Neutral Citation Number: [2022] EWCA Civ 32

Case No: CA-2021-000535

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
MR JUSTICE PEPPERALL
[2021] EWHC 296 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2022

Before :

LORD JUSTICE COULSON
LORD JUSTICE BAKER
and
LADY JUSTICE ANDREWS

- -

Between :

Mulalley & Co. Limited	**Appellant**
- and -	
Martlet Homes Ltd	**Respondent**

- -
- -

Simon Hughes QC & James Frampton (instructed by **Pinsent Masons LLP**) for the **Appellant**
Jonathan Selby QC (instructed by **Norton Rose Fulbright LLP**) for the **Respondent**

Hearing date: 14 December 2021

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Approved Judgment

LORD JUSTICE COULSON :

1. INTRODUCTION

1. This appeal raises the question: can a defendant plead a comprehensive defence to allegations of breach (which relies on matters not expressly addressed by the particulars of claim), and raise a separate case on causation (which it says would defeat the claimant's claim in any event), and then seek to rely upon CPR 17.4(2) to deny the claimant the opportunity of amending its claim outside the limitation period to challenge the veracity of what the defendant has said and/or pleading that, even if that separate case on causation is made out, the defendant would still be liable to the claimant? As explained below, the wider circumstances in which this issue has arisen can be traced back to the tragedy of the Grenfell Tower fire on 14 June 2017, so the result may be of some significance to the construction industry.

2. The claimant/respondent ("Martlet") are the owners of five high-rise towers in Gosport in Hampshire. Their predecessors in title employed the defendant/appellant ("Mulalley") to act as the design and build contractors to carry out extensive refurbishment work at the five towers between 2005 and 2008. Mulalley's work included the selection and installation of a proprietary external wall product called the STO system, involving expanded polystyrene ("EPS") external wall insulation, horizontal fire barriers, and an overcoat of render. Following the Grenfell fire, Martlet carried out checks on the towers and discovered major fire safety defects. These investigations were carried out right at the end of the relevant contractual limitation period. Indeed, by the time these proceedings were commenced, it was recognised that one of the five towers could not be included because any claim in respect of it would be statute-barred.

3. The original Particulars of Claim contain a variety of allegations of inadequate design and workmanship relating to what is said to be the deficient fire protection provided by the STO system installed in the four towers. In their pleaded Defence, Mulalley deny the allegations of bad design by relying, amongst other things, on a certificate which they say demonstrated that the STO system complied with the Building Regulations at the time of the refurbishment work. Mulalley go on to allege that the reason why the STO system needed to be removed and replaced was because of the presence of the combustible EPS insulation within the STO system which, they say, was a prohibited material in 2017 (but not at the time of their contract). Thus Mulalley say that the cause of Martlet's loss was Martlet's need to comply with the Government's new advice and requirements in 2017, and not any breach of contract on their part.

4. Martlet sought permission to amend the Particulars of Claim to say expressly that the EPS insulation did not comply with the Building Regulations at the time of the contract and that the causation defence arose out of Mulalley's wrongful choice and subsequent use of the STO system and, in particular, the inclusion within that system of the combustible EPS insulation. Mulalley objected to those amendments on the basis that they involved a new cause of action, which did not arise out of the same or substantially the same facts as had been pleaded in the original Particulars of Claim, and which was statute barred. Pepperall J ("the judge") agreed that it was a new claim, but concluded that it arose out of the same or substantially the same facts as

were already in issue, and permitted Martlet to make the amendments. Mulalley appeal against that decision.

5. In addition to Mulalley's argument that the judge was wrong to conclude that the new claim arose out of the same or substantially the same facts as were already in issue, there is a second question for the court, raised in Martlet's Respondent's Notice. They argue that the judge was wrong to find that the amendments amounted to a new cause of action. Logically, that point falls to be decided first: a consideration of whether the claim arises out of the same or substantially the same facts as were already in issue is only required at all if the amendments amount to a new cause of action.

2. THE OUTLINE FACTS

6. Mulalley were engaged as design and build contractors by Martlet's predecessors in title, Kelsey Housing Association Limited ("Kelsey"). The works comprised the refurbishing of the existing towers and included the over cladding of the external walls with the STO system. This comprised expanded polystyrene (EPS) insulation boards fixed to the external walls, with horizontal fire barriers (made up of mineral wool) in between the sections of the insulation to correspond to each floor of the towers. The EPS and fire barriers were then covered with an acrylic render.

7. The contract was in the JCT 1998 Standard From of Building Contract with Contractor's design incorporating both standard and bespoke amendments. Under that contract the core obligation at Article 1 required Mulalley to "complete the design for the Works and carry out and complete the construction of the Works". Because it was a design and build contract, the contract documents included both Employer's Requirements and Contractor's Proposals.

8. There were numerous clauses of the contract and the Employer's Requirements which set out the basic obligations on the part of Mulalley in respect of design and workmanship. It is unnecessary to set out all those pleaded in the Particulars of Claim. However, they included:

    a) Clause 2.1 which provided:

    "The Contractor shall upon and subject to the Conditions carry out and complete the Works referred to in the Employer's Requirements, the Contractor's Proposals…, the Articles of Agreement, these Conditions and the Appendices in accordance with the aforementioned documents and for that purpose shall complete the design for the Works including the selection of any specifications for any kinds and standards of the materials and goods and workmanship to be used in the construction of the Works so far as not described or stated in the Employer's Requirements or Contractor's Proposals."

    b) Clause 2.5 which provided:

    "2.5.1 Insofar as the design of the Works is comprised in the Contractor's Proposals and in what the Contractor is to complete under clause 2 and in accordance with the Employer's Requirements and the Conditions (including any further design which the Contractor is to carry out as a result of a Change

in the Employer's Requirements), the Contractor shall have in respect of any defect or insufficiency in such design the like liability to the Employer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Employer, had supplied such design for or in connection with works to be carried out and completed by a building contractor not being the supplier of the design.
2.5.1a In addition to the foregoing, the Contractor hereby accepts responsibility for the design of the Works and every part thereof and for the selection and standards of all and any materials, goods and workmanship forming part thereof.

c) Clause 6.1.1 which provided:

".1 Clause 6.1.1.2 shall apply except to the extent that the relevant part or parts of the Employer's Requirements state specifically that the Employer's Requirements comply with the Statutory Requirements.
.2 The Contractor shall comply with… any Act of Parliament, any instrument, rule or order made under any Act of Parliament, or any regulation or byelaw of any local authority or of any statutory undertaker which has any jurisdiction with regard to the Works…"

d) Clause 8.1 which provided:

".1 All materials shall so far as procurable be of the respective kinds and standards described in the Employer's Requirements, or, if not therein specifically described, in the Contractor's Proposals or specification referred to in clause 5.3…
.2 All workmanship shall be of the standards described in the Employer's Requirements, or, to the extent that no such standards are therein specifically described, in the Contractor's Proposals or specifications referred to in clause 5.3. If no such standards are so described the workmanship shall be of a standard appropriate to the Works.
.3 All work shall be carried out in a proper and workmanlike manner…"

e) Paragraph GI 010 of the Employer's Requirements which provided:

