Neutral Citation Number: [2021] EWHC 296 (TCC)

Case No: HT-2019-000452

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 16 February 2021

**Before** :

**THE HONOURABLE MR JUSTICE PEPPERALL**

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**Between :**

**MARTLET HOMES LIMITED**

**Claimant**

**- and -**

**MULALLEY & CO. LIMITED**

**Defendant**

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**Jonathan Selby QC** (instructed by **Norton Rose Fulbright LLP**) for the **Claimant**
**Simon Hughes QC** (instructed by **Pinsent Mason LLP**) for the **Defendant**

Hearing date: 5 February 2021

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# Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment
and that copies of this version as handed down may be treated as authentic.

## THE HONOURABLE MR JUSTICE PEPPERALL:

1. Martlet Homes Limited owns five high rise towers in Hampshire. By a design and build contract dated 20 January 2005 entered into between the then owners of the towers and Mulalley & Company Limited, Mulalley agreed to design and undertake various refurbishment works for a total price of £14,867,818. Such works included the design and installation of external cladding. Practical completion was achieved in respect of the works to the various tower blocks between 5 December 2006 and 7 April 2008.

2. Martlet issued these proceedings against Mulalley on 11 December 2019 seeking damages for alleged negligence and breach of contract in the design and construction of the refurbishment works. Since the building contract had been entered into by way of deed, such claim was brought a matter of days before the expiry of the twelve-year limitation period in respect of the works at Hammond Court and Blake Court and less than four months before the expiry of the limitation period in respect of the works at Harbour Tower and Seaward Tower. It is common ground that any claim in respect of the works at the fifth tower block, Garland Court, was already statute barred.

3. The claim form was served together with Particulars of Claim on 9 April 2020, which, being Maundy Thursday, was the very last working day on which proceedings could be served within the four months allowed by r.7.5 of the Civil Procedure Rules 1998. By then, there was no possibility of a fresh action in respect of any of the towers since more than twelve years had elapsed from the latest of the dates of practical completion. The Particulars of Claim alleged that Mulalley was in breach of the design and build contract in respect of various defects in the fire barriers; a failure properly to fix the insulation boards to the external walls; and a failure properly to repair the existing substrate. Martlet claimed damages of around £8 million comprising the cost of remedial works and of a "waking watch" that had had to be provided in each tower pending the completion of such works.

4. Mulalley served a full Defence on 4 June 2020. It admitted a number of breaches of contract while putting Martlet to proof of other allegations. It denied, however, that the alleged breaches of contract had caused any loss because it argued that, following the tragic fire at Grenfell Tower in June 2017, Martlet was in any event required to replace the combustible expanded polystyrene ("EPS") cladding fitted to the towers. Martlet served a Reply on 9 July 2020. While it joined issue with the causation defence, it pleaded at paragraphs 80 to 83 of its Reply that, even if Mulalley were right as to causation, it would remain liable because Mulalley was in breach of contract in using combustible EPS insulation boards in cladding the towers.

5. Mulalley now seeks to strike out paragraphs 80 to 83 of the Reply on the basis that Martlet cannot raise a new claim by way of a Reply. Martlet resists such order but, in the alternative, seeks permission to amend its Particulars of Claim to plead out its EPS case. Mulalley argues that the court should refuse permission to amend

since this is an attempt to plead a new claim based on new facts after the expiry of the limitation period.

## THE CLADDING SYSTEM

6. In order to make sense of the parties' cases, it is first necessary briefly to describe the cladding system installed by Mulalley. The system comprised 80mm EPS insulation boards which were fixed to the external walls with adhesive. The outer faces of the boards were treated with a reinforcing coat into which a glass fibre reinforcing mesh was embedded. The mesh was then rendered to give the final finish. At every level above the third storey, a horizontal firebreak was installed. This was mostly by installation of a 200mm layer of non-combustible lamella insulation boards extending the full 80mm thickness of the EPS boards. In places, rockwool insulation was used in place of lamella boards.

## THE STATEMENTS OF CASE

THE ORIGINAL PARTICULARS OF CLAIM

7. The original allegations of breach of contract were pleaded at paragraphs 41-42 of the Particulars of Claim. There were three broad allegations of defective design or workmanship:

    7.1 Fire barrier defects: Martlet alleged that the fire barriers were defectively installed in that:

        a) they were fixed to the wall substrate using a "dot and dab" method of adhesion rather than a continuous band of adhesive, thereby leaving gaps between the substrate and the fire barriers of between 20mm and 40mm;

        b) in places, there were vertical gaps between adjacent fire barriers of up to 15mm;

        c) they were fixed with inadequate 110mm dowels (whereas 180mm dowels should have been used to penetrate the thickness of the insulation (80mm), the adhesive, the original external render and gain adequate purchase into the substrate);

        d) the heads of the dowels were of insufficient diameter to provide adequate resistance in order to prevent the fixings from being pulled out of the fire barriers (the dowels were 35mm in diameter and fitted without a washer, whereas the use of an 80mm washer would have increased the surface area of the fixings and provided greater pull resistance); and

        e) insufficient dowels were used in that they were not positioned at a maximum of 300mm centres along the fire barriers.

