

Seele Austria v Tokio Marine

Round three and the final

1 Introduction

This talk will focus on the recent decisions of *Seele Austria GmbH & KG v Tokio Marine Europe Insurance Ltd* (17 February and 6 August 2009)¹. The case involved the courts interpreting a Construction All Risks (CAR) policy. Following the Court of Appeal decision, the case was remitted to the Technology and Construction Court (TCC) for the quantum trial. As has been a feature of this case, the path to trial was not without twists and turns. We will consider what can be learned from the judgments of Mr Justice Coulson and Mr Justice Clarke in this case.

2 The facts

The Claimant, Seele Austria GmbH & Co KG (Seele) entered into a Trade Contract with the main contractor, BLS Martins Ltd (BLS), under which it was to design and install windows at building number 2 (St. Martins House).

Seele's principal business is the design and execution of glass facades and glass roofs. In fact, they had been involved in many prestigious projects, including Heathrow Terminal 5. On 16 January 2002, they entered into a Trade Contract with BLS under which they was to design, procure, install, execute and complete the atrium wall glazing, shop front and external curtain walling for the Paternoster project. Under the Trade Contract, Seele were obliged to remedy any defective work of which they were given notice and, if they failed to take any such steps, the client (BLS) was entitled to employ and pay others to carry out the remedial work. The installation included "punched" windows to the second to fourth floors of the building.

¹ [2009] EWHC 255 (TCC) and [2009] EWHC 2066 (TCC) respectively]

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As you are, no doubt, aware, a “punched” window is a window installed in spaces between vertical load-bearing concrete columns and the horizontal concrete floors. In this case, the window was assembled off-site. It consisted of an aluminium frame and pre-installed integrated glass and stone fixed to the frame. Once the window was inserted into the intended concrete space, it was sealed to the concrete along with a waterproof EPDM membrane. On this project, the external spaces between the windows were to be clad in handset stone on the north and east elevations and brick on the south and west elevations. This cladding work was the responsibility of another sub contractor, Irvine & Whitlock, who were contracted by BLS and under the supervision of the project manager, Bovis Lend Lease Ltd (Bovis). The internal finishing works, including the ceilings (Phoenix), floors and plasterboard (BDL), were also to be carried out by other subcontractors, again under the supervision of Bovis.

The punched windows were tested off-site in the laboratory and, at that stage, they passed the test. The Trade Contract stipulated that 10% of the windows had to be tested once they had been installed on site. It was for Bovis to determine when the site tests should be carried out. In an ideal world, the tests would have been carried out before the handset stone and brick cladding had been erected, in case access had to be gained to the windows to remedy any defects revealed by the test. In this case, the cladding work on level 2 and half of level 3 had been completed before the tests were carried out. It would appear that Bovis left the testing until this stage in an attempt to speed up the project and secure an earlier completion bonus. Bovis were probably reasonably confident, given that the windows had passed the laboratory test, that the windows would pass. The truth was rather different and when the installed windows were tested against water penetration with a hose they all failed. The end result was that the cladding had

to be removed and the internal walls and ceilings opened up to allow the necessary remedial work to be carried out.

3. The defects

It was our case, and it was accepted both at first instance and in the Court of Appeal, that there were a number of factors causing leaks to the windows. These included:

1. The incorrect installation at the factory of the termination bar.
2. The use of too few screws to fix the EPDM membrane to an aluminium strip to the frame.
3. Faulty gluing and clamping of the membrane to the frame under the aluminium strip.
4. Faulty fixing of the membrane to the concrete pillars.
5. Penetration of the EPDM membrane by fixing the bracket for the stone adjacent to the termination bars.
6. Pin holes in the EPDM membrane caused by in situ welding by Seele.
7. The failure to the seal in the halfen channel.

Seele incurred the cost of remedying the defects in the windows. The remedial work was set out in a detailed method statement dated 14 October 2002, as agreed between Seele and Bovis. Initially, time was spent trying to cut into and then patch the faulty membrane but this approach was abandoned in favour of replacing the membrane in its entirety by fixing it with more screws and gluing it in a proper fashion to the frame and the concrete pillars. Seele rectified the termination bars.

Seele also claimed the cost of having a project manager on site throughout the period of the remedial works. It was charged by the employer, by way of set off to the final account, for the costs incurred in having the internal finishes broken open and the cladding removed by Irvine & Whitlock to allow access to the defective windows and for the cost of reinstating the internal finishes in cladding. The employer also charged Seele, by way of set off, for the delay to the completion of the project caused by the remedial works. Seele sought these costs and charges in respect of the remedial works, which became known as the 'access costs, under the policy. They claimed a total £1,237,709.48.

