of the narrow "carve-out" applying in that case and it was in those circumstances that the *Hollington v Hewthorn* principle required the claimants to prove each element of their case.

255. In this context it is to be noted that Clarke J considered the last two sentences of the passage quoted above from *Hollington v Hewthorn* in *The Sargasso* at 424. He took the view that those sentences provided support for the plaintiff's contention in the case before him that the arbitration award definitively determined its liability to the party in whose favour the award had been made. Clarke J noted that Goddard LJ had not been considering the precise point which was in issue before Clarke J. Nonetheless Clarke J concluded that those words of Goddard LJ when seen alongside the approach in *Biggin v Permanite* supported the view that the arbitration award was to be seen as the measure of the plaintiff's liability to the third party unless the defendant proved that the award was unreasonable or that there had been a failure to mitigate.

256. It is relevant that in this case Lendlease is not saying that its recoverable loss against Aecom is the cost of putting matters right. Rather it was saying that Aecom's actions had put Lendlease in breach of the latter's obligations to Project Co and that the consequence of this was the liability in the amount of Joanna Smith J's judgment. I am satisfied that the approach to which Clarke J referred is applicable and that this claim falls within the "carve-out" identified in *Hollington v Hewthorn*. That is because the quantum of Lendlease's liability to Project Co is a matter of fact which is in issue here and which was determined by Joanna Smith J. The last sentence of the passage quoted from *Hollington v Hewthorn* explains how the "carve-out" operates. With the substitution of "breach of contract" for "negligence" in that sentence the circumstances here are precisely those which are

being addressed. It is apparent that Goddard LJ was not saying that the "carve-out" only applied to claims of negligence but was, instead, giving an example of its operation and the same approach as set out in the example is to be followed here. I have considered whether the position is changed by the Chancellor's reference in *Ward & others v Savill* at [82] to the absence of prejudice. In my judgement the position is not changed and the Chancellor was not in some way seeking to confine the "carve-out" to cases where no prejudice was caused and to impose this as a further requirement.

257. It follows that the effect is that Joanna Smith J's judgment is not relevant to the question of whether Aecom was in breach of its obligations to Lendlease. It is, however, conclusive as to the fact that Lendlease was in breach of its obligations to Project Co. Subject to the qualification I will address in the following paragraphs it is also conclusive as to the fact that Lendlease was as a consequence liable to Project Co in a particular amount. Lendlease has to show without reference to the judgment that Aecom was in breach of the latter's obligations and that this breach caused Lendlease to be liable to Project Co. However, provided Lendlease does that then Joanna Smith J's judgment provides the starting point in relation to the amount of that liability and the onus is then on Aecom to show that the amount of the judgment is not the true measure of Lendlease's loss by reason of Aecom's breach.

258. The qualification to that proposition flows from the fact that Joanna Smith J made a global award in favour of Project Co. At [365] the judge explained that there was an "overlap between the various Defects in terms of allocation of cost of remedial works – with the same elements of cost occurring in more than one Defect". Joanna Smith J was critical of the failure to agree an approach to that allocation and said that this would have had the potential to cause difficulties if Project Co's claim had succeeded in respect of some but not all of the defects. At [366] she explained that having found that all the defects were made out she did not need to attempt "to unravel the allocations or the rationale that lay behind them".

259. What is the consequence for the quantification of the claim against Aecom of that award of a global sum? If all the Plant Room 2 Defects are established against Aecom then the *Hollington v Hewthorn* "carve-out" can safely be applied. In those circumstances the award made by Joanna Smith J can be seen as being the measure of the loss caused to Lendlease subject to Aecom establishing that it is not the true measure. However, very different considerations apply if Lendlease fails to establish Aecom's liability for all these defects. In those circumstances Lendlease will not be able to rely on the "carve-out" in respect of a smaller number of defects. That is because it cannot then be properly said that Joanna Smith J's judgment is conclusive as to the amount which Lendlease had to pay Project Co by reason of Aecom's breach in respect of those defects. In those circumstances it will not be possible by reference to that judgment alone to identify the amount which any particular defect caused Lendlease to have to pay. The judgment cannot then be seen as conclusive as to the amount of damages payable as a consequence of a particular breach. In that regard it is to be noted that in *Hollington v Hewthorn* Goddard LJ clearly had in mind the case where a single identifiable sum was awarded by way of damages and that Clarke J was considering the position in respect of a single arbitration award. In the event that Aecom were found to be

liable for some of the Plant Room 2 Defects but not all then the burden would fall on Lendlease to show that a particular amount of the sum awarded by Joanna Smith J was caused by the defect or defects for which Aecom was responsible. It is hard to see how that could be shown where Joanna Smith J expressly proceeded on the footing that she was not making an allocation between the different defects.

The Consequences of the Settlement made with Engie.

260. Although there were some significant differences of emphasis the parties were substantially agreed as to the applicable principles in this regard and the central dispute was as to whether Lendlease had satisfied the requirements for the sums paid in this settlement to be recoverable against Aecom.

261. In *Siemens Building Technologies FE Ltd v Supershield Ltd* [2009] EWHC 927 (TCC) at [62] – [79] Ramsey J reviewed the authorities addressing the situation where party A seeks to recover from party C the sum which the former had paid in settlement of a claim made against it by party B. He summarised the applicable principles thus at [80]:

> "In my judgment the following principles can, in summary, be derived from the authorities:
>
> (1) For C to be liable to A in respect of A's liability to B which was the subject of a settlement it is not necessary for A to prove on the balance of probabilities that A was or would have been liable to B or that A was or would have been liable for the amount of the settlement.
>
> (2) For C to be liable to A in respect of the settlement, A must show that the specified eventuality (in the case of an indemnity given by C to A) or the breach of contract (in the case of a breach of contract between C and A) has caused the loss incurred in satisfying the settlement in the manner set out in the indemnity or as required for causation of damages and that the loss was within the loss covered by the indemnity or the damages were not too remote.
>
> (3) Unless the claim is of sufficient strength reasonably to justify a settlement and the amount paid in settlement is reasonable having regard to the strength of the claim, it cannot be shown that the loss has been caused by the relevant eventuality or breach of contract. In assessing the strength of the claim, unless the claim is so weak that no reasonable party would take it sufficiently seriously to negotiate any settlement involving payment, it cannot be said that the loss attributable to a reasonable settlement was not caused by the eventuality or the breach.
>
> (4) In general if, when a party is in breach of contract, a claim by a third party is in the reasonable contemplation of the parties as a probable result of the breach, then it will generally also be in the reasonable contemplation of the parties that there might be a reasonable settlement of any such claim by the other party.
>
> (5) The test of whether the amount paid in settlement was reasonable is whether the settlement was, in all the circumstances, within the range of settlements which reasonable people in the position of the settling party might have made. Such circumstances will generally include:
>
> (a) The strength of the claim;
>
> (b) Whether the settlement was the result of legal advice;
>
> (c) The uncertainties and expenses of litigation;

(d) The benefits of settling the case rather than disputing it.

(6) The question of whether a settlement was reasonable is to be assessed at the date of the settlement when necessarily the issues between A and B remained unresolved."

262. Miss McCafferty said that the effect of this was that Lendlease had to show: a breach by Aecom causing loss which was the subject matter of the settlement; that Lendlease had acted reasonably in settling Engie's claim; and that the amount paid in settlement was a reasonable sum in respect of the breach in question. Miss McCafferty said that Lendlease had failed in particular to establish the last element.

263. The requirements identified by Miss McCafferty were correct as far as they went. However, in considering whether those requirements have been satisfied it is necessary to bear in mind the third and fifth principles identified by Ramsey J. Thus it will be reasonable to settle a claim "unless the claim is so weak that no reasonable party would take it sufficiently seriously to negotiate any settlement involving payment". In addition the amount of the settlement will be regarded as reasonable if having regard to the circumstances it was "within the range of settlements which reasonable people in the position of the settling party might have made".

264. Mr Hickey prayed in aid the approach taken by HH Judge Thornton QC in *Bovis Lendlease Ltd v R D Fire Protection Ltd* (2003) 89 Con LR 169. In that case the claimant was contending that its claim against the defendant should not be affected by a settlement with another party which was in part in respect of the subject matter of the claim against the defendant. The claimant said that was because the settlement had been in a global figure and that it was impossible to determine what part of that global figure had been attributable to the current claim. The judge rejected the argument that such an exercise was necessarily impossible. He did not exclude the potential for a finding that there was impossibility in a particular case but clearly regarded that as unlikely and said that it would have to be established by evidence.

