Pump Court

The TCC revisits principles relating to amendment, discontinuance and contribution in Lendlease Construction (Europe) Limited v AECOM Limited [2022] EWHC 2855.

In *Lendlease Construction (Europe) Limited v AECOM Limited* [2022] EWHC 2855 (TCC), the claimant contractor (**Lendlease**) was seeking to pass on its own liability for certain defects in the Leeds Hospital oncology facilities to the defendant M&E consultant (**AECOM**).

Shortly before trial, Lendlease sought to make various amendments to its Particulars of Claim. Mrs Justice Joanna Smith determined a number of points of general application, including:

1. When a right to claim under the Civil Liability (Contribution) Act 1978 is "extinguished".
2. The general principles applicable to amendment, including after expiry of limitation.
3. The consequences of amendments amounting to discontinuance.

These are discussed in turn below.

Lynne McCafferty KC and **Matthew Thorne** instructed by Beale & Co, represented AECOM.

Alexander Hickey KC instructed by Shoosmiths, represented Lendlease.

Limitation and the Civil Liability (Contribution) Act 1978

Where a cause of action is arguably outside the usual limitation period, parties often seek to rely on the extended limitation period under the Civil Liability (Contribution) Act 1978, and defendants are not always aware of the scope of their potential defence to such a claim.

In this case, Lendlease pursued AECOM under its contract of appointment. AECOM relied on the expiry of the relevant limitation period under the Limitation Act 1980. In turn, Lendlease sought to add a contribution claim under a collateral warranty between AECOM and Lendlease's employer.

Section 1(3) of the 1978 Act provides:

> *"(3)A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred,* ***unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based****."*

Clause 1.3 of the Collateral Warranty on which Lendlease relied provided that AECOM:

> *"**shall not have a liability** under this Deed in any proceedings commenced more than twelve years after the date of*

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
www.4pumpcourt.com

Barristers regulated by the Bar Standards Board.

completion of the Works".

The application was made more than 12 years after completion. The question for the Court was therefore whether the wording of clause 1.3 "*extinguished the right on which the claim…was based*". If it did, there could be no claim under the 1978 Act.

The Court looked first at *Aries Tanker Corporation v Total Transport Ltd* [1977] 1 WLR 185 and *Philp v Cook* [2017] EWHC 3023 (QB), noting at paragraph 40 that:

> *…in both of these authorities the relevant wording held to extinguish the respective claims was similar to the wording in this case. The focus was on liability and the extinction of a right. Thus, in Aries Tanker the words "shall be discharged from all liability" were held to extinguish the claim. In Philp v Cook the words "are not liable for a claim" were held to operate to extinguish the underlying claim. The words in this case "shall not have a liability" appear to me to be on all fours with those cases.*

Joanna Smith J contrasted the position with the case of *Bloomberg LP v Sandberg* [2015] EWHC 2858 (TCC), where the relevant provision used the words "*no proceedings shall be commenced*" and where this amounted to a procedural time bar only.

Without needing to finally decide the point, the Court indicated that, "*it does appear that any right to bring a claim against AECOM pursuant to the collateral warranty has been extinguished*".

Defendants to claims under the 1978 Act would be well-advised to scrutinise the terms of their own appointments, and potentially include similar terms going forward, if they wish to avoid long-tail claims under the 1978 Act.

Principles applicable to amendment

The TCC revisited the key principles applicable to amendment generally, by reference to *Sainsbury's Supermarkets Limited v Ryan Jayberg Ltd* [2020] EWHC 3404 (TCC); and also highlighted the requirement set out in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 that the proposed amendments must be "*coherent and properly particularised*".

Noting that the limitation period had also arguably expired by the date of the application, the Court considered the threshold requirements for amendment after expiry of limitation under CPR 17.4, by which amendments are not permitted where a period of statutory limitation has expired unless (1) the amendment does not add a new claim or (2) any new claim arises out of the same or substantially the same facts as an existing claim.

