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Design life guarantees and limitation: what have you actually been offered?[1]

Design life guarantees are a common feature of construction and infrastructure contracts providing comfort that a critical aspect (or aspects) of a structure that will last for a certain period of time. Much of the historical commentary and case law on design life guarantees is focussed on the precise nature and scope of the guarantee in question. For example, is the guarantee that something is "*fit for purpose*" for a certain period of time? Alternatively, when properly construed, is the design life obligation merely a promise that reasonable skill and care has been exercised to try and ensure, so far as possible, that the subject matter of the guarantee will last for a certain length of time?

Given the extensive case law analysing the precise nature of numerous design life guarantees, it is perhaps surprising that little commentary exists on the interaction between the law of limitation and design life guarantees. This is particularly relevant where a party has been offered a design life guarantee for a period of time such as twenty or twenty-five years. Such timeframes would exceed the standard limitation periods for breaches of contract and/or tortious claims (more on these below).

In this *Insight*, we analyse the interaction between the law of limitation and design life guarantees so that those offering (and being offered) design life guarantees for lengthy periods of time can properly consider how long they will actually benefit from the design life 'guarantee' in question.

The law on limitation – the basics

As an overarching point of principle, it is important to remember that limitation periods do not mean that there is no longer a claim after the passage of the prescribed period. What limitation periods do offer is a complete defence to the allegations. Whilst, in practical terms, this may seem rather artificial (given that there is no potential for the innocent party to recover), the application of limitation does not necessarily mean that there hasn't been a breach and/or negligent act.

Where a designer (or indeed a contractor with design responsibilities) is being sued for breach of contract, the primary rule is that the limitation period is six years for a breach of a simple contract[2] (sometimes referred to as a contract under hand) and twelve years for breach of a contract[3] under seal (i.e., a deed). *Keating on Construction* notes the following in relation to designers (specifically architects):

> *"Actions against the architect in contract must be commenced within six years of the date on which the cause of action accrued, or within 12 years if the engagement is by deed. These periods specified under the Limitation Act 1980 may, however, be modified or excluded by the terms of the contract between the architect and the employer provided that clear words are used."*[4]

If a right of action arises in tort (and the circumstances as to when this may occur are not covered in this article), then actions must be commenced within six years of the cause of action (the tortious act).[5] In circumstances where there are latent defects in a design, the position in relation to limitation periods for a tortious claim is different again. This can (potentially) be very useful if the contractual limitation period has expired prior to any issues with the design life guarantee becoming apparent.

Hudson on Building Contracts summarises the position in relation to latent defects as follows:

> *"Construction Professionals cannot always rely on the six-year limitation period (or 12 years should they contract under seal) under ss.2 and 5 of the Limitation Act 1980 to bar a claim, because where the client discovers the defect many years after breach, then by virtue of the latent damage provisions in s.14A a new additional period of limitation can arise for latent defects, which runs for three years from the client's knowledge (subject to 15 years' long stop from breach by the professional)."*[6]

The relevant parts of section 14A of the Limitation Act provide:

> *"(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.*
>
> *(2) Section 2 of this Act shall not apply to an action to which this section applies.*
>
> *(3) An action to which this section applies shall not be brought after*

the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either—

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action..." [Emphasis added]

So, if the damage is not known about until after the six-year default limitation period for tortious claims elapses, then there is an "extension" which runs from three years of the client's knowledge of the damage. In the very recent case of *Vinci Construction UK Ltd v (1) Eastwood and Partners Ltd (2) Snowden Seamless Floors Ltd v GHW Consulting Engineers Ltd*,[7] Mrs Justice O'Farrell provided helpful guidance on how the three-year period applies in the context of physical damage:

"55. Where section 14A of the Limitation Act 1980 applies, it displaces section 2 and provides for a potentially longer limitation period, namely, six years from the date on which the cause of action accrued, or if later, three years from (i) the date of the knowledge required for bringing an action for damages in respect of the relevant damage, together with (ii) a right to bring such action.

