

Construction Law Update

Introducing New Claims – An Unnecessary Risk?

In the recent case of *Martlet Homes Ltd v Mulalley & Co. Ltd*, the court considered two different methods via which a claimant can seek to introduce additional submissions and arguments into its claim against another party.

Background

Martlet Homes Limited (“MHL”) owns five high rise towers in Hampshire. By a design and build contract dated 20 January 2005, MHL engaged Mulalley & Co. Limited (“Mulalley”) to undertake refurbishment works, including the design and installation of external cladding.

MHL issued proceedings against Mulalley for damages of around £8 million comprising the cost of remedial works to defects in the fire barriers and a “waking watch” that had to be provided in each tower pending completion of such works. The proceedings were issued just prior to expiry of the 12 year limitation period that applied under the contract. Claims in respect of tower five were statute-barred.

MHL’s Particulars of Claim contained three broad allegations of defective design and/or workmanship relating to (1) fire barrier defects; (2) insulation defects; and (3) substrate defects.

In their Defence, Mulalley admitted some breaches of contract but put MHL to proof on other allegations.

However, Mulalley denied that their breaches of contract had caused the loss because, following the Grenfell Tower fire, MHL were, in any event, required to replace the combustible expanded polystyrene (“EPS”) cladding fitted. In their Reply, MHL pleaded that, even if Mulalley was correct about this, Mulalley remained liable because they were in breach of contract for using the combustible EPS insulation boards.

Mulalley sought a court order to strike out this aspect of MHL’s Reply (i.e. the allegation that Mulalley were in breach for using combustible EPS insulation boards) on the basis that this was a new claim which could not properly be raised in a Reply to a Defence.

MHL resisted this order and, in the alternative, sought permission from the court to amend their Particulars of Claim to include the EPS allegation. Mulalley argued that permission to amend the Particulars of Claim ought to be refused on the basis that MHL were seeking to raise a new claim based on new facts following expiry of the limitation period.

Strike-out application

The Civil Procedure Rules (“CPR”) require that Particulars of Claim must include “a concise statement of the facts on which the claimant relies”. Submitting a Reply to a Defence is optional, but the CPR say that a Reply “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.”

With these requirements in mind, the court stated: “...the optional nature of the Reply, the rule restricting subsequent statements of case... all point to the clear conclusion that any ground of claim must be pleaded in the Particulars of Claim. New claims must be added by amending the Particulars of Claim and cannot simply be pleaded by way of Reply.”

In the circumstances, the court struck out the relevant parts of MHL’s Reply relating to the EPS argument because they amounted to a new claim by which, quite independently of the particulars pleaded in the original Particulars of Claim, MHL were seeking to establish their claim for damages.

Construction Law Update

In reaching its conclusion, the court held that it would be inherently undesirable for claimants to be able to advance new claims by way of Reply because this would mean that claimants would not need to be precise in their Particulars of Claim.

Application to amend Particulars of Claim

To determine whether the court could use its discretion to allow the amendment to MHL's Particulars of Claim given that the limitation period had expired, the court had to consider the following questions:

1. Is it reasonably arguable that the proposed amendments are outside the applicable limitation period?
2. Do the proposed amendments seek to add or substitute a new cause of action?
3. Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim? If not, the court has no discretion to permit amendment.

If the answer to each of the above questions is yes, the court has discretion to allow the amendment.

Question 1: Yes, MHL sought to amend the Particulars of Claim after expiry of the limitation period.

Question 2: Although no new duties were alleged and no changes were made to claimed loss/damage, the proposed amendment was a new cause of action because the original claim concerned the compromise of fire barriers, whereas the proposed amendment regarded the actual use of combustible EPS insulation boards as a breach of contract.

Question 3: The proposed amended claim was based upon assertions introduced by the Defence that the true cause of loss was the need to replace the entire EPS cladding system and, further, the proposed amended claim pleaded the same loss and damage as contained in the original Particulars of Claim.

Even though the amendment required the court to consider an additional question in relation to the combustible EPS insulation boards, the proposed amendment arose from substantially the same facts as Mulalley raised in their Defence.

Discretion

Balancing various matters, including the prejudices that would be suffered by each party, the court concluded that this was a proper case for granting permission to amend the Particulars of Claim to allow MHL to plead their alternative case.

This case always concerned design and workmanship, and therefore it was envisaged that the parties would build up a case around the overall cladding system. Indeed, expert evidence as to the suitability of the insulation boards had already been obtained. As such, Mulalley would not be disproportionately prejudiced by having to investigate new questions.

Analysis

The court commented that it was "astonishing" that MHL chose not to plead their alternative case at the outset, especially given that the same subject matter arose in a previous adjudication between the parties. Considering limitation issues, MHL took an "unnecessary risk" in assuming they might be able to introduce an amended case by way of Reply or an amendment to their Particulars of Claim.

This case demonstrates the importance of ensuring that Particulars of Claim are as robust as possible from the outset. The later introduction of an amended case is subject to considerable oversight by the courts and is not a foregone conclusion.

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