    7.2 Insulation defects: Martlet alleged that the insulation boards were not properly fixed to the walls in that:

        a) the adhesive was applied in dabs with no "sausage" around the edge of each board; and

b) the boards were fixed with inadequate 110mm dowels (whereas again 180mm dowels should have been used).

7.3 Substrate defects: Martlet alleged that Mulalley failed properly to repair the underlying substrate and fill existing penetrations and vents.

8. Martlet pleaded that as a result of the fire barrier defects, their effectiveness would be compromised in the event of fire spreading to the cladding system. First, the gaps between the fire barriers and the substrate, and the vertical gaps between adjacent fire barriers, would allow fire and smoke to bridge the fire barriers. Secondly, the use of inadequate dowels compromised the ability of the fire barriers to remain fixed to the walls in the event of fire or high winds. Accordingly, Martlet pleaded that, in breach of regulation 4 of the Building Regulations 2000, the works were not carried out so as to comply with requirements B3(4) and B4(1) of Schedule 1 to the regulations. Such requirements provided:

> "B3(4) The building shall be designed and constructed so that the unseen spread of fire and smoke within concealed spaces in its structure and fabric is inhibited …
>
> B4(1) The external walls of the building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building."

9. The fire barrier and insulation defects were pleaded as breaches of Mulalley's obligations in respect of both workmanship and design. Thus, if the workmen were following Mulalley's design in using adhesive as alleged and 110mm dowels without washers then Martlet contended that the works were not designed with reasonable skill and care.

THE DEFENCE

10. By its Defence, Mulalley denied any design breach but made a number of admissions of defective workmanship. Specifically, it admitted at paragraphs 38-42 of the Defence that:

10.1 the "dot and dab" application of adhesives to the firebreaks did not comply with requirements B3(4) and B4(1);

10.2 there were at least two vertical gaps in the firebreaks whereas there should have been none;

10.3 the firebreaks and insulation boards should have been secured with 180mm dowels and 80mm washers; and

10.4 such admitted defects compromised the effectiveness of the fire barriers.

11. No admissions were made as to other alleged vertical gaps in the fire barriers, the spacing between dowels or that the dowels used compromised the stability of the fire barriers in the event of fire or high winds. Further, Mulalley denied that the alleged breaches of contract caused the claimed loss and damage:

11.1 As to the waking watch, the Defence asserted that this was introduced on 23 June 2017, nine days after the Grenfell tragedy, upon identifying defects in the internal fire compartmentation of the towers arising from works for which Mulalley was not responsible.

11.2 As to the decision to replace the cladding, Mulalley pleaded that the boards used were combustible and no longer permitted for use on buildings over 18 metres in height. The use of EPS, the Defence contended, was no longer in accordance with the then applicable Building Regulations. Accordingly, the replacement of the cladding system was in any event necessary following Grenfell in order that Martlet might comply with its duty as building owner pursuant to the Regulatory Reform (Fire Safety) Order 2005 to take such fire precautions as might reasonably be required to ensure that the towers were safe.

REPLY

12. By its Reply, Martlet joined issue with the causation defence and insisted that the pleaded breaches of contract were an effective cause of the claimed loss and damage. It then pleaded:

*"Alternative Case*

80. Further and alternatively, even on Mulalley's case on causation, the loss and damage which Martlet claims in these proceedings was caused by Mulalley's further breach(es) of the Contract set out below.

81. Mulalley's use of EPS as insulation in the design and construction of the Cladding Works to each of [the towers]:

81.1 Was in breach of article 1 of the Articles of Agreement and/or clause 6.1.1.2 of the Conditions of Contract and/or paragraph GI 010 and/or GDI 001 of the Employer's Requirements, in that the use of combustible EPS panels meant that:

81.1.1 The external walls of those buildings did not adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of those buildings, contrary to Regulation 4 and Requirement B4(1) of the Building Regulations 2000.

81.1.2 The building fabric, elements and/or components did not provide for a minimum useful life of 70 years.

81.2 Was in breach of article 1 of the Articles of Agreement and of the warranty at Section 7 of the Contractor's Proposals in that the use of flammable EPS panels meant that:

81.2.1 The Sto system that was installed was not suitable for tall constructions.

81.2.2 The Sto system that was installed would not achieve a class 0 fire rating in respect of those areas of the Towers above 18 metres.