56. For the purposes of this case, the relevant knowledge required is: i) such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify instituting proceedings; and ii) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence.

57. Under section 14A the onus is on a claimant to plead and prove that it first had the knowledge required for bringing its action within a period of three years prior to the issue of its claim: Nash v Eli Lilly [1993] 4 All ER 383 per Purchas LJ at p.396." [Emphasis added]

That is obviously useful if the defects are caught in time. However, Section 14B of the Limitation Act 1980 confirms that: (a) even if no damage arises before the 15 years for bringing a tortious claim elapses; and (b) the claimant therefore has no knowledge of the issue, the backstop limitation period of 15 years will still apply.

"14B.— Overriding time limit for negligence actions not involving personal injuries.

(1) An action for damages for negligence, other than one to which section 11 of this Act applies,[8] *shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission—*

(a) which is alleged to constitute negligence; and

(b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

(2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that—

(a) the cause of action has not yet accrued; or

(b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;

before the end of the period of limitation prescribed by this section." [Emphasis added]

As noted in the textbook, "Limitation Periods":[9]

"*In those cases where the longstop does apply, its effect is drastic. It bars the right of action notwithstanding that the case of action has not accrued and/or that the starting date for the purposes of s.14A has not arrived. As with s.14A it is important to observe that this provision is not limited to cases of what is commonly described as latent damage. It applies to all actions for damages for negligence except personal injury cases. Therefore, in cases where the damage occurs some considerable time after the relevant breach of duty, the limitation period available to the claimant may be less than the six years allowed by ss.2 and 14A of the 1980 Act. Section 14B therefore, in some cases, reduces the limitation period that would be available under the present law.*" [Emphasis added]

This is obviously a crucial point to be aware of in the context of design life guarantees – being that the absolute maximum limitation period available to sue a designer for negligence is 15 years from the date on which the designer committed the negligent act. This is the case even if the damage is not known about prior to the 15 years elapsing.

So, what is the policy underlying the law of limitation?

There are key policy reasons for limitation periods which are well summarised in the textbook *Limitation Periods*.[10]

> *"Policy issues arise in two major contexts. The first concerns the justification for having statutes of limitation at all and the particular limits that presently exist. The second concerns the procedural rules that apply after an action has been commenced. Arguments with regard to the policy underlying statutes of limitation fall into three main types. The first relates to the position of the defendant. It is said to be unfair that a defendant should have a claim hanging over him for an indefinite period and it is in this context that such enactments are sometimes described as "statutes of peace". The second looks at the matter from a more objective point of view. It suggests that a time-limit is necessary because with the lapse of time, proof of a claim becomes more difficult—documentary evidence is likely to have been destroyed and the memories of witnesses will fade. The third relates to the conduct of the claimant, it being thought right that a person who does not promptly act to enforce his rights should lose them. All these justifications have been considered by the courts."*[11]

So, in essence, the law recognises that after a certain period of time the commercial risk of any claim should no longer hang over a company or individual not least because of the difficulties in proving breach and/or negligence so long after the fact.[12]

It is important to have this underlying policy in mind when reviewing the (remarkably limited) case law on the interaction between design life guarantees and limitation periods below.

Case law on the interaction of limitation and design life

There are two main cases concerning the interaction between limitation periods and guarantees as to the design life of construction works. However, the point has generally appeared as a subsidiary issue given that the cases in question were brought within the relevant limitation periods.

The most important case is the Supreme Court decision in *MTMT Højgaard A/S*.[13] Whilst it was not the main issue in dispute, one of the points examined in the judgment relates to the interaction between a two-year limitation period and a design life of 20 years.