"Nothing contained within these Employer's Requirements is intended to override any statutory requirements or the requirements of Fire Officers, etc. The Designer/Design and Build Contractor is required to ensure that the ultimate designs satisfy such other requirements notwithstanding anything contained within this document."

f) Paragraph GDI 001 of the Employer's Requirements which provided:

"The Works are to be designed and constructed in accordance and compliance with all relevant and related Statutory Requirements, Codes of Practice, British Standards, Material Manufacturer's and Supplier's recommendations,

Agrément Certificates, Professional or Trades or Suppliers Bodies recommendations, and the like."

g) Paragraph GDI 008 of the Employer's Requirements which provided:

"Where a material, proprietary product or the like has more than one grade or type or more than one use or method of application or installation, ensure that the grade, type, use and method of application or installation selected is that most appropriate to the use to which the material, proprietary product or the like is being put."

h) Paragraph GDI 010 of the Employer's Requirements which provided:

"Designs are to provide for a minimum useful life of the building fabric, elements and components of 70 years…"

i) Section 2(d) of the Contractor's Proposals which stated:

"External Insulated render
Our submission is based upon the use of a STO system, incorporating 110mm EPS insulation to main areas, 30mm thick to balcony returns. This is a very high quality system specially designed for high rise usage and for which a third-party ten year warranty is available…"

j) Section 7 of the Contractor's Proposals contained further detail of the STO system and described the benefits of the system as including:

"Class 'O' fire rating and lightweight materials make this system suitable for tall constructions."

9. The Statutory Requirements, referred to in clause 6.1.1 of the Conditions of Contract and paragraphs GI010 and GDI 001 of the Employer's Requirements, included Regulation 4 of the Building Regulations 2000, which required the Works to be carried out so that they complied with Schedule 1 to those Regulations. Schedule 1 included:

a) Requirement B3(4), under the heading 'Internal fire spread (structure)', which provided that:

"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."

b) Requirement B4(1), under the heading 'External fire spread', which provided that:
"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.""

10. Practical completion of the Works to the four towers relevant to these proceedings (Harbour Tower, Seaward Tower, Blake Court and Hammond Court) was achieved in

about April/May 2008. Practical completion of a fifth tower, Garland Court, was achieved earlier and any subsequent claims in respect thereof were accepted by Martlet as being statute barred.

11. Following the fire at Grenfell Tower in June 2017, investigations were carried out as to the nature and condition of the STO system at the four towers identified above. It is Martlet's case that these investigations identified a range of major fire safety defects for which Mulalley was responsible. The claim form was issued on 11 December 2019. It was served four days later.

3. THE PLEADINGS

12. In order to test whether the judge was right to say that the amended Particulars of Claim i) raised a new claim; ii) which arose out of the same or substantially the same facts as were already in issue, it is necessary to look in detail at the original Particulars of Claim, the original Defence, and the amended Particulars of Claim.

3.1 The Original Particulars of Claim

13. The obligations which Martlet relied on in the original Particulars of Claim include all those set out at paragraphs 8 and 9 above, as well as a number of others.

14. Paragraph 41 of the original Particulars of Claim alleges that Mulalley's design of the cladding works was in breach of the obligations noted above and separately alleges that Mulalley's workmanship was also in breach of those obligations.

15. The particulars of Mulalley's breaches of contract are divided into three categories. They are fire barrier defects (paragraphs 41.1-41.4); insulation defects (paragraph 41.5); and substrate defects (paragraph 42). The specific allegations in those paragraphs can, in my view, be categorised as primarily allegations of poor workmanship. That is because they are concerned with the fixing of fire barriers using a particular method of adhesion; the leaving of gaps between adjacent fire barriers; the use of insufficient dowels; the failure to fix the insulation properly to the walls; and a failure to repair the underlying substrate and fill in historic penetrations and vents before applying the EPS. That said, I accept Mr Selby's submission that, because these defects were widespread and systemic across all four towers, they also embrace allegations of poor design and specification, and were pleaded as such.

16. Take for example the method that was used to adhere both the fire barriers and the insulation to the walls. In both cases the criticism is that a 'dot and dab' methodology was used rather than a continuous method of adhesion. These failures were not sporadic but uniform, across all the walls of all the towers. That might mean that it was the result of an instruction or an answer to a site query emanating from Mulalley's design team: that would explain why the defect was systemic rather than localised, and could therefore be categorised as a failure of design rather than workmanship. Of course, in the present case, such a distinction is substantively academic because Mulalley were responsible for both design and construction. But it is relevant for present purposes, when considering the scope and extent of the original claims against Mulalley, that the original defects were pleaded as a failure of design/specification as well as of workmanship.

17. At paragraphs 43-60 of the original Particulars of Claim, Martlet set out in some detail the history of their discovery of the defects and the events thereafter. Extensive remedial work has been carried out involving the removal and replacement of the STO system. At the time of the original Particulars of Claim, that work was largely complete in respect of the four towers. Together with the cost of providing a "waking watch" because of the risk of fire, the damages claim is said to amount to around £8m (paragraph 61).

3.2 The Defence

18. Mulalley helpfully summarise their position at paragraphs 6-13 of the Defence. They aver (at paragraph 7.3) that the STO system contained "combustible insulation materials which complied with the Building Regulations in place at the time the Works were carried out but which did not comply with the Building Regulations current in 2017." This then leads on to the plea at paragraph 10 of the Defence that Martlet was not entitled to the damages claimed because Mulalley was not the cause, in fact or in law, of the loss.

19. At paragraph 34 of the Defence, Mulalley deny any breach of their design obligations. At paragraph 35.1, when addressing the status of their selection and use of the STO system and the EPS insulation in particular, Mulalley allege that they:

> "…relied on the British Board of Agrement ("BBA") certificate number 95/3132 dated 19 October 1995 in respect of the STO Therm system ("the BBA certificate") to demonstrate compliance with Contract and Building Regulations in force at the time the Contract was entered into…"

20. At paragraph 36 of the Defence, Mulalley expressly deny the alleged breach of GD010 in respect of the assessed cladding design life of 70 years. Mulalley say that their obligation was to select materials of the types specified by the employer (Kelsey) so far as procurable, and that the choice of cladding available to Mulalley was restricted for a variety of reasons.

21. As to the allegations of breach at paragraph 41 onwards of the original Particulars of Claim, Mulalley respond to those at paragraph 38-43 of the Defence. The paragraphs are a mixture of admissions, non-admissions and relatively terse denials.

22. Paragraphs 51-89 of the Defence, which covered 9 pages of the pleading, were a response to Martlet's decision to remove and replace the cladding. Mulalley emphasise that, because the cladding contained EPS insulation, it was a fire risk and was not compliant with the Building Regulations current in 2017. They point to the fact (paragraph 56 of the Defence) that Mulalley informed Martlet on 7 July 2017 that the cladding comprised the STO system, and that this system was no longer permitted for use on buildings over 18 metres in height. They repeat, at paragraph 59.3 of the Defence, their assertion that the materials used in the cladding works did not comply with the Building Regulations current at that date (July 2017). The same assertion is repeated again at paragraph 66.3 of the Defence.

