Case No: HT-2019-000107

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2020] EWHC 3404 (TCC)

Rolls Building
Fetter Lane, London, EC4Y 1NL

Date: 11/12/2020

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

SAINSBURY'S SUPERMARKETS LIMITED **Claimant**

- and -

RYAN JAYBERG LIMITED **Defendant**

- -
- -

Geraint Webb QC and George Mallet (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Duncan McCall QC and Matthew Thorne (instructed by **Beale & Co LLP**) for the **Defendant**

Hearing date: 25th September 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties; representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 11th December 2020 at 10:30am"

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. There are two matters before the Court:

    i) an application by the Claimant ("SSL") to amend its Particulars of Claim, which is opposed by the Defendant ("RJL"); and

    ii) an application by RJL to strike out parts of the Reply and Response to the Request for Further Information on the basis that certain new allegations by SSL have no real prospect of success and are sought to be added outside the limitation period.

Background

2. SSL is a retailer operating primarily in the supermarket sector. RJL carries on business as a provider of refrigeration, ventilation and air conditioning products.

3. In about 2009 SSL invited its existing refrigeration contractors, RJL and Space Engineering Services ("Space"), to put forward proposals for natural refrigeration systems in its stores to reduce its environmental impact. SSL engaged RJL to install the system under consideration at three trial sites and engaged Space to install the system at another trial site.

4. In May/June 2010 RJL and Space submitted successful tenders to provide refrigeration systems at various SSL stores in the UK.

5. On 23 June 2011 SSL and RJL entered into a Framework Agreement for the supply of goods and services in respect of the refrigeration systems.

6. The refrigeration systems supplied by RJL use carbon dioxide as a natural refrigerant and require external heat rejection cooler devices ("the CO_2 Units") to cool the refrigerant. The CO_2 Units are generally located externally on a store's roof or within its service yard. Fans drive ambient air over a coil as the refrigerant is passed along the tubes, resulting in the refrigerant being cooled and condensed to the required temperature. The condensed liquid refrigerant is circulated under high pressure through the store's refrigeration system and evaporated to cool the produce in the cabinets.

7. RJL procured from SCM Frigo SpA ("SCM") the compressors, control system and the CO_2 Units for the refrigeration systems ("the CO_2 Packs"). SCM procured the CO_2 Units from specialist manufacturers, Lu-Ve and Eco-Luvata.

8. SSL's case is that between 2010 and 2014 RJL designed, selected, supplied and/or installed new carbon dioxide refrigeration systems at 78 or 79 of its supermarket stores.

9. From about 2014 it was discovered that the CO_2 Units had suffered corrosion and a number of units were replaced.

10. SSL alleges that premature corrosion of the CO_2 Units was caused by RJL's breach of contract and/or negligence in respect of the advice provided and the design, selection and/or installation of the CO_2 Units. Its case is that the new refrigeration system was

required to comply with SSL's refrigeration specification and the specification addendum, which stipulated that the system should have a minimum life of 15 years; alternatively, good industry practice required a service life for the plant of 15-20 years.

11. RJL's case is that it was not engaged to design or advise on selection of the appropriate CO_2 Units. It was engaged variously to supply the refrigeration equipment to some stores, supply and install the equipment in other stores, and install only the equipment in further stores. RJL disputes that the CO_2 Units were required to achieve a 15 year minimum service life. Its position is that the Specifications did not contain such a requirement and none should be implied. The CO_2 refrigeration system was new technology and therefore no minimum service life could be guaranteed. Further, its case is that the corrosion has been caused by cleaning and maintenance failures on the part of SSL in respect of the CO_2 Units.

Proceedings

12. On 28 March 2019 SSL commenced these proceedings, seeking damages against Space and RJL in the sum of in the sum of £7-8 million.

13. The Particulars of Claim included the following assertions:

> "12. … The CO_2 Units operate at up to 120 bar (gauge) and are, therefore, regulated in accordance with the Pressure Systems Safety Regulations 2000.
>
> …
>
> 16. The relevant specifications and design guides ("the Specifications") were set out within the "Refrigeration" section of SSL Standards and Projects Website ("the Standards Website"). The Specifications were revised and updated from time to time. Each of the Defendants had access to, and did access, the Standards Website at all material times from 2009 and, in particular the following specifications:
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> 16.1. The "Refrigeration Spec – Refrigeration Equipment" ("the Refrigeration Specification") …
>
> 16.2. The "Refrigeration Spec – Refrigeration Design Guide" ("the Design Guide") …
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> 16.3. In about 2010, following the refurbishment of the "initial stores" … the Claimant, in consultation with each of the Defendants, produced additional specifications specific to the CO_2 system, namely:
>
> 16.3.1. The "Refrigeration Spec – Carbon Dioxide Refrigeration Installation Specification –

Addendum" ("the CO_2 Refrigeration Installation Specification") …

16.3.2. The "Refrigeration Spec – Carbon Dioxide Refrigeration Plant Specification – Addendum" ("the CO_2 Plant Specification")."

14. At paragraph 17.1 of the Particulars of Claim, SSL pleaded that the Specifications included a requirement that the plant should have a minimum life of 15 years:

> "…the said Refrigeration Specification included, *inter alia*, the requirement that: "The plant and equipment supplier [the Defendants] must state the expected useful lifetime of any item supplied. SSL expect a minimum lifetime of 15 years for major items of plant such as compressor pack/condensers" ("the 15-Year Minimum Lifetime Requirement"). The CO_2 Units constituted "major items of plant" within the meaning of the Refrigeration Specification and were therefore subject to the 15-Year Minimum Lifetime Requirement. The Refrigeration Specification stipulated where requirements were to apply to HFC only. All other requirements were required to apply to all refrigeration systems (including CO_2)."

15. SSL alleged breach of contract and/or negligence against RJL in respect of its advice and design in respect of the refrigeration system, and its selection, supply and installation of the CO_2 Units, in that the units failed to meet the 15 year minimum life requirement, were of inadequate quality and durability, and were unfit for purpose:

> "45. … each of the Defendants was in breach of the express and/or implied terms of the relevant contract in relation to the design, selection, supply and/or installation of the CO_2 Units …
>
> 46. Further or alternatively, each of the Defendants acted in breach of their contractual and/or common law duties in respect of the advice which they provided in relation to the design of the CO_2 system and in relation to the CO_2 Units and in relation to their design of that system and their selection, and supply of the CO_2 Units.
>
> 47.1. The Defendants failed to exercise reasonable care and skill in relation to the advice provided in respect of the design of the CO_2 system and/or in relation to the selection of the said CO_2 Units in failing to ensure that the CO_2 Units would meet the requirements of the Claimant and the Specifications. Without prejudice to the generality of the foregoing, the CO_2 Units as designed, selected, supplied and installed were prone to premature corrosion.