265. Mr Hickey relied on the passages in the judgment at [80] and at [87] – [96] where Judge Thornton emphasised that the court could carry out an assessment of what part of a settlement sum was attributable to particular defects "with only very limited material to work with" [91]; in a "rudimentary" way [94] (see also [125]); and "using rough and ready methods" [95]. Mr Hickey said that this was of significance and should govern the approach to be taken both when determining whether Lendlease had shown the reasonableness of the amount paid to Engie and when assessing the appropriateness of the sums attributed to particular defects.

266. It is clearly right that the court is not to take an artificially rigid approach to the quantification of the sums attributable to particular defects in a settlement. However, I do not find the decision of Judge Thornton of assistance here. The judge was dealing with a very different circumstance from that which I have to address and was, as noted above, concerned to reject the argument that it was necessarily impossible to attribute parts of a global settlement to particular defects.

Moreover, Judge Thornton's judgment was given before Ramsey J's analysis of the applicable principles in *Siemens v Supershield* and before that of HH Judge Coulson QC (as he then was) in *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC) to which Ramsey J referred. In addition Judge Thornton was not suggesting that the court could simply pluck figures out of the air but rather that a broad brush approach could be taken provided that there was some material from which conclusions could be drawn.

267. It follows that there must be some evidence before the court can be satisfied that the sum paid in settlement of a claim was reasonable in amount. The evidence may not be overly detailed and the court will apply a common sense approach indeed, echoing Judge Thornton, sometimes a rough and ready approach. Moreover, applying Ramsey J's fifth principle a wide range of settlement sums can be held to be reasonable. There must nonetheless be evidence from which the court can properly conclude that the sum paid in settlement was reasonable. This also is apparent from Ramsey J's fifth principle which contemplates the court considering a number of matters which will need to be established by evidence. The requirement for evidence is also apparent from *Biggin & Co Ltd v Permanite Ltd*. There at 321 Somervell LJ addressed the evidence "necessary to establish reasonableness" and contemplated cross-examination as to the facts on which a claimant relied and at 325 Singleton LJ said that a claimant in such a case must call evidence to establish the reasonableness of the settlement. Finally, in this regard reference is to be made to the judgment of Clarke J in *The Sargasso* where summarising the effect of *Biggin v Permanite* he said at 423:

> "If this were a settlement case I would regard myself as bound to hold that the plaintiffs would have to prove that the amount for which they had settled was reasonable. It is not clear to me how far the Court of Appeal thought that the plaintiffs must go in establishing that fact. Nevertheless the Court of Appeal appears to have thought that it would not be sufficient merely to produce the settlement and that some examination of the underlying facts would be required…."

268. Aecom says that even if its other defences fail it is not liable to Lendlease for the sums the latter paid to Engie because Lendlease has failed to surmount even the low hurdle necessary to establish that those sums were paid reasonably. I will turn next to that question.

The Recoverability of the Sum paid in Settlement to Engie.

269. I am satisfied that Lendlease has shown that it was reasonable to enter into a settlement agreement with Engie. It is not in reality contended by Aecom that Engie's claim against Lendlease was so weak that Lendlease acted unreasonably in negotiating a settlement involving payment. The real question is whether Lendlease has shown that the sums paid were reasonable.

270. For Aecom Miss McCafferty contended that Lendlease had produced no evidence to establish that the amount of the settlement agreement with Engie was the result of legal advice or the assessment of the figures by experts nor other adequate evidence to show the reasonableness of the figures.

271. The settlement between Lendlease and Engie was reached as the result of a mediation. This was attended by Mr Avey and a colleague from Lendlease. There was no expert quantity surveying input at that stage. Mr Avey emphasised that the agreement was made on a commercial basis. There had been agreement on the amounts for all but three of the defects at the mediation and there was subsequently an agreement on those for what Mr Avey described as "commercially reasonable figures" leading to the settlement of the Engie claim. The settlement took account, Mr Avey said, of the significant costs which would be incurred if the matter had proceeded and was reached "before significant work was needed to be undertaken … in respect of disclosure and witness and expert evidence".

272. David Somerset, Lendlease's quantum expert was not involved in the matter at the time of the mediation or the subsequent settlement. He addressed the reasonableness of the settlement figures in his reports. In respect of almost all the relevant defects Mr Somerset's report adopted a similar structure. He identified the sums which had been claimed against Lendlease by Project Co and Engie. He said that he had "not been provided with any details to support the Scope of Works or the overall costs which are claimed". He then identified the settlement sum. Mr Somerset then said that he had not been provided with details of how the settlement sum was negotiated. However, he then expressed his opinion that the settlement sum was reasonable because it represented a discount from the amount claimed by Engie and because it was the result of a negotiation following a mediation. The tenor of his oral evidence in respect of most of the defects was to the same effect saying in essence that because the agreement was the result of a commercial negotiation between competent parties he regarded it as likely to have been reasonable.

273. Mr Somerset's approach was different in respect of defects 11 and 21. There the necessary remedial works involved respectively the reinstallation of fire dampers and installation of supplemental equipotential bonding. There Mr Somerset's assessment of reasonableness was based on the number of locations in which there would have to be such installation and consideration of what would be a reasonable sum per location.

274. Aecom's quantum expert, Richard Walmsley, had been provided with more of the underlying documents though by no means all of those which he believed would have been necessary for a proper assessment of the figures. Mr Walmsley put forward figures which he contended were to be seen as reasonable settlement figures in respect of a number of the defects but in respect of some others he said that the absence of documentation meant that he was not able to provide any figure and could not say either that there had been settlement in a reasonable sum or what such a sum would have been.

275. Mr Hickey's closing submissions on this point amounted to a variation of the approach adopted by Mr Somerset. Mr Hickey pointed out that the settlement had been reached "between two very experienced construction parties, following exchanges of pleaded cases, following a detailed mediation, and following months of discussions … quite a lot of which would be privileged". He pointed out that although there could have been further disclosure and expert evidence "that would have defeated the whole point of the exercise". In essence he was saying that the

settlement figures should be regarded as having been reasonable in light of that background.

276. I remind myself of the low hurdle that has to be surmounted to show that a settlement was in a reasonable figure. However, I have concluded that in respect of a number of the defects Lendlease has failed to surmount that hurdle. In accordance with the approach I have outlined at [268] above proving the reasonableness of a settlement figure requires the party asserting that reasonableness to do more than to assert that the settlement was for less than was being claimed. There must be some material from which the court and the other party can assess whether the settlement figure was reasonable in the particular circumstances. A party which fails to provide such material has failed to show a precondition for recovery of the settlement sum. Here Lendlease has failed to provide that material in respect of a number of the defects. Subject to the qualification I will explain in the next paragraph I will approach the quantification of the claim derived from the Engie settlement by reference to Mr Walmsley's analysis: adopting his figures where he has been able to identify a reasonable settlement sum and finding no sum would have been payable where no such figure can be identified.

277. The qualification is in respect of Defects 11 and 21. There Mr Somerset was able to form an opinion as to the reasonableness of the settlement sum by reference to the work involved. The differences between his assessment and that of Mr Walmsley are not great in respect of those defects and I will consider below which is to be preferred to the extent of those limited differences.

278. Lendlease claimed further sums in addition to those said to be attributable to the particular defects and I will address those further below.

Findings in respect of the alleged Defects.

279. I turn now to the particular defects. In light of the conclusions rehearsed above and in particular the conclusions that no liability flowed from Rev 19 and that the claim was statute-barred I will set out my findings on the individual defects briefly. In light of the approach I have explained at [260] above I will address the quantum of the claim in respect of the Plant Room 2 Defects after I have considered all of those defects.

Defect 1: the Construction of Plant Room 2 as a Single Fire Compartment.

280. The elements of Defect 1 can be considered together because they all flow from the lack of fire compartmentation. The arguments about the segregation or diverse routing of the cables involved some distinct questions but the cables all ran through Plant Room 2 and the lack of compartmentation there meant that there was no segregation of the cables (see Joanna Smith J's judgment at [267(1)]).

