Reports from the courts

Our regular analysis of court decisions of most interest to construction comes from **Andrew Croft**, **Ben Spannuth** and **Daniela Miklova** of **Beale & Company Solicitors LLP** who look at a judgment highlighting the effect of an overriding reasonable skill and care clause in consultants' contracts; and another which provides for the first time clarification of the territorial scope of adjudication where the *Construction Act 1996* has lacked in definition.

Lendlease Construction (Europe) Limited v Aecom Limited

[2023] EWHC 2620 (TCC); Eyre J

On 15 October 2004, St James's Oncology SPC Limited (Project Co) engaged Lendlease Construction (Europe) Ltd (Lendlease) to design and build an Oncology Centre at St James's University Hospital, Leeds (the D&B Contract) (the Project). Lendlease engaged AECOM Limited (AECOM) to provide M&E services in relation to the Project (the Consultancy Agreement).

Clause 1.01 of the Consultancy Agreement provided that AECOM would "ensure that no act, default or omission […] shall cause or contribute to any breach by the Contractor of any of its obligations" in the D&B Contract/the Employer's Requirements.

Clause 4.01 of the Consultancy Agreement warranted that AECOM would "comply […] with the requirements of the local authority, statutes, regulations, and codes of practice in force and relevant to the design of the Works" and that "[n]otwithstanding any other clause in [the Consultancy Agreement] […] shall not be construed to owing any greater duty […] than the use of necessary reasonable skill, care and diligence".

On 11 December 2019, Project Co and Engie Buildings Ltd (Engie), which maintained the Oncology Centre, commenced proceedings against Lendlease in relation to alleged defects in the basement plantroom (the Plant Room 2 Defects) and other defects (the Non Plant Room 2 Defects). On 9 November 2021, Lendlease settled the Non Plant Room 2 Defects in the sum of £2.9m. The TCC subsequently found Lendlease liable for the Plant Room 2 Claim in the sum of £5,048,534.39.

On 30 May 2019, Lendlease commenced proceedings against AECOM, alleging that the Plant Room 2 Defects were all the consequence of AECOM's breaches such that it was entitled to be indemnified in the full amount of its liability to Project Co. Lendlease also attributed nine of the Non Plant Room 2 Defects, which related to matters of MEP design, to AECOM. Lendlease argued 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 that clause 4.01 imposed a strict obligation on AECOM to achieve compliance with the requirements of the local authority, statutes, etc.

Decision

Eyre J dismissed Lendlease's claim against AECOM.

In relation to the nature and extent of AECOM's obligations under the Consultancy Agreement, Eyre J held that the Consultancy Agreement "did not operate to step down to Aecom Lendlease's obligations to Project Co" under the D&B Contract. Eyre J found that clause 1.01 and 4.01 of the Consultancy Agreement were not laying down competing requirements for a specified design and for a specified performance criteria of the kind referred to in ***MT Hojgaard A/S v E.ON Climate and others [2017] UKSC 59*** and nor were they setting out inconsistent design obligations.

Eyre J emphasised the need to consider those clauses "in the context of the Consultancy Agreement read as a whole" such that it was necessary to give effect to the final sentence of clause 4.01, which was on its natural reading "a qualification on the duties which would otherwise be owed by Aecom under other provisions including clause 1.01".

To the extent that the Consultancy Agreement contained prescribed criteria, Eyre J held that this should be interpreted "as setting the context in which the question of what is required in order to perform with reasonable care, skill, and diligence is addressed". A failure to comply with the regulations, etc. was therefore "a failure to exercise reasonable care, skill, and diligence in the absence of a compelling explanation to the contrary".

Comment

This judgment highlights the effect of an overriding reasonable skill and care clause in consultants' contracts. Whilst AECOM was able to defeat Lendlease's argument that strict obligations were owed under the Consultancy Agreement, this judgment is a useful reminder to parties to undertake detailed reviews of contractual documentation, especially where there are competing obligations.

Van Elle Limited v Keynvor Morlift Limited

[2023 EWHC 3137 (TCC); HHJ Stephen Davies

The Royal National Lifeboat Institution (RNLI) was the owner of a pontoon at Fowey Harbour in the River Fowey in Cornwall. HHJ Davies explained that the River Fowey is "identified […] as not forming part of the sea and being a Category C river (a tidal river or estuary)" and Fowey Harbour "is well inland of the point where the river Fowey meets the sea". RNLI engaged Keynvor Morlift Limited (KML) as main contractor in relation to pile replacement works. KML in turn appointed VEL to undertake works to "replace the existing pontoon berthing and mooring piles including the installation of new piles" (the Works) (the Contract).

A dispute arose between VEL and KML in relation to the true valuation of VEL's entitlement under the Contract, which VEL referred to adjudication. On 27 June 2023, the adjudicator decided that KML should pay to VEL the sum of £335,142.33 (the Decision). VEL sought to enforce the Decision, which KML defended on the twin grounds of jurisdiction and breach of natural justice. KML submitted:

(i) in order for a dispute to be referred to adjudication under the *Construction Act 1996* (the Act), there must be a construction contract which relates to the carrying out of construction operations in England;
(ii) in the absence of a definition in the Act as to what is England for this purposes, "the obvious starting point is the definition in the *Interpretation Act 1978*", which in turn referred to an Ordnance Survey election map which showed the boundary of Cornwall to run along each side of the River Fowey from the point where the river enters the sea to a point just upstream of the pontoon and along the low water line of the River Fowey; and
(iii) the piles were founded in the sea bed below low water mark and therefore were not structures forming or to form part of the land in accordance with s105 of the Act.

VEL argued that the Works should be seen as works to the pontoon as a whole and therefore comprised "works forming […] part of the land". VEL further noted that "the illustrative list of examples of 'works forming part of the land' under section 105(1)(b) includes 'docks and harbours', 'coast protection or defence', and 'inland waterways'" and that these are structures below the low water mark such that "it must follow that Parliament intended for those structures to be subject to the *Construction Act* and did not intend for an arbitrary cut off at the low water mark".

Decision

HHJ Davies held that the Contract was a construction contract within the meaning of section 104(6) of the Act.

HHJ Davies referenced the Territorial Sea (Baselines) Order 2014 (the Order), which in turn referenced Schedule 1 of the United Nations Convention on the Law of the Sea (UNCLOS), which confirms that "[i]f a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks". HHJ Davies held that "on a proper interpretation the *Construction Act* applies to construction contracts which relate to the carrying out of construction operations in England, where England ends on the baseline as established by [the Order and UNCLOS]" such that s105(1) of the Act includes "land covered by water and, hence, land covered by inland waters up to the baseline which, in the case of rivers such as the river Fowey, extends to the mouth of such rivers".

Comment

Although a fact-based decision, the TCC has for the first time clarified the territorial scope of adjudication where the *Construction Act 1996* has lacked in definition. This judgment is of particular interest of those involved in offshore construction. This decision also reinforces the TCC's attitude to the enforcement of adjudication decisions wherever possible. **CL**