47.2. The CO_2 Units selected, supplied and installed by the Defendants do not comply with the 15-Year Minimum Lifetime Requirement, contrary to the requirements in the Specifications …

47.3. The CO_2 Units designed, selected, supplied and installed by the Defendants were not of satisfactory quality, not of appropriate durability, and/or were not reasonably fit for purpose in that they suffered from premature corrosion as aforesaid.

47.4. Without prejudice to the generality of the foregoing, the CO_2 Units selected supplied and installed were prone to and at risk of premature corrosion because of the failure of the Defendants …"

16. On 10 June 2019 RJL served its Defence, alleging that the claim was misconceived:

"1.1. … The Second Defendant was not engaged to design or advise on appropriate units and it did not do so. Rather, the Second Defendant was simply engaged to supply units nominated by the Claimant. It did so.

1.2. The alleged 15 year service life requirement, which is fundamental to the claim, is said by the Claimant to arise from a specification document.

1.2.1. That specification was not incorporated into the contracts under which the Second Defendant was engaged.

1.2.2. The specification is, in any event, inapplicable to CO_2 Units including those forming the basis of the claim. Rather, it applies to older-technology HFC refrigeration units used by the Claimant.

1.2.3. In any event, the sentence referred to by the Claimant within the specification is merely to an "expectation" which would not give rise to a contractual obligation even if the specification had been incorporated into the relevant contracts.

1.3. Nor does such an obligation arise outside the express terms on the contracts on which the Claimant relies. The CO_2 Units were new technology, and there was no obligation to achieve any particular service life. The Claimant is now seeking to claim for something to which it was never entitled and reflecting technology which did not exist. "

17. RJL admitted the assertion in paragraph 12 of the Particulars of Claim, namely, that the CO_2 Units were regulated in accordance with the Pressure Systems Safety Regulations 2000 ("the PSSR 2000").

18. The alleged breaches of duty were denied:

> "76. … RJL had no obligation in respect of the design and/or selection of the CO_2 Units, and was obliged only to supply the units specified by SSL…
>
> 77. …SSL has failed properly to particularise the advice alleged to have been given by RJL, and RJL is unable properly to respond. It is in any event denied that RJL was obliged to advise SSL as to the appropriate CO_2 Units or materials…
>
> 78. Paragraph 47 and its sub-paragraphs are insufficiently particularised: SSL has failed to detail what it alleges RJL ought to have done but failed to do, or what RJL did but ought not to have done …"

19. Further, causation was denied; RJL's case is that the corrosion was caused by inadequate maintenance and cleaning for which SSL was responsible.

20. RJL pleaded a limitation defence at paragraph 90:

> "If and to the extent that SSL succeeds in its allegations in respect of design or selection of the CO_2 Units, any such design or selection was completed by, at the latest, May 2010, by which point SSL had defined and/or specified the manufacturers and units to be procured. Accordingly any such claim would be statute-barred by virtue of the Limitation Act 1980."

21. In its Reply dated 31 July 2019, SSL reiterated its primary case that RJL agreed to the Specifications, including the 15 year minimum lifetime requirement. Its secondary case was that if RJL did not, or could not, comply with that requirement, it was in breach of its contractual obligations to supply plant of satisfactory quality and fitness for purpose and/or negligent. Further, SSL pleaded a failure to supply information as to the service life and maintenance requirements of the CO_2 Units as required by the applicable regulations:

> "4. Systems which incorporate equipment operating under pressure pose particular safety risks. Sound engineering practices must therefore be followed in respect of the design and supply of systems incorporating such equipment. Common law and statutory duties of care apply to those who supply such equipment and to those who design, those who assemble and those who install systems incorporating such equipment, including the duties provided for by

the Pressure Systems Safety Regulations 2000 ("PSSR 2000") and/or the Pressure Equipment Regulations 1999 ("PER 1999")…

5. As a designer, and/or as a supplier, and/or as an assembler/installer of the relevant refrigeration systems and, separately, as a supplier and/or installer of the CO_2 Units, RJL owed common law and statutory duties to provide sufficient written information to the Claimant concerning the design, construction, examination, operation and maintenance, including as to the fatigue life, creep life and corrosion allowances, of those systems and their components, including the CO_2 Units. The Claimant will rely on the requirements imposed on RJL pursuant to the PER 1999 and the corresponding guidance and/or pursuant to, *inter alia*, the PSSR 2000 and the corresponding guidance in this regard …"

22. On 27 September 2019 SSL served proposed Amended Particulars of Claim.

23. By letter dated 18 October 2019 RJL indicated that it did not agree to the proposed amendments on the ground that they sought to add a new claim after expiry of the limitation period.

24. On 17 December 2019 RJL served on SSL a Part 18 Request for Further Information.

25. The claim against Space was settled on 12 February 2020.

26. On 28 February 2020 SSL served its response to the RFI, including the following:

"5(d) RJL was required to design and/or select and/or supply and/or install the refrigeration equipment and/or systems in accordance with applicable 'Laws', including product safety laws. The relevant laws included, *inter alia*, the PER 1999 and/or PSSR 2000. RJL expressly admits the application of the PSSR 2000 at paragraph 19 of its Defence. The obligations contained therein necessarily meant that RJL's obligations under the 2011 RJ Framework Agreement extended to ensuring compliance with the relevant regulatory requirements imposed by the PER 1999 and/or PSSR 2000; those regulatory requirements required RJL to provide information and/or advice to SSL at all material times in relation, amongst other things, to the minimum service life of the CO_2 Units…"

The application

27. On 2 June 2020 SSL issued its application, seeking permission to amend its Particulars of Claim as set out in a draft pleading pursuant to CPR 17.1 and/or 17.4.

28. On 21 August 2020 the Defendant issued its application, seeking an order that parts of the Reply and parts of the Further Information be struck out pursuant to CPR 3.4(2)(a).

