

CONSTRUCTION

Pleadings

Kennedys successfully strikes out claim for indemnity against insurers; High Court refuses subcontractor permission to amend pleadings - *Seele Austria GmbH & Co KG v Tokio Marine Europe Insurance Ltd* [6.8.09]

This case concerns a subcontractor's claim to be indemnified under a Combined Contract Works (CAR) policy in relation to windows of an office development in Paternoster Square, London.

In June 2006, nearly four years after discovery of the defects in September 2002, the claim was issued, seeking recovery of a range of losses flowing from the installation of defective windows. Although 150 windows needed replacing, losses were neither fully particularised, nor allocated to specific windows.

At first instance, the Commercial Court held that the correct interpretation of the relevant policy clause was that there was no indemnity. However, that decision was overturned by a 2:1 majority of the Court of Appeal, so the claim was transferred to the Technology and Construction Court (TCC) for quantum to be decided. Although the Court of Appeal held there was cover, this was only in relation to "access costs", meaning the cost of removing and replacing "good work" to gain access to defective windows. Repair costs and consequential losses were not covered. The Court of Appeal also held there was retained liability, i.e. a deductible, of £10,000 in relation to *each* window. Accordingly, the subcontractor could only claim for individual windows when the losses attributable to access works exceeded the deductible.

Just before the case management conference in November 2008, the subcontractor served draft amended particulars of claim claiming, amongst other things, there was only one £10,000 deductible for all windows, and confirming indemnity was sought for 76 windows. Insurers objected to this amendment and the court agreed, holding it *res judicata*. The subcontractor was ordered to provide proper particulars to clarify their case on quantum.

When this clarification was provided, the subcontractor's case was that the deductible had been exceeded on only 18 windows, on the north and east elevations, from which flowed losses of £560,263. Insurers served an amended defence, challenging the losses attributed to them, not least as these 18 stone-clad windows on the north and east elevations would have required minimal access works.

In May 2009, the subcontractor pleaded a "new" case in its amended reply, claiming the deductible had been exceeded on 31 windows, on the south and west

elevations, resulting in losses of £356,779. These 31 windows were not additional to the 18 above but instead of them, and were brick-clad. Insurers wrote to the court objecting to this late change of case and its irregular nature. Meanwhile, they had to prepare witness evidence to answer both the 18 and 31 window cases.

At the pre-trial review in July, the subcontractor was ordered to serve a standalone pleading confirming its case. It now alleged the deductible had been exceeded on 26 windows (conceding 5 had not even been clad) and loss of £395,870 - somewhat less than the £1.2 million originally claimed.

At trial last month, insurers applied to strike-out the claim on the grounds the subcontractor needed permission to amend their claim and this should be refused. It was common ground that unless the Judge permitted amendment the subcontractor had no sustainable case.

Decision

The Judge granted insurers' application. He held that, pursuant to CPR 16 PD 9.2 - which 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*" - the subcontractor had to regularise its position. Normally, this would be a matter for the Judge but, in this instance, the Limitation Act 1980 (the 1980 Act) had to be considered.

Section 35(1) of the 1980 Act provides, "*... any new claim made in the course of any action shall be deemed to be a separate action...*", whilst s.35(3) prohibits the court allowing a new claim, made in the course of any action, after the expiry of any time limit. Following the comments of Lord Justice Auld in *Lloyds Bank Plc v Rogers* [1999], that: "*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*", the Judge held that substituting a claim for 18 stone-clad windows on the north and east of the building for 26 brick-clad windows on the south and west was a new claim. He also held that the limitation period had expired, as time ran from when the insured peril occurred (at the latest, January 2003), rather than when the loss manifested. Accordingly, prima facie, the amendment had to be refused.

However, s.35(5)(a) of the 1980 Act permits 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 previously made in the original action.*" The Judge reviewed this exception but held that the claim did not arise out of the same or substantially the same facts. He noted that there would be a different cause of action for each window, as it only arose when loss attributed to an individual window reached the £10,000 deductible threshold. Accordingly, the court had no option but to refuse

amendment.

That said, the Judge added, *obiter*, that had he had a discretion, he would still not have allowed the amendment, given that it would deprive insurers of a possible limitation defence, all the relevant evidence was to hand by 2004 and the subcontractor had left the deductible point until very late.

Comment

While the subcontractor may have succeeded on appeal regarding their interpretation of the policy, they failed to fully particularise their loss which, ultimately, allowed insurers to strike-out the claim and recover all their costs.

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

The subcontractor's misguided attempt to reintroduce a case based on a single deductible, following the Court of Appeal's judgment, also attracted criticism from the court and the ultimate sanction of indemnity costs in favour of insurers on that issue. Indeed, the subcontractor's repeated amendment of its particulars - each of which had to be defended by insurers - led to a huge escalation of costs which by the time of judgment were, ultimately, many times greater than the amount in dispute. Thankfully, on this occasion, insurers were vindicated in defending the claim to trial.

Despite the Judge's criticisms of the merits of the subcontractor's case, he did allow 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. Just yesterday, we received notice of such an appeal.

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

For further information contact John Farrell, Kennedys, 0207 667 9108 or Matthew Raftery, Kennedys, 0207 667 9256.

This article first appeared in Kennedys' *Insurance Brief* of August 2009.

London
25 Fenchurch
Avenue
London
EC3M 5AD
Tel: 0207 667
9667

Kennedys worldwide (including associated offices):

Auckland, Belfast, Birmingham, Cambridge, Chelmsford, Dubai, Dublin,
Hong Kong, Karachi, Lisbon, London, Madrid, Maidstone, Manchester,
Mumbai, New Delhi, Paris, Santiago, Singapore, Sydney, Taunton and
Warsaw.

www.kennedys-law.com

[Privacy statement](#)
[Disclaimer](#)
[Copyright](#)