281. In light of the conclusions set out above as to the nature of Aecom's duty and the responsibility for Rev 19 this part of the claim is statute-barred. The claim is, moreover, precluded by the Settlement Agreement because the lack of compartmentation existed and was apparent at September 2012.

282. Aecom said that it would not have been liable in this respect even if the claim had not been barred in those respects. Miss McCafferty emphasised that it was common ground that the iterations of the fire strategy which had preceded Rev 19 had showed compartmentation and were compliant with HTM 81. The lack of compartmentation first appeared in Rev 19. That was correct but I have concluded that but for my conclusions as to limitation and the effect of the Settlement Agreement Aecom would have been liable for this defect. Although the earlier iterations of the fire strategy had shown fire compartmentation Aecom not only knew that there was in fact no compartmentation but it caused Rotary to omit the installation of dampers on the penetrations between the partitions. This appears from the exchange between Messrs Dean and Don which I have set out at [179] and following above. I have noted that Mr Middleton's ignorance of that exchange was relevant to the consideration of the responsibility for Rev 19 but the fact remains that Aecom in the person of Mr Dean knew of these matters. It was in breach of its obligations in acting as it did but the cause of action accrued by the end of August 2006. Aecom's contributory negligence contention addressed the contention in relation to Rev 19 and so would not have come into play in respect of the earlier actions.

Defect 2: Adequacy of the Protection against External Fire Spread.

283. As explained at [12] above Lendlease maintained that Aecom was in breach in this respect but accepted that no separate loss flowed from the breach and so I need not consider it further.

Defect 3: Separation of Switchgear and the Absence of a Fire Suppression System.

284. As it developed in the course of the evidence and of submissions this aspect of the claim turned on the responsibility for the absence of a gaseous fire suppression system. No such system was installed nor provided for in the fire strategy (after the Stage D report as I shall explain below). It follows that the alleged breach had occurred before the completion of construction and, moreover, existed and was apparent at the time of the Settlement Agreement. The claim is, therefore, statute-barred and precluded by that agreement. Even if the claim had not been so precluded I would for the following reasons have found that there was no breach in this respect.

285. Aecom's Stage D Report at the time of financial close in September 2004 had provided for a gaseous fire suppression system for the plant room. The Stage E Specification of July 2005 made no such provision. The question became one of the reason for that change. Lendlease said that it was because of a failing on the part of Aecom whereas the latter said that it had been the result of an instruction from Lendlease (which Aecom believed to have resulted from the instructions of the Trust).

286. In his statement Mr Middleton said that although sprinklers had been required by Building Control Lendlease had instructed Aecom to look at alternatives such as aspirated early detection systems. In the course of cross-examination he confirmed this account saying that the change of instruction had come in 2005 or 2006 and adding that suppression had not been needed over the HP transformers "because they were of the type of cast dry resin which did not require suppression" and that

"it wasn't requested in the LV room or the generator room". He added that "the only areas where we had extensive discussions with the Trust and Lendlease were in the IT rooms and PABX rooms". It was apparent that Mr Middleton's recollection of these matters was limited which was entirely understandable given the passage of time since they occurred. However, he did draw support from the minutes of a meeting held on 23rd May 2006.

287. The meeting was attended by representatives of Lendlease, Aecom and others (though it is to be noted not Mr Middleton). It was said to be a meeting "to discuss integration [of] gas suppression system with Vesda fire detection system". Under the heading "background" Kate Khan of Project Co is recorded as having reported that "at financial close the Trust signed a contract that did not include gas suppression. During the last days of negotiations changes were made and the planned gas suppression was removed".

288. Mr Middleton relied on those minutes as supporting his explanation of the reason for the omission of a gas suppression system.

289. Mr Hickey emphasised that the meeting was concerned with the IT server rooms and the PABX rooms. It is correct that this was the focus of the meeting but it is not self-evident that the opening background remarks which I have just quoted were so limited and read naturally they are of more general application. The fact that the meeting was focussed on the IT server rooms and the PABX rooms tends to support Mr Middleton's recollection.

290. This was an aspect of the case where the consequences of the passage of time; the absence of documents; and the absence of evidence from those directly involved was particularly marked. However, I have concluded that the more likely explanation for the fact that the Stage E Specification did not provide for gaseous fire suppression was an instruction from Lendlease that this was not required and that as a consequence there is no breach. I do so because there had been provision for such a system in Aecom's Stage D Report; the change was a significant one which is unlikely to have been the result simply of an oversight; there would be no reason for Aecom to have made the change unless it had been asked to do so; there is no suggestion that the omission was challenged at the time on behalf of Lendlease or by any other party; and the comments made at the May 2006 meeting provide support for the view that the removal was the result of a decision by the Trust which was then communicated to Aecom.

Defect 4: Separation of the Service Riser.

291. As it developed in the course of the evidence there were two aspects to this alleged defect. The first was the absence of fire compartmentation at the base of the service riser. The second was that the protection at the upper levels of the service riser was provided only by fire doors with a 60 minute fire resistance and so there was a failure to comply with HTM 81 which required a resistance of 120 minutes. Both aspects fall within the scope of the limitation defence and are precluded by the Settlement Agreement for the same reasons as the preceding defects. In addition I am satisfied that neither defect is made out on the facts.

292. As to the first element Mr Jones ultimately accepted in cross-examination that the omission of fire compartmentation at the base of the service riser was not a consequence of Aecom's design of the fire strategy. Instead it was a matter of the way in which the riser had been constructed which was the result of the approach taken by Lendlease following on from its discussions with Building Control. In light of the conclusions which I have reached as to the origin of Rev 19 and the extent of Aecom's responsibility to review matters and/or to warn Lendlease this is not a matter for which Aecom can be liable.

293. The conclusion in respect of the second aspect follows from that in respect of the first. For Aecom Mr Morgan did not accept that HTM 81 required each fire door leading to the riser at upper levels to give 120 minutes' fire resistance and so denied that there was a breach of that requirement. I adopt Joanna Smith J's succinct explanation of why 60 minute fire doors are effective to provide 120 minutes fire resistance in such circumstances. At [281(a)] she said:

> "Mr Davis' evidence, which does not appear to be in dispute, is that `usually, where a riser shaft is provided, protection to adjoining floors will be provided by a fire resisting door at the floor of origin'. This means that for a fire successfully to spread via a riser it would have to enter the riser through a 60 minute fire-resisting door (so bypassing the 120 minute compartment floor) and exit the riser at another floor through another 60 minute fire resistance door – thus giving 120 minutes fire resistance."

294. It follows that if there had been adequate fire compartmentation at the foot of the service riser the 60 minute fire doors at upper levels would have provided 120 minutes fire resistance complying with HTM 81. The absence of the former was not attributable to Aecom so neither aspect of this defect is established.

<u>Defects 5 and 6: Adequacy of the Plant Replacement Strategy for Transformers and RMUs(5) and Generators (6).</u>

295. These defects can be addressed together. Although there was a potential difference in that the replacement of generators could in some instances be effected by dismantling *in situ* it was not in reality suggested that a strategy which was inadequate for the transformers would be adequate in relation to the generators.

296. The claims in relation to these defects are statute-barred and precluded by the Settlement Agreement in the same way as those in respect of the preceding defects.

297. The question of whether there would be liability but for those defences is less clear cut. It was common ground that there were particular difficulties arising from the location of Plant Room 2 at level B1 which was one storey above ground level. Joanna Smith J's finding as to the compliance of the strategy with HTMs 2023 and 2011 is not binding against Aecom. In addition it is apparent that in making her finding Joanna Smith J was particularly influenced by Lendlease's obligations under the Project Agreement: obligations which as I have explained above were not stepped down to Aecom.

298. It was in relation to the plant replacement strategy that Miss McCafferty's criticism of the change of stance by Lendlease's experts was most sustained and had most force. It was apparent here that the change of Mr Bradley's opinion was

brought about by Joanna Smith J's judgment but Mr Bradley was unpersuasive as to why this had caused him to change his assessment of what was required for an adequate replacement strategy. In this regard I found Mr Bradley's evidence unimpressive and I formed the impression that he was striving to avoid making legitimate concessions rather than engaging with the questions he was being asked. In those circumstances there was considerable force in Miss McCafferty's contention that his original opinion was a powerful indication of an approach which could be taken by a competent designer exercising reasonable care and that such a designer could have regarded the replacement strategy as adequate.