29. The parties have helpfully colour-coded the proposed amendments into the following categories:

    i) Red amendments – not opposed;

    ii) Purple amendments – allegations in respect of the PER 1999 and PSSR 2000 (collectively, "the Pressure Regulations"), which are opposed on the grounds that they have no real prospect of success and seek to introduce a new claim that does not arise out of the same, or substantially the same, facts and matters already pleaded, outside the limitation period;

    iii) Blue amendments – opposed on the grounds that they have no reasonable prospects of success or are inadequately particularised and they raise new claims outside the limitation period;

    iv) Green amendments – deletions of allegations against Space, which are opposed on the grounds that they are relevant to the remaining allegations against RJL.

The applicable tests

30. Once a statement of case has been served, a party may amend it only with the consent of the other party or with permission of the court: CPR 17.1.

31. CPR 17.3 provides that the court has a general discretion to allow an amendment to a statement of case, subject to CPR 17.4 (amendments of statement of case after the end of a relevant limitation period).

32. On an application by a party to amend its pleading, where there is no issue of lateness or adverse impact on the trial date, the principles can be summarised as follows (see the White Book notes at paragraphs 17.3.5 and 17.3.6):

    i) When deciding whether to grant permission to amend, the court must exercise its discretion having regard to the overriding objective.

    ii) Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.

    iii) Although the court will have regard to the desirability of determining the real dispute between the parties, it must also deal with the case justly and at proportionate cost, which includes (amongst other things) saving expense, ensuring that the case is dealt with expeditiously and fairly, and allocating to it no more than a fair share of the court's limited resources.

iv) An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91. A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472. In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*.

33. If a party wishes to amend so as to withdraw an admission, it must obtain permission of the Court under CPR 14.1(5). In exercising its discretion to allow the withdrawal of an admission, the Court will consider all the circumstances of the case and seek to give effect to the overriding objective, including the balance of prejudice to the parties.

34. CPR 17.4 states:

> "(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…"

35. Section 35(2) of the Limitation Act 1980 provides that a new claim includes any claim involving the addition or substitution of a new cause of action.

36. In this case, SSL accepts that in some cases limitation will have expired in respect of any new claims in contract. SSL does not accept that limitation will have expired in respect of many of the claims in negligence. Further, it relies on 12 year collateral warranties in respect of a number of stores, although RJL's position is that the warranties are limited to the installation works and would not extend to allegations based on design, selection or advice.

37. The pleaded case is that the advice, design and/or selection services were provided in 2009-2010, the Framework Agreement was entered into in 2011, the supply and installation works were carried out between 2009 and 2014, and the first corrosion was observed in 2014. SSL has pleaded its case by reference to sample stores, for reasons of proportionality. That approach does not permit an analysis of the limitation issues in respect of each claim pertaining to the equipment installed at each store. On the basis of the pleaded facts, RJL has a reasonably arguable case that the limitation period has expired in respect of parts of the claim, particularly regarding any advice

or design provided prior to the Framework Agreement. Therefore, SSL must bring itself within CPR 17.4(2) in respect of any amendment to add a new claim.

38. In *Co-operative Group Limited v Birse Developments Limited* [2013] EWCA Civ 474, the claimant originally pleaded against the defendants various defects in the concrete floor slabs of two warehouses, requiring localised remedial works. The Court of Appeal held that a proposed amendment to allege a new defect requiring wholesale replacement of the slabs amounted to a new claim that did not arise out of the same, or substantially the same, facts and matters. In the course of his judgment, Tomlinson LJ provided the following guidance as to what amounts to a new cause of action:

> "[19] A cause of action is, as Diplock LJ famously observed in *Letang v Cooper* [1965] 1 QB 232 at 242/3, "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". Longmore LJ in *Berezovsky v Abramovich* [2011]1 WLR 2290 at 2309 expressed the concept in essentially the same way: "A cause of action is that combination of facts which gives rise to a legal right."
>
> [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.
>
> [22] … 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 paragraph 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."

39. In *Mastercard Inc. v Deutsche Bahn AG* [2017] EWCA 272 the Court of Appeal emphasised that section 35 of the Limitation Act 1980 and CPR 17.4(2) impose a legal threshold before any application to amend outside the limitation period becomes a matter of discretion for the court - per Sales LJ:

> "[35] It is clear from the structure of CPR Pt 17.4(2) that the court only has a discretion to allow an amendment ("may allow …") to introduce a new claim (i.e. cause of action) into an existing claim where a limitation period defence will be circumvented by operation of the "relation back" rule when a prior condition has been satisfied, namely that the new claim arises out of the same or substantially the same facts as the already existing claim. Although it is sometimes said that this is substantially a matter of impression (see *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 1 W.L.R. 1409, at 1418 per Glidewell LJ), it was emphasised by Millett LJ in *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400, CA, at 418, that while in borderline cases this may be so, "In others it must be a question of analysis" (and see *Ballinger v Mercer Ltd* at [36], set out below). It is clear from Pt 17.4(2) itself that the condition must be satisfied before permission to amend can be granted in a case to which it applies. In some cases, that may involve an evaluative judgment by the court in which it is possible to say that there is more than one answer which could rationally be given on the point, and in relation to which it could not be said of any of those answers on appeal that it is "wrong" such that an appeal should be allowed (CPR Part 52.21(3)(a)). In other cases, the issue may be more clear-cut and admit of a single answer which is right, so that if a different answer is given by a judge it can readily be seen on appeal to be wrong. In both sorts of case it is, strictly, a matter of analysis whether the judge has made the proper or an acceptable evaluation on the question whether the condition has been satisfied.
>
> [36] This is a substantive question of law, and an important one. Parliament has decided that valuable limitation defences

> which it has introduced for the benefit of defendants should only be circumvented by operation of the "relation back" rule where the precondition has been satisfied. This is not a matter of discretion for a judge."

40. In *Akers v Samba* [2019] EWCA Civ 416, McCombe LJ provided the following guidance as to the application of the legal threshold:

> "[40] It is to be noted that in the *Ballinger* case Tomlinson LJ said the words "the same or substantially the same" are not synonymous with "similar": Loc. Cit. p. 3611, paragraph 37. He also quoted with approval Colman J's identification of the purpose of the test laid down in s.35(5) of the Act, i.e. that a defendant is not to be put in the position of having 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".
>
> Both matters clearly have their validity, but the emphasis upon whether facts are the "same" or only "similar" and what is beyond the ambit of the original claim may well need careful analysis.
>
> [50] … Broadly similar allegations, implicitly made or understood will not do… "

41. CPR 3.4(2) provides that:

> "The court may strike out a statement of case if it appears to the court:
>
> …
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim …"

42. It is common ground that the test on an application to strike out is whether the court is certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out.

