Important TCC Judgment on limitation, accrual of cause of action, and more

Summary

In a decision which will be of wide interest and general application, Eyre J has handed down a wide-ranging and important judgment in *Lendlease Construction (Europe) Limited v AECOM Limited* [2023] EWHC 2620 (TCC).

Alexander Hickey KC (instructed by Shoosmiths LLP) acted for the Claimant, Lendlease. **Lynne McCafferty KC** and **Matthew Thorne** (instructed by Beale & Co Solicitors LLP) acted for the Defendant, AECOM.

The judgment covers a number of key areas of law which are widely applicable to commercial and construction disputes, including:

- The circumstances in which adverse inferences might properly be drawn from the absence of a potentially relevant witness or contemporaneous documents.
- Whether a contract can be a deed even if not executed by two directors or with a common seal.
- To what extent contractual provisions can 'oust' the statutory limitation period.
- When a cause of action accrues in negligence and contract in respect of defective design.
- Whether a contract is limited to the exercise of reasonable skill and care, or whether it imposes strict obligations to comply with specified criteria.
- The circumstances in which a duty of reasonable skill and care can be discharged by reliance on others.
- The circumstances in which a continuing duty to review, advise or warn will arise, and the scope of any such duty.
- The effect of a settlement agreement compromising claims about which a claimant "ought to have known".
- The principles governing recovery of upstream settlement sums and upstream judgment sums.

Background

The proceedings concerned the design and construction of the Oncology Centre at St James' University Hospital, Leeds (the **Hospital**). The Hospital was constructed by main contractor Lendlease under PFI arrangements between 2004 and 2007. AECOM was appointed to provide M&E and Fire Safety Strategy services.

Following the discovery of alleged defects in the design and construction of the Hospital, two separate claims were brought against Lendlease: one by its Employer and one by the estates maintenance contractor (Engie). The claims culminated in (a) a settlement by which Lendlease agreed to make payment in respect of various alleged M&E defects; and (b) the judgment of Joanna Smith J of 12 October 2022 [2022] EWHC 2504 (TCC), which found the existence of various defects for which Lendlease was held liable.

In parallel with those upstream proceedings, Lendlease in turn claimed against AECOM in respect of various alleged fire safety and M&E defects. It was Lendlease's position that, if it was liable to the Employer or Engie, then AECOM would in turn be liable to Lendlease on the same basis.

Decision

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Mr Justice Eyre dismissed Lendlease's claim against AECOM, giving detailed consideration to a wide range of legal principles which will be of general application, as follows.

Evidence

Eyre J considered the circumstances in which adverse inferences might be drawn from the absence of a potentially relevant witness or contemporaneous documents. He held at [67] that this should be approached "*as matters of common sense and rationality and as being determined by the context and the particular circumstances*", following *Efobi v Royal Mail Group [2021] UKSC 33* at [41] (in respect of witnesses) and *Volpi v Volpi* [2022] EWCA Civ 464 at [5] (in respect of documents).

Limitation

Three issues arose:

- First, whether AECOM's appointment operated as a contract but not as a deed with the consequence that the relevant limitation period was 6 years from the date of the accrual of Lendlease's cause of action meaning that every part of the claim was statute-barred.
- Secondly, whether a clause in AECOM's appointment provided for a 12-year period to bring claims in any event.
- Thirdly, even if the relevant limitation period was 12 years, whether significant parts of the claim were nonetheless statute-barred.

Whether the contract was a deed: Eyre J found that AECOM's common seal was not affixed and that it had not been signed by two statutory directors. Nevertheless, he held that the two signatories were purporting to execute the document as a deed and (following *Freeman & Lockyer v Buckhurst Part Properties (Mangal) Ltd* [1964] 2 QB 480 and *Hely-Hutchinson v Brayhead* [1968] 1 QB 549) he held at [111] that AECOM was estopped from contending that the signatories had no authority to do so.

Whether the contract permitted a 12 year limitation period: Lendlease argued that, whether or not the contract was a deed, it expressly provided for a 12 year period in which to bring claims, thereby contracting out of any earlier six-year period in the Limitation Act 1980.

Following *Oxford Architects Partnership v Cheltenham Ladies College* [2006] EWHC 3156 (TCC), the Judge rejected Lendlease's argument, holding at [125] that the contractual provision amounted to a long-stop but did not oust the statutory limitation period. Eyre J considered that *Oxford Architects* "*correctly set out the approach to be taken*" subject to one clarification: that, in light of *Wood v Capita Insurance Services* [2017] UKSC 24, it could no longer be said that express words would be required to contract out of the statutory limitation period: 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*".

Whether the claim was statute-barred despite a 12-year limitation period: Eyre J confirmed at [220] that, where limitation has been put in issue, it was for Lendlease as claimant to establish that the claim was not statute-barred (following *Cartledge v Jopling & Sons* [1962] 1 QB 189 and *London Congregational Union Inc v Harriss & Harriss* [1988] 1 All ER 15).

He held at [222] that the cause of action for a claim in negligence based on defects in a design for construction accrues when the negligence first causes damage, which will be when the defective design is incorporated into the building, per *Cameron Taylor Consulting Ltd v BDW Trading Ltd* (2022) 200 Con LR 32.

