

Tilbury Douglas Construction Limited v Ove Arup & Partners Scotland Limited

Case Ref No: CA117-21

Date, Time and Duration of Hearing: Wednesday 8 and Thursday 9 May 2024 (2 days)

Division and Senators: First Division (Lord President, Lord Malcolm and Lady Wise)

Livestreamed Hearing?: Yes No

Agents and Counsel:

Agents/Counsel for the Reclaimer (*Ove Arup & Partners Scotland Limited*):

Clyde & Co LLP

Roddy Dunlop KC and Murray Steele

Agents/Counsel for the Respondent (*Tilbury Douglas Construction Limited*):

Brodies LLP

Gavin MacColl KC and Adam McKinlay (Brodies)

Link to Judgment Reclaimed/Appealed:

https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2023csoh53.pdf?sfvrsn=f2f32279_2

Case Description:

This is a reclaiming motion (appeal) from a decision of the Lord Ordinary. It concerns issues of time-bar for claims (known in Scots Law as prescription).

The litigation concerns the development of a former railway yard east of Haymarket Station, Edinburgh into five office and retail buildings with a basement car park. The respondent, Tilbury Construction, was the principal

contractor for enabling works, which were intended to prepare the site for construction. Two railway tunnels lie beneath the site. These tunnels required to be reinforced and made ready for construction of the development to take place on top of them. The reclaimer, Ove Arup, was subcontracted to design the tunnel work.

Work began onsite in January 2014. During construction, it became apparent that the brickwork in one of the tunnels was softer than anticipated, and that there was a significant amount of voiding between the brickwork lining and the bedrock beneath it. Ove Arup's design required to be redone in order to address these problems. Additional works were required and the project was delayed.

Tilbury Construction contend that Ove Arup's original design was based on erroneous and overly optimistic assumptions that voiding was not present in the brickwork, and about the strength and stiffness of the brickwork in the tunnel.

They claim damages of £5,951,533.99 from Ove Arup for losses they say that they suffered as a result of the delays and additional costs to the project necessitated by the redesign. They raised proceedings on 30 July 2019.

Ove Arup contend that, by May 2014, Tilbury Construction had become aware that the differences between the original design and the situation on the ground were such that additional work would be required, with consequent delay. They argue that this awareness meant that the five-year time-bar period (the prescriptive period) which applied to the claim started running in May 2014, and that the claim therefore time-barred in May 2019. They rely on sections 6(1) and

11(1) of the Prescription and Limitation (Scotland) Act 1973 in support of that argument. Tilbury Construction argue that the five-year period did not commence until the end of November 2014, because it was not until that stage that Ove Arup made them aware that a redesign was needed. They rely on sections 6(4) and 11(3) of the Act.

The Lord Ordinary agreed with Tilbury Construction's argument. He held that the claim did not time-bar until November 2019 and that it had been raised in time. He allowed the claim to proceed to a proof before answer.

Ove Arup appeal that decision. The First Division will hear the appeal on the 8th and 9th of May 2024.