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PERSPECTIVES

Fire Strategy in St James's Oncology v Lendlease and the Building Safety Act – An Architect's Perspective

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INTRODUCTION

Since the major fire event at Grenfell Tower in June 2017, a significant period of cultural and professional change has occurred within the construction industry in regard to fire safety. During this period, we have seen the development of a new regulatory and legislative framework, including the Building Safety Act 2022 ("the BSA") and the first guidance by the UK judiciary.

This article discusses the key issues raised by the parties and the court in another recent opinion — St James's Oncology SPC Limited v Lendlease Construction (Europe) Limited & Another[1] (*"St James's Oncology v Lendlease"*) — in particular the review and approval processes of the fire safety strategy, the adoption of a fire engineering approach, and the compliance of the proposed strategy with relevant standards and guidance. Those issues will serve as a starting point in this article for analysing the architect's role in the preparation of fire strategy for buildings and the implications of the BSA on changes made during construction.

Following the July 2022 judgment in Martlet Homes Limited v Mulalley and Co Limited[2] (*"Martlet v Mulalley"*), the St. James's Oncology v Lendlease decision was published in October 2022 by the Technology and Construction Court ("TCC"). While *Martlet v Mulalley* concerned fire safety issues in the external wall construction in high-rise residential buildings,[3] *St James's Oncology v Lendlease* relates to the internal fire protection, specifically the fire strategy and compartmentation of plant rooms in a hospital building. The decision in St James's Oncology v Lendlease is of particular interest because it provides another valuable insight into the court's approach to fire-related cases in buildings, but with the focus on the healthcare sector.

Guidance and advice on fire safety in the design of healthcare buildings is included in the 'Firecode' suite of Health Technical Memoranda ("HTMs"), which are published by the UK Government. HTMs in the 'Firecode' suite are similar to Approved Document B, in that they provide specific guidance for the designers to demonstrate compliance with the requirements of the Building Regulations. In the context of the latest fire safety reforms, there is a new regime under the BSA for 'higher-risk buildings,' that is, buildings of at least 18 metres high or with at least seven stories, which applies during the design and construction of hospitals, if the above height threshold is met.

The Case

St James's Oncology v Lendlease concerned the alleged fire safety and electrical engineering defects in the basement power plant room of the Oncology Centre at St James's University Hospital in Leeds ("the Oncology Centre"). The key document setting out the fire safety design for the Oncology Centre was the Fire Safety Strategy ("the Fire Safety Strategy") prepared by engineering consultancy, AECOM. One of the main issues in this case arose from the difference in the basement compartmentation strategy presented in Revision 12 of the Fire Safety Strategy, which required 60-minute, fire-resisting construction to the electricity substation and the rooms within it. Revision 19 of the same document removed the need for compartmentation in these areas. Based on the evidence, it appeared that the latter revision of the Fire Safety Strategy was prepared around 19 November 2007, shortly before practical completion of the Oncology Centre had been certified on 14 December 2007.

During the course of the remedial works between 2015 and 2017 (to address issues other than those complained of in these proceedings), certain concerns were raised about the fire compartmentation, specifically the lack of sub-compartmentation between the switch rooms and generator rooms in Plant Room 2. It was confirmed that Plant Room 2 had been built in accordance with Revision 19 of the Fire Safety Strategy. However, subsequent investigations concluded that in the absence of fire-engineering justification, the 'original' fire compartmentation shown in Revision 12 of the Fire Safety Strategy should have been constructed in Plant Room 2.

In the decision, the judge — Mrs Justice Joanna Smith DBE — generally confirmed that *"it appears to be common ground between the fire experts that there could have been no issue with* [the design shown in Revision 12 of the Fire Safety Strategy] *if implemented"*.[4] Therefore, the key issues that the judge had to determine related to Revision 19 of the Fire Safety Strategy. Those issues included:

[1] [2022] EWHC 2504 (TCC).
[2] [2022] EWHC 1813 (TCC).
[3] https://www.jsheld.com/insights/articles/martlet-v-mulalley-design-considerations-of-a-reasonable-architect-on-fire-safety-issues-post-grenfell
[4] [2022] EWHC 2504 (TCC), para. 174.

1. The review and approval of the Fire Safety Strategy by the parties and / or Building Control.

2. The adoption of a fire engineering approach in the Fire Safety Strategy.

3. The standard of fire safety in the Fire Safety Strategy by reference to HTM 81, which at the time provided guidance on the design of fire precautions in new hospitals and major extensions to existing hospitals.