He held at [223] that the cause of action for a claim in contract accrues at the date of breach. A cause of action for defective design will therefore accrue "*when the design is handed over to the contractor for construction even if*

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construction is not completed until substantially later".

Applying those principles, all alleged defects were held at [225] to be statute-barred, no relevant act or omission having occurred less than 12 years prior to issue of the claim.

Nature and extent of AECOM's contractual obligations

Whether AECOM's obligations were limited to the exercise of reasonable skill and care: Lendlease's case was that its upstream obligations were stepped down to AECOM, such that AECOM was obliged to achieve the outcome which Lendlease had contracted to achieve under the building contract.

Whilst there was an express provision requiring AECOM to exercise reasonable skill and care, Lendlease relied on *MT Hojgaard A/S v E.ON Climate* [2017] UKSC 59 and *Martlet Homes Ltd v Mulalley & Co Ltd* [2022] EWHC 1813 (TCC) for the proposition that AECOM was nevertheless liable for strict compliance with prescribed criteria.

The Judge disagreed, holding that the answer turns on the "*proper interpretation*" of the relevant clauses "*when seen in the context of the Consultancy Agreement read as a whole*" at [133]. Here, AECOM's appointment "*did not operate to step down to Aecom Lendlease's obligations to Project Co*" and, insofar as the contract contained prescribed criteria, these are better seen 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*" (at [141]-[143]). Nevertheless, "*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*".

Discharge of reasonable skill and care by reliance on others: In respect of allegations concerning electrical switchgear, it was AECOM's case that it had properly discharged its duty to exercise reasonable skill and care by reliance on the work of a third party specialist. The Court considered the applicable principles by reference to *Cooperative Group Ltd v John Allen Associates* [2010] EWHC 2300 (TCC) at [348], holding at [352] that it was reasonable for the third party specialist to be engaged and that AECOM was not obliged to duplicate the work done by that specialist.

Whether AECOM came under a continuing duty to review, advise or warn: In view of its position on limitation, Lendlease contended that AECOM came under a continuing duty to advise, warn, or review the state of the works. Eyre J considered the well-known authorities including *New Islington & Hackney Housing Association Ltd v Pollard Thomas & Edwards Ltd* [2001] BLR 74, *Oxford Architects* and *Cameron Taylor*, concluding at [168] that:

"*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.*"

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On the facts of this case, no such continuing duty arose.

Effect of the parties' settlement agreement

Lendlease and AECOM had executed a settlement agreement in September 2012 which encompassed "*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*".

The Court accepted at [234] that this was not limited to claims which were in existence at the date of settlement, but instead "*had a wider effect*". Accordingly, the Court held at [236] that the settlement agreement was "*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*". Eyre J went on to conclude that a large number of the alleged defects fell within that description.

Entitlement to recover settlement sums

Eyre J also considered the effect of the separate settlement agreement between Lendlease, the Employer, and Engie. In reliance on the well-established principles in *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314, *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC) and *Siemens Building Technologies FE Ltd v Supershield Ltd* [2009] EWHC 927 (TCC), Eyre J concluded at [262] that Lendlease had to show: a breach by AECOM causing loss which was the subject matter of the upstream settlement; that Lendlease had acted reasonably in settling the claim; and that the amount paid in settlement was a reasonable sum in respect of the breach in question.

Distinguishing *Bovis Lendlease Ltd v R D Fire Protection Ltd* (2003) 89 Con LR 169, Eyre J held at [267] 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, …sometimes a rough and ready approach. Moreover, …a wide range of settlement sums can be held to be reasonable*".

Whilst the Judge accepted at [269] that it was reasonable for Lendlease to enter into a settlement agreement with the Employer and Engie, he held that Lendlease had not proved the reasonableness of the settlement sums. He held that whilst it is a "*low hurdle that has to be surmounted to show that a settlement was in a reasonable figure*" nevertheless "*in respect of a number of the defects Lendlease has failed to surmount that hurdle*" (at [276]). He continued:

"*…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*".

Entitlement to recover upstream judgment sum

Lendlease sought to recover the full judgment sum awarded against it by Joanna Smith J in the upstream proceedings brought by the Employer (to which AECOM was not a party). In reliance on *The Sargasso* [1994] 1 Lloyd's LR 412, Lendlease contended that the amount awarded in those proceedings should be taken as its measure of loss.

For its part, AECOM relied on *Ward v Savill* [2021] EWCA Civ 1378 on the basis that AECOM was not party to the judgment of Joanna Smith J and, as such, Lendlease must prove in these proceedings all the elements of its claim including the amount of the loss caused by the relevant defects.

This point was academic in light of his decision on limitation and the effect of the parties' settlement agreement, but the

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Judge noted at [256] that "*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*". He held at [257] 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.*"

The qualification was that Joanna Smith J's judgment was for a global sum which was not allocated to individual defects.

Accordingly, Eyre J held at [259] that if Lendlease failed to establish AECOM's liability for all the same defects then it cannot be 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. 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, but "*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*."

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