

ISSUE ESTOPPEL/ABUSE OF PROCESS

Court rejects insured's late application to amend its claim in order to avoid multiple deductibles - *Seele Austria GmbH Co v Tokio Marine Europe Insurance Ltd* 17.2.09

This case, concerning coverage under a Combined Contract Works (CAR) and Third Party Liability policy, has a long and convoluted history. In dispute is an indemnity claimed by Seele in respect of the cost of rectifying defective windows in an office development in Paternoster Square, London.

The proceedings started in the Commercial Court in 2006 where, following the hearing of liability issues, the judge decided that there was no indemnity under the policy in the absence of accidental damage to the works. The Court of Appeal overturned this decision and the matter was transferred to the Technology and Construction Court to decide quantum issues.

Applications

- Following the Court of Appeal decision that a separate deductible applied to each window affected by workmanship defects, Seele issued an application to amend the particulars of the claim to allege that the windows were in fact affected by generic design defects. Tokio Marine opposed this application on the basis of issue estoppel and *Henderson* abuse of process.
- Seele also applied to amend the quantum claims to introduce claims for consequential loss. Tokio Marine opposed this on the basis that the policy did not respond under basic insurance law principles. In addition, Seele's new claim included many items which were originally said to be straightforward remedial costs, and therefore could not be recovered.

Issue estoppel

After an extensive review of the proceedings, the Judge held that the issue of "design v workmanship" defects had been decided in Tokio Marine's favour by both courts. He further concluded that parties cannot subsequently, in the same proceedings, advance arguments or adduce further evidence to show 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 Seele's knowledge and control.

Henderson abuse

The Judge referred to the decisions in *Henderson v Henderson* [1843] and *Johnson v Gore Wood & Co (a Firm)* [2002] 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 basis the Judge concluded that it would be an abuse of process if the court allowed the design amendments to be made at such a late stage. Notably, he came to this conclusion despite 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.

Quantum

The Judge considered that a number of the costs included in the amended pleadings might well be classified as consequential losses or otherwise be excluded, but held that 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.

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 costs apportionment sought in addition to adducing plainly the evidence before the start of the quantum trial.

The Judge 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.

Comment

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

It is also a good example of a proactive case-management decision, highlighting the necessity for claimants to set out the genuine heads of claim supported by evidence.

Kennedys are acting for Tokio Marine in relation to this matter.

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