23. At paragraph 74 of the Defence, contrasting the position that they say pertained under the Building Regulations in 2017, Mulalley refer to a STO report of 4 September

2017 which, they say, confirmed that the STO system "was permissible under the Building Regulations in force at the time that the Contract was entered into." Similar points are raised in relation to a subsequent report by Pellings (paragraph 77.1.2 of the Defence) and a report by Capita (paragraph 78.4).

24. Paragraphs 90-100 of the Defence are concerned with causation. In essence, Mulalley said that Martlet would have had to have undertaken the removal and replacement of the cladding "absent any alleged breaches on the part of Mulalley" (paragraph 92).

3.3 The Reply

25. The only relevant element of the Reply was the pleading of what I call below the "selection of combustible insulation" claim. This is the new claim at the heart of this appeal. As we shall see, the judge said that it was inappropriate for this claim to be included in the Reply and ruled that it had to be made instead by way of amendment to the Particulars of Claim.

3.4 The Amended Particulars of Claim

26. There are no amendments or additions to the raft of contractual obligations previously pleaded by Martlet. The amendments to paragraph 41, identifying Mulalley's alleged breaches of those obligations, are minor: they consist of the addition of one or two obligations, previously pleaded in respect of workmanship, which are now also made in respect of design. The addition of the words "and selection of goods and materials" after the reference to Mulalley's design makes no substantive difference, given that i) design deficiencies had already been pleaded in paragraph 41; ii) the selection of goods and materials is traditionally regarded as being part of the scope of a contractor's (and an architect's) design obligations; and iii) clause 2.1 of the contract expressly provided that the selection of goods and materials was part of Mulalley's design obligations (paragraph 8(a) above).

27. The significant amendment comes at paragraph 41.6 under the existing heading 'Insulation Defects'. It is all new. It reads:

> "41.6 If, as Mulalley contends at paragraphs 51 to 55, 59, 66, 73, 78.1, 84, 90 to 92, 93.2, 93.6, 94, 95 and 100 of its Defence, the losses claimed herein were caused by the fact that the insulation was EPS, Mulalley's selection and use of EPS as insulation in the design and construction of the Cladding Works to each of Harbour Tower, Seaward Tower, Blake Court and Hammond Court was in breach of article 1 of the Articles of Agreement and/or clause 2.1 and/or clause 2.5.1 and/or clause 2.5.1a and/or clause 6.1.1.2 and/or clause 8.1.1 of the Conditions of Contract and/or paragraph GI 010 and/or paragraph GDI 001 and/or paragraph GDI 003 and/or paragraph GDI 004 and/or paragraph GDI 008 and/or paragraph GDI 010 of the Employer's Requirements and/or sections 2(d) and 7 of the Contractor's Proposals and/or of regulation 7 of the Building Regulations, in that the EPS panels were flammable or combustible. This meant that:
>
> 41.6.1 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.
>
> 41.6.2 The building fabric, elements and/or components did not provide for a minimum useful life of 70 years.
>
> 41.6.3 The STO system that was installed was not suitable for tall constructions.
>
> 41.6.4 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."

By way of shorthand, I shall call this "the selection of combustible insulation claim".

28. There are no other amendments to the Particulars of Claim. In other words, the addition of the selection of combustible insulation claim makes no difference to the loss and damage claimed by Martlet against Mulalley. Martlet say that it simply provides another route to the same loss and damage as was claimed originally, albeit on a contingency basis.

4. THE JUDGE'S JUDGMENT BELOW

29. The judge's careful judgment, produced just eleven days after the hearing, is at [2021] EWHC 296 (TCC). The judge dealt with - and rejected - Martlet's first proposition that, having originally pleaded the selection of combustible insulation claim in their Reply, they did not need to amend their Particulars of Claim to make that same claim ([15]-[24]). Martlet do not seek to challenge that decision on appeal.

30. The judge then considered whether the selection of combustible insulation claim amounted to a new cause of action. He dealt with the arguments and the law at [29]-[32]. His conclusion at [34] was that it was a new cause of action:

> "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."

31. It is that paragraph which Mr Selby QC, on behalf of Martlet, seeks to challenge by way of the Respondent's Notice.

32. The judge then moved on to consider whether that new claim arose out of the same or substantially the same facts. Again he dealt with the arguments and the law first, at [35]-[44]. His conclusions were at [45]-[47] as follows:

"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."

33. It is those paragraphs and that conclusion which Mr Hughes QC, on behalf of Mulalley, seeks to challenge on appeal.

34. Finally the judge dealt with discretion at [48]-[53], concluding that this was a proper case for allowing a post-limitation amendment. There is no challenge to that aspect of his judgment.

35. Although permission to appeal was granted by this Court on 21 April 2021, the parties have continued to prepare for trial on the basis of the judge's order (i.e. including the selection of combustible insulation claim). The trial is due to be heard in March 2022.

5. THE ISSUES ON APPEAL

36. Section 35 of the Limitation Act 1980 provides, at sub-section (1), that "any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced …on the same date as the original action." Sub-section (3) provides that a new claim will not be allowed after the expiry of any time limit, save as provided for in sub-section (4) and (5). Sub-section (5) permits the addition 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."

37. These provisions are given effect by CPR 17.4, 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;
> (ii) the Foreign Limitation Periods Act 1984; or
> (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.
> (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."

38. It is conventional to say that four questions need to be answered when considering r.17.4 (see *Ballinger v Mercer Limited* [2014] EWCA Civ 996; [2014] 1 WLR 3597 and *Hyde v Nygate* [2019] EWHC 1516 (Ch)). They are:

i) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?

ii) Did the proposed amendments seek to add or substitute a new cause of action?

iii) 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?

iv) Should the Court exercise its discretion to allow the amendment?

39. In the present case there was never a dispute in relation to question i): it is accepted that the opposed amendments are outside the applicable limitation period. Moreover, for the purposes of this appeal, there is no dispute that, if the answer to questions ii) and iii) are both Yes, as the judge found, he exercised his discretion appropriately. Thus the sole focus for this appeal are questions ii) and iii): is the selection of combustible insulation claim a new cause of action and, if so, does it arise out of the same or substantially the same facts as are already in issue. Before moving on to deal with each of those questions in turn, I set out the relevant law.

6. THE LAW

6.1 A New Cause of Action

40. A cause of action is, in the classic phrase, "…a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person…": *Letang v Cooper* [1965] 1 QB 232 at 242. In order to ascertain whether the opposed amendments amount to a new cause of action, the court has to compare the essential allegations which are in issue on the original pleadings with those proposed by way of amendment.

