IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION
COURT (KBD)
[2022] EWHC 2855 (TCC)

No. HT-2019-000180

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 1 November 2022

Before:

MRS JUSTICE JOANNA SMITH

B E T W E E N :

LENDLEASE CONSTRUCTION (EUROPE) LIMITED — Claimant

- and -

(1) AECOM LIMITED
(2) AECOM HOLDINGS LTD — Defendants

MR A. HICKEY KC (instructed by Shoosmiths LLP) appeared on behalf of the Claimant.

MS L. McCAFFERTY KC and MR M. THORNE (instructed by Beale & Company Solicitors LLP) appeared on behalf of the First and Second Defendants.

J U D G M E N T

MRS JUSTICE JOANNA SMITH :

1 By its application notice dated 13 October 2022, the Claimant seeks permission in this matter to amend its Particulars of Claim. Although the trial is due to start on 28 November 2022, the proposed amendments are extensive and they fall into a number of categories. I intend to refer to them, as the parties have done at the hearing, by reference to the colour-coding on the draft version of the Amended Particulars of Claim provided to me in advance of the hearing, for which I am most grateful. Not all of the amendments are opposed, albeit where they are consented to there is, in every case, a dispute as to costs. Accordingly, I shall need to deal with every category of proposed amendment in this judgment. Save where I distinguish between them, I shall refer to the Defendants in this judgment as AECOM.

The Yellow Amendments: paragraphs 11, 11.1, 12, 12.1, 12.2, 12.3, 12.4, 12.5, 12.6, 12.7, 12.8, 13, 15 lines 1-2, 43, 48, 48.1, 50, 51(1), 51(2), 52 and the Prayer at paragraph 1

2 These amendments are, for the most part, designed to take account of the result in the upstream action involving the Claimant and St James's Oncology SPC Limited (referred to in those proceedings as "**Project Co**") (*St James's Oncology SPC Ltd. v Lendlease Construction Ltd.* [2022] EWHC 2504 (TCC)) ("**the Project Co proceedings**"), a result which only became publicly known upon the hand-down of the judgment in that action on 12 October 2022. Paragraph 12.1 of the amendments concerns a Settlement Agreement between the Claimant, Project Co and Engie Buildings Ltd ("**Engie**"), while paragraph 48.1 simply moves into the Amended Particulars of Claim a pleading that, it is common ground, already exists in the Claimant's Scott Schedule.

3 AECOM consents to these amendments, save for one line that is currently marked in yellow in paragraph 48 to which I shall return. The only issue between the parties therefore is costs.

4 The Claimant does not consent to the usual order that (as the amending party) it should pay the costs of and occasioned by the amendments (see **White Book** volume 1 at 17.3.10). The Claimant says that the costs should be in the case, essentially because these amendments flow from the judgment in the Project Co Proceedings, such that the amendments could not have been included any earlier, but equally have not been made voluntarily – i.e. they were a necessary amendment. Mr Hickey KC, on behalf of the Claimant, points out that both parties knew that these amendments were likely to be necessary and that provision was made for them in the Costs Budgets.

5 Mr Hickey drew my attention to the case of *Various Claimants v MGN* [2021] EWHC 771 (Ch), in which Mann J observed, at [35] and [36], that the "common order", awarding costs of the amendment to the other party, is "not, however, an inevitable order", that costs are in the discretion of the judge, and that whilst the usual order would be appropriate in a case where there had been a change of tack by the amending party, such that duplicative work was caused to the other party, nonetheless that reasoning would not necessarily apply when new information has come to light which could not have been pleaded previously.

6 On the yellow amendments, I am inclined to agree with Mr Hickey. Ms McCafferty KC, for AECOM, argued in her skeleton that the majority of these amendments did not flow from the judgment in the Project Co Proceedings. However, having looked at them with care, I consider that the majority either flow from that judgment or involve the repetition of material that already exists in the Scott Schedule. Ms McCafferty also argued that Lendlease could have joined AECOM to the Project Co Proceedings. While that is correct,

in circumstances where that did not happen it appears to have been accepted on both sides that amendments of this type would need to be made upon hand down of the judgment in the Project Co Proceedings.

7 Accordingly, I consider that the usual order should not apply here. I am going to order that the costs of the yellow amendments should be costs in the case. The parties have agreed on the timetable for response to these amendments, which will be reflected in my order in due course.