299. There are, however, potent factors operating in favour of a finding that Aecom was in breach in relation to the replacement strategy. Thus it was accepted that the strategy which Aecom had produced was "quite scant" (as Mr Gold described it). In light of that it was not open to Aecom to argue that the inadequacies of the resulting arrangements were the responsibility of Lendlease and/or Rotary. The position might have been different if Aecom had produced a detailed strategy which had not been implemented adequately. That was not the position: instead in respect of a location where the level of the Plant Room meant that replacement would inevitably be problematic Aecom had produced a less than detailed strategy. The difficulties in replacing plant in accordance with the strategy were summarised by Joanna Smith J and were not in reality disputed before me with Mr Gold accepting the real difficulties which would be involved.

300. In light of the scale of those difficulties and the limited extent of the strategy produced by Aecom I have concluded, albeit with a degree of reservation, that if the claim had not been statute-barred or precluded by the Settlement Agreement then I would have found Aecom to be in breach in these respects.

Defect 7: Adequacy of the Fire-Stopping of the Ductwork leading to the Service Riser.

301. This defect is essentially duplicative of Defect 1 in so far as it relates to ductwork within the Plant Room and of Defect 4 in so far as it relates to the connexion between the AHUs in the Plant Room and the service risers. For the reasons already explained both elements are statute-barred and caught by the Settlement Agreement. In the event that Aecom had not been able to invoke those defences it would have been found to have been in breach in respect of the first element (the ductwork in the Plant Room) but not in respect of the second (the connexion to the service riser).

Defect 8: Fire Stopping of Cable Installation.

302. This defect covers the same ground as Defect 1C and relates to the lack of fire compartmentation. It is statute-barred and precluded by the Settlement Agreement for the same reasons as that defect. As with that defect and for the same reasons if the claim had not been so precluded Aecom would have been liable in this regard.

303. In their written submissions in respect of this breach Miss McCafferty and Mr Thorne referred to Mr Vaughan's email of 19th November 2007 which I have quoted at [199] above and said that "confirms that it was Lendlease who had failed to fire-stop the walls". For the sake of completeness I should say that as will be clear from my analysis of the genesis of Rev 19 I do not interpret the first sentence

of the email in that way. Seen in context it was simply a statement that the walls were not fire stopped and that this was why Rev 19 should not designate them as constituting fire compartmentation.

Defect 9: Absence of Segregation between Essential and Non-Essential Cables.

304. Before Joanna Smith J the focus of this defect was in the terms I have just entitled it namely that there had been a failure to segregate essential cables from those which were non-essential. As she made clear at [297(1)] and as I will consider further below Joanna Smith J proceeded on the footing that essential and non-essential cables were present and had not been segregated from each other.

305. As the matter developed before me it was common ground that all the relevant cables fell to be regarded as essential cables because they were mains or generator backed. The contention was that Aecom's design was in breach of its obligations because it did not provide for the essential cables all to be fire-rated.

306. The alleged breach occurred at the time of the provision of the design and as already explained any cause of action in that respect accrued at the latest by the time of the completion of the Plant Room in August 2006. It follows that at the time these proceedings were started it was statute-barred. The defect was also present and apparent at the time of the Settlement Agreement and the claim was precluded by that agreement.

307. In respect of this alleged defect Mr Bradley accepted that he had changed his stance from that which he had advanced in the action before Joanna Smith J. Mr Bradley frankly accepted that this change was a consequence of that judge's judgment. Before the judgment he had believed that compliance with HTM 81 did not require all the cables to be fire-rated and diversely routed. Mr Bradley said that the judgment "certainly changed the landscape" and caused him to believe that his original interpretation of HTM 81 was wrong. He took the judgment to be an acceptance of the argument put forward by the other side in the earlier case and to be interpreting HTM 81 as requiring all essential cables to be fire-rated and not just those which were on life-safety systems which had been his previous view.

308. Mr Bradley accepted that in 2004 – 2005 when the relevant drawings were produced he would have taken the same view as those producing the drawings namely that cables which were essential but not related to life-safety systems did not have to be fire rated. He also accepted that such view could be taken by a reasonably competent engineer.

309. On behalf of Aecom Mr Gold said that notwithstanding Joanna Smith J's judgment he remained of the view that HTM 81 did not require all essential cables to be fire rated. He said that he regarded the contrary view as a misinterpretation of HTM 81 and that he remained of the view that HTM 81 only required those essential cables providing power to life safety systems to be fire rated.

310. On first impressions there is force in the interpretation of HTM 81 which Mr Bradley says was adopted by Joanna Smith J. To a non-engineer it seems counter-intuitive to read HTM 81 as requiring the fire rating of essential cables when they are not segregated from non-essential cables but not when they are segregated

from them. However, I do not understand the effect of the judgment to be that HTM 81 required all essential cables to be fire-rated.

311. Joanna Smith J dealt with this defect at [292] – [297]. The breach of HTM 81 alleged by Project Co was a failure to segregate essential from non-essential services and a failure, if segregation was not possible, to cause the essential services cables to be fire-resistant and installed with physical barriers. Lendlease's initial response to that allegation was to say that all the cables were fire-resistant. Joanna Smith J said, at [296], that Mr Bradley had raised a further line of defence namely that the cables formed a unified system in which all the cables were essential. Mr Bradley then contended that in such a unified system there was no need for all the cables to be fire-rated.

312. At [297] Joanna Smith J set out her "main reasons" for rejecting Lendlease's argument. It is apparent that the core of the judge's reasoning was the fact that the cables provided both essential and non-essential supplies and that the essential and non-essential cables were not segregated from each other. In those circumstances it was not necessary for Joanna Smith J to reach a conclusion on the argument that HTM 81 did not require essential cables to be fire-rated provided they were not alongside non-essential cables. Indeed it was in that context that the judge said, at [297(8)], that "it is unnecessary to look in greater detail at the various provisions on which the experts relied in the HTMs".

313. It follows that the judgment did not adopt the interpretation of HTM 81 which Mr Bradley now advances. As the judgment was the sole basis advanced for his change of stance the claim in respect of this defect would fail on the merits.

314. Moreover and even if the effect of the judgment was as asserted by Mr Bradley this part of the claim would still fail on the merits. I need not consider whether the interpretation which Joanna Smith J is said to have adopted is correct. That is because Mr Bradley and Mr Gold were both agreed that at the time of the drawings a competent engineer would have taken the view that it was not necessary for all the essential cables to be fire rated. As I have explained at [144] above Aecom's obligation was to exercise reasonable care and skill. A failure to meet the requirements of HTM 81 is to be seen as a failure to exercise such care and skill in the absence of a compelling explanation but the obligation remained one to exercise reasonable care and skill. Here the fact that the approach adopted was that generally adopted by competent engineers would be such a compelling explanation.

315. It follows that even if it had not been statute-barred nor precluded by the Settlement Agreement the claim in respect of this defect would have failed.

Quantum in respect of the Plant Room 2 Defects.

316. I have found that but for limitation and the effects of the Settlement Agreement Lendlease would have established that Aecom was in breach of the Consultancy Agreement in respect of some but not all of the Plant Room 2 Defects. In particular no liability would have been established in respect of Defects 3, 4, and 9.

317. As I explained at [260] above the effect of this is that the burden is on Lendlease to establish the amount of the sum awarded by Joanna Smith J which is attributable to the proven breaches. I noted there that this would be a difficult exercise. Does the evidence which has been adduced succeed in establishing a figure which would have been recoverable but for limitation or the effect of the Settlement Agreement?

318. For Lendlease Mr Somerset accepted that difficulties could arise in the current proceedings if the court were to find that Aecom was liable for some of Defects 1 – 9 but not others. He had not addressed that possibility in his expert evidence for these proceedings nor had he broken down the quantification of the claim between Defects 1 - 9. Mr Somerset said that this was because he had relied on the judgment in the Project Co action and had taken the claim to be one for Defects 1 – 9 collectively. When he was pressed on how the judge in the current proceedings could determine the correct sum to be awarded in respect of these defects separately Mr Somerset said that the only way would be for this judge to look at the expert reports prepared for the Project Co case. He accepted that could not in reality be done. That is particularly so where Mr Somerset and Mr Finn, Project Co's quantum expert, were not agreed on the correct approach to allocation and where Joanna Smith J had expressly not made a determination as to the correct allocation.