The Pressure Regulations ("purple") amendments

43. The purple amendments include the following relevant allegations:

> "12A. … the CO_2 Units were classified as "piping" pursuant to regulation 7(2)(c)(i)(bb) of Pressure Equipment Regulations 1999 ("PER 1999") and the Second Defendant was required, in respect of the supply and/or installation of the CO_2 Units and/or the

assemblies and/or systems into which they were incorporated, to comply, *inter alia*, with regulations 7 (as an authorised representative of the manufacturer of the CO_2 Pack and/or Units), and/or 8 (as a manufacturer of the relevant CO_2 system assemblies) and/or 10 (as a supplier of such equipment and/or assemblies) of the PER 1999 and/or as a matter of good industry practice should have ensured compliance with the said provisions.

12B. Further or alternatively, as the designer and/or manufacturer and/or supplier of the pressure system and/or assembly into which the CO_2 Units were incorporated, the Second Defendant was required to comply with, and/or as a matter of good industry practice should have complied with, regulation 4 and/or 5 of the PSSR 2000 and the approved Code of Practice.

…

33A. As the designers and/or assemblers and/or suppliers of the relevant CO_2 refrigeration systems and of the CO_2 Units, the Second Defendant was under a statutory duty pursuant to the PER 1999 and/or PSSR 2000 to provide information to the Claimant in writing as to the design, construction, examination, operation and maintenance of the relevant CO_2 refrigeration systems and of the CO_2 Units, including as to the minimum service life of the CO_2 Units, or in the words of the DTI Guidance issued in respect of the PER 1999, as to the "intended life" of the CO_2 Units… At all material times, the Second Defendant was under an express contractual duty … to ensure that the refrigeration systems, including the CO_2 Units, which it designed and/or supplied and/or installed complied with all relevant laws, including the PER 1999 and/or the PSSR 2000, alternatively such compliance was an implied term of the relevant contacts …

…

46A. Further or alternatively, if and insofar as the Second Defendant contends by its Defence that (i) the Refrigeration Specification and/or the 15-Year Minimum Lifetime Requirement for the CO_2 Units was not incorporated into the relevant contracts and/or was not agreed by the parties and/or was not applicable to the CO_2 Units and/or that (ii) there was no minimum service life stipulated by the Claimant and/or accepted by the Second Defendant in respect of the CO_2 Units

and/or (iii) that the service life of the CO_2 Units was not (and/or could not be) reliably stated by the Second Defendant, then the Claimant will contend that the Second Defendant was in breach of its common law duties of care and/or contractual duties (including the contractual duty to ensure that the CO_2 Units and related refrigeration systems conformed to all applicable legal requirements, including the PER 1999 and/or the PSSR 2000) to provide adequate and appropriate information to the Claimant in respect of the minimum service life of the CO_2 Units… The Claimant will rely upon such breaches of statutory duty under the PER 1999 and/or the PSSR 2000 as may be proved as evidence of negligence on the part of the Second Defendant and/or as evidence of breach of the Second Defendant's contractual duty …

46B. Further or alternatively, if and insofar as the Second Defendant contends by its Defence that the corrosion of the CO_2 Units was caused and/or contributed to (i) by any failure on the part of the Claimant to maintain or clean the CO_2 Units appropriately and/or (ii) by any change to the control settings, then the Claimant will rely on the Second Defendant's breaches of its common law duties of care and/or contractual duties to provide adequate and appropriate information to the Claimant in respect of the CO_2 Units and the CO_2 systems into which they were incorporated, including as to the requisite cleaning and maintenance regimes and/or the control setting parameters outside which the CO_2 Units should not be operated … The Claimant will rely upon such breaches of statutory duty under the PER 1999 and/or the PSSR 2000 as may be proved as evidence of negligence on the part of the Second Defendant and/or as evidence of breach of the Second Defendant's contractual duty …"

44. At paragraph 47.1A, the proposed amended allegations include breach of the Pressure Regulations:

"47.1A.1 The Second Defendant was in breach of Regulations 7 and/or 8, and/or 10 and Schedule 2 of the PER 1999 (including, but not limited to, the requirement that: (i) "pressure equipment must be designed, manufactured and checked, and if applicable equipped and installed, in such a way as to ensure its safety when put into service in accordance with manufacturer's instructions, or in reasonably foreseeable conditions" as required by paragraph 1.1 of Schedule 2(ii) "the pressure equipment must be

properly designed taking all relevant factors into account in order to ensure that the equipment will be safe throughout its intended life" as required by paragraph 2.1 of Schedule 2 and /or (iii) that "the pressure equipment must be designed for loadings appropriate to its intended use and other reasonably foreseeable operating conditions" including "corrosion, erosion, fatigue etc" as required by paragraph 2.2.1 of Schedule 2 and/or (iv) that, "in particular … the design must take appropriate account of all possible combinations of temperature and pressure which might arise under reasonably foreseeable operating conditions …" as provided by paragraph 2.2.3(b) of Schedule 2 and/or (v) that "adequate allowance or protection against corrosion or other chemical attack must be provided, taking due account of the intended and reasonably foreseeable use" as provided by paragraph 2.6 of Schedule 2) and/or the requirements of good industry, for the reasons set out in paragraph 47.1 above and/or 47.1A.2 below.

47.1A.2 Further, or alternatively, the Second Defendant was in breach of Regulation 4 and/or 5(1)(a) of the PSSR 2000 and the corresponding Approved Code of Practice and/or the requirements of good industry practice in failing to have any or any adequate regard to the need to ensure that the CO_2 Units, once incorporated as part of the relevant systems or assemblies, would safely achieve a minimum service life of 15 years (or any stated minimum service life) and/or that appropriate instructions and information were provided to the Claimant as to maintenance and/or cleaning and/or control settings so as to ensure that, properly operated, the CO_2 Units would achieve such a minimum service life (or any stated minimum service life) safely.