41. The best-known authority in the last decade about what constitutes a new cause of action for these purposes is *Co-Operative Group Limited v Birse Developments Limited & Anr.* [2013] EWCA Civ 474; [2013] BLR 383. In that case, the original claim made by the building owners concerned specific defects in the floor slabs of two warehouses. The complaints were about the thickness of the floor slabs in places, the absence of sawn joints and a deficient jointing system. The allegations were in respect of the need to carry out localised repair works, valued at around £381,000.

42. The opposed amendments involved a complaint about the absence of steel fibre within the floor slabs which, it was said, would lead to damage in the future if the originally intended racking leg load was deployed. This was a systemic failure, said to give rise to the need for the complete replacement of both floor slabs at a cost of £2.5m.

43. The judge at first instance found that the amendments did not involve a new cause of action although, rather unusually, he went on to find that, if they did amount to a new cause of action, they did not arise out of the same or substantially the same facts as the original claim. The defendant, Birse, appealed the judge's conclusion that the claim in respect of the missing steel fibre was not a new cause of action.

44. The law was summarised by Tomlinson LJ at [20] and [21] as follows:

> "20. In the quest for what constitutes a "new" cause of action, i.e. a cause of action different from that already asserted, it is the essential factual allegations upon which the original and the proposed new or different claims are reliant which must be compared. Thus "the pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action" – see *Paragon Finance v Thakerar* [1999] 1 All ER 400 at 405 per Millett LJ. "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 " - see per Robert Walker LJ in *Smith v Henniker-Major* [2003] Ch 182 at 210.
>
> 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 paragraph 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, paragraph 30."

45. Tomlinson LJ noted that the courts had sometimes had difficulty in deciding whether a new cause of action had arisen, in circumstances where different facts were alleged to constitute a breach of an already pleaded duty. He said [22] that that was particularly true in construction cases, and he compared *Steamship Mutual Underwriting Association Limited v Trollope and Coles (City) Limited* [1986] 33 BLR 77 with *Idyll Limited v Dynerman* [1971] 1 CLJ 294, where different conclusions were reached on what appeared to be indistinguishable facts. He went on:

> "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 included the facts out of which the duty is to be spelled as well as those which allegedly give rise to breach and damages."

In this context, he said that he agreed with Jackson J (as he then was) in *Secretary of State for Transport v Pell Frischmann Consultants Limited* [2006] EWHC 2009 (TCC) when he too observed that, "if a claimant alleges a different breach of some previous and pleaded duty, it would be a question of fact and degree whether that constitutes a new claim".

46. On the facts of *Co-Op v Birse,* Tomlinson LJ had no doubt that the amendment comprised a new cause of action. At [23] he accepted the submission of Ms Sinclair QC (leading counsel for Birse), that the original claim related to "relatively disparate defects in the floors, capable of disparate replacement and repair", whilst the new allegation was of "a systemic defect which must result in its entire condemnation and replacement because of its inability to withstand the design load to which it has never yet been subjected." He said at [26] that the two claims were plainly different causes of action[1]:

> "26. I cannot agree with the judge that an allegation of a further defect in the slabs arising out of design, workmanship or failure to comply with the contractual requirements must, necessarily, be an assertion of the same cause of action as that upon which reliance has already been placed, simply because breaches in relation to design, workmanship and failure to comply with contractual requirements are already in play. That approach ignores the

[1] Speaking for myself, I regard this result as entirely unremarkable on the facts. I therefore respectfully disagree with the learned editors of the Building Law Reports when they suggest that this decision heralded a "tightening up" in the discretion to grant permission to amend pleadings. In my judgment, it was a straightforward application of well-worn principles to the facts of the case.

> importance which the judge had earlier recognised of identifying the essential facts upon which reliance is placed. Furthermore the judge's (correct) conclusion that the further allegations involve separate and distinct allegations of breach and separate and distinct allegations of loss is in my view incompatible with his ultimate conclusion that they are "part of the same cause of action". It is, rather, indicative that they comprise a new and different cause of action."

6.2 The Same or Substantially the Same Facts

47. The leading case on this aspect of r.17.4, particularly in a construction context, is *Brickfield Properties v Newton* [1971] 1 WLR 862. In that case the Court of Appeal held that a claim against an architect for negligence in the design of a building raised a cause of action which was different to that of negligence in supervising its erection in purported compliance with that design. However, by reference to the old Rules of the Supreme Court (which did not materially differ from r.17.4), this court found that it arose out of the same or substantially the same facts. Sachs LJ said at 873E-G:

> "Where there are found in completed buildings serious defects of the type here under review the facts relating to design, execution and superintendence are inextricably entangled until such time as the court succeeds in elucidating the position through evidence. The design has inevitably to be closely examined even if the only claim relates to superintendence, and all the more so if the designs are, as is alleged here, experimental or such as need amplification as the construction progresses. The architect is under a continuing duty to check that his design will work in practice and to correct any errors which may emerge. It savours of the ridiculous for the architect to be able to say, as it was here suggested that he could say: "true, my design was faulty, but, of course, I saw to it that the contractors followed it faithfully" and be enabled on that ground to succeed in the action."

48. On the same point, Cross LJ said at 880D-E:

> "3. The wording of Ord. 20, r. 5 (5), differs significantly from that of Ord. 18, r. 15 (2), It is no objection to amendment under Ord. 20, r. 5 (5), that some of the facts out of which the new cause of action arises are peculiar to it and that some of the facts out of which the old cause of action arises are peculiar to it. It is enough if the overlap is so great that the new cause of action can fairly be said to arise out of substantially the same facts as the old cause of action. For the reasons given by Sachs L.J. I think that this is the case here and that there was power to allow the amendment in question under Ord. 20, r. 5 (5)."

49. This topic was addressed more recently by the Court of Appeal in *Ballinger v Mercer Limited & Anr* [2014] EWCA Civ 996; [2014] 1 WLR 3597, in which Tomlinson LJ referred to a number of subsequent observations about the applicable test:

> "34. Helpful guidance as to the proper approach to the resolution of this question was given by Colman J in *BP plc v Aon Ltd* [2006] 1 Lloyd's Rep 549 where, at page 558, he said this:-

> "52. At first instance in *Goode v. Martin* [2001] 3 All ER 562 I considered the purpose of Section 35(5) in the following passage:
>
> "Whether one factual basis is 'substantially the same' as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim."
>
> 53. In *Lloyd's Bank plc v. Rogers* [1997] TLR 154 Hobhouse LJ. said of Section 35:
>
> "The policy of the section was that, if factual issues were 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."
>
> 54. The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts."

> 35. In the *Welsh Development Agency* case Glidewell LJ said, in an often quoted passage at page 1418, that whether or not a new cause of action arises out of substantially the same facts as those already pleaded is substantially a matter of impression.

> 36. Less well-known perhaps is the cautionary note added by Millett LJ in *Paragon Finance*, where at page 418 he said, after citing the passage from Glidewell LJ to which I have just referred:-
>
> > "In borderline cases this may be so. In others it must be a question of analysis."