319. Defects 3, 4, and 9 are not trivial items and cannot be disregarded. It follows that even if the claim in respect of the other Plant Room 2 Defects had not been statute-barred or precluded by the Settlement Agreement I would have had to conclude that Lendlease had failed to establish the loss which had been caused by those defects in relation to which Aecom was in breach.

Defect 11: Accessibility of the Fire Dampers.

320. There is no dispute that at least some of the fire dampers in the HVAC ducts have not been positioned so as to be accessible for the purposes of maintenance and testing. There is no agreement as to how extensive the problem is or where the responsibility for it lies. Lendlease says that Aecom was responsible for spatial coordination and is responsible for this defect because its design in terms of the location of other services and building structures meant that the dampers could not be installed so as to be accessible. Aecom says that it was responsible for setting out the principles of coordination with Lendlease and Rotary being responsible for the detailed installation. It does not accept that its design meant that the dampers could not be located so as to be accessible.

321. In his written opening Mr Hickey said that "this defect is one that is obviously the result of a breach in performance that occurred after 31st May 2007 less than 12 years before these proceedings commenced". That contention is seemingly made on the basis that Aecom should have reviewed the post construction testing of the dampers and the problems which were encountered. I reject that submission and find that this part of the claim is statute-barred. Any breach on the part of Aecom occurred at the time of the submission of its drawings or at the time of a failure to challenge the approach being taken to installation. On either view time began to run when the construction was completed because it was then that the dampers were in inaccessible locations. In addition the claim is precluded by the Settlement

Agreement. Not only was the defect in existence at the time of the agreement but it had been the subject of a report in 2010.

322. As to liability Mr Bradley accepted that he had not carried out his own survey of the position of the dampers. In addition he had not analysed Aecom and Rotary's drawings to see whether Aecom's design precluded installation in accessible locations and whether the dampers were installed where they should have been. Instead he had relied on a survey prepared on behalf of Engie and the accompanying photographs. This survey identified 33 dampers (out of a total in excess of 2,000) which were in inaccessible locations (it appears from Mr Moseley's report that there were a further 4 which were inaccessible). Mr Bradley said that the photographs and Engie's report supported the conclusion that the defect was a consequence of Aecom's design because of the "sheer density" of other services around the ducts. There is some force in Mr Bradley's point but it is the starting point for the analysis rather than its conclusion. Considerably more analysis would be needed before it could be said even on the balance of probabilities that the inaccessibility of these dampers was attributable to a breach on the part of Aecom particularly in circumstances where the problem affected such a small proportion of the dampers. It follows that even if the claim in respect of this defect had not been statute-barred nor precluded by the Settlement Agreement I would not have found it established.

Defect 13: The Sizing of the Condensate System.

323. The allegation in this regard is that the condensate pipework serving the Low Temperature Hot Water plate heat exchangers was undersized and that this had caused excessive venting.

324. The claim in respect of this defect is statute-barred. The Aecom drawings relevant to this defect were produced in July 2005 and the pipework was installed by the end of October 2005. It follows that any cause of action accrued substantially more than twelve years before the commencement of proceedings. Even if the claim had not been statute-barred I would not have found liability to be established for the following reasons.

325. The experts were agreed that the pipework was undersized and that excessive venting was occurring. They were not agreed as to the cause of the venting and there was an issue as to whether it was the result of the size of the pipework. However, what is significant is that the experts were also agreed that the pipework as installed differed from that shown on Aecom's drawings (and also in some respects from that shown in Rotary's drawings). The pipework was smaller in size and the installation had at least at one point taken the form of two pipes rather than one. It was also said on behalf of Aecom that the system as installed contained more bends than it had provided for though Mr Bradley did not accept that the bends were necessarily to be seen as a departure from Aecom's design. Aecom accepted that two of the pipes in its design had been undersized but as matters turned out Rotary had installed even smaller pipes than those.

326. The difficulty for Lendlease is that it needs to show not only that Aecom failed to exercise reasonable care and skill in its design but also that such failure was causative of the defect and so of Lendlease's loss. In circumstances where the

system as installed did not accord with Aecom's design and where the departures from the design were clearly more than trivial Lendlease has not shown such causation. Any inadequacies in Aecom's design have not been shown to be the cause of the problems which occurred.

327. For completeness I add that I do not find the changes in the arrangements for the hot water system which I will consider in relation to Defect 15 to have any relevance in this regard. Lendlease did not come close to establishing either that those changes caused the inadequacies of the condensate pipework in the sense that they caused the pipework as installed to be inadequate when it would otherwise not have been nor in the sense that they necessitated the installation of the inadequate pipework.

Defect 14: Accessibility of the Smoke Fans.

328. This alleged defect raises similar issues to those addressed in respect of Defect 11. Here it is said that the location of the smoke extract fans meant that there was insufficient access to those fans. Again Lendlease said that this was a consequence of Aecom's design while Aecom said that its responsibility was limited to the principles of coordination and that its design did not preclude the fans being positioned in accessible locations. In addition, Aecom does not accept that the extract fans were in inappropriately inaccessible locations. In that regard Mr Moseley made the common sense point that the need to displace other services to get access to the fan does not without more mean that the location is inappropriate given the limited number of occasions on which such access will be needed. Whether the fan is inappropriately inaccessible will be a matter of degree depending on the degree of displacement of other services which will be necessary and the likely frequency of the need for access.

329. The claim in respect of this defect is statute-barred and precluded by the Settlement Agreement in the same way as that in respect of Defect 11. Here there was no report about accessibility in advance of the Settlement Agreement but the location of the fans and any consequent inaccessibility would have been evident at that time.

330. There might be more scope for saying that the inaccessibility of the fans was a consequence of Aecom's design than in relation to the dampers but there is again a paucity of evidence. I do not have the material which would enable me to conclude that the fans are in fact inappropriately inaccessible let alone that this is the consequence of Aecom's design. It follows that even if not statute-barred nor precluded by the Settlement Agreement the claim in relation to this defect would fail.

Defect 15: Resilience of the Domestic Hot Water Plant.

331. As pleaded the allegation in respect of this defect was that the domestic hot water system as designed by Aecom and then installed did not provide adequate resilience because of a change from the design intent as set out by Project Co.

332. The original intent as set out in Aecom's Stage D design was for a single 3N+1 system serving the whole building and consisting of four 1,500 litre vessels. That

was changed in the July 2005 design to two separate systems each of 2N with two 2,000 litre vessels in each system and each serving half of the building.

333. That 2N system had to be replaced in 2010 because of corrosion of the water vessels. Lendlease does not suggest that the corrosion and the need for replacement was the consequence of any failing on the part of Aecom. It is to be noted that Aecom countered that in any event the corrosion may have been caused by the action of Rotary in using stainless steel vessels rather than copper ones as provided for in Aecom's design.

334. The replacement vessels installed in 2010 were each of 1,000 litres.

335. In his written opening Mr Hickey said:

> "The issue then, really, is not whether there was sufficient water capacity, but the fact that the design change has meant that the spatial considerations did not allow for replacement if something goes wrong."

336. This was a different case from that which had been pleaded. It had not appeared until Mr Bradley's supplemental expert report of October 2022. There he had said:

> "11.1.7 Rotary installed the four 3000lt vessels, and these were put into service but were found to be suffering from corrosion problems, presumably/possibly from the chlorine dioxide22. A decision was made to replace the vessels, but I am advised that it was not possible to replace the vessels with ones of the same size owing to space constraints, mainly due to the amount of pipework above and around the vessels (the existing units had to be cut up in situ to enable them to be removed). The largest vessels that could be retrofitted were 1000lt….
>
> "11.1.8 In summary, it is unclear why the stainless steel tanks were corroded. The levels of chlorine dioxide from the Trust's water treatment system should not have caused corrosion sufficient to require the vessels to be replaced, especially in such a short time after being put into service. But the planning of the plant in the plant room ought to have allowed sufficient space for the replacement of the vessels without having to reduce the vessel capacity from 3000lt to 1000lt. The level of space planning of the plant to facilitate replacement was a pre-construction activity that ought to have been carried out by AECOM. …"

337. Mr Hickey advanced a further variant of this argument in his cross-examination of Mr Moseley. There Mr Hickey put that the difficulty was inherent in the change from 1,500 litre vessels to 3,000 litre ones suggesting that if a 3,000 litre vessel went wrong it could not be replaced by a tank of a similar size while "replacement would not have been an issue" in the case of 1,500 litre vessels. Not only does that not follow as a matter of logic it was not the way in which Mr Bradley had put the point.