4. The continuing coverage issues

At the quantum phase, there were still issues relating to the application of the retained liability (deductible) and the policy exception relating to consequential loss.

The deductible provided as follows:

“18. **Design Workmanship and Materials**

This Section includes loss or damage arising out of a defect in design plan specification workmanship or materials other than in respect of...

Insured's Retained Liability

The first £2,500 of each and every occurrence or series of occurrences arising out of any one event

(3) *The Insurers will additionally indemnify the Insured in respect of intentional damage necessarily caused to the Insured Property (a) to enable the replacement repair or rectification of Insured*

Property (a) which is in a defective condition subject to the Insured's Retained Liability being the first £10,000 of the cost of each and every occurrence or series of occurrences arising out of any one event but the Insurers Liability shall be limited to £2,500,000 of the cost of each and every occurrence or series of occurrences arising out of any one event

For the purpose of this memorandum the Insured Property shall not be regarded as lost or damaged solely by virtue of the existence of any defect in design plan specification materials or workmanship in the Insured Property or any part thereof

Where the cost of replacing repairing or rectifying any loss or damage in respect of the Insured Property (a) which is defective is less than the Insured's retained liability applicable to (1)(ii) then at the option of the Insured the Insurer(s) agree that the wording of (2) and (3) shall apply in respect of such loss or damage."

The exception read as follows:

"EXCEPTIONS TO SECTION 1 OF POLICY NO: 5048700099

The Insurer(s) shall not be liable in respect of ...

1. CONSEQUENTIAL LOSS

penalties under contract for delay or non-compliance or consequential loss not specifically provided for herein"

5 A reminder: the Court of Appeal's decision

The appeal was heard before Lord Justice Waller (the Vice-President of the Civil Division), Lord Justice Moore-Bick and Lord Justice Richards. The majority judgment was given by Moore-Bick LJ, with Waller LJ supporting our interpretation. It was held that Memorandum 18(3) operated as a standalone indemnity and was not subject to the operation of the rest of the Memorandum. In short, Memorandum 18(3) operated as a freestanding agreement, providing additional cover to sub-contractors (such as Seele) in accordance with its terms, and was not conditional on the operation of clause 18(2). The Court of Appeal held that the Judge at first instance, Mr Justice Field, had erred in holding that clause (3) was subject to clause (2) and, therefore, only provided cover for defect and subcontracts works which had caused unintentional damage to the other work that was free of defective condition.

Therefore, whereas Memorandum 18(2) required there to be accidental damage as a consequence of a defect, under Memorandum 18(3) the sub-contractor (Seele) was entitled to an indemnity for damage deliberately caused to the works to gain access to remedy a latent defect, even in the absence of accidental damage. It is interesting to note that Moore-Bick LJ and all the Lord Justices stated that Memorandum 18 was on the whole *“a difficult provision to construe”* and that it *“bears the hallmarks of a provision which has been fashioned from various different clauses rather than having been drafted as a single integral whole.”*

Moore-Bick LJ’s approach was, nonetheless, to hold that Memorandum 18 should be construed quite literally and independently of the rest of the clause. His approach meant that the external cladding and the internal plasterboard ceilings had to be removed in order to enable the sealing of the windows to be replaced. That constituted damage to the works other than those affected by the defect, but it was deliberate damage carried out for this purpose of gaining access to seal the

membranes. The cost of making good the defects themselves and the access damage was not covered under Memorandum 18 because the defects themselves are not damage and did not cause damage to other parts of the works. Nor, for the same reason, was it covered by clause 18(2). However, Moore-Bick LJ took the view that, as it was necessary to carry out remedial works to preserve the physical integrity of the building, the insured, including Seele as a sub-contractor, were entitled to be indemnified under clause 18(3) in respect of the cost of making good the necessary access damage.

The case provides some practical guidance on the application of retained liability provisions in the construction of insurance claims. It is a common feature of such claims that there may be issues as to whether there is a single or series of design flaws or repeated incidences of bad workmanship. These design flaws or workmanship issues can arise in a single property, for example in roofing slabs or electricity fittings. Where these defects cause a cascade of incidences of damage, the question often arises under a standard retained liability provision as to whether that damage is a single *“occurrence or series of occurrences arising out of one event”*. As the judgment of Moore-Bick LJ makes clear, the mere fact that a single mistake by a workman is repeated over and over again is not enough to find that there was *“one event”* for these purposes.