The Blue Amendments: paragraphs 48.2-48.16

8 These amendments are said by Mr Hickey to reflect new material provided by AECOM in disclosure in about June of this year. AECOM again consents to these amendments but says that it is entitled to its costs and further seeks an order entitling it to serve additional factual and expert evidence to deal with the facts and matters pleaded in the amendments.

9 Mr Hickey explains that it was considered proportionate not to make the blue amendments straightaway (i.e. upon receipt of the new material) in circumstances where it was acknowledged that yet further amendments would be needed in due course, not least because of the awaited judgment in the Project Co Proceedings. However, in circumstances where he says the amendments arise from new material, once again he submits that the normal order as to costs should not apply. He says that AECOM should not need any further evidence in relation to the blue amendments because the matters pleaded were all available to, and known by, AECOM previously.

10 On this category, I reject Mr Hickey's submissions. In my judgment, it is fair and just to make the usual order as to costs in respect of the blue amendments. These are new factual allegations which have been identified in circumstances which are not entirely clear. There is no evidence in support of the application confirming where the documents came from which prompted this pleading, and Ms McCafferty has pointed out that many of the new paragraphs appear to be based on documents which ought to have been in the custody or control of the Claimant in any event. Absent that evidence, and absent any proper explanation for the failure to make these amendments at an earlier time, it seems to me that the only appropriate order is that the Claimant should pay AECOM's costs of and consequential upon the amendments.

11 The failure on the part of the Claimant to make the amendments immediately upon becoming aware of new material, wherever it came from, means that AECOM has prepared witness evidence and served expert evidence on the understanding that the case against it will not change. That has proved to be a misconceived understanding, and I accept that AECOM will be required to go back and review its existing evidence in light of these amendments and there will no doubt be inevitable duplication of work. That would not have been the case had the amendments been made as soon as the new material became available. In my judgment, the rationale for a costs order in AECOM’s favour, as identified in *Various Claimants v MGN* at [35], applies directly here.

12 Further, it would not be consistent with the overriding objective to permit these amendments (which plainly raise new factual allegations, as Ms McCafferty showed me) without affording AECOM the opportunity to serve any further factual evidence on which it wishes to rely by way of response. Ms McCafferty suggested that this could be done by 8 November, and I am going to make an order to that effect. Mr Hickey candidly accepts that the Claimant has no witness evidence in relation to the events pleaded in the blue amendments, and so needs no similar order.

13 Two final points, however, arise in relation to the blue amendments. First, as to a possible claim by AECOM in contributory negligence against the Claimant, and, second, as to the desire on the part of AECOM to serve further expert evidence to address the blue amendments. As to the former, I am not prepared to grant permission in the absence of sight of a proposed pleading. If AECOM wishes to seek permission to rely on a new contributory negligence claim arising out of the facts and matters pleaded in the blue amendments, then it will need to seek consent from the Claimant in short order and, if consent is refused, then I shall need to deal with the matter on paper. My order as to costs does not cover the potential for any new contributory negligence claim.

14 As to the potential for expert evidence, I am not satisfied at present that I have heard enough as to the precise nature of the new expert issues that have been raised by the blue amendments. No evidence was served by AECOM addressing this issue. Accordingly, I invite AECOM to provide an Amended Defence responding to the blue amendments and at the same time clearly identifying the additional expert issues in respect of which permission for further expert evidence is sought. I will then deal with the matter as swiftly as possible on paper. Of course the Claimant will have the opportunity also to provide me with submissions, and the order must address that in due course. I should make it clear that if I do grant permission for expert evidence, then it will only be fair also to give the Claimant the opportunity to rely on expert evidence on the same issues.

The Green Amendments: removal of paragraphs 7, 14, 39, 40 and paragraph 2 of the Prayer - the abandonment of the claim against the Second Defendant.

15 These amendments are designed to effect a discontinuance of the action against the Second Defendant, as I understood Mr Hickey to accept during the course of his submissions. The Claimant seeks the court's permission to amend to abandon its claim, but says that no notice of discontinuance is necessary (although Mr Hickey very fairly offers to serve such a notice if the court so requires).

16 The decision to abandon the claim against the Second Defendant has come about in circumstances where neither the Claimant nor AECOM has been able to locate a copy of a Parent Company Guarantee on which the claim is based. The Second Defendant did not admit the existence of the Parent Company Guarantee in the Defence, and requested a copy from the Claimant. No copy has ever been found. The Claimant denies that the Second Defendant has incurred any specific costs by reason of this claim and the Claimant maintains that there should be no order for costs against it notwithstanding the effective discontinuance.