338. This claim is untenable. The allegation based on the spatial considerations and the effect of Aecom's design on the size of the replacement vessels is a new contention which was not pleaded. It could only be said to be a matter of resilience by an artificial interpretation of that term and it is significant that neither expert approached the matter in that way in his initial report. It is not open to Lendlease to advance the claim on this basis without amendment. For completeness I add that even if it had been open to Lendlease to put its case this way considerably more

would have been required to establish a breach in this regard. Mr Bradley's treatment of the point is confined to the short passages I have quoted above. Much more would have been needed to show not only that the replacement of the 3,000 litre vessels with other vessels of an equivalent capacity was not practicable but also that a competent designer would and could have created a design which would enable this. Both limbs of that proposition may be correct but the evidence does not show that.

339. The change which was made in 2010 was not because of any lack of resilience or of capacity. Although it appears that the settlement with Engie was on the basis that there had been a breach in the failure to provide a system in accord with the original design it is not apparent how that failure (as opposed to the corrosion of the tanks) had caused loss.

340. The claim in respect of this defect is both statute-barred and precluded by the Settlement Agreement. The cause of action accrued at the latest when the design was incorporated in the construction. The position is even starker with reference to the Settlement Agreement in circumstances where the vessels installed by Rotary had been replaced in 2010.

341. In those circumstances I need deal only briefly with the questions of the capacity and resilience of the system as designed by Aecom. There was no clear explanation of why there had been a change from the original single building system. It was suggested that the change may have been with the knowledge and/or at the instigation of Lendlease or Project Co. That however, was no more than speculation. There is no evidence in that regard and if such a contention were to be relied upon it would have had to be established by Aecom. Mr Bradley accepted that the change had not reduced capacity but said that the creation of two separate systems reduced resilience. This was not accepted by Mr Moseley. On balance I would have found that there had been a reduction in resilience accepting Mr Bradley's analysis in that regard but this does not avail Lendlease given that as already explained the breach was not causative of loss and that the claim is statute-barred and precluded by agreement.

Defect 18: Adequacy of the Fault Withstand Capacity of the Electrical Switchgear.

342. The experts were agreed that the fault withstand capacity of the switchgear was insufficient. That failing resulted from the switchgear being installed in accordance with a grading survey carried out by Schneider Electrics.

343. To the extent that Aecom is liable in this respect then the claim is statute-barred with any cause of action having accrued at the latest at the time of completion of the installation.

344. The issue as to liability turns on the question of the extent of Aecom's obligations in relation to the switchgear and whether they could be performed by reliance on the Schneider survey. That raises further questions of whether Aecom exercised reasonable care and skill in doing so and in commenting on the survey.

345. Aecom's obligation in this regard was derived from Matrix 3 paragraph 1.3. It was to "provide detailed design information that shall include … HV/LV System discrimination study and fault level/protection settings".

346. Lendlease is right to say that obligation extended beyond producing a design which was in general terms capable of implementation. Instead it required detail and made Aecom responsible for identifying the fault level and protection settings.

347. The question then becomes one of whether Aecom could in principle discharge its obligation by relying on the Schneider figures and whether it was in fact entitled to do so in the circumstances of this case.

348. It is to be remembered that as I have explained above Aecom's obligation was that of exercising care and skill. The principles applicable when deciding if there has been discharge of that duty in circumstances such as these were identified thus by Ramsey J in *Cooperative Group Ltd v John Allen Associates* [2010] EWHC 2300 (TCC) at [180]:

> "From those decisions I consider that the following propositions can be derived:
>
> (1) That construction professionals do not by the mere act of obtaining advice or a design from another party thereby divest themselves of their duties in respect of that advice or design.
>
> In *Moresk v Hicks* the first argument was that it was an implied term of the architect's employment that he should be entitled to delegate certain specialised design tasks to qualified specialist sub-contractors. That implied term was rejected as was the alternative that the architect had implied authority to act as agent for the building owner to employ the contractor to design the structure and that the architect did just that. It was not argued that if the architect remained liable for the design then it was possible for the architect to discharge a duty to take reasonable care by relying on the advice or design of specialists provided that such reliance was reasonable.
>
> (2) That construction professionals can discharge their duty to take reasonable care by relying on the advice or design of a specialist provided that they act reasonably in doing so.
>
> In *London Borough of Merton v Lowe* the architect's decision to use Pyrok was reasonable. In commenting on the decision in *Moresk v Hicks*, Waller LJ distinguished that case on the basis that the architect has virtually handed over to another the whole task of design and *"the architect could not escape responsibility for the work which he was supposed to do by handing it over to another."*
>
> In *Sealand of the Pacific v McHaffie* the decision to use the specialist concrete had been based solely on representations and guarantees from the sales representative and a pamphlet which dealt with the use of the product in a different manner and for different purposes. Any other enquiries would have disclosed that the use of the product was not sound engineering procedure. The architect appreciated that the use of the material was somewhat experimental. It was held that further enquiries should have been made. In my judgment that is a case where the court held that the architects had not acted reasonably in relying on the sales representative and the pamphlet given the circumstances of the case. If the architect had made the further enquiries and those further enquiries had supported the use of the concrete it seems that the court would not have held the architects liable. That would be the case even if the enquiries led to advice which, unbeknownst to the architects, was negligent.

In *Surrey v Church* the architect knew of the instability in the soils and that placed a duty to have appropriate investigations made by an expert. He selected somebody not qualified as a soils expert and despite the fact that he knew that he could engage whatever competent specialists he needed and that there were firms specialising in soil testing he did not select such a specialist. The basis of contractual liability appears to have been fitness for purpose but it was also found that the architect was negligent. Again it seems that the basis upon which the architect was negligent was that, knowing there were problems with the soils, he should have had appropriate investigations carried out. However, instead of going to specialist soil testing engineers he went to ones who were not so qualified, even though he knew that the client would authorise him to engage those who were competent. In those circumstances it is evident that the architect did not act reasonably.

In *Richard Roberts v Douglas Smith Stimpson* Judge Newey QC evidently did not think that the architects had acted reasonably. Their investigations were limited to conversations and letters and some telephone conversations with potential suppliers. They do not seek help from other architects or professionals or competent research institutions or trade associations. The supplier's quotation was suspiciously cheap and was not properly considered. Alarm bells were not heeded and the proposals for the lining were put to the client without any warning whatsoever. Again the conclusion is not that, if the architects had made all the necessary enquiries, there would still have been liability but rather that, because they acted unreasonably in the way in which they chose the tank lining, they did not exercise the care to be expected of ordinary competent architects.

(3) That in determining whether construction professionals act reasonably in seeking the assistance of specialists to discharge their duty to the client, the court has to consider all the circumstances which include

(a) Whether the assistance is taken from an appropriate specialist;

(b) Whether it was reasonable to seek assistance from other professionals, research or other associations or other sources;

(c) Whether there was information which should have led the professional to give a warning;

(d) Whether and to what extent the client might have a remedy in respect of the advice from the other specialist;

(e) Whether the construction professional should have advised the client to seek advice elsewhere or should themselves have taken professional advice under a separate retainer."

349. In applying those principles to the facts of this case it is of note that Schneider were engaged by Rotary. It appears likely that Lendlease was also aware of the involvement of Schneider because the document at G1918 of the Bundle (considered in the next paragraph) came from Lendlease's disclosure. Neither Rotary nor Lendlease appears to have contended at the time that Schneider should not have been engaged.

350. I am satisfied that it was reasonable for Schneider to be engaged to provide the survey. The question then becomes one of whether Aecom's duty to exercise reasonable care and skill required it to go further than it did in checking or challenging Schneider's survey. Aecom made detailed and critical comments on the protection survey on 7th March 2006. It is unclear what response there was to those. The document at G1918 was a composite document. The original document

had been produced by Atkins and was entitled "Comments on [Aecom] Protection Setting Study". To that had been added in red and dated 24th May 2006 a response from Schneider. There was no evidence from anyone who had been involved at the time and the documentary record is clearly incomplete.

