

Reports from the courts

Our regular review of the court decisions of most interest to construction comes from [Andrew Croft](#) and [Ben Spannuth](#) of [Beale & Company Solicitors LLP](#) who examine a case that shows the Claimant-friendly approach being taken by the courts in relation to amendments to pleadings and limitation, especially in relation to cladding / fire safety claims; and one that acts as a further reminder of the risks of entering into oral contracts.

Mulalley & Co. Limited v Martlet Homes Ltd

[2022] EWCA Civ 32; Coulson LJ

Pursuant to an amended JCT 1998 Standard Form of Building Contract dated 20 January 2005 (the Contract), Martlet Homes Limited (Martlet) engaged Mulalley & Co. Limited (Mulalley) as design and build contractors to refurbish five high-rise towers in Hampshire, including over-cladding the external walls with the STO system, which involved expanded polystyrene ('EPS') external wall insulation, horizontal fire barriers, and an overcoat of render (the Works). The Contract Sum was c.£14.9m.

The Works achieved practical completion between 5 December 2006 and 7 April 2008.

Following the fire at Grenfell Tower in June 2017, investigations were carried out as to the nature and condition of the STO system at four of the towers. Martlet alleged that these investigations identified various fire safety defects for which Mulalley was responsible.

Martlet commenced proceedings in December 2019. Martlet alleged that Mulalley's design of the cladding works and workmanship was in breach of its obligations under the Contract. Mulalley denied any breach of its design obligations on the basis that the STO system contained 'combustible insulation materials which complied with the Building Regulations in place at the time the Works were carried out' and that it was not the cause of the loss in circumstances where it would have to be replaced post-Grenfell in any event.

Martlet sought permission to amend its Particulars of Claim to expressly state that the EPS insulation was non-compliant with Building Regulations such that Mulalley was in breach of contract. Mulalley opposed Martlet's application to amend its Particulars of Claim, arguing that the amendments amounted to a 'new' cause of action which fell outside the limitation period.

At first instance, the Court found that Martlet's proposed amendments amounted to a 'new' claim but arose out of substantially the same facts and therefore allowed Martlet's amendments. Mulalley appealed the decision.

Decision

Coulson LJ held that Martlet's amendments to its Particulars of Claim, whilst a new cause of action, arose out of the same or substantially the same facts as were already in issue between the parties and were thus permitted despite being outside the limitation period.

Coulson LJ held that the proposed amendment was a new claim pursuant to CPR 17.4. While there was a 'reasonably strong case' for asserting it was not a new cause of action (on the basis that it 'does not rely on any duty or obligation that had not previously been pleaded by Martlet'), three principal reasons indicated that it was a new cause of action:

- (i) The claim was expressly pleaded as a contingent claim – it would arise only in circumstances where Martlet was successful on its causation defence.
- (ii) The emphasis in the original Particulars of Claim was on workmanship, whereas the new claim was principally concerned with design choices. The original claim did not allege that a component part of the STO system was of itself an inadequate material or unfit for purpose whereas the amended claim alleged the inherent unsuitability of the EPS insulation.
- (iii) There were sufficient differences between the nature, scope, and extent of the original claim and the amended claim to comprise a 'new' cause of action.

In terms of whether the new claim arose out of the same or substantially the same facts as were already in issue, Coulson LJ found that the

claim was always one in which it was said that the STO system in general, and the EPS insulation in particular, was defective and had to be replaced, and that the new claim simply identified a further reason for the replacement of the STO system. Notwithstanding that it might require a further element of investigation beyond that required by the original Particulars of Claim, 'it supplements the existing investigation, rather than doing away with it altogether'.

Coulson LJ further observed that the expansive manner in which Mulalley had pleaded its defence by asserting that its selection of the cladding was in accordance with the applicable Building Regulations meant that the question as to compliance with Building Regulations was already in issue between the parties: 'Otherwise, we would be in an extraordinary position where Mulalley would be able to say what they wanted about the original design, and Martlet could not dispute it'.

Comment

This case is a further example of the Claimant-friendly approach being taken by the courts in relation to amendments to pleadings and limitation, especially in relation to cladding / fire safety claims. Notwithstanding this, parties are reminded to plead out their claims in full rather than rely on the courts' discretion under CPR 17.4. Parties should therefore take steps to protect their position on limitation, whether through Standstill Agreements or issuing protective proceedings.

Diane Lumley v Foster & Co Group Ltd and others

[2022] EWHC 54 (TCC); Coppel QC

Diane Lumley (Lumley) engaged Foster & Co Group Ltd or one of its related companies to undertake works to her home in East Barnet pursuant to a contract concluded at a meeting on 21 June 2016 (the Contract).

On 21 June 2016, Mr Foster, the Second Defendant, arrived at the property in a car bearing the livery of 'Foster & Co'. Mr Foster also made several statements to Lumley to the effect that he would personally ensure that her project was completed.

On 8 October 2020, Lumley issued proceedings against six defendants alleging that the works were performed in a sub-standard manner such

that the property 'is scarcely habitable such that it has diminished in value and substantial remedial works require to be performed'. Lumley argued that the Contract had been concluded with Mr Foster (who traded as Foster & Co) on behalf of all the Defendants. The Defence submitted that the Contract was concluded between Lumley and the Fifth Defendant, Foster and Co Construction Limited (FCCL), and that FCCL was 'in the course of liquidation' such that 'the claim would be worthless'.

Jefford J directed that there be a trial of a preliminary issue of 'which of the defendants were parties to the contract formed with the Claimant in or around June 2016'.

Decision

Coppel QC held that the Contract was concluded between Lumley and Mr Foster at a meeting between them on 21 June 2016.

Coppel QC referenced the objective test set out in *Hamid v Francis Bradshaw Partnership [2013] EWCA Civ 470* and asked 'what a reasonable person, furnished with the relevant information, would conclude' – the private thoughts of those involved were ultimately irrelevant and inadmissible.

Coppel QC concluded that the objective evidence did not support the proposition that Mr Foster held himself out as contracting on behalf of a company. Rather, Mr Foster 'was concerned to give every impression that the Claimant was reaching agreement with him, that she could trust him and that he would be personally responsible for the project' and multiple representations were made to that effect in order to induce her to enter into the Contract. The onus was on Mr Foster to make clear that he was not contracting in a personal capacity – Mr Foster failed to formalise the contract which would have made clear that it was with FCCL or another corporate entity.

Comment

This case is a further reminder of the risks of entering into oral contracts. Parties are therefore advised to formalise their contractual relationships where possible in order to avoid disputes occurring. Parties should also ensure that they are contracting with the correct entities, especially where such entities may use trading names, operate as part of a group of companies, or communicate through individual representatives. **CL**