82. In that regard, it is noted that Mulalley must accept that the materials which it used in the Cladding Works (specifically, the EPS insulation) did not comply with the Building Regulations 2000 as:

82.1 Mulalley's own case at paragraph 59.3 is that the materials used in the Cladding Works did not comply with the Building Regulations which were in force as at 11 July 2017 (see paragraph 43.4 above); and

82.2 The relevant provisions of the Building Regulations 2010 which were in force as at 11 July 2017 (in particular, Regulations 4, 7 and Requirement B4(1)) were in identical terms in the Building Regulations 2000, i.e. those which were current at the date of the Contract.

83. Accordingly, if and to the extent that Mulalley's case on causation is accepted, Martlet is in any event entitled to and claims the loss and damage identified at paragraph 61 of the Particulars of Claim as damages for Mulalley's breaches of the Contract identified at paragraph 81 above."

13. At paragraph 17 of its Reply, Martlet clarified its case on defective design. As identified above, Martlet explained in relation to its original case that if and insofar as Mulalley contends that the works were carried out in compliance with its design, Martlet would maintain that the design was defective. It added, at paragraph 17.2, that Martlet also contended that the breaches pleaded at paragraph 81 of the Reply amounted to further breaches of Mulalley's design obligations.

DRAFT AMENDED PARTICULARS OF CLAIM

14. Although Martlet's primary position is that it rightly pleaded its alternative case by way of Reply, it has served draft Amended Particulars of Claim upon which it seeks to rely in the event that the strike-out application is successful. The principal proposed amendment is to replead paragraphs 81-82 of the Reply as additional particulars of the insulation defects at new paragraphs 41.6 and 41A of the draft.

## THE STRIKE-OUT APPLICATION

THE ARGUMENT

15. Mulalley's application to strike out paragraphs 80-83 of the Reply is made pursuant to r.3.4(2)(a) of the Civil Procedure Rules 1998 which provides that the court can strike out the whole or part of a statement of case that discloses no reasonable grounds for bringing or defending the claim. Simon Hughes QC, who appears for Mulalley, argues that paragraphs 80-83 are not responsive to the Defence but seek to set up a new claim. That this is so is, he contends, put beyond doubt by the heading to the new paragraphs (viz. "Alternative Case"), paragraph 17.2 of the Reply and the proposed amendment to the Particulars of Claim.

16. Jonathan Selby QC, who appears for Martlet, argues that paragraphs 80-83 of the Reply were properly pleaded in response to the causation defence. It is, he observes, inevitable that a Reply will contain new and different allegations from those contained in the Particulars of Claim since otherwise it will serve no purpose. The very purpose of a Reply is to deal with any different version of events pleaded in the Defence. Accordingly, Mr Selby argues that the Reply in this case does not fall foul of paragraph 9.2 of Practice Direction 16 because it is not "inconsistent" with Martlet's primary case pleaded in the Particulars of Claim; and the prohibition in the Practice Direction upon new claims by way of a Reply must be read consistently with the meaning of a new claim under r.17.4. Further, relying on the decision in Herbert v. Vaughan [1972] 1 W.L.R. 1128, he submits that the rules do not in any event preclude a party from pleading a new argument in the Reply where it arises out of a line of defence.

DISCUSSION

17. Particulars of Claim must include, among other matters, "a concise statement of the facts on which the claimant relies": r.16.4(1)(a). Where a defendant denies an allegation in the Particulars of Claim, r.16.5(2) provides that:

> "(a) he must state his reasons for doing so; and
>
> (b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version."

18. Pleading a Reply is, however, optional: rr.15.8 and 16.7, and (in this court) paragraph 5.5.3 of the TCC Guide. Indeed, a claimant who does not file a Reply is not taken to admit the matters raised in the Defence: r.16.7. While the rules give little guidance to what can be pleaded in a Reply, paragraph 9.2 of Practice Direction 16 provides:

> "A subsequent statement of case 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."

19. No party may serve a statement of case after a Reply without the permission of the court: r.15.9. While a Reply is reasonably commonplace, the editors of the 2020 edition of Civil Procedure (the White Book) rightly observe, at paragraph 15.9.1, that permission to serve subsequent statements of case will only be appropriate in the most exceptional circumstances and that the court is more likely to permit amendments to earlier statements of case.

20. In my judgment, the terms of r.16.4(1)(a), the optional nature of the Reply, the rule restricting subsequent statements of case and the terms of the Practice Direction 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. I reject Mr Selby's

submission that such view would deprive the Reply of all purpose. A Reply can be particularly useful in order to refute a ground of defence. For example, a Reply can properly plead:

20.1 a later date of knowledge pursuant to ss.14 or 14A of the Limitation Act 1980, or that the court should disapply the primary limitation period pursuant to ss.32A or 33 of the Act, in answer to a plea in the Defence that the claim is statute barred;

20.2 that an exemption or limitation clause was not incorporated into the parties' contract or that it was of no effect in excluding or limiting liability because the clause did not satisfy the condition of reasonableness within the meaning of the Unfair Contract Terms Act 1977; or

20.3 that the defendant is estopped by some earlier judgment or representation from relying upon a particular defence.