The Judge held that Lendlease's contribution claim did not satisfy those requirements:

> 45. *…a claim under the 1978 Act is a "new claim" which is not on the same or substantially the same facts as the existing claim. In particular (1) it is a new cause of action; (2) it relies on a new duty and corresponding breach, which was not previously pleaded; (3) it arises out of new facts, namely, the (as yet) unpleaded duties and corresponding breaches said to have been owed by AECOM to Project Co and/or to Engie…*

Moreover, whilst those principles all apply "*upon an application for permission to amend which does not involve any lateness*", Lendlease's application could have been made considerably earlier. The Court held:

> 46. *…delay is an important factor to weigh in the balance: see Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm) per Carr J (as she then was) at [36]-[38]. Whilst the amendments in this case are not said to be "very late", in the sense that the trial date is jeopardised, nevertheless they are plainly late, the*

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
www.4pumpcourt.com

Barristers regulated by the Bar Standards Board.

application having been issued only six and a half weeks prior to trial.

47. *…The Claimant had indicated much earlier in the proceedings that it wished to amend, but it never pursued such amendment until now…*
48. *The court must exercise its discretion upon an amendment application in accordance with the overriding objective: see Sainsbury's. Weighing the relevant factors in the balance, I consider that both delay and a lack of particularisation would by themselves tip the balance against the grant of permission and would have been enough to support a decision to refuse permission. Further, and in any event, I consider that the effect of this proposed amendment is to add a new claim in circumstances where the limitation period has arguably expired, such that it falls foul of CPR 17.4…*

Discontinuance by amendment

Lendlease also sought to delete two types of allegations as part of its amendments:

- Its alternative claim against AECOM's parent company. This had been alleged to have arisen under a parent company guarantee. The defendants did not admit the existence of the PCG and, following disclosure, none had been found. In light of that lack of evidence, Lendlease sought to delete the claim against the parent company.
- The original claim also included various separate alleged defects. AECOM had pleaded that these defects were included within an earlier settlement agreement. Lendlease sought to delete two of the alleged defects on the basis that they were indeed settled.

In both cases, the Court held that these deletions amounted to a discontinuance: the first was a discontinuance of the action against the parent company, and the second was a discontinuance of the claims in relation to the two defects. The rules on discontinuance were thus held to apply.

The Court referred with approval to *Pycom v Campora* (unrep, Chancery Division, 7 July 2022) and *Galazi v Christoforou* [2019] EWHC 670 (Ch). It agreed that the CPR requires the service of a Notice of Discontinuance but the Court can waive that requirement on hearing an application for permission in respect of amendments. Nevertheless, the cost consequences would remain the same.

Thus, in respect of the claim against the parent company, the Court held that:

20. *…there must be unusual circumstances established if the default rule is to be disapplied. There are no such unusual circumstances here… pragmatism plainly does not suffice to displace the presumption. There has been no change of circumstances (the difficulty in locating the Parent Company Guarantee has been known for some considerable time) much less could it be said that any change of circumstances has been brought about by the unreasonable conduct of the Second Defendant.*
21. *The Claimant chose to plead a case premised upon a contract which it has been unable to find. As a consequence, it has been forced to discontinue. I see no basis for doing anything other than ordering that it should pay the Second Defendant's costs of the proceedings…*

As for the defects claim, the Court continued:

24. *Again, this is a discontinuance of claims in relation to two defects where there is no real change of circumstances and it cannot possibly be said that AECOM's conduct (unreasonable or otherwise) caused any such change. Mr Hickey says the appropriate course is for the judge to determine the issues "in the round" at trial, but I disagree.*
25. *The Claimant must pay AECOM's costs of dealing with these defects…*

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
www.4pumpcourt.com

Barristers regulated by the Bar Standards Board.

Pump Court

Thus the Court held that it was a high threshold to displace the default rule that a claimant must pay the costs following its discontinuance.

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
www.4pumpcourt.com

Barristers regulated by the Bar Standards Board.