17 The Second Defendant disagrees. It says that the rules on discontinuance in CPR 38 plainly apply. In particular, the Second Defendant says that the Claimant is liable for its costs, pursuant to CPR 38.6, up to the date of discontinuance.

18 The Second Defendant referred me to two authorities in which amendments in fact represented the discontinuance of causes of action: see *Pycom v Campora* (which appears to be unreported, a decision of Mr Recorder Richard Smith sitting as a Deputy High Court Judge) at [33] to [34], and *Galazi v Christoforou* [2019] EWHC 670 (Ch) per Chief Master Marsh at [44] and following. I am inclined to agree with Chief Master Marsh in the latter case, that it is hard to avoid the conclusion on the wording of CPR 38 that the filing and service of a notice of discontinuance is required in every case. However, I also note his acceptance of the fact that, in practice, the court often impliedly waives the requirement for notice and deals with costs on the hearing of the application for permission in respect of amendments. This is such a hearing.

19 Whilst I am not going to require the service of a notice of discontinuance, in my judgment, there is no reason here to do anything other than apply CPR 38, and in particular CPR 38.6, to the effect that a claimant who discontinues is liable for the costs. The fact that the Claimant does not consider it likely that the Second Defendant will in fact have incurred any costs in dealing with the discontinued claim does not appear to me to affect the position.

20 The notes to CPR 38.6 in the **White Book** make it plain that there must be unusual circumstances established if the default rule is to be disapplied. There are no such unusual circumstances here. Ms McCafferty drew my attention to *Galazi* at [59] where Chief Master Marsh sets out the principles that apply on an application to displace the default rule in respect of the costs of discontinuance by reference to the judgment of Moore-Bick LJ in *Brookes v HSBC Bank plc* [2011] EWCA Civ 354 at [6]. Having regard to the six factors specifically there identified, Mr Hickey has identified no good reason for displacing the usual presumption that the defendant should recover its costs, and 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. It is to be hoped that agreement can be reached on such costs, but if that proves impossible, then they will be a matter for detailed assessment in due course. It would be wholly inappropriate for the court to attempt a summary assessment of such costs at this stage.

The Pink Amendments: abandonment by Lendlease of two pleaded defects - Defects 10 and 12.

22 AECOM says that similar principles to those applicable to the green amendments should also apply to the pink amendments. The Claimant is abandoning its claim in relation to these two defects, and AECOM should therefore be compensated in costs.

23 The Claimant says that Defects 10 and 12 have been belatedly withdrawn because AECOM has only recently identified a defence, namely that these defects were compromised by a 2012 settlement agreement. I reject this submission. AECOM's Defence at paragraphs 37-40 expressly pleads the existence of the 2012 settlement agreement, that "the matters forming the basis of the present proceedings were included within the Notified Claims", and that "the settlement agreement encompasses all of the claims pursued in these proceedings and Lendlease has no entitlement to pursue the claim". Whilst I accept that, as Mr Hickey submits, this is somewhat generic, I nonetheless note that the Claimant and AECOM were both parties to this settlement agreement and the matters which were compromised by it must have been known to the Claimant long ago.

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. Once again, it is to be hoped that these can be agreed but, if not, they must go off to a detailed assessment in due course.

The Red Amendments: paragraph 47 (and one line in yellow paragraph 48).

26 Prior to the hearing, the Claimant's paragraph 47 was in the following terms:

> "Further, Lendlease relies upon the matters that Project Co proved at trial in respect of further technical details in support of their pleaded claims, including expert evidence which was given in open court and was disclosed to AECOM in these proceedings in June 2022 and which the court accepted in its judgment. Lendlease relies upon the material evidence adduced at trial to the extent that it was accepted by the court in its judgment. Lendlease hereby amends and supplements its pleaded case against AECOM by reliance on the same for its full meaning and effect, together with the matters set out herein below."

In paragraph 48 in the third line, the Claimant referred to the fact that matters had been "proven in the judgment of 12 October 2022".

27 AECOM made three main complaints about paragraph 47 and the short passage in paragraph 48, which, to my mind, were entirely justified:

(i) first, that paragraph 47 was insufficiently particularised, because it did not identify the relevant matters that Project Co proved at trial or the material evidence on which the Claimant wishes to rely;

(ii) second, the evidence served in the Project Co Proceedings is not evidence in these proceedings; and

(iii) third, the content and findings of the judgment in the Project Co Proceedings cannot be deployed by the Claimant as evidence of the matters found therein (save insofar as the Claimant wishes to rely on the judgment as evidencing the quantum of its own liability to Project Co).