Therefore, each individual circumstance should be looked at and analysed to see whether there are different or separate causes or a combination of causes. The result would have been different had the poor workmanship been attributable to a *“single event”*, such as giving the workman the wrong instructions which they then conscientiously followed, so as to produce a series of similar defects and, by the same logic, it seemed that, had the leaking been wholly attributable to a design defect in the manufacture of the window units, the claimant might have succeeded

in arguing a single deductible for the totality of the damage caused in the windows.

6. The retained liability and its practical application

To put this in context, there were, in fact, 150 windows at levels two to four at St. Martins House. 73 had been installed by the time the water tests were carried out, i.e. when the defect was discovered.

Throughout, Seele tried to argue that only one retention applied. Following the Court of Appeal's decision, they eventually conceded that their starting point was 18 windows but, perhaps wisely for a change, they did not suggest the remedial works or access costs for 18 windows amounted to £1.2 million. As it turned out, the costs claimed for the remedial works or access costs declined as we examined the detail of the individual costs concerned.

Seele's claim at trial was put as follows:

"The Claimant incurred substantial costs and losses as a result of the remedial works. These comprised:

(a) the Claimant's own costs (including supervision costs) in (i) gaining access to the defective parts of the window assemblies and (ii) carrying out repairs; and

(b) costs of materials; and

(c) costs of additional testing; and

(d) the costs of other trade contractors which were required to remove and then reinstate the work which they had done around and over the window assemblies

(including ancillary costs relating to the remedial works). Those costs were charged to the Claimant by BLS/Bovis (the "Contra-charges"); and

(e) supervising the access works of other trade contractors.

7. The remedial works

To maintain their claim, Seele sought not only their own costs but the costs of other sub-contractors, in the main Irvine Whitlock, BDL, Phoenix and others. Seele prepared a video confirming the various stages of the remedial works. I refer to the attached slides to illustrate each stage and the work done.

8. Round three - Seele change their case again!

In November 2008, the matter was transferred to the TCC. Despite the Court of Appeal's decision that a deductible applied to each window affected by workmanship defects, and almost three years after the proceedings were issued, Seele issued an application to amend its Particulars of Claim. The proposed amendments related to a cause of damage to the windows being a generic design defect and quantum.

Insurers naturally opposed the 'design amendments', relying on issue estoppel and the *Henderson* abuse of process defence because the 'design v workmanship' issue had already been determined or could and should have been raised for determination in previous stages of the litigation. The insurer's view (not shared by Seele) was that the effect of refusing Seele permission to make the design amendments would be application of one deductible per defective window, which would reduce the value of the claim by half. Seele advanced the argument that the nature of defects had never been determined and it would be wrong and unfair to now prevent it from raising the new case. After a review of the general

principles on amendment, Coulson J referred to the principles of issue estoppel established by Diplock LJ in *Thoday v Thoday* [1964]², namely the necessity to demonstrate that a particular issue had already been litigated, decided and was a necessary ingredient in the previously advanced cause of action. He concluded that issue estoppel would apply to the determination of preliminary issues, or even interlocutory matters, decided earlier in the same action between the parties. After an extensive review of the proceedings before the courts at both instances, the Judge held that the issue of ‘design v workmanship’ defects had already been decided in the insurer’s favour by both courts. He further determined that the parties cannot subsequently, in the same proceedings, advance arguments or adduce further evidence directed to showing that the issue in question has been wrongly determined.

He disregarded Seele’s argument of ‘special circumstances’ by stating that, if there had been any potential confusion as to whether the issue of ‘design v workmanship’ had been in play, then the resolution of that confusion had been within the sub-contractor’s knowledge and control.

If the design amendments had not been barred by issue estoppel, Coulson J then considered whether such amendments would be an abuse of process. He referred to the decisions in *Henderson v Henderson* [1843]³ and *Johnson v Gore Wood & Co (a Firm)* [2002]⁴ as authorities for the proposition that a court will not permit the same parties to open the same subject of litigation in respect of matters which, due to negligence, inadvertence or accident, were not but should have been decided in previous litigation. He decided that the issue of generic design defect could and should have been raised before, in the liability proceedings. On this

² 1 All ER 341

³ All ER Rep 378

⁴ 2 AC 1 HL

basis, he concluded that it would be an abuse of process for the court to allow the design amendments to be made at such a late stage. Notably, Coulson J came to this conclusion in spite of the fact that the previous litigation was, in fact, an earlier stage of the same proceedings; a development characterised as unusual but, on the facts of this case, appropriate.

