Quarterly Review
August 2013

Construction

Teal Assurance Company Ltd v WR Berkley Insurance (Europe) Ltd [2013]

The Supreme Court has confirmed that an insurer could not choose the order in which claims made by an insured exhausted layers of insurance cover under a consultant’s programme of professional indemnity insurance, upholding the Court of Appeal’s decision in this case.

The consultant’s programme of professional indemnity insurance contained various layers. The primary layer was underwritten by Lexington and above that there were three excess layers, underwritten by the consultant's captive Insurer, Teal Assurance Company (“Teal”). At the top was a further layer of “top and drop” insurance, also written by Teal and was reinsured with W R Berkley and Aspen.

Each of the excess layer policies and the “top and drop” policy incorporated the same terms and conditions as the primary Lexington policy and ‘dropped down’ to continue as the underlying policy once the layer below was exhausted. The “top and drop” insurance policy excluded US and Canadian claims.

The consultant notified various claims to its insurers, which included some from the US and Canada. The issue was whether the consultant and Teal were entitled to choose which claims were to be met from the primary and excess layers so as to ensure that those remaining claims were not US or Canadian claims and could be met from the “top and drop” layer.

The Supreme Court concluded that Teal’s proposal that the priority of the claims could be adjusted as against the programme of insurance was not permitted by the policies. Lord Mance held that the purpose of an insurance policy is to meet “each ascertained loss when and in the order in which it occurs”. Accordingly, there was no guarantee that the US and Canadian claims would be covered by the consultant’s programme of insurance.

Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd [2013]

A planning consultant’s appointment, which excluded liability for indirect and consequential loss, limited liability to the amount of the consultant’s fees and required any claims to be filed within 1 year of completion of the services was held to be reasonable under the Unfair Contract Terms Act 1999. In addition, a term was implied into the appointment entitling the consultant to an extension of time if it was delayed due to acts or omissions of the client which were beyond the consultant’s reasonable control.

The consultant’s appointment included an obligation to complete the planning application by a specified date, which it failed to comply with. The client brought proceedings against the consultant to recover loss of profit as a result of its failure to sell the site claiming that if planning permission had been completed in accordance with the appointment the client would have made significant profit.
The court held that the consultant was not in breach of contract or negligent, mainly because the most significant delays in the planning application could be attributed to the client. Even if the consultant had been in breach/negligent, the consultant's liability would have been excluded by the exclusion for consequential and indirect loss and limited to the amount of its fees by the limitation of liability. The court did not consider the limitations and exclusions of liability to be unreasonable as the two parties were both “relatively substantial” commercial organisations and the client had understood what it was agreeing to.

It was also considered that the requirement for claims to be “filed” within 1 year of completion of the services meant that a Letter of Claim in accordance with the Pre-Action Protocol had to be sent within the specified period: it did not require proceedings to be commenced within that period.

**Oakapple Homes (Glossop) Ltd v DTR (2009) Ltd (In Liquidation) [2013]**

An “equivalent rights of defence clause” in a collateral warranty on a design and build project did not entitle a consultant to raise the defence of contributory negligence in a claim by a beneficiary as a result of the negligence of the contractor, who was very closely connected to the employer. However, the ‘equivalent rights clause’ was sufficient to ensure that the warranty fell within the scope of the consultant’s PI policy.

The court rejected the consultant’s argument that the negligence of the contractor could have been used to raise the defence of contributory negligence against the employer. In addition, it was suggested that the wording of the collateral warranty and the novation agreement did not entitle the consultant to raise the defence of contributory negligence because such a defence would reduce the damages payable to the claimant and not the liability of the consultant.

The consultant’s PI policy excluded cover for any collateral warranty which granted a greater or longer lasting benefit than the appointment with the employer. The court considered this to mean that the consultant should not have any greater liability to the beneficiary than it would have to the employer and not that the damages payable to the beneficiary should be no greater than those payable to the employer. Accordingly, even though the defence of contributory negligence could not be raised, the ‘equivalent rights clause’ was sufficient to ensure that the warranty did not fall within the exclusion in the PI policy.

**Hunt & Others v Optima Cambridge Ltd & Others [2013]**

A consultant was liable to leaseholders of a property in both contract and in tort as a result of signing certificates stating that works had been constructed to a satisfactory standard.

Practical completion took place towards the end of 2003 but the certificates were issued between January and October 2004. The certificates stated that the consultant would be liable to first and subsequent purchasers and their lenders for six years from the date they were issued.

After a number of defects arose eight leaseholders commenced proceedings against the consultant in March 2010 arguing that the certificates amounted to a contractual warranty which had been breached by the consultant and that the
consultant was also liable for negligent misstatement as a result of signing the certificates. The certificates were held to be contractual warranties, as the wording used inferred a contractual intention. These warranties had been breached by the consultant, who was also liable for negligent misstatement. The consultant’s limitation defences were dismissed on the basis that all but one of the claims had been brought within 6 years of the certificate. The final claimant became aware of the claim less than 3 years before commencing proceedings and could therefore claim in tort under s14A of the Limitation Act 1980 regarding latent defects.

**Procedural**

**Co-operative Group Limited v Birse Developments Limited and another**

The Co-op was leasehold owner of a distribution centre comprising two large warehouses in Rugby. Birse was the main D&B contractor. In September 2010, the Co-op issued their claim in breach of contract under a collateral warranty (issued on completion in 1998 and within the 12 year permitted period). The allegations as set out in the original claim related to the cracking of the concrete floor slab and areas below the required thickness and movement. The Co-op sought to amend the Particulars of Claim pursuant to further testing which revealed that the internal slab was structurally inadequate as it lacked the necessary steel fibre content. The amendments sought also attempted to increase the quantum of the claim due to the cost of replacement of the floor slabs in both warehouses and substantial consequential losses.

The Limitation Act 1980, section 35 prohibits any amendment to the Particulars of Claim with a view to introducing a new cause of action unless it arises out of the same or substantially the same facts in the original action. Birse argued that the amendments constituted a new cause of action. The Co-op’s position was that this amendment was a further particularisation of an existing allegation of breach of contract or a “technical explanation of the failure”.

The High Court held that there was no new cause of action. The Court of Appeal overturned the High Court. Lord Justice Tomlinson held that to establish whether there was a new cause of action, a comparison would need to be made between the essential factual allegations on which the original claims relied and the essential factual allegations on which the proposed new claims rely. The Court of Appeal held that the High Court had not properly applied this test because their approach ignored the importance of identifying the essential facts.

The case serves as a reminder of the strict approach the courts will take to determine whether an application to amend out of time will be permitted. Applications to amend out of time can be complex, particularly in construction cases. The courts have found it difficult to decide this issue where new facts are alleged to constitute breach of a duty already pleaded. The court’s discretion under CPR 17.4 to allow an amendment after the expiry of a limitation period should not be taken lightly.

For further information please contact

**Stephen Milne**  
Associate  
T: +44 (0) 20 7240 3474  
E: s.milne@beale-law.com

**Marc Jones**  
Associate  
T: +44 (0) 20 7240 3474  
E: m.jones@beale-law.com