47.1A.3 The aforesaid breaches of statutory duty are relied upon as evidence of negligence (that is, breach of the contractual and common law duty of care) and as evidence of breach of the said contractual duties to comply with the relevant regulatory requirements and/or the requirements of good industry practice. Paragraphs 47.1 above and 47.2 to 47.5 below are relied upon. The provision of adequate protection against corrosion could have been achieved, and should have been achieved, by the types of measures, or a combination of the measures, identified in paragraph 41B above."

45. At paragraph 47.4.6, there is a proposed addition to the alleged failure of RJL to instruct and/or direct SSL in relation to any cleaning requirements for the CO2 Units to include breaches of the Pressure Regulations.

46. At paragraph 47.5, there is a further allegation of breach of the Pressure Regulations in respect of any failure to agree or inform as to the 15 year or other minimum service life.

47. At paragraph 48A, the proposed amendment is as follows:

> "Had the Second Defendant discharged its duties in this regard and informed the Claimant that the CO_2 Units could not be stated to have a 15 year minimum service life and/or could not be stated to have any particular minimum service life then the Claimant would not have agreed to the system design and would not have purchased the CO_2 Units…"

48. The issues for the Court in respect of the purple amendments are:

    i) whether the proposed amendments have a realistic, as opposed to a fanciful, prospect of success;

    ii) whether they constitute new claims within the meaning of CPR 17.4(2) and section 35 of the Limitation Act 1980;

    iii) if new claims, whether they arise out of the same, or substantially the same, facts and matters already pleaded;

    iv) whether the Court should exercise discretion to allow the amendments.

Whether the purple amendments have a real prospect of success

49. Mr Webb QC, leading counsel for SSL, submits that the proposed amendments have a real prospect of success. The CO_2 Units are heat exchangers and categorised as piping for the purposes of regulation 2 of the PER 1999. RJL was the "responsible person" under the PER 1999, as the manufacturer, or authorised representative of the manufacturer, of the CO_2 Units or the CO_2 Packs ("the assembly"). Regulations 7 and/or 8 and Schedule 2 to the PER 1999 placed obligations on RJL to ensure that the CO_2 Units and/or Packs were safe throughout their intended life, including an obligation to ensure an appropriate design against corrosion, erosion and fatigue. Regulation 10 of the PER 1999 imposed a prohibition on a person who was not a "responsible person" from supplying any pressure equipment or assembly unless that pressure equipment or assembly was safe.

50. SSL relies on the fact that the CO_2 packs supplied, including the CO_2 Units, were CE marked by the pack manufacturers, SCM, in accordance with the requirement of the PER 1999. The refrigeration systems, incorporating the CO_2 Packs, were CE marked by RJL, as the manufacturer of those systems or assemblies. On the basis of that evidence, Mr Webb submits that RJL held itself out as an authorised representative of SCM, and, in any event, was a supplier of the CO_2 Packs, including the CO_2 Units.

51. Mr Webb submits that the PSSR 2000 impose duties and obligations on suppliers as well as designers, manufacturers and importers of pressure equipment systems. Regulations 4 and/or 5 of the PSSR 2000, together with the approved Code of Practice, placed obligations on RJL, as the "supplier" of the equipment, to provide sufficient written information concerning its design, construction, examination, operation and maintenance as may reasonably foreseeably be needed to enable compliance with the provisions of the PSSR 2000. The Approved Code of Practice required RJL to provide SSL with information regarding the operation and maintenance of the equipment.

52. On that basis, he submits that there is a realistic prospect of succeeding on the amended case that if the CO_2 Units did not, or could not, meet the 15 year minimum life requirement, RJL was in breach of the PER 1999 and/or the PSSR 2000 and, thereby, in breach of contract and/or negligent.

53. Mr McCall QC, leading counsel for RJL, submits that SSL is unable to show that its proposed amendments have a real prospect of success. Regulation 2 of the PER 1999 defines a "responsible person" as:

> "(a) the manufacturer or his authorised representative established within the Community; or
>
> (b) where neither the manufacturer nor his authorised representative is established within the Community, the person who places the pressure equipment or assembly on the market or put it into service as the case may be."

He submits that RJL was not the manufacturer of the CO_2 Units; they were manufactured by Lu-Ve or Eco-Luvata, companies based in Italy. RJL was not the manufacturer of the assembly; the CO_2 Packs were supplied by SCM. RJL was not the authorised representative of SCM. RJL did not place the CO_2 Units or Packs on the market. Therefore, SSL has no real prospect of establishing that regulations 7 or 8 applied to RJL.

54. Mr McCall accepts that regulation 10 of the PER 1999 would in those circumstances apply to RJL but submits that the obligation under regulation 10 was limited to an obligation to ensure that the equipment was safe. Schedule 2 did not extend to an obligation to state the minimum service life of the equipment.

55. RJL admits that the PSSR 2000 applied to the CO_2 Units. However, regulations 4 and 5 of the PSSR 2000 do not apply where regulations 7, 8 or 10 of the PER 1999 apply. Regulation 7 of the PER 1999 applied to the manufacturers of the CO_2 Units, Lu-Ve and Eco-Luvata. Therefore, regulations 4 and 5 of the PSSR 2000 did not apply to RJL.

56. Mr McCall's wider submission is that, even if the PER 1999 and/or the PSSR 2000 applied, on a plain and natural reading of the regulations, they did not impose any obligation to state a minimum service life; in any event, any such obligation could not arise pre-contract and therefore it would have no causative effect. On that basis, he submits that the new claims have no real prospect of success.

57. The starting point is consideration of the pleaded case that the Pressure Regulations applied to RJL in respect of its contractual performance. In my judgment, there is a real prospect of success on this issue for the following reasons.

58. Firstly, it is common ground that the PSSR 2000 applied to the CO_2 Units based on the original pleading at paragraph 12 of the Particulars of Claim and the admission at paragraph 19 of the Defence. The nature and extent of the obligations, if any, imposed on RJL by the PER 1999 or the PSSR 2000 will be a matter of legal submission, factual evidence and expert evidence.

59. Secondly, it is common ground that the contractual relationship between SSL and RJL was not straightforward and changed over time. The terms of the contract are in dispute and, on RJL's case, the nature and extent of its required contractual performance varied between different stores.