> 37. I would also point out, as did Briggs LJ in the course of the argument, that "the same or substantially the same" is not synonymous with "similar". The word 'similar' is often used in this context, but it should not be regarded as anything more than a convenient shorthand. It may serve to divert attention from the appropriate enquiry."

50. I am not sure, with respect, how far these various observations really take us, although it is important to stress the point at [37] of Tomlinson LJ's judgment, namely that "substantially the same" is not synonymous with "similar". *Brickfield v Newton* does not appear to have been cited in *Ballinger*, which is a potentially important omission. Furthermore, in the most recent case which touches on this topic, *Libyan Investment Authority v King* [2020] EWCA Civ 1690; [2021] 1 WLR 2659, Nugee LJ said at

[49]-[50] that it was neither necessary nor helpful to seek to resolve the differences between some of these observations since they were not and could not be a substitute for applying the wording of s.35 of the Limitation Act 1980 or CPR 17.4(2).

51. On the facts of *Ballinger,* the disputed amendments concerned actuarial valuation reports for the year ending 2002, which were entirely new, in that they had not been mentioned in the original particulars of claim, or in the defence, or in the reply. The court had no difficulty in concluding that the amendments did not therefore arise out of the same or substantially the same facts as already in issue on the existing claims.

52. The only other authority dealing with the "same or substantially the same facts" to which we were taken was *Akers & others v Samba Financial Group* [2019] EWCA Civ 416; [2019] 4WLR 54. That was an unusual case, in that the Supreme Court had decided that the claim as originally formulated was bound to fail and they remitted the proceedings to the High Court in order to allow the claimants to endeavour to amend the claim. The reamendments deleted the original claim in its entirety and formulated a new claim, based on a constructive trust, in its place. The judge granted the application to reamend, concluding that he was not confined to looking at the pleadings alone but could look at a number of statements made by the defendant in earlier parts of the proceedings.

53. The appeal against that decision was allowed. McCombe LJ said at [44] that "the new claim is based on allegations of knowledge to be inferred from a multitude of facts said to have been known and of a plethora of sources of inquiry that it is said to have been undertaken over a very lengthy period indeed." He found at [46] that it was fanciful to assume that the detailed facts now alleged would already have been investigated by the defendant, at least to the extent that the claimants were now contending. He concluded at [49] that the judge "did not conduct any real evaluation of the new claim against the facts in issue in the old claim…. As I think Sales LJ was saying in the *Mastercard* case, it is necessary to make an evaluation of the new case as against the old case in order to ask the threshold question whether the new case arises out of the same or substantially the same facts as the old one." At [50] he undertook that exercise and concluded that the new claim did not arise out of the same or substantially the same facts as those already in issue in the old claim.

54. Again speaking for myself, I consider that *Akers* was another example of existing principles being applied to an unusual factual situation, and no new point of principle emerges from it. The conclusion that the new claim did not arise out of the same or substantially the same facts as the old claim seems plain from the analysis undertaken by McCombe LJ.

6.3 The Potential Relevance of the Defence

55. There is a strand of authority dealing with the position where the claimant alleges that the new claim arises out of the facts put in issue by the defendant in his or her defence. The leading case is *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 WLR 1828. There the claimant sustained severe head injuries whilst sailing as a guest on the defendant's yacht. In consequence she had no memory of how the accident had happened. She commenced proceedings against the defendant on the basis of a factual account given to her by a fellow guest, which blamed the moving "car" (to which the mainsheet block and tackle was attached) coming free of the guide rail and hitting her

on the head. The defendant pleaded a different factual account in his amended defence, suggesting that he was at the helm approaching the mouth of the river, and warned the crew that he was going to gybe[2]. He instructed them what to do during the gybe and to be aware of the boom. As the gybe commenced, another guest was taking in the mainsail in the cockpit. When the claimant leaned over to help her, with the mass of her torso across the main sheet tract, the boom swung across at almost the same time and the claimant was struck on her side by the mainsail itself. She was knocked down and hit her head on the side of the cockpit.

56. The claimant then sought to amend her particulars of claim to reflect the defendant's account back at him. It is difficult to be more precise than that because the amendments are not set out in the judgment of Brooke LJ, so it is not possible to compare them with the defence (which is summarised but also not set out) in the way recommended by the authorities referred to above. The headnote in the Law Report simply says that the amendments were "founded on the defendant's version of the facts". The gist of the amendments appears to have been that, even if the defendant's factual account of the gybe was correct, then he was still negligent (and the amendments doubtless went on to explain how and why that was so). The Master and Colman J refused the claimant permission to amend, but the Court of Appeal allowed the claimant's appeal.

57. At [36], Brooke LJ explained why the amendment was permissible:

> "36. It is commonplace that the claimant must not be impeded in her right of access to a court for the determination of her civil rights unless any hindrance to such access can be justified in a way recognised by the relevant Strasbourg jurisprudence (for the general principles, see *Cachia v Faluyi* [2001] EWCA Civ 998 at [17] – [20], [2001] 1 WLR 1996). All she wants to do is to say that even if the accident happened in the way Mr Martin says it happened, he was nevertheless negligent for failing to take appropriate steps, as an experienced yachts master, to protect her safety as a novice sailor. She does not want to rely on any facts which will not flow naturally from the way Mr Martin sets up the evidential basis of his defence at the trial."

58. The ratio of *Goode v Martin* was concerned with whether, in undertaking the exercise under r.17.4, the court could have regard to the defence at all. Brooke LJ concluded that it could:

> "46. Mr Ralls contended that we should interpret CPR 17.4(2) as if it contained the additional words "are already in issue on". It would therefore read, so far as is material:
>
> "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).

[2] To change course by swinging the sail across a following wind.

> This would bring the sense of the rule in line with the language of the 1980 Act, which is the source of the authority to make the rules contained in CPR 17.4.
>
> 47. In my judgment it is possible, using the techniques identified by Lord Steyn in *R v A*, to interpret the rule in the manner for which Mr Ralls contends. In this way there would be no question of a violation of the claimant's Article 6(1) rights, and the court would be able to deal with the case justly, as we are adjured to do by the Civil Procedure Rules. I would therefore permit the amendment and allow the appeal. A case management conference should be heard at an early date with a view to setting a timetable for an early trial after all the delays that have recently occurred."

That this was the ratio of *Goode v Martin* can be seen in both *Mastercard Inc 7 others v Deutsche Bahn AG & Others* [2017] EWCA Civ 272 at [41] and *Libyan Investment Authority* at [38].

59. I should say that, although we were referred to *Mastercard* in this connection, I ultimately derived little assistance from that case for the purposes of this appeal, because it was not, on analysis, a situation where the claimant was reflecting back the defence against the defendant. As Sales LJ (as he then was) said at [63], *Goode v Martin* "did not cover a case where it is not the defendant who introduces a new factual element into the pleaded issues by his own pleaded case, but rather where it is the claimant that introduces a new factual element by his own pleading in reply to the defence." Similarly, although *Akers* (paragraphs 52-54 above) also included a reference to *Goode v Martin*, that aspect of the argument was in no way essential to the decision.