Coulson J, therefore, dismissed the application for the design amendments on the basis not only that the underlying issue had already been determined against the sub-contractor and could not be reopened, but also that it could and should have been raised years ago and that to allow the amendments would be unfair, contrary to the Civil Procedure Rules and an abuse of process.

Seele's second category of proposed amendments related to quantum and was also opposed by the insurer.

The insurer in its submissions established that the sub-contractor sought to introduce claims for consequential losses or composite claims to which the policy either did not respond, or which were expressly excluded. We argued on behalf of insurers that, if there were two competing causes, for example (a) access costs and/or (b) consequential costs and, as here, (b) is expressly excepted, then there is no indemnity for the 'Insured cause': *Wayne Tank and Pump Co v Employers Liability Assurance Corporation* [1974]⁵

Coulson J also considered the insurer's argument that the new claim appeared to include many items which were originally said to be straightforward remedial costs, which were also excluded from the policy and as such would not be recoverable.

⁵ 1 QB 57

He considered that although a number of the costs included in the amended pleadings might be classified as consequential losses or otherwise be excluded, it would be inappropriate to turn an application to amend into a form of preliminary issue hearing and to decide points of law on an interlocutory basis. We returned to these issues at the trial.

He also acknowledged that Seele had not provided adequate particulars of claim and, as such, ordered it to particularise its case as to the dominant cause of costs claimed and/or the basis of the costs apportionment sought in addition to adducing plainly the evidence before the start of the quantum trial.

The Judge also encouraged Seele to review its claim with regard to supervision costs and warned it of the potential costs consequences if the claim, which appeared to relate to a period after remedial works on the windows had been completed, failed at trial.

After the two day hearing, the TCC allowed the sub-contractor's application with respect to its quantum amendments but rejected the application with respect to the cause of damage.

This decision, although arising from a procedural application, reinforces the point that defendants can successfully rely on issue estoppel/*Henderson* abuse of process arguments in response to applications to amend particulars of claim, and need not wait to plead such arguments in an amended defence.

This was a pro-active case management decision, highlighting the necessity for claimants to set out the genuine heads of claim supported by evidence. Although complex issues, including those relating to the coverage of consequential loss, were left to be determined at trial, the Judge unequivocally directed what

information Seele needed to provide in the pleadings. Therefore, Seele had clear warning as to what they needed to do to present their case and back it up with documentation.

9. The final round?

Seele's new quantum case

To recap, the original claim was for over £1.2 million. Just prior to the CMC hearing before Mr Justice Coulson in November 2008, Seele served a draft Amended Particulars of Claim that alleged, inter alia, that there was only one retained liability of £10,000, for all windows. The claimant confirmed at that stage that the indemnity was sought in respect of 73 windows. The insurers objected to this amendment. The court agreed, holding it res judicata, and instructed Seele to provide proper particulars (and supporting documents) to make their exact case on quantum clear.

Seele's amended case was that the retained liability had been exceeded on 18 windows, on the north and east elevations, from which flowed loss of £560,263. This position was confirmed in a 'clarification letter' in April 2009. Therefore, you would assume the battle lines were drawn.

The insurers obtained permission to rely on expert evidence from a quantity surveyor. The Amended Defence was served, addressing the '18 windows' case and challenging the losses attributed to these 18 windows. That Defence identified, amongst other issues including certain policy defences, that the 18 stone-clad windows on the north and east elevations would have required minimal access works.

In May 2009, in an attempt to revive their claim, Seele served a 'new' case in the Amended Reply. In this, it was argued that the retained liability had, in fact, been exceeded on 31 windows on the south and west elevations, from which flowed loss of £356,779. The 31 windows were not in addition to the 18 windows but a replacement for them. It was also noted that the 18 windows were clad in stone, whereas the 31 windows were clad in brickwork. The insurers wrote to the court in detailed terms objecting to this very late change of case and the irregular nature of such an 'amendment'. The insurers had to prepare their witness evidence to answer both the 18 and 31 window case, as it remained unclear which case they had to meet.

The position was clarified once Mr Justice Clarke became the trial Judge. At the pre-trial review in early July 2009, Seele were ordered to file and serve a standalone pleading to confirm its current (or latest) case. Seele was now alleging that the retained liability had been exceeded on 26 windows (they now had to concede that 5 windows had not been clad at all), from which flowed loss of £395,870.

10. At last, the Trial!

The trial began in late July. The insurers made an application for the claim to be struck-out on the grounds that the Claimant needed permission to amend their claim and that this permission should be refused. It was common ground that unless the Judge permitted an amendment the Claimant had no sustainable case.