351. In favour of liability it is to be noted that the provision of the fault level and protection settings was ultimately Aecom's responsibility. The settings which were provided are agreed to have been defective. Having raised questions as to Schneider's survey it can be said that the obligation to exercise reasonable care and skill required Aecom to follow the matter through and to ensure that the questions were adequately addressed.

352. The factors militating against liability are as follows. As already noted Schneider were specialists and it was reasonable to engage them. Aecom did not simply rubber stamp the results of Schneider's work but did instead raise a number of questions. Aecom was not obliged to duplicate the work done by Schneider and was arguably entitled to assume that the queries it had raised would be properly addressed by the specialists. In addition it can be said that in circumstances where the claim is advanced at a late stage and where it is not the fault of Aecom that documents are missing and evidence from those involved at the time cannot be obtained then Aecom is not to be criticised for its inability to provide a full history.

353. The point is finely balanced but the last factor is significant. When bringing a claim late in the day Lendlease must bear the consequences of the resulting paucity of evidence. In light of that I have concluded that even if the claim had not been statute-barred in this respect I would have found that Lendlease had failed to establish that the deficiency in this regard had been caused by a breach on the part of Aecom.

Defect 19: Smoke Detector Installation.

354. The allegation here is that a number of smoke detectors were positioned within 1 metre of ventilation ducts and that this was a defect because such positioning was not compliant with BS 5839.

355. The claim in this regard is statute-barred because the cause of action accrued at the latest when the construction was completed in accordance with the design provided by Aecom. In addition it is precluded by the Settlement Agreement. The alleged defect not only existed at the time of the agreement but was a matter of which Lendlease knew or ought to have known – indeed the positioning of the smoke detectors and the question of compliance with the British Standard was referred to in an email exchange between Derek Elliott of Lendlease and Mr Middleton in December 2007.

356. Even if the claim had not been statute-barred nor precluded by the Settlement Agreement I would have found that liability was not established for the following reasons.

357. Aecom said that Lendlease had failed to identify the locations where smoke detectors were within 1 metre of the ventilation duct. However, Mr Moseley accepted that there were a number of locations where this was the position. He

took the view that in most instances (though he was not able to say whether this was so in every case) this was a consequence of the size of the room or the presence of other necessary equipment meaning that the only practicable location for the smoke detector was within 1 metre of the duct.

358. There is force in the point made by Lendlease that the positioning of the smoke detectors is not just a matter of construction but is rather a matter of design. Certainly Aecom cannot say that this is necessarily a feature of installation or construction falling outside its design responsibility.

359. BS5839 contemplates that there will be occasions when a smoke detector has to be positioned within 1 metre of a ventilation duct. However, it indicates that there must be a sound reason for this and also indicates that in such an instance the agreement of all interested parties should be obtained.

360. My conclusion as to the nature of Aecom's duty as being one of reasonable care and skill and the fact that BS5839 contemplates circumstances where it will not be possible for a smoke detector to be more than 1 metre from a duct affect what is necessary for a breach to be shown. They mean that in order to show a breach it is necessary for Lendlease to show two matters in respect of each instance where a smoke detector is within 1 metre of a ventilation. First, it must show that Aecom's design either precluded a gap of more than 1 metre or did not address the point. Second, it must show that if Aecom had exercised reasonable care and skill it would have been able to produce a design which provided for a gap of 1 metre or more. It is not enough for Lendlease to show that the smoke detectors were within 1 metre of the ventilation ducts nor even that there was non-compliance with BS5839 unless it can show that the exercise of reasonable care and skill would have led to a different design. Lendlease's evidence simply does not begin to do this and no breach of the duty of care and skill is established..

361. Mr Bradley criticised Aecom's failure to obtain the agreement of all interested parties to the positioning of the smoke detectors. It is not clear to me that Mr Moseley is not right to say that the approach of Honeywill indicated that it accepted that there had been a legitimate derogation from BS5839. Even if that is not correct this criticism adds nothing. Unless reasonable care would have led to a different configuration the failure to obtain agreement does not advance matters.

Defect 21: Adequacy of the Earthing in Group 1 Medical Locations.

362. HTM 2007 distinguished between three categories of medical locations with Group 2 being the highest risk category. Clause 11.94 of HTM 2007 appeared to make the distinction between Group 1 and Group 2 locations by reference to whether medical-electrical equipment is to be used for intracardiac procedures in the location. In his explanation in cross-examination Mr Bradley described it as the difference between areas like wards and those like operating theatres. The precise distinction matters little because in each location there was to be electrical equipment and HTM 2007 provided for there to be additional bonding in such locations (as opposed to Group 0 locations where there was no such equipment) in order to provide extra protection for patients and staff against the risk of electrocution.

363. It is common ground that Aecom's design addressed the earthing requirements for equipment in Group 2 locations but not for that in the Group 1 locations. Lendlease says this was a breach of Aecom's obligations.

364. The claim is statute-barred because the cause of action arose at the latest at the time of construction and arguably earlier. In addition the alleged defect was in existence and had been the subject of correspondence before the Settlement Agreement and so the claim is precluded by that agreement. But for those defences I would have held Aecom to be liable for the following reasons.

365. Mr Bradley accepted that there was no evidence that there was in fact inadequate earthing in the Group 1 locations but this does not advance matters in circumstances where Aecom made no provision in respect of these locations despite having done so for the Group 2 locations.

366. Similarly Aecom's argument that there was no binding requirement in this regard at the time of its design does not advance matters. The relevant provisions were guidance at the time and Aecom's obligations as a specialist providing a design necessarily required it to take account of the guidance (as it did in respect of the Group 2 locations).

367. A further line of defence raised by Aecom related to the question of who should have initiated the discussions about identifying the Group 1 locations. In his report Mr Gold said that the initiative should have come from Lendlease and that there was no obligation on Aecom to raise the question. However, in his answers in cross-examination Mr Gold accepted that Aecom could and should have raised the question of the Group 1 locations with clinicians from the Trust. Even without that concession I am satisfied that at the very lowest the extent of Aecom's design responsibilities meant that reasonable care required it to raise the question and to point out to either the Trust or to Lendlease that Group 1 locations needed to be identified with a view to the additional bonding being included in the design. The fact that Aecom included such provision for the Group 2 locations shows that it knew or ought to have known that such provision would be needed in some locations. Despite having made that inclusion in the design it failed either itself to include provision for the Group 1 locations or to cause Lendlease or the Trust to specify those locations. It cannot sensibly be contended that if Aecom had raised the matter such locations would not have been identified nor that if identified Aecom was not required to make provision for them in the design.

Defect 22: Fire Damper Installation.

368. This alleged defect relates to ductwork outside Plant Room 2. It is said that Aecom is responsible for a number of instances where such ductwork passes through a fire barrier without a smoke/fire damper being installed.

369. A report prepared on behalf of Engie in support of its claim against Lendlease ("the Bolster Report") identified a number of locations where it was said that dampers should have been present but were not. Lendlease accepted that a number of these omissions were the result of poor workmanship or defective performance of the installation work by Rotary. However, it contended that some were the responsibility of Aecom.

370. In the responsive Scott Schedule three instances where the omission was said to be the responsibility of Aecom were put forward. Mr Bradley went further in his report. He had not himself investigated to confirm the absence of the relevant dampers. Mr Bradley took those locations from the Bolster Report. He then compared that report with the drawings prepared by Aecom and by Rotary to identify the reason for the omission. As a result of that exercise Mr Bradley said that there were 15 instances where the absence of a damper could be attributed to its omission from Aecom's design. Mr Bradley identified a further three instances where he said that Aecom should have picked up on the fact that Rotary's drawings did not include a damper where one should have been provided.

371. Mr Moseley also did not investigate the particular locations on site. He had only been shown the Bolster Report in the course of the discussions leading up to the experts' joint statements. In their written opening Miss McCafferty and Mr Thorne characterized this as amounting to "something of an ambush". However, I am satisfied that it was the result of a regrettable oversight rather than any malign intent. Mr Moseley acknowledged that in its treatment of this matter Mr Bradley's report was "comprehensive" and "very thorough". The two experts had lengthy discussions about this aspect of the matter and Mr Moseley said that as a consequence he accepted that Mr Bradley's analysis was "very sound". However, he did not accept that the absence of the dampers could be attributed to a failing on the part of Aecom. This was because he took the view that the identification of the locations at which dampers were to be installed was a matter of the detailed coordination and installation and as such went beyond the scope of Aecom's design responsibility. In addition Mr Moseley was of the opinion that Aecom's obligation to comment on Rotary's drawings when asked to do so (as it was) did not extend to checking in such detail as would have been necessary to pick up the three omissions identified by Mr Bradley.