In each example, the claimant would be pleading new facts in order to refute a defence, but it would not be pleading a new claim. Equally, while there is no obligation to respond upon the facts, a Reply can usefully admit a fact alleged in the Defence (thereby avoiding the cost and trouble of needing to prove the fact and allowing the court and parties to focus on the real issues) while explaining why such admitted fact does not provide a defence to the claim. Or a Reply can deny an allegation of fact and usefully explain why such allegation must be wrong.

21. Not only is the proposition that one can advance a new claim in a Reply contrary to the clear terms of the Practice Direction, but it is also inherently undesirable and contrary to the overriding objective of dealing with cases justly and at proportionate cost. If such practice were to be condoned, claimants would not need to be precise in their formulation of the Particulars of Claim since they could always have a second bite of the cherry when pleading the Reply. Defendants would have to seek permission from the court in order to answer by way of Rejoinder any new claims pleaded in the Reply, which might in turn call for a Surrejoinder from the claimant. Further, a claimant seeking to bring a new claim after the expiry of the limitation period could sidestep r.17.4 altogether (although possibly not s.35 of the Limitation Act 1980) by avoiding the need to make any amendment.

22. I reject Mr Selby's submission that the prohibition in the Practice Direction upon pleading new claims in the Reply must be construed as a reference to new claims that would not, by r.17.4, be allowed to be pleaded by way of a post-limitation amendment. One has only to compare the terms of the Practice Direction with r.17.4(2) (which I discuss in more detail below) to see that the former is a broad ban on pleading new claims by way of a Reply while the latter provides a narrow power to allow some new claims to be pleaded by way of a post-limitation amendment.

23. Although Mr Selby addressed me on the terms of the equivalent rule in the former Rules of the Supreme Court 1965, I do not find either the terms of Ord. 18 r.10 or the pre-1999 case law to be particularly helpful. In any event, the principle that Mr Selby takes from the old cases of Renton Gibbs & Co. Ltd v. Neville & Co. [1900]

2 Q.B. 181 and Herbert v. Vaughan [1972] 1 W.L.R. 1128 does not assist Martlet in this case:

23.1 In Renton Gibbs, the plaintiff sued for a little under £114, being the price of work done and materials supplied to the defendant's order. The defendant admitted the claim but counterclaimed for £3,000 by reason of the claimant's alleged breach of an entirely different contract entered into before the plaintiff's incorporation. By its Reply, the plaintiff denied being a party to or bound by the pre-incorporation contract but contended that, if the company were liable, it would seek to set-off against any such liability a claim for unliquidated damages for breach of the contract. In such unusual circumstances, the Court of Appeal held that the plaintiff was not relying on the claim under the disputed contract as an independent claim but as a shield against the defendant's counterclaim. Accordingly, it was properly raised by way of Reply. Nevertheless, Romer LJ identified, at page 187, the general rule in the same terms as I find it to be under the Civil Procedure Rules 1998:

> "If a plaintiff when he sees a counterclaim finds that he has omitted to raise a claim in addition to that already raised in the statement of claim, he ought, as a rule, to raise that claim by amendment of his statement of claim."

23.2 Renton Gibbs was considered by Goff J, as he then was, in Herbert v. Vaughan. The judge rightly stressed, at page 1133G-H, the key point in the Victorian case:

> "That, therefore, was not setting up a new claim consistent or otherwise with the old claim but was legitimately using what could be raised as a new claim as an answer to a defence, and for no other purpose, and was therefore properly included in the reply."

23.3 In the instant case, Martlet does not seek to rely on its alternative case in respect of the use of combustible EPS boards purely as a shield to some counterclaim by Mulalley, rather it relies on such case to establish liability upon its claim. It is no matter that Martlet has no need of its alternative case if it can prove causation on the basis of its original case; this is still a new claim by which, quite independently of the particulars pleaded in the original Particulars of Claim, Martlet seeks now to establish its claim for damages.

24. For these reasons, the alternative case was not properly raised by way of Reply and I strike out paragraphs 80-83.

## THE AMENDMENT APPLICATION

THE LAW

25. Martlet therefore falls back on its application to amend the Particulars of Claim. Given that a new action would now be statute barred, it is necessary to consider section 35 of the Limitation Act 1980, which provides:

> "(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

> (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
>
> (b) in the case of any other new claim, on the same date as the original action.
>
> (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—
>
> (a) the addition or substitution of a new cause of action; or
>
> (b) the addition or substitution of a new party; …
>
> (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.…
>
> (4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
>
> (5) The conditions referred to in subsection (4) above are the following—
>
> (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; …"

26. The procedural rule envisaged by s.35(4) of the Act is now contained in r.17.4 of the Civil Procedure Rules 1998, which provides:

> "(1) This rule applies where—
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under—
>
> (i) the Limitation Act 1980 …
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