60. However, there is one passage in the judgment of Sales LJ in *Mastercard* which is of some help, because it describes how the principle in *Goode v Martin* was intended to work in practice. At [42], he said:

> "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."

61. The most recent case to which we were referred in this strand of authority was *Libyan Investment Authority,* to which I have previously referred. Again, that was not a case that had any connection with an amended claim relating back to what was said in the defence. It was another highly unusual case, where the judge had struck out the amended particulars of claim because they had no real prospect of success, but gave

the claimants permission to make another application to re-amend. When they did so, they sought to rely on r.17.4, but the defendant said that, since the existing claims had all been dismissed, there were no facts which were "already in issue on" the claim. It was only in that very limited context that *Goode v Martin* was relevant to the court's consideration of the issues. In truth, the real point in issue on appeal in *Libyan Investment Authority* was whether the judge's order striking out the original particulars of claim could be corrected pursuant to the slip rule to give effect to his intention of allowing the claimants an opportunity to re-amend their particulars of claim, and to prevent that order from having the unintended consequence of prohibiting the claimants from making any such application. That is very far removed from the issues in this appeal.

7. THE CROSS-APPEAL: IS THIS A NEW CAUSE OF ACTION?

62. On the face of it, there is a reasonably strong case for saying that the amendments to the Particulars of Claim do not amount to a new cause of action. The selection of combustible insulation claim does not rely on any duty or obligation that had not previously been pleaded by Martlet. In particular, precisely the same requirements of the Building Regulations are relied on, and the same loss and damage is claimed.

63. In addition, the new allegation of breach of contract affects the external walls, which is the same element of the building as is already in issue. The new breach also relates to the very same element of those external walls, namely the STO system, that was previously put in issue by the original Particulars of Claim. Even more importantly, perhaps, the component of the STO system most relevant to the amended claim, namely the EPS insulation, is already the subject of pleaded breaches of contract, and it has always been part of Martlet's case that the EPS had to be removed in its entirety. This is, therefore, one of those cases that Tomlinson LJ had in mind where different facts are alleged to constitute a breach of an already pleaded duty (see paragraph 45 above).

64. However, I consider that, notwithstanding all those points in favour of Martlet, there are three principal reasons which lead to the conclusion that the selection of combustible insulation claim is a new cause of action.

65. First, that claim is expressly pleaded as a contingent claim. It only arises at all if Martlet succeed on their original claims (Act 1) and if Mulalley then succeed in showing that, notwithstanding the defective installation of the STO system, the need to replace that system was always going to be required because of the selection and use of the combustible EPS insulation (Act 2). If that happens, Martlet want to be able to say: "Well, that does not get you off the hook, because you were responsible for choosing the EPS insulation in the first place". That is a perfectly understandable contingent claim. But it is not a claim that had previously been made; it gives rise to a further act of the drama (Act 3).

66. If the amendment had not been made, and Mulalley were successful in demonstrating that the replacement of the STO system was inevitable because of the use of the combustible EPS insulation then, on their case, that would provide them with a complete defence. On Martlet's case, the existence of the selection of combustible insulation claim, which had not previously been made, may deprive Mulalley of that defence. That analysis strongly suggests that this is a new cause of action.

67. The second reason why I have concluded that this is a new cause of action arises out of a comparison between the practical realities of the old case and the new. None of the points set out in paragraphs 62 and 63 above can disguise the fact that the emphasis of the original Particulars of Claim was on workmanship, or what Mr Hughes calls "the implementation of design choices", rather than the design choices themselves. On the other hand, the selection of combustible insulation claim is principally concerned with design choices.

68. The original claim did not involve any allegation that a component part of the STO system, namely the EPS insultation, was *of itself* an inadequate material or unfit for purpose from the very outset of the refurbishment works. By contrast, the inherent unsuitability of the EPS insulation is at heart of the amended claim. Again therefore, I conclude that, on balance, it is a new cause of action.

69. Thirdly, it is necessary to apply the principles set out in the authorities noted at paragraphs 40-46 above, and to compare the nature, scope and extent of the original claim with the nature, scope and extent of the amended claim. In undertaking that exercise, I consider that, although less obvious than the position in *Birse v Co-Op*, at least some of what Tomlinson LJ said in that case about the features of a new cause of action applies with equal force to the amended claim here.

70. For these reasons, I consider that the amendment falls on the wrong side of the line for Martlet: as a matter of fact and degree, the selection of combustible insulation claim constitutes a new cause of action. I would therefore dismiss the cross-appeal.

8 APPEAL GROUND 1: IS THE PRINCIPLE IN *GOODE V MARTIN* LIMITED ONLY TO THE FACTS PLEADED IN THE DEFENCE?

71. It was Mr Hughes' submission that, to the extent that Martlet relied on *Goode v Martin,* they were seeking to extend the principle outlined in that case beyond its narrow limits. He said that the principle in *Goode v Martin* only applied if the new claim relied on no new facts or matters at all beyond that which is pleaded in the defence.

72. I do not accept that submission for three reasons.

73. First, I consider it unwise to invest the words in any judgment, even from such a distinguished judge as Brooke LJ, with all the force of a statute. All that Brooke LJ did in *Goode v Martin* was to say that, if a defendant advanced a new case in its defence, and the claimant wanted to say that, even on that basis, the claim was still good, then the claimant should be permitted to do so. He was not laying down any hard and fast rules about the precise degree of overlap between what was in the defence and what could be in an amended claim. Moreover, as I have pointed out, the question of overlap was not in any event part of the *ratio* of *Goode v Martin*, which was instead concerned with whether the defence was relevant at all to the test under r.17.4.

74. Secondly, this ultra-restrictive approach is not what *Goode v Martin* envisaged: nowhere does Brooke LJ say that there has to be a complete, 100% overlap between the defence and the amended claim in order for the point to run. On the contrary, at [36] he envisages that the principle would apply to any facts which would "flow

naturally from the way the defendant sets up the evidential basis of his defence". That seems to me to anticipate that the claimant in *Goode v Martin*, or any claimant in a similar situation, would not be confined only to the matters raised in the defence, which would of course never involve an admission of negligence anyway. What I think Brooke LJ had in mind was a situation where the same basic facts as are pleaded in the defence are then turned back on the defendant by way of a new claim, with some modest degree of leeway permitted for expansion or elaboration or explanation. Anything else would be contrary to the (limited) flexibility provided by the words "the same or substantially the same" in r.17.4.

75. The development of the claimant's case in *Goode v Martin* illustrates this approach. The defendant set out what he said were the facts leading up to the accident. He did not say that his conduct amounted to negligence; on the contrary, he said that what he had done meant that he was not at fault. So it must have been envisaged, at the very least, that once the amended claim was permitted, the claimant would be permitted to adduce expert evidence to explain how and why the defendant's version of what happened still amounted to poor sailing practice. Doubtless there would have had to have been an investigation into that new aspect of the case, with an exchange of experts' reports which (on the assumption that the facts relayed by the defendant were true), addressed whether and to what extent they constituted a breach of duty. None of that arose out of the claimant's original pleading, but to prevent any criticism of the defendant's conduct of the gybe when he had himself raised it as part of his defence would have been unjust, and contrary to the overriding objective.