60. Thirdly, the relationship between RJL and SCM is not clear on the evidence before the Court. There is a dispute between the parties as to whether there was a partnership or other arrangement between RJL and SCM that would bring RJL within the definition of "authorised representative" for the purpose of the Pressure Regulations.

61. It is not appropriate to carry out a mini trial of these issues on the limited evidence currently before the Court. For those reasons, SSL satisfies the Court that there is a real prospect of success in establishing the applicability of the Pressure Regulations as set out in paragraphs 12A and 12B of the proposed amended Particulars of Claim.

62. I turn then to consider whether the allegations of breach and causation have a real prospect of success. Although the allegations have been drafted at some length in various parts of the pleading, they can be divided into two categories:

    i) RJL failed to provide adequate and appropriate information in respect of the minimum service life of the CO_2 Units;

    ii) RJL failed to provide adequate and appropriate information as to the required cleaning and maintenance regimes and/or the control setting parameters outside which the CO_2 Units should not be operated.

63. Regulation 7(1) of the PER 1999 provides that:

> "… no person who is a responsible person shall place on the market or put into service any pressure equipment … unless the requirements of paragraph (3) have been complied with in relation to it. "

64. The requirements of paragraph (3) are:

> "(a) it satisfies the relevant essential requirements [Schedule 2];
>
> (b) the appropriate conformity assessment procedure in respect of the pressure equipment has been carried out …;

(c) the CE marking has been affixed …;

(d) a declaration of conformity has been drawn up …; and

(e) it is in fact safe. "

65. Regulation 8(1) provides that similar requirements apply to a responsible person who places on the market or puts into service an assembly.

66. Regulation 10 prohibits a person who is not a responsible person from supplying any pressure equipment or assembly unless that pressure equipment or assembly is safe.

67. The essential safety requirements in Schedule 3 include:

> "1.1 Pressure equipment must be designed, manufactured and checked, and if applicable equipped and installed, in such a way as to ensure its safety when put into service in accordance with the manufacturer's instructions …
>
> 2.1 The pressure equipment must be properly designed taking all relevant factors into account in order to ensure that the equipment will be safe throughout its intended life…
>
> 2.2.1 The pressure equipment must be designed for loadings appropriate to its intended use and other reasonably foreseeable operating conditions. In particular, the following factors must be taken into account … corrosion and erosion, fatigue, etc …
>
> 2.6 Where necessary, adequate allowance or protection against corrosion or other chemical attack must be provided, taking due account of the intended and reasonably foreseeable use."

68. The PER 1999 are concerned with ensuring the safety of pressure equipment through its design, manufacture, checking, supply and installation. They impose obligations on those to whom they apply to provide records of those processes and certification that the safety requirements have been met. They do not impose obligations to provide information or advice as to the design life of the equipment. It is arguable that the obligations regarding protection against corrosion could extend to the provision of information, advice or instructions.

69. Regulation 4 of the PSSR 2000 provides that:

> "Any person who designs, manufactures, imports or supplies any pressure system or any article which is intended to be a component part of any pressure system shall ensure that paragraphs (2) to (5) are complied with."

70. Paragraphs (2) to (5) impose obligations to design and construct the pressure system or article so as to prevent danger.

71. Regulation 5(1) provides:

> "Any person who –
>
> (a) designs for another any pressure system or any article which is intended to be a component part thereof; or
>
> (b) supplies … any pressure system or any such article,
>
> shall provide sufficient written information concerning its design, construction, examination, operation and maintenance as may reasonably foreseeably be needed to enable the provisions of these Regulations to be complied with."

72. The PSSR 2000 are concerned with avoiding or managing the risks to safety caused by failure of a pressure system. They impose obligations on the relevant person to provide written information, including information as to the operation and maintenance of the pressure system. They do not include information as to the minimum design life.

73. In my judgment, the allegation that RJL failed to provide adequate and appropriate information in respect of the minimum service life of the CO_2 Units does not have any real prospect of success.

74. Firstly, the general references to the Pressure Regulations do not identify the specific obligation on which SSL wishes to rely and it has failed to provide any explanation or argument that would make such an obligation implicit in the regulations.

75. Secondly, SSL has pleaded a bare assertion that RJL was obliged to provide information as to the minimum service life of the CO_2 Units but it has not set out the circumstances in which, or when, such obligation arose so that RJL may understand the case it has to meet.

76. Thirdly, SSL has pleaded that if RJL had informed it that there was no, or not the required, minimum service life, it would not have purchased the CO_2 Units. However, as submitted by Mr McCall, the Pressure Regulations would not apply to RJL before it entered into any agreement with SSL to procure the refrigeration systems, including the CO_2 Units.

77. SSL has shown a real prospect of success in respect of the allegation that RJL failed to provide adequate and appropriate information as to the required cleaning and maintenance regimes and/or the control setting parameters outside which the CO_2 Units should not be operated. Without making any finding on this issue, it is arguable that the Pressure Regulations required RJL to address the issues of operation and maintenance as alleged.

78. For those reasons, the case pleaded in paragraphs 33A, 36, 46A, 47.1A.1, 47.1A.2, 47.1A.3, 47.5 and 48A has no real prospect of success; the case pleaded in 46B and 47.4.6 does have a real prospect of success.

Whether the purple amendments raise a new claim

79. Mr Webb submits that the proposed amendments do not constitute a new claim within the meaning of CPR 17.4(2) and section 35 of the Limitation Act 1980; they provide further particulars of the existing claims for breach of RJL's contractual and tortious duties. The Pressure Regulations points arise directly from the matters which RJL have elected to put in issue by its pleaded denial of the 15 year minimum lifetime requirement and its positive case regarding SSL's responsibility for cleaning and maintenance.

80. Mr McCall submits that the proposed amendments amount to a new claim. The case originally pleaded by SSL was that RJL contracted to supply CO_2 Units in accordance with a specification which contained an alleged 15 year minimum lifetime requirement, the units corroded prematurely in breach of that requirement and SSL is entitled to damages reflecting the cost of repair and replacement. The effect of the purple amendments is to plead an alternative case, namely, that RJL was subject to statutory obligations to supply information as to the minimum lifespan of the equipment pursuant to the PER 1999 and/or PSSR 2000; if, contrary to its original case, there was no contractual 15 year minimum lifetime requirement then RJL failed to supply information in accordance with those regulations; if RJL had fulfilled such duties then SSL would not have gone ahead with the purchase. The new case, Mr McCall submits, is therefore precisely the opposite of the case originally pleaded.