27. In Hyde v. Nygate [2019] EWHC 1516 (Ch), John Kimbell QC sitting as a Deputy High Court judge helpfully distilled the effect of the rule into four questions:

> "Q1. Is it reasonably arguable that the opposed amendments are outside the applicable limitation period? If the answer is yes, go to Q2. If the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b). (Stage 1)
>
> Q2. Do the proposed amendments seek to add or substitute a new cause of action? If the answer is yes, go to Q3; if the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b). (Stage 2)
>
> Q3. 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 the amendment. (Stage 3)
>
> Q4. If the answer to Q3 is yes, the court has a discretion to allow the amendment. (Stage 4)"

See also Tomlinson LJ in Ballinger v. Mercer Ltd [2014] EWCA Civ 996, [2014] 1 W.L.R. 3597, at [15].

*Stage 1: Outside the limitation period?*

28. It is common ground that Martlet seeks to amend its Particulars of Claim after the expiry of the limitation period.

*Stage 2: A new cause of action?*

29. Mr Selby argues that the amendments plead no new duties, no new losses and concern the same element of the building as was already in issue upon Martlet's original case. Further, Martlet had already pleaded that the waking watch had to continue until the cladding had been removed from the towers. Mr Hughes stresses the need to consider the essential factual allegations in both the original Particulars of Claim and the draft amended case; and again points to Martlet's own description of the EPS claim as its "alternative case."

30. The classic definitions of a cause of action are "every fact which is material to be proved to entitle the plaintiff to succeed" (per Brett J in Cooke v. Gill (1873) L.R. 8 C.P. 107, at 116) and "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person" (per Diplock LJ, as he then was, in Letang v. Cooper [1965] 1 Q.B. 232, at 242-3). In determining whether an amendment raises a new cause of action, Millett LJ (as he then was) in Paragon Finance plc v. DB Thakerar & Co. [1999] 1 All E.R. 400, at 405, stressed Brett J's focus on materiality:

> "… only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction."

31. Further, in Smith v. Henniker-Major & Co. [2003] Ch 182, Robert Walker LJ (as he then was) explained, at [96]:

> "So in identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading."

32. In Co-operative Group Ltd v. Birse Developments Ltd [2013] EWCA Civ 474, Tomlinson LJ, observed at [21]-[22]:

> "21. The court is therefore concerned with the comparison of 'the essential factual elements in a cause of action already pleaded with the essential factual elements in the cause of action as proposed' – see per David Richards J in HMRC v. Begum [2010] EWHC 1799 (Ch) at [32]. 'A change in the essential features of the factual basis (rather than, say, giving further particulars of existing allegations) will introduce a new cause of action' – ibid, [30].
>
> 22. Where an amendment pleads a duty which differs from that pleaded in the original action, it will usually assert a new cause of action – see per Sir Iain Glidewell in Darlington Building Society v. O'Rourke [1999] P.N.L.R. 365 at 370. However as Sir Iain went on to observe, where different facts are alleged to constitute a breach of an already pleaded duty, the courts have had more difficulty in deciding whether a new cause of action is pleaded. Particularly has this been so in construction cases… The question to be resolved is therefore one of fact and degree. For my part I am not convinced that one needs to look further than for a change in the essential features of the factual basis relied upon, bearing in mind that the factual basis will include the facts out of which the duty is to be spelled as well as those which allegedly give rise to breach and damage. I respectfully agree with Lloyd LJ … who observed in the Trollope and Colls case, at page 101, that 'in most cases it will be easy to say on which side of the line the case falls'. But as Lloyd LJ observed, there will sometimes be a grey area, where different views are possible. I would not therefore dissent from the following distillation of the principles by Jackson J, as he then was, in Secretary of State for Transport v. Pell Frischmann [2006] EWHC 2909 (TCC) at [38]:
>
> (i) If the claimant asserts a duty which was not previously pleaded and alleges a breach of such duty, this usually amounts to a new claim.
>
> (ii) If the claimant alleges a different breach of some previously pleaded duty, it will be a question of fact and degree whether that constitutes a new claim.
>
> (iii) In the case of a construction project, if the claimant alleges breach of a previously pleaded duty causing damage to a different element of the building, that will generally amount to a new claim.
>
> I would simply add my own gloss to the effect that if the new breach does not arise out of the same or substantially the same facts as those

> already in issue on a claim previously made in the original action, it is likely to be a new cause of action."

33. The application of these principles in the Co-Op case is instructive. The judge below took the view that since the original claim alleged breaches of contract in relation to the design, workmanship and non-compliance with the employer's requirements in relation to the warehouse concrete floor slabs, it followed that any new allegations of further defects in those slabs, even if they involved separate and distinct breaches and losses, were part of the same cause of action. The Court of Appeal disagreed, and Tomlinson LJ observed that the judge might have been led into error by misapplying Millett LJ's suggestion that the matter be considered at "the highest level of abstraction."