76. This point needs to be stressed because in both *Mastercard* and *Hyde & others v Nygate & others* [2019] EWHC 1516 (Ch) there is a suggestion that the claimant in *Goode v Martin* was not seeking to rely on <u>any</u> new facts other than those pleaded in the defence. In fact, as I have pointed out, no-one can be certain about that, since neither of the two relevant pleadings are set out in the judgment. Whilst Brooke LJ uses the words "no new facts" at [42], I consider that this was simply a shorthand for the wider point he was making at [36] (set out at paragraph 57 above). In any event, irrespective of the introduction of new facts as such, there can be no doubt that – as I have explained above - the amended claim in *Goode v Martin* gave rise to an entirely new investigation, almost certainly involving experts, which had not previously been required. Indeed, because the claimant could not remember the accident at all, it was likely that the investigation of the amended claim – which was instead based on the defendant's recollection – was going to become the central feature of the trial.

77. Thirdly, as signposted in paragraph 74 above, this attempt to limit *Goode v Martin* would run counter to r.17.4. What we are concerned with is whether the amendment arises out of the same or substantially the same facts as are in issue already. The words "or substantially the same" are expressly designed to move away from the sort of restrictive arguments advanced by Mr Hughes in this case. The words provide some flexibility, although that must always be limited because, as noted at paragraphs 49 and 50 above, the test does not extend as far as "similar" facts.

78. It would be wrong in principle to say that, when applying the test under r.17.4, the court should do it in an imbalanced way, taking into account "the same or substantially the same facts" in issue when considering the new claim by reference to the original particulars of claim, but only taking into account "the same facts" when looking at what is put in issue by the defence.

79. The judge had this point well in mind. At [44] he said:

> "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 WLR 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."

80. I respectfully agree with that analysis. It would be contrary to principle and overly-restrictive to suggest that the *Goode v Martin* approach can only arise where the amended claim seeks to add nothing at all to that which is pleaded in the defence. The proper approach is, as I have said, more flexible than that.

81. For these reasons, therefore, I reject Ground 1 of the appeal. The principle in *Goode v Martin,* as set out in the *ratio*, is that any proposed amendment has to be considered by reference to the same or substantially the same facts as are already in issue, including those set out in the defence. Beyond that, it is a question of fact and degree.

9. APPEAL GROUNDS 2-4: DOES THE NEW CLAIM ARISE OUT OF THE SAME OR SUBSTANTIALLY THE SAME FACTS AS ARE ALREADY IN ISSUE?

82. I deal with these Grounds together because they all go to question iii), as identified in paragraphs 38 and 39 above: does the new claim arise out of the same or substantially the same facts as are already in issue? In accordance with the authorities, the judge undertook a careful analysis of the original Particulars of Claim, the Defence, and the amendments. He found that the selection of combustible insulation claim did arise out of the same or substantially the same facts as are already in issue.

83. A preliminary point concerns the nature of this court's approach on appeal. It might be said that, because this was an evaluative decision by the judge, this court should

afford him a wide degree of latitude (see *Todd v Adams and Chope (ta Trelawny Fishing Co*.) [2002] EWCA Civ 509; 2 All ER (Comm) 97 at [129]. But Mr Selby did not push that point too hard on the particular facts of this case, and I think he was right not to do so. The issue that arises here is an important one and may, post-Grenfell, be replicated in analogous situations at blocks of flats across the country. It is therefore appropriate to address the arguments *de novo*, without any qualifications to or limitations on the analysis undertaken.

84. That said, on a careful consideration of the material, and in the light of the authorities to which I have referred, I have concluded that the judge was right to decide that the new claim arose out of the same or substantially the same facts as are already in issue. Again, there are a number of reasons for that conclusion.

85. First, all the elements of Martlet's reasonably strong (if ultimately unavailing) argument that this was not a new cause of action are relevant to the question of whether the selection of combustible insulation claim arose out of the same or substantially the same facts. I consider that the features of the selection of combustible insulation claim set out at paragraphs 62 and 63 above demonstrate that, although this was a new cause of action, it arose out of the same or substantially the same facts as had been set out in the original Particulars of Claim (i.e. before even considering the defence).

86. Perhaps the best way to demonstrate this is by reference to the reasoning of both the trial judge and Tomlinson LJ in *Co-Op v Birse*. There, the new case could properly be said to wipe out the old, because instead of addressing workmanship defects in localised areas of the floors, the new case required an investigation into the design of the floors, and if it was established, would render the need for localised repairs irrelevant (because instead the floors themselves would have to be replaced, no matter what other defects might exist). In contrast, the present case was always a claim in which it was said that the STO system in general, and the EPS insulation in particular, was defective and had to be replaced in its entirety. The selection of combustible insulation claim merely identifies a further reason for the replacement of the STO system. It may require a further element of investigation beyond that required by the original Particulars of Claim, but it supplements the existing investigation, rather than doing away with it altogether.

87. Secondly, I consider that that is the inevitable result of this court's approach in *Brickfield v Newton* (paragraphs 47-48 above). If there was sufficient overlap in that case between, on the one hand, an existing claim based solely on the architect's inadequate supervision of the contractor (and therefore defective workmanship) and, on the other, a new case based on the architect's design, so as to say that they arose out of the same or substantially the same facts, then that strongly suggests that there is sufficient overlap here, between an originally pleaded case that raised both workmanship and design (albeit emphasising workmanship), and an amended case which again pleads both (but this time emphasises design).

88. In addition, although *Brickfield v Newton* expressly accepts that there must be sufficient overlap in order to meet the test of "the same or substantially the same facts", it also demonstrates that such overlap does not have to be total. The Court of Appeal in *Brickfield v Newton* accepted that there will or might be matters raised by way of amendment that would require investigation which would not have needed to

be investigated before the amended claim was made. There, the obvious new area of investigation concerned the design decisions which were made by the architect before the work on site began, and the extent to which those design decisions fell below the applicable standard. Those new allegations of design deficiency were described by Sachs LJ as being "different from and anterior to negligence in superintending". Thus the fact that an additional investigation was required as a result of the amendment in *Brickfield v Newton* was nothing to the point.

89. I accept of course that, as the cases emphasise, this is always a matter of fact and degree in each case: what might appear in one authority to be of direct applicability to the case under review may, on analysis, be wholly distinguishable. But I am of the view that, for the reasons I have given, the present case fits comfortably within the approach set out in *Brickfield v Newton*, even before considering what was put in issue by Mulalley's Defence.