28 Despite arguments made in his skeleton to the effect that AECOM was a privy, such that it was bound by the judgment, Mr Hickey rowed back from this in his oral submissions today. In essence, he now says that paragraph 47 ought not to be controversial. He explains that the Claimant is not suggesting that AECOM is bound by the judgment in the Project Co Proceedings or that it is a privy. Instead, he says that the Claimant relies on the judgment primarily (1) for the purposes of establishing that Lendlease was liable to Project Co; and (2) as evidencing the quantum of the Claimant's liability to Project Co, which it is now seeking to pass down the contractual chain to AECOM. In addition, he suggests that, in so far as the court made findings as to the interpretation of technical codes, Health Technical Memoranda, and the like, the court at the trial in these proceedings may wish to follow those findings, but would not be bound by them.

29 Mr Hickey's change of position took much of the heat out of this point but, as I made clear to him, I remained concerned that his pleading did not accurately reflect his revised position. I also remained concerned at the suggestion in his submissions that arguments around the effect of the judgment in the Project Co Proceedings might resurface at trial. Furthermore, I agree with Ms McCafferty, as I have said, that paragraph 47 in its original form is insufficiently particularised.

30 I am not going to preclude Mr Hickey from pleading something suitable as to his reliance upon the judgment in the Project Co Proceedings, but he will need to do so in terms that are clearer and more confined than those that currently appear in paragraph 47. After the short adjournment, Mr Hickey returned to court with a suggested (albeit as yet incomplete)

revised draft pleading of paragraph 47 which appeared at first blush to address the concerns I have identified. The proposal made changes both to paragraph 47 and to paragraph 48. Mr Hickey has since provided a further draft of his proposed new paragraphs, which Ms McCafferty has seen, but has not had sufficient time fully to review. Her preliminary response to it is that it meets some of the concerns that she had identified in her skeleton but that there may still be an issue around particularisation.

31 Not wanting to put Ms McCafferty under pressure to arrive at a conclusion in relation to that pleading today, I am prepared to give AECOM further time in which to consider it. However, bearing in mind the timing of the trial and the need for the Claimant's amended pleading to be finalised, I am going to give AECOM until close of business on Thursday to decide whether it is content with this revised pleading. If AECOM is not content with it, then it will need to provide its detailed reasons to the Claimant by that date so that the Claimant will have an opportunity to reconsider the pleading. I should make it clear, however, that I expect everyone to cooperate in finding a solution on this particular point, which does not seem to me to be something that ought to take up much of the parties' time in circumstances where they have got better things to do in preparing for trial.

The Orange Amendments: paragraph 15 and the new contribution claim

32 The Claimant seeks to include a new contribution claim under the Civil Liability (Contribution) Act 1978 ("**the 1978 Act**"), never formally pleaded, although plainly on the cards for some time, as I shall return to in a moment. This is now identified in paragraph 15 of the proposed Amended Particulars of Claim and paragraph 2 of the Prayer.

33 The applicable test upon an application for permission to amend which does not involve any lateness (as in fact this one does, and I will come back to that in moment) or adverse impact on the trial date, but which is concerned with a limitation argument, was set out recently in *Sainsbury's Supermarkets Limited v Ryan Jayberg Ltd* [2020] EWHC 3404 (TCC) per O'Farrell J at [30] to [37], which I shall not read out now for the sake of time.

34 The Claimant says that this new contribution claim relies upon facts and matters which are already pleaded and is simply another legal route to liability. The Claimant relies on the fact that AECOM provided a collateral warranty to Project Co and says that the 1978 Act claim has a good prospect of success and that the proposed amendments should be permitted. There is no suggestion from AECOM that the proposed amendments will impact upon the trial date.

35 AECOM identifies four main reasons why permission should not be granted in respect of the orange amendments: (1) that the allegations are insufficiently particularised; (2) that the amendments fall outside the applicable contractual limitation period and so have no real prospect of success; (3) that the amendments do not satisfy CPR 17.4, and/or (4) that the application is brought late, has weak prospects of success and adds disproportionate complication to the proceedings.