34. In this case, the facts that no new duties are alleged and there has been no amendment to the claimed loss and damage assist Mr Selby's argument but cannot be decisive. Further, it is too superficial, and would be to fall into the same error as the judge at first instance in the Co-Op case, to focus simply on the fact that the proposed amendment seeks to plead an additional challenge to the design of the cladding system. Here, the essential factual basis of the original design claim in respect of fire safety was that that the efficacy of the fire barriers was compromised by air gaps and the use of inadequate fixings. By contrast, the essential factual basis of the proposed amendment is that the use of combustible EPS insulation boards was itself a breach of contract. That, I am satisfied, is a new cause of action.

*Stage 3: Arising out of the same or substantially the same facts?*

35. Mr Selby argues that the EPS claim arises from the same or substantially the same facts as Mulalley put in issue by its Defence. He relies strongly on the decision of the Court of Appeal in Goode v. Martin [2001] EWCA Civ 1899, [2002] 1 W.L.R. 1828. Further, he argues that the EPS boards and fire barriers are all part of one system. Mr Hughes responds that the principle in Goode v. Martin is limited to exceptional cases where the claimant can plead its new case in reliance upon the defence case and without relying upon any new facts. Here, he says that the Defence does not raise any issue as to whether the use of EPS boards in 2005-8 amounted to professional negligence. Further, he argues that the case law requires close analysis of both the existing statements of case and the proposed amendment.

36. If, in assessing whether the new claim arises out of the same or substantially the same facts as an existing claim, the court is limited to consideration of the matters pleaded in the original Particulars of Claim then I would be satisfied that the answer at stage 3 should be "no" and that this application would have to be dismissed. The original Particulars of Claim were simply not concerned with the use of combustible EPS insulation boards. The cases demonstrate, however, that the court must take a wider view of the facts arising on the claim that also encompasses consideration of the Defence.

37. In Goode v. Martin [2001] EWCA Civ 1899, [2002] 1 W.L.R. 1828, Ms Goode suffered a serious head injury while sailing on Mr Martin's yacht. Having no memory of her accident, she pleaded her original claim on the basis of an account provided by a witness that she had been struck by a "car" coming free of its guiderail. Consistently with such account, Ms Goode pleaded that Mr Martin had failed properly to inspect and maintain the roller elements of the car. By an Amended Defence, Mr Martin provided for the first time his account as to how the accident had happened. He pleaded that Ms Goode had been struck by the mainsheet as the boom swung to the starboard side during a gybe. The accident was, he contended, her fault for failing to heed his instructions to remain seated as the boat gybed and for failing to mind the boom. After the expiry of the primary limitation period, Ms Goode sought to amend her Particulars of Claim in order to adopt Mr Martin's account.

38. In allowing Ms Goode's appeal against the refusal of permission to amend, the Court of Appeal rejected Mr Martin's argument that upon its proper construction s.35(5)(a) limited the enquiry to whether the new cause of action arose "out of the same facts or substantially the same facts" as were already in issue on the face of the claimant's Statement of Claim. Brooke LJ cited the following observation of Hobhouse LJ, as he then was, in Lloyd's Bank plc v. Rogers, The Times, 24 March 1997:

> "The policy of the section is that, if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts."

There was, Brooke LJ explained, no reason of policy to read a restriction into s.35 so as to prevent consideration of the facts put in issue by the Defence.

39. While the language used in r.17.4 read in isolation might have yielded a different conclusion, Brooke LJ observed that neither the Civil Procedure Rule Committee nor its predecessor had ever evinced any intention to use its power under s.35(4) to add further restrictions to post-limitation amendments. Further, construing r.17.4(2) in accordance with s.3 of the Human Rights Act 1998 and the overriding objective, he concluded that the rule should be read as if it contained the additional words "are already in issue", such that the rule read:

> "The court may allow an amendment whose effect will be to add . . . a new claim, but only if the new claim arises out of the same facts or substantially the same facts as *are already in issue on* a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings." (Emphasis added.)

40. Thus, in Goode v. Martin, Ms Goode was allowed to plead by way of post-limitation amendment that, if Mr Martin succeeded in establishing his version of events, she was entitled to damages because, upon such facts, he was negligent as an experienced yacht master in failing to take proper care of her as a novice sailor.

41. In Ballinger v. Mercer, Tomlinson LJ observed, at [33], that the proper approach to r.17.4 as identified in Goode v. Martin was derived from s.35(5), "the language of which, as pointed out in that case, is not accurately or faithfully produced in CPR r.17.4." The Court of Appeal recently confirmed that it was bound by the Goode v. Martin construction of r.17(4) in both Akers v. Samba Financial Group [2019] EWCA Civ 416, [2019] 4 W.L.R. 54, at [24], (McCombe LJ) and Libyan Investment Authority v. King [2020] EWCA Civ 1690, at [38]-[39], (Nugee LJ). While a longstanding problem, it may be that the Civil Procedure Rule Committee could find time to amend r.17.4 in order to reflect more accurately the effect of s.35(5).