81. In my judgment, with one exception, the claim set out in the purple amendments is a different claim to the original pleaded case.

82. The essential factual allegations of the original claim were as follows:

    i) RJL contracted to design, supply and install the CO_2 Units in accordance with the specification requirements that they should be of satisfactory quality and durability, have a minimum life of 15 years and be fit for purpose.

    ii) RJL was in breach of contract and/or negligent in that the CO_2 Units suffered premature corrosion and failed to satisfy the 15 year minimum lifetime requirement.

    iii) SSL is entitled to damages assessed as the costs of replacement of the CO_2 Units.

83. The essential factual allegations of the claim set out in the purple amendments are as follows:

    i) RJL owed a statutory duty to provide information and advice to SSL as to the design, construction, examination, operation and maintenance of the CO_2 Units pursuant to the Pressure Regulations.

    ii) RJL was in breach of its statutory duty under the Pressure Regulations to provide adequate and appropriate information to SSL in respect of: (a) the minimum service life of the CO_2 Units; and (b) the required cleaning, maintenance and operational control of the CO_2 Units, such that it was in breach of contract and/or negligent.

iii) If properly advised by RJL in accordance with its statutory duties, SSL would not have purchased the CO_2 Units.

iv) SSL is entitled to damages assessed as the costs of replacement of the CO_2 Units.

84. The amendments seek to introduce a new cause of action based on breach of statutory duty, a duty that differs from the original pleading. An attempt has been made by SSL to plead the new statutory duty as giving rise to the contractual and common law duties already pleaded but it does not detract from the fact that the duty alleged is new.

85. SSL points to paragraph 12 of the original pleading which asserted that the CO_2 Units were regulated in accordance with the PSSR 2000. That assertion was admitted by RJL in its defence. However, it did not assert any contractual, statutory or common law obligation based on the PSSR 2000 and there was no allegation of breach of the same.

86. The new allegations of breach are different in kind to the original allegations of breach. The original pleading alleged that RJL failed to design, supply and install CO_2 Units with a 15 year minimum service life. The new pleading alleges that RJL failed to advise or inform SSL that the CO_2 Units did not have a 15 year minimum service life.

87. The new allegations were raised in the Reply but SSL is not entitled to rely on its Reply to bring in a new claim and circumvent the rules on amendment outside the limitation period.

88. The position is different in respect of the case regarding operation and maintenance. At paragraph 47.4 of the original pleading, SSL alleged that the CO_2 Units were prone to and at risk of premature corrosion because of a number of failures on the part of RJL. Those failures included measures to protect against corrosion and instruction as to cleaning requirements. The proposed amendments in this regard, can properly be described as further particulars of the pleaded allegations in response to the defence raised by RJL that SSL was responsible for premature corrosion of the units through inadequate maintenance.

Same, or substantially same, facts and matters

89. Mr Webb submits that if the proposed amendments raise a new claim within the meaning of CPR17.4(2) and section 35 of the Limitation Act, they arise out of the same or substantially the same factual issues already pleaded. He submits that the proposed amendments do not plead any new facts. They would not expand impermissibly the ambit of the relevant investigations, disclosure or evidence. All of the facts and matters now forming part of the proposed amendments were raised in the original Particulars of Claim and/or the Reply (in response to issues raised in the Defence) and all those facts are already in issue in the case.

90. Mr McCall submits that the proposed amendments rely on facts and matters that did not form part of the original claim, namely:

i) whether the Pressure Regulations applied to RJL;

ii) whether RJL was obliged to provide information to SSL as to the intended service life of the relevant goods and, if so, whether it was in breach of such obligation;

iii) what SSL would have done if it had been informed that the CO_2 Units did not have a 15 year minimum service life (or any stated minimum service life);

iv) whether RJL was obliged to provide information to SSL as to the required maintenance, cleaning or control settings for the CO_2 Units and, if so, whether it was in breach of such obligation.

91. The facts and matters relied on in support of SSL's case that the Pressure Regulations imposed obligations on RJL as a matter of principle are the same, or substantially the same, as the original claim. There is already a dispute between the parties on the face of the pleadings as to whether RJL provided any advice or design services in the selection of the CO_2 Units, whether it acted in partnership with SCM, the nature and extent of the goods and services provided, and the contractual terms applicable to RJL's performance. These are matters that could reasonably be assumed to require investigation for the purpose of defending the original claim. The only change to the scope of the investigation would be the application of the Pressure Regulations to the contractual matrix.

92. The facts and matters relied on in support of SSL's case that RJL was obliged to provide information to SSL as to the intended service life of the relevant goods and, if so, whether it was in breach of such obligation, are new and outside the ambit of the investigation required on the original pleading; likewise, what SSL would have done if it had been informed that the CO_2 Units did not have a 15 year minimum service life (or any stated minimum service life). The original pleading on duty and breach is limited to evidence as to the condition of the CO_2 Units – whether the units selected and supplied were of adequate quality and durability, met the 15 year service requirement and were fit for purpose. The proposed amendments would extend the inquiry to consider advice that should have been given as to the service life of the units and SSL's decision to enter into the Framework Agreement.

93. The allegations relating to RJL's obligation to provide information as to the required maintenance, cleaning or control settings for the CO_2 Units arise out of the facts and matters already pleaded. The original pleading includes at paragraph 47.4 allegations that RJL failed to ensure that the control systems maintained the required gas exit and ambient temperatures to avoid corrosion; further, that RJL failed to instruct and/or direct SSL in relation to any cleaning requirements for the CO_2 units. The Defence expressly raises at paragraph 72:

> "the cause of the corrosion is Sainsbury's own inadequate cleaning and maintenance and/or operation using inappropriate control settings."

Therefore, these factual issues are in any event going to be litigated between the parties. In those circumstances, SSL should be able to rely upon the additional allegations which substantially arise from those facts.