36 Dealing with these in turn, I agree with Ms McCafferty that this allegation is insufficiently particularised: see in particular *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 per Popplewell LJ at [18(2)]. With only a few weeks to trial, it was incumbent on the Claimant to plead this proposed new claim with full particularity. However, that has not been done. In so far as there is an allegation of duties owed by AECOM to Project Co, the allegation refers to a collateral warranty in favour of Project Co but, contrary to CPR 16.4, no specific provisions of the Project Co collateral warranty have been pleaded and no specific obligation or breach has been identified. Further, despite the

Prayer seeking a contribution or indemnity in favour of Lendlease in respect of its liability to Engie, there is no allegation at all that AECOM owed any duty to Engie, and no cause of action has been identified which could give rise to a liability on the part of AECOM to Engie. Lendlease has also failed to advance any allegation in the proposed pleading that AECOM is liable to either Project Co and/or to Engie for "the same damage" under the 1978 Act, or any particulars as to what such damage may be.

37 In all of those circumstances, it does seem to me that this pleading is wholly insufficient, not least in circumstances where this is a case which is due to begin trial in one month's time. No reason has been provided for this insufficient particularisation.

38 Turning to the next ground identified by AECOM, section 1(3) of the 1978 Act provides that:

> "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."

39 Clause 1.3 of the Project Co collateral warranty provides that AECOM "shall not have a liability under this Deed in any proceedings commenced more than twelve years after the date of completion of the Works". AECOM says that it is common ground that more than 12 years has passed since the date of completion, such that liability was extinguished pursuant to this provision on 14 December 2019 and it is entitled to the benefit of the proviso in section 1(3) of the 1978 Act. Ms McCafferty argues that the effect of clause 1.3 of the collateral warranty is to extinguish AECOM's liability. This is a legal argument which is contested by the Claimant.

40 Ms McCafferty relies on two authorities in support of her case, namely *Aries Tanker Corporation v Total Transport Ltd* [1977] 1 WLR 185, and *Philp v Cook* [2017] EWHC 3023 (QB). I note 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.

41 On the other hand, the wording in the case to which Mr Hickey took me is very different. He referred me to the case of *Bloomberg LP v Sandberg* [2015] EWHC 2858 (TCC), a decision of Fraser J. In that case the clear focus in the relevant contractual provision was on the commencement of proceedings. The relevant provision used the words "no proceedings shall be commenced". As the judge said at [27], the effect of the passage of time on the underlying legal right is a very important issue. He held that, on the facts of that case, there was a procedural time bar only.

42 Given my reading of the authorities to which I have been referred at some speed, it does appear that any right to bring a claim against AECOM pursuant to the collateral warranty has been extinguished. However, given that this is an *ex tempore* judgment and that I am of the view that the other grounds identified by AECOM are sufficient to exclude the proposed amendment, I decline finally to decide the point. It is clear that a considerable amount of

analysis was undertaken by Fraser J in *Bloomberg* and I have not had the benefit of detailed submissions on the authorities or substantial time for further consideration.

43 Turning then to the next point raised, I agree with AECOM that the orange amendments do not satisfy the requirements of CPR 17.4.

44 By CPR 17.4, 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. In particular and having regard to the guidance in *Sainsbury's*, to which I have already referred, in my judgment, there is clearly an arguable case that the limitation period here (whether under the collateral warranty even when viewed as a Deed, or the agreement between the Claimant and AECOM) has expired. More than 12 years has gone by.

45 In the circumstances, if an amendment is to be permitted and AECOM is not to be prejudiced by the "relation back" principle, the requirements of CPR 17.4 must be satisfied. However, in my judgment they are not satisfied. I accept Ms McCafferty's submissions that 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. I agree with AECOM that if the Claimant wishes to bring these contribution proceedings now, then the appropriate course of action is to issue a fresh claim and seek consolidation, albeit of course risking all of the possible defences that would be raised to such a claim.

46 The last factor identified by AECOM concerns the issue of delay, and I agree with AECOM that 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 application having been issued only six and a half weeks prior to trial.

47 Ms McCafferty took me through a detailed chronology of events which clearly shows that while contribution proceedings have been intimated for many months, the Claimant has taken no steps to bring forward an amendment to plead a contribution claim until now. I accept that the chronology that she took me to exposes dilatory conduct on the part of the Claimant, and I reject Mr Hickey's riposte that his amendments are "as prompt as could be". That is simply not the case in relation to this claim. The Claimant had indicated much earlier in the proceedings that it wished to amend, but it never pursued such amendment until now. Mr Hickey contends that this claim is nothing more than a legal wrap up of existing facts, but I have found that is not the case, and I have been given no good reason why it could not have been fully and properly pleaded much earlier in these proceedings. None is given in the witness statement of Mr Avey, dated 12 October 2022, supporting the application.

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. In all of those circumstances, I refuse permission for the orange amendments.

CERTIFICATE

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