

Legal Briefing

Ted Lowery looks at a claim concerning defective fire stopping in a PFI hospital

St James's Oncology SPC Limited v (1) Lendlease Construction (Europe) Limited (2) Lendlease Construction Holdings (Europe) Limited [2022] EWHC 2504 (TCC)

Before Mrs Justice Joanna Smith DBE

In the Technology and Construction Court

Judgment delivered 12 October 2022

The facts

The Oncology Centre at St James University Hospital Leeds was a PFI project constructed and maintained pursuant to a project agreement made during October 2004 between the Leeds Teaching Hospital NHS Trust and the project company, SPC. Lendlease was SPC's design and build contractor.

The design criteria within the project agreement were stepped down to the D&B contract and required compliance with various statutory criteria and certain NHS standards, including HTM 81 (fire precautions) HTM 2007 (electrical services supply and distribution) and HTM 2011 (emergency and essential electrical supply equipment). The project agreement required the fire safety design to satisfy HTM 81 but allowed for non-compliances if justified on a fire-engineering approach basis, as long as the standard achieved was equal to or better than HTM 81.

Plant Room 2 in the Oncology Centre included several rooms housing the HV/LV transformers, switchgear, and the emergency diesel generators and fuel tanks. As incorporated into the project agreement and in line with the HTMs, the fire safety strategy prepared by Lendlease required 60 minutes fire stopping compartmentation around each room within Plant Room 2 and 120 minute compartmentation between Plant Room 2 and the external risers with 60 minute fire doors.

During November 2007 Lendlease circulated a revised fire safety strategy document proposing the removal of the compartmentation around individual rooms within Plant Room 2. As completed in December 2007, Plant Room 2 did not include any discrete fire stopping around individual rooms but comprised a single fire compartmentation space measuring some 1,927 m².

The revised fire safety strategy document was circulated to the Trust, Leeds council's building control, the local fire authority and to the independent certifiers, Capita Symonds, with no objections being raised.

During 2018, SPC commissioned an investigatory report which concluded that the compartmentation arrangements in Plant Room 2 did not adequately control the risk of the spread of fire both horizontally and vertically, created a risk of loss of primary and secondary power supplies and had not been adequately fire engineered.

During 2019 SPC commenced proceedings against Lendlease claiming that Plant Room 2 was subject to numerous defects including the absence of fire compartmentation and inadequate fire stopping construction. SPC sought some £6,242,274.47 as the anticipated costs of a proposed remedial works scheme.

Lendlease contended that the Oncology Centre was not defective because albeit common ground that Plant Room 2 did not satisfy HTM 81, to the extent that any aspects of the design were non-compliant with the D&B contract requirements, these were derogations which had been identified, justified and ultimately approved by all relevant parties. Lendlease also argued that where SPC had yet to commence remedial works and might never do so, any award of damages would amount to a windfall and/or betterment.

The issue

Was the fire stopping and compartmentation in Plant Room 2 in breach of contractual requirements?

The decision

The judge found that Lendlease had not justified its design of Plant Room 2 as part of a fire engineering approach nor satisfactorily explained how the 2007 revised fire safety strategy document achieved the necessary standard of safety comparable to HTM 81.

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The judge further concluded there had been no meaningful approval of the revised fire safety strategy document by any of the Trust, building control, the local fire authority or Capita Symonds: even had there been any substantive approvals, these would not have changed the position under the D&B contract that Lendlease was at all times responsible for the design of the works and for achieving compliance with the contractual requirements.

The judge considered that SPC's proposed remedial works scheme was not unreasonable *per se* and that there was ample evidence of SPC's intention to implement these works. The judge therefore rejected Lendlease's argument that the sum claimed amounted to a windfall and/or betterment and awarded SPC some £5,048,534.39 in damages.

Commentary

Having acknowledged that as built, Plant Room 2 did not satisfy HTM 81, Lendlease were unable to offer a satisfactory explanation, whether from a fire engineering perspective or otherwise, for the change from individual room compartmentation. Hence, Plant Room 2 was defective in breach of the fire safety design requirements in the D&B contract.

Albeit that all disputes will be decided on their own facts and by reference to the particular terms of the contracts, this judgment examines a number of common issues raised in fire stopping defects claims and should be of interest to anyone involved in disputes concerning fire protection design in PFI assets.