42. In MasterCard Inc. v. Deutsche Bahn AG [2017] EWCA Civ 272, Sales LJ, as he then was, explained the reasoning in Goode v. Martin at [42]:

> "The important feature of Goode v. Martin is that in order to make out her newly formulated claim, the claimant did not need or propose to introduce any additional facts or matters beyond those which the defendant himself had raised in his pleaded defence. In effect, the claimant was allowed to say, 'Well, if you are going to defend yourself against my existing claim by reference to those facts you have now pleaded in your defence, I rely on those very facts (if established at trial) to say that you are liable to me.' In such a case, the defendant has chosen to put those facts in issue in relation to the claimant's existing claim and there is no unfairness and no subversion of the intended effect of the limitation defence introduced by Parliament to allow the claimant to rely on the defendant's own case as part of her claim against him."

43. In Hyde v. Nygate, the deputy judge considered this passage and cautioned, at [30]:

> "Care needs to be taken with Goode v. Martin. An important feature of that case is that in order to make out her newly formulated claim, the claimant did not need to plead any additional facts beyond those already in the defence."

44. Mr Hughes seizes on Brooke LJ's observation in Goode v. Martin that Ms Goode was not seeking to introduce any new facts, Sales LJ's explanation of the case in MasterCard and the deputy judge's note of caution in Hyde v. Nygate in order to make the submission that a claimant can only plead a post-limitation amendment on the basis of facts put in issue by the defendant where he can do so without needing to plead *any* new facts. This is not, however, what Goode v. Martin decided. Nor, I venture to suggest, did Sales LJ mean to confine the application of the principle in Goode v. Martin but merely to demonstrate that the decision involves no unfairness to defendants and no subversion of the will of Parliament. Indeed, properly analysed, Mr Hughes' submission implicitly seeks to refine Brooke LJ's own rewriting of r.17.4 to introduce some asymmetry: namely that the new claim might arise from (a) "the same facts or substantially the same facts as a claim already put in issue by the claimant"; but only from (b) "the precise facts already put in issue by the defendant." No such restriction is apparent on the face of s.35(5) nor in the judgment of Brooke LJ. Indeed, in light of the decision in Goode v. Martin, it is plainly not open to me as a puisne judge to read such

limitation into the approach to a post-limitation amendment arising from a defence: see Jackson J (as he then was) in Charles Church Developments Ltd v. Stent Foundations Ltd [2006] EWHC Civ 3158 (TCC), [2007] 1 W.L.R. 1203, at [40]-[41]; Nugee LJ in the Libyan Investment case, at [38]-[39]; and McCombe LJ in the Akers case, a [24]. In any event, it seems to me that there is no good policy reason for doing so. Stage 3 is concerned with the essential threshold condition for granting permission to amend and the court can always recognise any injustice that might be caused by an amendment in a particular case by refusing permission at stage 4.

45. Here, Mulalley pleads the following essential facts by its causation defence:

45.1 The EPS insulation boards are combustible: paras 7.3, 51, 54, 59.4, 66.2 and 73.1

45.2 The use of such insulation boards to clad high-rise tower blocks is no longer appropriate post-Grenfell:

a) The use of such boards does not comply with the current Building Regulations: paras 7.3, 9.1, 51, 59.3, 64.1, 66.3, 73.1 and 74.2.

b) The system installed by Mulalley is no longer certified for use upon buildings over 18 metres in height: paras 55.3, 56 and 73.1.

45.3 Consequently, Martlet was required to replace the cladding system:

a) Martlet was required, as owner, to remove the EPS boards in accordance with its duty pursuant to the Regulatory Reform (Fire Safety) Order 2005 and advice notes issued by the Department for Communities and Local Government: paras 9.2-9.3, 55.1 and 55.3.

b) Further, it was advised to address the fire risk by removing the cladding: paras 58, 59.5, 66.4, 77.1, 81 and 84.

45.4 The true causes of Martlet's losses (namely the cost of the waking watch and of removing and replacing the combustible cladding) were Martlet's duties under the 2005 order and the governmental advice upon the need to remove combustible cladding systems: paras 90-100.

46. The proposed amended claim is based upon the assertion introduced by the Defence that the true cause of loss was the need to replace the entire cladding system because of the post-Grenfell realisation that the use of combustible materials created an unacceptable risk of fire. It pleads the same loss and damage as claimed in the original Particulars of Claim. It is true that the amendment requires the court to consider the additional question of whether a cladding solution that incorporated combustible EPS boards separated by fire barriers was designed in 2005-8 with reasonable skill and care. Such exercise must of course be carried out without the benefit of hindsight provided by the Grenfell tragedy. Mulalley obviously did not plead that its original design was in breach of contract. Indeed, it specifically pleaded, at paragraph 74.2, the manufacturer's advice that the cladding complied with the Building Regulations in force at the time of the contract. But then equally the yachtsman in Goode v. Martin did not plead that he was in any way negligent in his instruction of Ms Goode or in executing the gybe.