372. On behalf of Aecom it was said that it was not open to Lendlease to expand its allegation in this regard beyond the three instances cited in the Scott Schedule. In addition it was said that Lendlease should not be allowed to base a claim on the Bolster Report when that had only been disclosed and provided to Mr Moseley at a late stage.

373. The claim in respect of this defect is statute-barred. The cause of action arose at the latest at the time of construction and potentially rather earlier. It is also precluded by the Settlement Agreement. The defect existed and ought to have been known of at the time of that agreement. However, if the claim had not been defeated by those defences I would have found Aecom liable for the fifteen instances where Mr Bradley had identified the absence of a damper as being attributable to its omission from Aecom's design but not for the further three instances.

374. It cannot be said that Aecom suffered any prejudice from the expansion of the claim nor from the late disclosure of the Bolster Report regrettable though both were. There was no suggestion that there was any reason to doubt the accuracy of the Bolster Report as to the locations where dampers were not present. Mr Moseley discussed matters at length with Mr Bradley and there was no suggestion that if the former had been given the Bolster Report earlier or had been aware earlier of

Lendlease's expanded case he would have done anything other than accept Mr Bradley's analysis of the material.

375. The question then becomes one of where the responsibility lay. I have already explained why I found that Aecom's responsibility for design was not limited to the extent that Aecom contended. The extent of its responsibility in relation to the location of the dampers can be determined by reference to what in fact happened. It is apparent that Aecom's design and drawings made reference to the positioning of some dampers. Indeed, Lendlease accepted that some of the omissions on which Engie relied had been the result of a failure by Rotary to act in accordance with the design. The fact that some provision for dampers was made is a compelling indication that this was a matter which Aecom was to address. Having included dampers at some locations it is unrealistic for Aecom to say that it had no responsibility for the omission at other locations if on a proper analysis there should have been dampers at those other locations.

376. However, Aecom would not be liable for the further three instances. Its obligation was to comment on the drawings prepared by Rotary and provided to it for comment. That was an obligation to comment. The obligation was to exercise reasonable care and skill in that regard. It is a matter of fact and degree as to what extent this required detailed checking of the drawings. I am satisfied that Mr Moseley is right to say that it did not extend to checking in the degree of detail which would have been required to identify these omissions.

Defect 23: Absence of Break Tanks for Laboratory Hot Water Systems.

377. This defect can be addressed shortly. Aecom accepts that there was a failure to exercise reasonable care and skill in the design of the hot water supply to the laboratory area. However, it says that the claim is statute-barred. I agree that limitation provides Aecom with a defence in this respect. The cause of action accrued when the relevant drawing was issued for construction in January 2006 or at the latest by the time of construction in accordance with that drawing. Accordingly, the cause of action accrued more than twelve years before the commencement of proceedings.

Quantum in respect of the Individual Non Plant Room 2 Defects.

378. I have explained at [270] and following above why save in respect of two defects I have accepted Mr Walmsley's assessment of the amount which would fall to be awarded if liability had been established for the particular defects. That approach leads to these figures for the particular defects.

379. Defect 11. Here Mr Somerset was able to advance a figure of £200,000 based on an assessment of a reasonable sum for the installation of the replacement fire dampers in light of the number of dampers and the invoices which he had seen. Mr Walmsley's figure was £183,241.98. I have regard to the fifth of the principles enunciated by Ramsey J in *Siemens v Supershield* and the wide ambit of reasonable settlement sums. The difference between the figures advanced by Mr Somerset and Mr Walmsley was comparatively modest and if liability had been established I would have accepted that £200,000 was within the range of sums which it was reasonable to be pay in settlement of this defect.

380. Defect 13: £124,000.

381. Defect 14: £0.

382. Defect 15: £128,000.

383. Defect 18: £576,396.17.

384. Defect 19: £0.

385. Defect 21: Here Mr Somerset opined that the settlement figure of £300,000 was reasonable. He proceeded on the basis that this related to 250 rooms. The amount claimed by Engie was £547,811 which would equate to £2,191 per room. Mr Somerset said that the settlement sum equated to £1,200 per room and was a significant discount. Mr Walmsley accepted that a figure of £1,200 per room was a reasonable sum. That would have given a sum of £258,000 for 218 rooms. The figure of £300,000 would equate to £1,376 per room for 218 rooms. Here it is apparent that the settlement sum was indeed a significant discount from the amount which had been claimed by Engie. In addition it was apparent from his answers in cross-examination that Mr Walmsley was not suggesting that £1,200 per room was at the top of the reasonable range from which it follows that a slightly higher figure would also have been reasonable. Again in light of the wide ambit of reasonable settlement figures if liability had been established I would have accepted that £300,000 was recoverable in respect of this defect.

386. Defect 22: £66,000.

387. Defect 23: £180,000.

<u>The Additional Elements of the Claim for the Non Plant Room 2 Defects.</u>

388. Lendlease claimed that a number of further sums were recoverable as damages flowing from the Non Plant Room 2 Defects.

389. The first item consisted of three sets of additional design costs said to have been incurred as a consequence of defects 13, 18, and 19. In principle such costs would have been recoverable if the defects had been established and if the expenditure had been shown to relate to them. There is force in the criticism on behalf of Aecom that the particularisation of the causation of the expenditure and its relation to the defects is poor and that there is an indication that there might have been double-counting in respect of some elements of them. However, I note that for Aecom Mr Walmsley was able to identify relevant invoices totalling £334,525.52. On balance if liability had been established I would have been satisfied that a sum of the order of £200,000 discounted from that figure to take account of the risk of double-counting and the inadequacy of the evidence of causation was recoverable.

390. The sum of £62,300 was claimed in respect of design fees said to have been paid to Aecom for reviewing and assisting in respect of the Plant Room 2 Defects. The costs of assistance in addressing the defects would potentially be recoverable by Lendlease. However, rather more particularisation of the sums paid and the reason for the expenditure would be required before the amount could be awarded. It is

also relevant that I have found that Aecom was not in breach of its duty in respect of Rev 19 and that even if the claim in respect of them had not been statute-barred the claim in relation to some of the individual defects would have failed on the merits. It would, therefore, be necessary for Lendlease to establish the particular sums attributable to assistance with the matters where Aecom was in breach. That exercise does not appear to have been done.

391. The sum of £159,178.35 (by way of reduction from a figure of £198,874) is claimed in respect of Lendlease management time. Although the cost of management time is in principle recoverable for there to be an award the requirements explained by Wilson LJ in *Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2007] EWCA Civ 3, [2007] 3 Costs L R 389 at [86] must be met. In particular the party seeking such costs needs to show the extent of the diversion of its staff together with significant disruption to its business. Lendlease has not shown those matters here. Mr Somerset had been provided with a spreadsheet of costs and had sought to analyse the figures but accepted that he had not been able to verify the sums in question nor to allocate them to particular defects nor to separate out the sums attributable to preparation for the court proceedings (which it was apparent was a significant element of the time spent by Mr Avey and Mr Bekesi).

392. Finally, Lendlease seeks the sum of £160,080 in respect of the legal costs paid to Project Co and Engie. This was by way of reduction of the sum of £200,000 to take account of the fact that the settlement with Engie included workmanship defects which Lendlease did not attribute to Aecom. If liability had been established Lendlease would have been entitled to recover a reasonable sum paid in costs as part of a settlement and the court would accept that the range of reasonable sums would be wide. If Aecom had been liable for all the Non Plant Room 2 Defects then I would have found that this figure was within the range of reasonable settlement sums in respect of costs. A difficulty arises from the fact that I have found that even if the claim were not statute-barred nor precluded by the Settlement Agreement Aecom would not have been found to have been in breach in respect of all these defects. Indeed on the analysis set out above Aecom would have been liable only for Defects 21, 22, and 23. It follows that Lendlease would have only been entitled to that proportion of the costs paid to Project Co and Engie which were attributable to those defects and there was no evidence in that regard.

Conclusion.

393. The claim is, accordingly, dismissed.