Based on review of the contemporaneous correspondence between the relevant parties involved in the design and construction of the Oncology Centre, the judge found that *"there does not seem to have been a coherent or structured approach to the amendment of the Fire Strategy"*.[5] The judge then stated that *"there is no evidence of detailed consideration of what was required and it is not clear that… AECOM was in agreement with the various points that were said to have been agreed…"* between the parties.[6] The judge concluded that *"there is… nothing to explain why a decision appears to have been made to remove the compartmentation within Plant Room 2…"*[7] Furthermore, it appeared that *"the changes to the Fire Strategy were ultimately made on the instructions of Lendlease… to ensure that the Fire Strategy reflected what was already in place"*,[8] although the evidence suggested that *"AECOM was not even clear as to precisely what had in fact been constructed on site"*.[9] The judge also found that no proper detailed review and approval process had taken place.[10]

Regarding the issues listed in Items 2 and 3 above, the judge dismissed Lendlease's argument that Revision 19 of the Fire Safety Strategy was *"an agreed and justified fire engineering solution"*.[11] Referring to the expert evidence, the judge concluded that Revision 19 of the Fire Safety Strategy *"did not provide a standard of fire safety equal to or better than that provided for in HTM 81"*.[12]

The Duties of the Expert Witness

In cases such as *St James's Oncology v Lendlease*, technical experts from different fields are typically appointed by the parties, to provide their analyses and opinions on the actions of the parties involved in the design and construction of a project, and whether these parties exercised the level of skill and care expected of another reasonably competent member of their respective professions. This includes the designers, contractors, and specialist subcontractors. They are also expected to provide opinions and analysis that is objective in an unbiased manner to assist the court, based on the Civil Procedure Rules ("CPR") Part 35.

The judge in *St James's Oncology v Lendlease* raised several significant procedural matters that are at the heart of providing expert evidence, including:

1. Assisting the court.

2. Paying *"rigorous attention"*[13] to the duties as an independent expert, specifically seeking to ensure *"a level playing field"*[14] with the opposing expert during the Expert Joint Statement discussions, including record keeping of meetings and conversations, sharing information and analysis, and addressing site visits in the report.[15]

3. Preparing comprehensive, clear, and accurate written submissions, by reference to relevant evidence.[16]

4. Avoiding being an *"overly combative witness"* advocating the case and *"unwilling to make appropriate concessions."*[17]

[5] [2022] EWHC 2504 (TCC), para. 206(1).
[6] [2022] EWHC 2504 (TCC), para. 206(1).
[7] [2022] EWHC 2504 (TCC), para. 206(1).
[8] [2022] EWHC 2504 (TCC), para. 206(4).
[9] [2022] EWHC 2504 (TCC), para. 206(4).
[10] [2022] EWHC 2504 (TCC), para. 206(8).
[11] [2022] EWHC 2504 (TCC), para. 242.
[12] [2022] EWHC 2504 (TCC), para. 245.
[13] [2022] EWHC 2504 (TCC), para.80.
[14] [2022] EWHC 2504 (TCC), paras.69 and 80.
[15] [2022] EWHC 2504 (TCC), para.80.
[16] [2022] EWHC 2504 (TCC), para.73.
[17] [2022] EWHC 2504 (TCC), all at para.79.

Fire Strategy - Requirements

As noted above, Judge Smith identified the Fire Safety Strategy as one of the most critical documents in the case. She suggested that *"Fire strategy documents are used by the designers as a means of explaining and justifying their fire safety decisions to the end user of the building"*.[18] While there is no clear definition of what constitutes a fire safety strategy, Regulation 38 of the Building Regulations[19] requires that fire safety information should be provided to the person responsible for the operation of the building and defines the fire safety strategy (or fire strategy) as follows:-

> *(3) … (a) "fire safety information" means information relating to the design and construction of the building or extension, and the services, fittings and equipment provided in or in connection with the building or extension which will assist the responsible person to operate and maintain the building or extension with reasonable safety;*

Approved Document B Volume 2 ("AD-B")[20] contains a section on Regulation 38 and describes the intention behind the regulation:

> *The aim of regulation 38 will be achieved when the person responsible for the building has all the information to enable them to do all of the following:*
>
> *a. Understand and implement the fire safety strategy of the building.*
>
> *b. Maintain any fire safety system provided in the building.*
>
> *c. Carry out an effective fire risk assessment of the building.*

AD-B continues by making references to the Regulatory Reform (Fire Safety) Order.[21] Section 4 of the Regulatory Reform (Fire Safety) Order[22] gives a description of what should be fire safety strategy considerations for a building:

> *4. (1) In this Order "general fire precautions" in relation to premises means…*
>
> *(a) measures to reduce the risk of fire on the premises and the risk of fire spread on the premises;*
>
> *(b) the measures in relation to the means of escape from the premises;*
>
> *(c) measures for securing that, at all material times, the means of escape can be safely and effectively used;*
>
> *(d) measures in relation to fire fighting on the premises;*
>
> *(e) measures in relation to the means for detecting fire on the premises and giving warning in case of fire on the premises; and*
>
> *(f) measures in relation to the arrangements for action to be taken in the event of fire on the premises…*

Fire Strategy - Architect's Role During Design and Construction of a Building

AD-B also references BS 9999 which describes the role of the designer in *"ensuring effective fire protection"* in the design, construction, and maintenance stages of a project. Focusing on the design stage,[23] as this is where the architectural role is most critical, it states the following:

[18] [2022] EWHC 2504 (TCC), para.13.
[19] The Building Regulations are a set of 'functional' requirements made under powers provided by the Building Act, which are minimum standards for design and construction of buildings. See p.27, The Building (Amendment) Regulations 2018, clause 28.
[20] See p.126, Approved Document B Volume 2, 2019 edition, R38, Regulation 38: Fire safety information.
[21] See p.127, Approved Document B Volume 2, 2019 edition, Section 19: Fire safety information.
[22] See p.5, The Regulatory Reform (Fire Safety) Order 2005.
[23] See p.34 (PDF p.50), BS9999:2017 Fire safety in the design, management, and use of buildings – Code of practice.

> ***7. 2 The design stage***
>
> *The basic fire safety strategy should be decided at the outset of the design process, so that all sectors of the ensuing process can be coordinated. The fire safety strategy report for the design should include the key assumptions and conditions that underpin the design…*
>
> *The designer should review the method(s) of procurement, construction, installation, integration and commissioning, and seek to ensure that the various elements can be properly inspected and tested and maintained and repaired… and that there is sufficient management documentation.*

When concentrating on the role of the architect in this process specifically and the documentation that captures the fire safety strategy, the RIBA Plan of Works[24] describes an architect's involvement at key stages in the development of the fire safety strategy.

For RIBA Work Stages 0 to 3 ('Strategic Definition' - 0, 'Planning and Briefing' - 1, 'Concept Design' - 2 and 'Spatial Coordination' - 3), RIBA Plan of Works describes the main architectural tasks as undertaking site appraisals and testing Client Requirements and Project Briefs to determine the appropriate level of fire safety suitability.

These stages of the process should also include input from key project stakeholders (such as end users, facilities managers, specialist consultants, fire and building control authorities, and others) and include a record of key fire safety design decisions in the form of the fire safety strategy report at the end of RIBA Work Stage 2.

Stage 3 focuses on integrating the fire safety measures into a spatially coordinated building design aligned with feedback and development from the key stakeholders (and a possible update to the fire safety strategy report). The architect's role may vary across projects (depending on their brief and requirements) but generally architects play more of a lead role within the design team during these stages.

For RIBA Work Stages 4 to 6 ('Technical Design' - 4, 'Manufacturing and Construction' – 5, and 'Handover' – 6), while still a central presence within the design team, the architect generally plays much less of a leading role. Instead, the architect is there to help coordinate and record the different technical fire safety requirements as part of the building procurement and construction process.

For RIBA Work Stage 7 ('Use'), if the architectural appointment is extended into this project stage, the architect will focus on how the implementation of the fire safety strategy is impacting the facilities management of the building. This will include collating feedback and risk assessments for review and feeding into updates to the fire safety information as required.

Key Changes Under the Building Safety Act

Based on the facts of the case, it appears that the compartmentation issues in Plant Room 2 of the Oncology Centre arose from an uncoordinated change to the Fire Safety Strategy during construction and when the building works were nearing completion. With the introduction of a new regulatory and legislative regime under the BSA, the issue with the compartmentation, such as that discussed in *St James's Oncology v Lendlease*, could have been avoided.

The new legislation establishes three new Gateways at key stages of design and construction process. Gateway 2 applications must demonstrate how the proposals comply with building regulations requirements, and building control approval must be obtained from the Building Safety Regulator[25] before relevant building works commences on site. Most importantly (and of relevance to this case), any "major changes"[26] to the approved design proposed during construction will require approval from the Building Safety Regulator before the change can be implemented. In addition, the BSA requires that all the relevant information about the building is created, stored, updated, and maintained throughout the building life cycle, with the responsibilities of the relevant parties clearly defined as part of the 'golden thread' requirement.

[24] RIBA Plan of Work 2020 Overview, RIBA Architecture.com, www.ribaplanofwork.com
[25] The BSA names the Health and Safety Executive as the new Building Safety Regulator in England, whose main functions are overseeing the safety and standards of all buildings, including those relating to fire, and leading implementation of the new regulatory framework for high-rise buildings.
[26] At the moment 'major' changes are not yet defined, and whether or not a change will be a 'major' change may depend on the circumstances of the project. However, the change in the fire compartmentation in *St James' Oncology v Lendlease* is likely to have been considered as 'major' because it had a significant impact on fire safety of Plant Room 2.

CONCLUSION

While a change to fire safety strategy should be carefully considered by the key parties at appropriate stages of the project, *St James's Oncology v Lendlease* shows that is not always the case. One could reasonably assume that, had the BSA been in place at the time of the design and construction of the Oncology Centre, it is unlikely that the changes to fire strategy and on-site could have been implemented without:

1. A proper scrutiny of the amended proposal by the relevant parties, including the Building Control Body/ Building Safety Regulator, and

2. A properly recorded agreement and approval of the amended proposal.

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