90. That brings me to the third and most important reason for my conclusion. In my judgment, what is set out in the Defence demonstrates beyond doubt that the selection of combustible insulation claim arises out of the same or substantially the same facts as are already in issue. Importantly, this is the result of both the way in which Mulalley have chosen to defend themselves against the design allegations made in the original Particulars of Claim, and from a consideration of Mulalley's separate causation defence. Although I address each in turn, I consider that, either way, the selection of combustible insulation claim "flows naturally" from the way in which Mulalley has pleaded its Defence. Indeed, as a result of the Defence, I am not even sure that it can be said that there is any investigation triggered by the amendment which was not already required.

91. As part of their defence to the design allegations in the original Particulars of Claim, Mulalley aver that the STO system that was installed (including the selection and use of what they accept was combustible EPS insulation), was not in breach of contract. They expressly plead that the EPS insulation, although combustible, was in accordance with the Building Regulations in force at the time (the Building Regulations 2000): see paragraphs 18-20 above. They even go so far as to set out at paragraph 35.1 of the Defence the particular BBA certificate which they say demonstrates such compliance.

92. In this way, whether or not the original design complied with the contract, and in particular whether or not the combustible EPS insulation was in accordance with the Building Regulations, is already in issue in this case. It has been expressly put in issue by Mulalley in their Defence, in considerable detail, in answer to the original allegations of negligent design. All Martlet are doing by way of the amendment is to say: "We dispute this aspect of your defence: we say that your original design, and in particular your selection and use of combustible insulation, did not comply with the contract and/or the Building Regulations". Martlet must be entitled to put in issue what Mulalley say in defence to their original claim; otherwise they would be deprived of a fair trial (as per Brooke LJ in *Goode v Martin*). Put another way, what Martlet are doing by way of their amendment was expressly envisaged by Sales LJ in *Mastercard* (paragraph 60 above): because Mulalley has chosen to put particular facts in issue in defending themselves, there can be no unfairness in allowing Martlet to turn those matters back on the defendant.

93. Then there is Mulalley's separate defence on causation, which is that at some point after the contract works were concluded, and certainly following the Grenfell fire, the STO system no longer complied with the Building Regulations, and had to be replaced, irrespective of the allegations in the original Particulars of Claim. A building block for the causation case is the assertion in the Defence that the STO system complied with an earlier iteration of the Building Regulations. Martlet are again entitled to counter that causation argument by saying that it would not relieve Mulalley of liability because, on a proper analysis, the STO system never complied with the contract.

94. For these reasons I consider that this case falls squarely within the principle set out in *Goode v Martin*. Indeed, in some ways, I consider this to be a stronger case than *Goode v Martin* because the selection of combustible insulation claim arises out of Mulalley's defence to the original design allegations, as well as their separate case on causation. Mulalley may have chosen to defend themselves against the original design allegations in an expansive way, pointing (amongst other things) to the certificate which they say shows that their selection of the combustible cladding was in accordance with the Building Regulations 2000, but that does not mean that Martlet are not entitled to challenge what they say. 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. So, irrespective of the separate causation case, the selection of combustible insulation claim arises out of the same or substantially the same facts as are already in issue.

95. This point is also relevant to Mr Hughes' complaint that the inclusion of the selection of combustible insulation claim has given rise to an extensive investigation which would not otherwise have been necessary. He relied on the judge's observation at [46] that the amendment required the consideration at trial of an additional question, namely the incorporation of the combustible insulation into the design. Mr Hughes said that this additional question demonstrated that the new cause of action could not arise out of the same or substantially the same facts as were already in issue. There are, however, a number of flaws in that submission.

96. I am not sure that it is necessarily correct to say that the amendment required the consideration of an additional question. I have already made the point that Mulalley themselves pleaded that the selection of the combustible insulation was not a breach of contract and that the insulation complied with the Building Regulations. That assertion would always have had to have been investigated: Mulalley would have needed to make that point good as part of their existing Defence, regardless of the amended claim. So on that basis no additional investigation will be needed.

97. Furthermore, even if the amended claim does give rise to some additional investigation, that could not of itself be a bar to the conclusion that the new claim arose out of the same or substantially the same facts as were already in issue. That brings us back to both *Brickfield v Newton* and *Goode v Martin*: there must be a substantial (perhaps a very substantial) overlap between the old claims and the new in order to meet the r.17.4 test but – as happened in both those cases - there may well be elements of the new claim which are not caught by the old, and which therefore have to be the subject of further investigation and evidence.

98. Mr Hughes also complained about the scale of the investigation that the selection of combustible insulation claim has required, as the parties prepare for trial in March. As I have said, it seems to me that there can be nothing in that point for the purposes of the appeal, primarily because this was an issue originally raised by Mulalley in their Defence and so was unrelated to the amended claim. Moreover, the point about the scale of any "new" investigation really goes to the exercise of the judge's discretion, and as I have said, that is not in issue on appeal.

99. But it is a concern that the investigation should be as complex as Mr Hughes indicated. We were shown the relevant provisions of the Building Regulations 2000 (which applied when the design and construction took place) and the Building Regulations 2010 (which applied at the time of the Grenfell fire and today). Those provisions were materially identical. That might suggest that the EPS insulation complied with both sets of Regulations or with neither; certainly if that was not so, one would expect to find a straightforward explanation as to when and how this potentially important change had come about. After all, these are meant to be practical Regulations which are easy to understand and implement in drawing offices and on building sites. If the explanation is not clear-cut, that may call into question the utility and efficacy of the Building Regulations themselves, but that can hardly be a reason for disallowing the amendments.

100. For all these reasons, therefore, I consider that, in contrast to the issue as to whether or not this was a new cause of action, Martlet's argument that the selection of combustible insulation claim arose out of the same or substantially the same facts as were already in issue, falls the right side of the line. The amendment is caught by r.17.4 and was rightly permitted.

10. CONCLUSIONS

101. If my Lord and my Lady agree, I would commend the judge's judgment and uphold his conclusions, both that this was a new cause of action, and that it arose out of the same or substantially the same facts as were already in issue. That would have the effect that both the appeal and the Respondent's Notice are dismissed.

LORD JUSTICE BAKER

102. I agree.

LADY JUSTICE ANDREWS

103. I agree that the appeal should be dismissed for the reasons given by Lord Justice Coulson, who has comprehensively dealt with the many cases cited and arguments addressed to the court. However it seems to me that paragraphs 91-92 of my Lord's judgment provide the short answer to the question whether the claim arises out of the same or substantially the same facts as are already in issue. A claimant ought to be able to submit to the court that the defendant is liable even if the version of events he has pleaded by way of defence is accepted. That was the position in *Goode v Martin*. Here the situation was different, because the cause of action that Martlet sought to introduce depended upon a factual issue raised in the defence being resolved *against* the defendant who raised it. However, I can see no reason in principle why the ability of the claimant to bring a claim arising from a matter put in issue by the defence

should depend on the way in which that issue may be resolved. In the present case, the judge was undoubtedly right, for the reasons that he gave. Indeed, it would be invidious if a defendant, having deliberately put in issue the compliance of the building design with the Regulations in force at the time of construction, could escape the consequences of an adverse finding on that issue by using limitation as a shield against a claim relying upon the non-compliance.