47. In my judgment, the proposed amendment in this case arises from substantially the same facts as Mulalley puts in issue by its Defence. Accordingly, the threshold question in s.35(5)(a) and r.17.4(2) falls to be answered in Martlet's favour.

*Stage 4: Discretion*

48. By his third witness statement, Mulalley's solicitor, Neal Morris, asserts that amendment would cause his client prejudice in having to investigate new questions as to the choice and use of the EPS boards between 13-16 years ago. Such investigation would involve searching for different documents which, he contends, would not be relevant on the original claim for workmanship defects. It is also asserted that it is "highly unlikely" that Mulalley will have retained all of its design documents, or that it will be able to recover documents from the external design team. Further, it contends that Mulalley will now face limitation issues in seeking to pass on any claim to its external designers. Mr Morris confirms that protective proceedings have not been issued. He adds that the amendment would require different lay and expert witnesses.

49. There is an oddity in this case in that the same events played out in the 2019 adjudication before Her Honour Frances Kirkham CBE. The adjudication claim was framed on the basis of the allegations that were subsequently pleaded in the Particulars of Claim. Mulalley asserted its causation defence in the adjudication and Martlet sought to introduce its alternative case as to the use of combustible cladding by way of reply. The adjudicator rejected Martlet's new case on the basis that it fell outside the scope of the dispute referred for adjudication. It was astonishing in those circumstances, especially with a looming limitation problem, that Martlet elected not to plead its alternative case from the outset in these proceedings. It was foreseeable that Mulalley might again take the same point on causation and Martlet took an unnecessary risk in assuming that it might be able to introduce an amended case either by way of Reply or a post-limitation amendment.

50. Against that, Mulalley no doubt realised from the reply submissions in the adjudication that there might well be an issue in these proceedings as to the use of EPS boards. Further, it had an opportunity to investigate that case at the time of the adjudication. Indeed, Mulalley served expert evidence in the adjudication to which was annexed a briefing note by Jamie Davis of HKA indicating that in Mr Davis's opinion the use of EPS insulation boards was not in compliance with the Building Regulations at the time of the contract. Against that, the Capita report offered the contrary view that the use of an EPS insulation system was compliant with the regulations at the time of the original design. Indeed, there is expert evidence to indicate that the cladding system might have been regarded as compliant until Approved Document B was amended in 2006.

51. Addressing the prejudice identified by Mr Morris:

    51.1 As already explained, this claim has always been in respect of both design and workmanship. Accordingly, it was in any event necessary to search for

documents and obtain witness evidence concerning the design of the cladding system. That said, the amendment would require a new focus on the use of EPS boards.

51.2 The parties already have the benefit of some expert evidence as to the suitability of EPS boards between 2005 and 2008. Such matter can easily be tried and indeed I take judicial notice of the fact that the court might by trial have the benefit of Sir Martin Moore-Bick's findings following the Grenfell Tower Inquiry.

51.3 No detail has been given of the contractual arrangements between Mulalley and its external subcontractors. It is therefore not possible to determine whether Mulalley would have been in any better position in terms of pursuing its design subcontractors had the EPS case been pleaded in the original Particulars of Claim in April 2020. In any event, Mulalley determined by no later than 2019 that the true cause of Martlet's multi-million-pound loss was the need to replace the combustible insulation boards and was aware, from the reply submissions filed in the adjudication, that Martlet might seek to hold Mulalley responsible for the use of EPS in the original design. It was therefore on notice that it might need to protect its position in order to pursue any claims against its sub-contractors but, upon Mr Morris's evidence, took no action to do so.

The real prejudice in this case is, in my judgment, the potential loss of a limitation defence.

52. I was not addressed as to the prejudice that Martlet might suffer in the event that the amendment is refused, but it is self-evident that it would lose the opportunity to seek to hold Mulalley to account for the choice of a combustible cladding system. There was no suggestion that Martlet might have a professional negligence claim in respect of the loss of such cause of action. Even if such an argument had been advanced, the claim would be uncertain and it is trite that the loss of the ability to sue the true wrongdoer and the need to instruct fresh legal advisers would involve some prejudice.

53. Balancing these matters, I conclude that this is a proper case for allowing a post-limitation amendment in order to plead Marlet's EPS case. Indeed, the policy identified by Hobhouse LJ that, if factual issues are in any event going to be litigated between the parties, they should be able to rely upon any cause of action which substantially arises from those facts militates in favour of granting permission.

## CONCLUSIONS

54. Accordingly, I strike out paragraphs 80-83 of the Reply but grant Martlet permission to amend its Particulars of Claim.