94. In conclusion on the purple amendments:

    i) The matters pleaded in paragraphs 12A, 12B, 29, 34.1 (save for the reference to paragraph 33A), 46B and 47.4.6 have a real prospect of success.

    ii) They do not raise new claims and arise out of the same facts and matters already pleaded.

    iii) The proceedings are not at an advanced stage procedurally and no prejudice will be suffered by RJL if the amendments are permitted.

    iv) In those circumstances, the Court exercises its discretion to allow the amendments.

    v) The matters pleaded in paragraphs 33A, 36, 46A, 47.1A.1, 47.1A.2, 47.1A.3, 47.5 and 48A raise new claims and do not arise out of the same facts and matters already pleaded.

    vi) It follows that the Court does not have discretion to allow the amendments.

    vii) In any event, any discretion would be exercised against allowing the amendments on the ground that they do not disclose a case that has a real prospect of success.

The blue amendments

95. RJL objects to a number of further proposed amendments on the grounds that they are insufficiently particularised, raise new claims outside the limitation period that do not arise out of the same, or substantially the same, facts and matters already pleaded, and have no real prospects of success.

96. The original Particulars of Claim plead allegations in respect of RJL's design, supply and installation of the CO_2 Units. By the blue amendments in paragraphs 18, 29 and 47, SSL seeks to expand the scope of the allegations to encompass the CO_2 refrigeration systems (including the CO_2 Units). This raises a new set of allegations that do not arise out of the existing pleaded case; it seeks to expand the ambit of the dispute from one confined to the CO_2 Units to the whole of the refrigeration system. There are no particulars given as to the defects in the system beyond those articulated in respect of the CO_2 Units. There are no details as to the impact, if any, of the new claims on the damages sought. For the reasons set out above, the Court does not have discretion to permit these amendments pursuant to CPR 17.4(2); in any event, if it had discretion, the Court would refuse to allow the amendments.

97. The Specifications and their application to the CO_2 Units, including the 15 year minimum service life, form a central plank of the case against RJL. The original Particulars of Claim pleaded at paragraph 26.1 that a schedule of rates was agreed for the CO_2 Units. SSL has sought to introduce an assertion that the parties agreed that the schedule of rates was to be based on the Specifications. This is simply further particularisation of the existing case. The amendment is permitted.

98. At paragraph 28 SSL seeks to add by way of further quotation from the agreement between the parties a reference to the obligation to comply with all laws relating to

the manufacture of and sale of the goods. As Mr Webb submits, the pleading already refers to another part of the agreement that is in substantially the same terms. This does not add a new claim but completes the references to the contractual document already pleaded. The amendment is permitted.

99. At paragraphs 15, 16.3.2 and 17.3 of the original Particulars of Claim, SSL pleaded the CO_2 Plant Specification as one of the material specifications that was sent to, or accessed by RJL. Failure to comply with the Specifications, including the 15 year minimum service life requirement, has always been part of the case against RJL. At paragraph 31.2, SSL seeks to add a new allegation that RJL advised SSL "as to the content of the CO_2 Plant Specification at all material times". I accept Mr McCall's complaint that this is insufficiently particularised. It is not clear what, if anything, it would add to the case. In any event, it amounts to a new claim that does not arise out of the same facts and matters already pleaded. Therefore, permission to amend is refused.

100. At paragraphs 31A, 31A.1 and 31A.3, SSL seeks to plead alternative bases on which it alleges that the CO_2 Plant Specification was incorporated into the contract(s) between the parties, by addendum, implication or rectification. I accept Mr Webb's submission that the new modes of incorporation are not new claims. They set out the legal analysis as to incorporation of the specification already pleaded. The merits of the pleaded alternatives are heavily dependent on the factual matrix and are matters to be determined at trial. Therefore, permission to amend is granted.

101. At paragraph 41B, SSL seeks to plead that:

> "The Claimant is under no obligation to prove the means by which protection against, or resistance to corrosion could have been achieved by the Second Defendant so as to ensure a minimum 15-year service life for the CO_2 Units."

102. RJL seeks to object to this pleading on the ground that it has no real prospect of success. Mr Webb does not understand the objection; neither does the Court. The matters which do, or do not, have to be proved by SSL to succeed on its existing pleaded case are for determination at trial. The amendment is permitted.

The green amendments

103. The green amendments are proposed deletions by SSL of those parts of its case that it alleged against the first defendant, Space.

104. RJL objects to the proposed deletions on the grounds that the involvement of Space is of relevance to the claim against RJL and they amount to admissions.

105. I reject that submission. The proposed deletions formed part of SSL's positive case against Space. They do not amount to admissions. Space is no longer a party to the claim. SSL no longer needs, or wishes to advance those facts and matters. Permission for those amendments is granted.

Strike out application

106. RJL seeks an order striking out those parts of the Reply and Further Information that contain the matters the subject of any amendments that have been refused. SSL opposes that application on the ground that it is made too late.

107. The Reply was served on 31 July 2019 and the Further Information was served on 28 February 2020. The Court recognises that there has been delay on the part of RJL in making this strike out application but until SSL applied for permission to amend the Particulars of Claim, RJL was entitled to take the position that its new allegations could not be pursued at trial. Therefore, the application would not be dismissed on grounds of delay.

108. In any event, there is a wider case management issue that the Court must consider. The purpose of pleadings is to clarify the issues between the parties so that the evidence and submissions at trial are directed to those issues. It is not good case management to leave in the Reply or Further Information matters that have already been rejected by the Court as part of the case on which SSL may rely.

109. The appropriate course is for SSL to delete from those pleadings the matters for which permission to amend has been refused.

Conclusion

110. For the reasons set out above:

i) Permission is given for the "purple" amendments in paragraphs 12A, 12B, 29, 34.1 (save for the reference to paragraph 33A), 46B and 47.4.6 of the Particulars of Claim.

ii) Permission is refused for the "purple" amendments in paragraphs 33A, 36, 46A, 47.1A.1, 47.1A.2, 47.1A.3, 47.5 and 48A of the Particulars of Claim.

iii) Permission is given for the "blue" amendments in paragraphs 26.1, 28, 31A, 31A.1, 31A.3 and 41B of the Particulars of Claim.

iv) Permission is refused for the "blue" amendments in paragraphs 18, 18.2, 18.3, 29, 31A.2, 47.2, 47.3, 47.4, 47.4.1 and 31.2 of the Particulars of Claim.

v) Permission is given for the "green" amendments in the Particulars of Claim.

vi) Permission is given for the "red" amendments in the Particulars of Claim.

vii) Associated matters pleaded in the Reply and the Further Information should be struck out or remain in accordance with the above rulings.

viii) All consequential or other matters, if not agreed, will be dealt with by the Court at a further hearing to be fixed by the parties.