Mr Justice Clarke found for the insurers on the following issues:

1 Did the Claimant need permission to amend?

CPR 16 PD 9.2 provides "*A subsequent statement of case must not contradict or be inconsistent with an earlier one; for example a reply to a defence must not bring*

in a new claim. Where new matters have come to light the appropriate course may be to seek the court's permission to amend the statement of case."

Further to this, it was held that the Claimant had to regularise its position. Normally this would be for the Judge to decide but, in this case, there were statutory provisions to be considered.

2 Did the Limitation Act 1980 apply?

Section 35(1) of the Limitation Act 1980 provides that "*any new claim made in the course of any action shall be deemed to be a separate action*". Section 35(3) contains a prohibition on the court allowing a new claim, made in the course of any action, after the expiry of any time limit.

Mr Justice Clarke noted the decision of Auld LJ in *Lloyds Bank Plc v Rogers* [1999]⁶: "*A claim for damages is a new claim ... if the claimant seeks, by amendment, to justify it on a different factual basis from that originally pleaded.*" Taking this into account, Mr Justice Clarke found that substituting a claim for 18 stone-clad windows on the north and east of the building for 26 (or 31) brick-clad windows on the south and west of the building was a new claim.

In addition, the limitation period had passed, with time running from the time the *insured peril occurred*, at the latest in January 2003, rather than when the loss was *manifested*. Accordingly, prima facie, the amendment would have to be refused.

3 The 'substantially the same' facts exception

There is, however, an exception under Section 35(5)(a) of the Limitation Act 1980, that allows the court to allow a new claim "*if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim*

⁶ 3 EGLR 83

previously made in the original action.” This was read in conjunction with CPR 17.4(2), and the case of *Goode v Martin* [2002]⁷ was considered in detail.

Mr Justice Clarke held that the claim did not arise out of the same or substantially the same facts. He particularly noted that, as the cause of action only arose when loss attributed to an individual window breached the £10,000 retained liability threshold, there would be a different cause of action for each window. This would arise at different times depending on when the window was installed and, depending on the type of cladding, for example, result in a different loss. Therefore, identification of the windows was an essential part of the new claim, which could not be viewed as arising from the same or substantially the same facts.

4 **The exercise of his discretion**

As the amended claim did not arise out of the same or substantially the same facts, the court had no option but to refuse the amendment.

Mr Justice Clarke did, however, consider, obiter, what the position would have been had he been able to exercise his discretion to allow the amendment. He confirmed that he would have refused the amendment.

The factors he took in to account included that an amendment would deprive the insurers of a possible limitation defence, that all the relevant evidence was to hand by 2004 and that, despite the Court of Appeal’s ruling (and insurers’ prompting), Seele had not attempted to deal with the retained liability point until a very late stage.

⁷ 1 WLR 1828

11. Conclusions

While Seele may have succeeded on appeal regarding their interpretation of the policy, they failed to fully and properly particularise their loss from the outset and/or from the point when the claim was transferred to the TCC. This failure ultimately meant that the insurers could successfully strike-out the claim, with Seele held liable for all of the insurers' costs of the action.

Insurers always maintained the claim was overstated and, on examination, quantum fell and continued to fall right up to trial. Furthermore, its actual value did not exceed the deductible.

Seele also failed to address the application of a deductible per window. Initially, the claimant proceeded on a 'claim everything and hope' basis when it came to allocating costs to specific windows. As the detail was addressed before the TCC, the value of the claim fell dramatically to, at best, a third of the original sum claimed. While quantum was not analysed at trial, the insurers maintained the actual value of the claim never exceeded the sum of the retained liability.

Seele's misguided attempt to reintroduce a case based on a single deductible issue, following the Court of Appeal judgment, resulted in further criticism from the court and the ultimate sanction of indemnity costs in favour of the insurers on that issue.

Sadly, despite his criticisms of the merits of Seele's case, Clarke LJ allowed them permission to appeal on the narrow issues of whether a new claim' can arise from the 'same or substantially the same facts' and the meaning of the words 'clearly in issue', given the wider application.

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Seele's failure to properly particularise its loss lead directly to repeated amendments of the particulars, each of which had to be defended in turn. These amendments lead to a huge escalation of costs, which by the time of judgment were many times greater than the amount in dispute.

Insurers were vindicated in defending the claim before the Commercial Court, Court of Appeal and TCC. The only disappointment is a further appeal on the technical issues above. So the final round has not been reached yet.

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