The key sections of this judgment are at paragraphs 29 and 30, where Lord Neuberger states:

> *"29. Accordingly, if, as E.ON argue, para 3.2.2.2(ii) of the TR amounts to a warranty that the foundations will last for 20 years, there would be a tension between that provision and clauses 30, 33 and 42 of the Contract. However, I do not consider that the tension would be so problematic as to undermine the conclusion that para 3.2.2.2(ii) amounted to warranties as described by Jackson LJ. In the light of the normal give and take of negotiations, and the complex, diffuse and multi-authored nature of this contract, it is by no means improbable that MTH could have agreed to a 20-year warranty provided that it could have the benefit of a two-year limitation period, save where misconduct was involved. It would simply mean that the rights given to E.ON by paras 3.2.2.2(ii) were significantly less valuable than at first sight Page 11 they may appear, because any claim based on an alleged failure in the foundations which only became apparent more than two years after the handover of the Works would normally be barred by clause 42.3. In this case, of course, there is no problem, because the foundations failed well within the 24-month period.*
>
> *30. However, in my view, although it would therefore be possible to give effect to para 3.2.2.2(ii) of the TR as a 20-year warranty as described by Jackson LJ, the points canvassed in paras 27 to 29 above justify reconsidering the effect of para 3.2.2.2(ii). It appears to me that there is a powerful case for saying that, rather than warranting that the foundations would have a lifetime of 20 years, para 3.2.2.2(ii) amounted to an agreement that the design of the foundations was such that they would have a lifetime of 20 years. In other words, read together with clauses 30 and 42.3 of the Contract, para 3.2.2.2(ii) did not guarantee that the foundations would last 20 years without replacement, but that they had been designed to last for 20 years without replacement. That interpretation explains the reference in para 3.2.2.2(ii) to design, and it obviates any tension between the terms of para 3.2.2.2(ii) and the terms of clauses 30 and 42.3. Rather than the 20-year warranty being cut off after 24 months, E.ON had 24 months to discover that the foundations were not, in fact, designed to last for 20 years. On the basis of that interpretation, E.ON's ability to invoke its rights under para 3.2.2.2(ii) would not depend on E.ON appreciating that the foundations were failing (within 24 months of handover), but on E.ON appreciating (within 24 months of handover) that the design of the foundations was such that they will not last for 20 years."* [Emphasis added]

In other words, Lord Neuberger sees no problem with a limitation period being much shorter than the design life for the works (here the 20 years required for the turbine foundations).

This line of thought was also followed in the Scottish case of *SSE Generation Limited*,[14] albeit in the context of

bespoke provisions. This case concerned the design for a tunnel design which was meant to have a 75-year design life. From the judgment it is clear that, again, the Judges did not see an issue with there being a period within which recovery can be sought for defects in relation to design which is far shorter than the length of time the design was meant to last for.

The reasoning behind this stance is set out at paragraphs 267 onwards of the *SSE* judgment:

> "*[267] The general description of the contractor's main responsibilities provides that liability for defects due to his design, which are not identified prior to the defects date, will be limited so far as the contractor can prove that he used reasonable skill and care to ensure that the design complied with the works information. This is consistent with Option M which, when read with clause 80.1, provides that loss or damage to the works taken over by the employer and occurring before the issue of the defects certificate, which is caused by a defect which existed at take over, will be the contractor's risk unless the contractor can establish that he used reasonable skill and care. The defenders' liability for identified and 106 unidentified defects, which give rise to loss or damage to the works, are both limited to the exercise of reasonable skill and care.*
>
> *[268] The structure of the contract is then that the contractor is obliged to correct all defects notified prior to, or specified in, the defects certificate. This is regardless of whether the defects were caused by fault and negligence in the design. This is clear from the provision (clause 45.1) which permits the employer to recover the cost of having a defect corrected by another from the contractor. Normally, the employer would only be at risk once the defects certificate has been issued and then only for defects not specified in that certificate. However, the bespoke provisions of this contract (clause 46.4) provided that the contractor must make good at his own cost and expense any defect in the civil works appearing during the period of 12 years after completion (take over).*
>
> *[269] Section 8 allocates liability to pay for loss or damage as a result of a defect in the works following take over by the employer. That loss will be an employer's risk, unless it occurred before the issue of the defects certificate and was due to a defect which existed at takeover. In that event, the contractor will bear the liability for the loss and damage, unless he can show that he exercised reasonable skill and care in ensuring that the design complied with the works information. If the contractor is obliged to correct a defect which was an employer's risk event, he will be entitled to the benefit of the indemnity to recover his costs and outlays.*
>
> *[270] After the twelve-year period, the defender is no longer obliged to correct defects. During the period between take over and the issue of the defects certificate, any loss or damage caused by the works is governed by clause 80.1. Following the issue of the defects certificate, any loss or damage to the works is an employer's risk event.*
>
> *[271] On the hypothesis that the pursuers had demonstrated that the 75-year design requirement had not been complied with, that would have to have been because of a defect in the accepted design (presumably ultimately a failure to line the tunnel throughout the CFZ). If they had proved that there had been a failure to shotcrete erodible rock, the failure would have been one in implementing the accepted design (on the hypothesis that it required this precaution). This would still fit into the description of a defect due to the contractor's "design", which is unqualified by reference to the wording which defines a defect. It is not suggested that those carrying out the support work in the HRT failed to comply with Mr Taylor's requirements. What he designated by way of HRT support is properly classified as part of the contractor's design when considering Option M. Clause 11.2(15) refers to a defect occurring where a part of the works designed by the contractor does not accord with the accepted design. The defenders thus escape liability for a defect, even if it existed at take over, if they can prove (as in the event they did (infra)) that they used reasonable skill and care in the design of the HRT.*" [Emphasis added]

What does this mean in practice?

Those receiving design life guarantees for very long periods (such as 75 years), need to be aware that, in reality, even if those guarantees are iron clad absolute guarantees, the law of limitation still applies. There will be little to no point trying to rely on 25-year flat roof guarantee after more than 20 years, when the applicable limitation period will have expired. Unfortunately, the length of some guarantees can provide false comfort that the position is different when, in reality, it is not.

The message is clear – limitation periods will be strictly adhered to notwithstanding much longer contractual design life obligations. Accordingly, parties are well served to be vigilant and to keep the long stop expiry of the applicable limitation periods firmly in mind. If problems emerge before that deadline, parties should act quickly to pursue claims, or otherwise protect their position. This may involve entering into a standstill agreement, to allow the parties to discuss appropriate remedial solutions or settlement. Alternatively, if timings are exceptionally tight, protective proceedings should be commenced without delay.

Claire King
Fenwick Elliott
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Footnotes

1. By Claire King with thanks to Katherine Butler for her excellent editorial suggestions.
2. See Section 5 of the Limitation Act 1980.
3. See Section 12 of the Limitation Act 1980.
4. At Chapter 14-161.
5. See Section 2 of the Limitation Act 1980. See also Section 14-165 of *Keating on Construction Contracts*.
6. *Hudson's Building and Engineering Contracts,* 14th Ed., Chapter 2 – Construction Professionals, Section 2.3: Limiting or Excluding Professional Duties and Liability, (3) - Limitation Periods at Section 2-033.
7. [2023] EWHC 1899 (TCC).
8. Section 11 of the Latent Damage Act applies to personal injury claims so is not relevant here.
9. See Section 6.030, 9th Edition by Andrew McGee.
10. 9th Edition by Andrew McGee.
11. At 1.050.
12. Indeed, one of the reasons the Building Safety Act 2022 has caused such shock waves through the industry is that it has lengthened limitation periods so significantly in the context of fire safety defects for residential buildings.
13. *MT Højgaard A/S (Respondent) v E.ON Climate & Renewables UK Robin Rigg East Limited and another (Appellants)* [2017] UKSC 59.
14. *SSE Generation Limited v Hochtief Solutions AG and another* [2018] CSIH 26.