

**Insights**

## **LIMITATION PERIODS AND CONCURRENT DUTY IN TORT AND CONTRACT**

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### **SUMMARY**

In *Sheffield Teaching Hospital Foundation Trust v Hadfield Healthcare Partnership Ltd and others*, the Technology and Construction Court provides helpful guidance about the use of standstill agreements to pause limitation periods, and the existence or otherwise of concurrent liabilities in tort and contract in the construction industry.

The decision related to an application for summary judgment. First, the sub-contractor had argued that the main contractor's claims did not fall within the definition of 'Dispute' that the parties had used in their standstill agreement, because the construction contract itself had not been included within the exhaustive definition of the term 'Project Documentation'. The sub-contractor's position, therefore, was that, the claims were time-barred. Secondly, the sub-contractor had argued that it was 'settled law' that a building contractor or sub-contractor does not owe a concurrent duty of care to avoid economic loss in respect of workmanship and materials, given that assumption of responsibility could not arise where there was an express construction contract in place. The court held that both issues were arguable, therefore dismissing the application for summary judgment.

### **WHAT ARE THE PRACTICAL IMPLICATIONS OF THIS CASE?**

This judgment provides useful guidance to practitioners whose practice includes dealing with the construction and associated industries, on two issues that arise quite often in respect to disputes in those industries. Those two issues are:

- First, how the parties may arrest or postpone the expiry of impending limitation periods, if they want to do so, for example to allow commercial negotiations to continue. The application of limitation periods within the construction industry is a common problem because of the practical issue that defects in the completed work can sometimes take many years to manifest themselves, thus leading to obvious questions of the application of limitation periods.

One of the means by which parties sometimes arrest or postpone the running of the limitation periods problem is to enter into a standstill agreement. This case highlights the importance of the detailed drafting of such agreements to ensure that the particular causes of action and items of potential claim are covered clearly. Also, consideration needs to be given to whether the standstill agreement should provide for a suspension of the limitation periods or whether there needs to be an extension in the limitation periods.

- The second issue that the court dealt with, ie whether a concurrent duty exists in negligence as well as in contract, is another issue that arises very often in construction disputes. The ruling in this case highlights that the question of whether a concurrent duty of care exists (in negligence) to avoid causing economic loss is not 'settled law' as suggested by one of the parties in the case, but rather 'is unsettled and controversial'

## WHAT WAS THE BACKGROUND?

This case concerned various contracts executed as deeds in 2014 among the claimant, the defendant (as main contractor), the First Part 20 Defendant (Kajima) (as design and construct sub-contractor) and the Second Part 20 Defendant (Veolia) (as facilities management services provider) for the design, build, construction, commission and operation of a new ward block (the Hadfield Wing) on a PFI basis.

The construction contract between the Defendant and Kajima (the Construction Contract) contained a limitation clause that prohibited commencement of proceedings against Kajima after 12 years from the actual completion date.

Potential defects in the fire compartmentation and other fire protection works were discovered in the Hadfield Wing in 2017 and 2018.

The parties entered into two standstill agreements in 2018 and 2019 respectively (the Standstill Agreements), under which the parties agreed that:

*'for...any defence...based on limitation, time bar...in connection with the Dispute (a Limitation Defence), time will be suspended during the Standstill Period' and 'no party shall raise any Limitation Defence that relies on time running during the Standstill Period...'*

The claimant vacated the Hadfield Wing in 2018 and relocated to temporary accommodation while the remedial works were carried out between 2019 and 2021.

The claimant commenced proceedings against the defendant in relation to the fire compartmentation and fire protection defects in 2020. The defendant then commenced Part 20 proceedings against Kajima, arguing these defects were caused by Kajima's failure to design and/or

construct in compliance with the Construction Contract. Kajima in turn claimed that the defects were due in part to the maintenance failures by Veolia.

On 13 January 2023, Kajima applied for summary judgment and/or to strike out parts of the Part 20 claim made against Kajima by the defendant.

## **WHAT DID THE COURT DECIDE?**

The defendant argued that (1) the scope of the Standstill Agreements applied to the defendant's claims against Kajima and therefore that its claim against Kajima were not statute barred, and (2) Kajima owed the defendant a concurrent duty of care, such that Kajima was liable to the defendant in both tort and contract (it being likely that the limitation period in tort would expire later than the limitation period in contract). Kajima argued that the defendant had no real prospect of succeeding on either of these two arguments.

## **STANDSTILL AGREEMENTS**

The First Standstill Agreement applied to 'Disputes' during the Standstill Period, and defined 'Dispute' as 'the exercise by any party of its contractual rights under the Project Documentation or any legal right such party may otherwise have...arising out of or connected with the Defects...'. It was not disputed that 'Project Documentation' did not include the Construction Contract.

Kajima argued that the proceedings commenced by the defendant in respect of the Construction Contract were not within the 'Dispute' definition, and therefore clearly were time-barred. Conversely, the defendant relied on the factual matrix evidence and argued that its claims constituted the exercise of legal rights arising out of or in connection with the 'Defects', and therefore were within the definition.

The court considered that it was arguable whether the defendant's claim fell within the wide terms of 'any legal right', and therefore the court was not in a position to determine whether the claims were barred by limitation. The court said it was necessary to ascertain the parties' intention in respect of the First Standstill Agreement, and in the absence of full documentation and cross-examination, the court was not able to reach a conclusion.

## **CONCURRENT DUTY OF CARE**

Kajima argued in general terms that it was 'settled law' that a building contractor or sub-contractor did not owe a concurrent duty of care (in negligence) to avoid economic loss in respect of workmanship and materials, given that assumption of responsibility could not arise in circumstances where there was in place a detailed construction contract. In response, the defendant argued that the issue whether such a concurrent duty of care at common law exists 'is unsettled and controversial'.

Kajima relied on *Robinson v PE Jones (Contractors) Ltd* [2012] QB 44 and argued that it was established law that it did not owe a concurrent common law duty of care to avoid pure economic loss arising out of defective workmanship or materials under a contract for construction works. No assumption of responsibility could arise from the Construction Contract. Therefore, the defendant's negligence claim against Kajima had no real prospect of success.

The defendant argued that the law was not as 'settled' or clear as Kajima argued, and that each case depended on its own facts as to whether a concurrent duty of care existed. The defendant argued that there is little reason in principle why a professional adviser does owe a concurrent duty whereas a building contractor (particularly one with some 'design' obligations) should not.

The court emphasised the importance of the factual matrix when considering whether any common law duty of care arises. The court found that the issue remained 'unsettled' and 'controversial' for the following reasons in particular:

- The court distinguished *Robinson v Jones* on the facts and considered it was reasonably arguable that the Construction Contract contained both design and workmanship obligations, did not exclude Kajima's liability in tort, and must be construed in the context of the specific PFI contractual arrangements in this case
- *Robinson v Jones* did not preclude the existence of a concurrent duty of care in tort where the factual circumstances gave rise to an assumption of responsibility. The court commented that 'it is right to question, as a matter of law, whether there is any basis on which building contractors should be distinguished from other professionals when ascertaining whether there has been any...assumption of responsibility' and considered that 'within the construction industry today there are many disciplines of special skill and expertise which could be described as professional'
- The court accepted that there may be a fine line between design and workmanship responsibility in respect of the fire protection issues and considered that factual and expert opinion evidence would likely be required

Therefore, the court held that this issue was unsuitable for determination on a summary basis and should be decided at trial.

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## **RELATED PRACTICE AREAS**

- Construction Disputes

## MEET THE TEAM



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