Neutral Citation Number: [2022] EWHC 1285 (TCC)

Case No: HT-2020-000479

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

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 26 May 2022

Before :

Jason Coppel QC
(sitting as a Deputy High Court Judge)

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Between :

TJD TRADE LIMITED **Claimant**

- and -

BAM CONSTRUCTION LIMITED

Defendant

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- -

Faisel Sadiq (instructed by **J Garrard & Allen**) for the **Claimant**
Thomas Lazur (instructed by **Browne Jacobson**) for the **Defendant**

Hearing date: 29 April 2022

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Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 26th May 2022

Jason Coppel QC:

Background

1. The Claimant applies to amend its Particulars of Claim pursuant to CPR 17.1(2)(b).

2. The Claim as currently pleaded is for damages for breach of contract and may be summarised as follows:

   i) In February 2014, the Claimant bought Technology House, Ampthill Road, Bedford MK42 9QG ("the Property").

   ii) The Claimant intended to convert the Property from offices to residential accommodation and to construct a two-storey roof extension across the top of the Property.

   iii) At the date of purchase the Property benefitted from changes to the planning regime whereby there were permitted development rights for conversion to residential use, but any conversion had to be completed by 30 May 2016. Conversion or alteration to the external appearance of the building would, however, still require planning permission for the necessary physical alterations to the Property.

   iv) The Claimant contracted with the Defendant on 29 October 2014 for the Defendant to carry out a feasibility study for the roof extension, produce the documents that would need to be submitted to the local planning authority (Bedford Borough Council) to obtain the necessary planning permission for the redevelopment and have those planning documents ready for submission by the end of December 2014.

   v) The Claimant relies on express contractual terms, an implied contractual term to the effect that the Defendant would carry out any necessary amendments to the planning documents once prepared and also the duty to perform its obligations with reasonable skill and care which was implied into the contract by s. 13 of the Supply of Goods and Services Act 1982 (see §§24-26 and 27 of the Particulars of Claim).

   vi) The Defendant breached the contract by (a) providing negligent advice as to the feasibility of the proposed roof extension, (b) failing to produce the necessary planning documents by the end of December 2014, (c) negligently producing planning documents that were defective such that Bedford Borough Council refused to validate them and (d) by subsequently refusing to correct the errors which had been made in the planning documents.

3. The Defendant defends the Claim on various grounds. It contends, *inter alia*, that its advice as regards the feasibility study was not negligent, that it was not required to produce the planning documents by the end of December 2014, that it in any event did so and that any failure to do what was necessary within the necessary timeframe was the fault of Aeromark Ltd ("Aeromark") a company associated with the Claimant's Director Ms Marks, with whom the contract had in fact been concluded. The Defendant

argues further that the planning documents it produced were not defective, but if they were then this was Aeromark's fault.

4. As the Claim is currently pleaded, the Claimant claims damages in the amount of £822,190, made up of professional charges for producing new planning documents and for fresh advice on the feasibility of the proposed extension, additional consultancy fees and (predominantly) the increased cost of construction attributable to delay in the redevelopment project, plus interest.

5. The Claim was issued on 21 December 2020.

6. By the proposed amendment, the Claimant seeks to claim further losses arising out of an alleged loan agreement which it says it had entered into with Ms Marks. According to Ms Marks, giving evidence on behalf of the Claimant in support of the application, she and the Claimant concluded a loan agreement on 21 February 2014 whereby she would make available to the Claimant a facility of £5,500,000 to be used for the purchase of the Property and redevelopment costs. It is alleged that the loan agreement provided, *inter alia*:

    i) The Claimant would pay Ms Marks interest at 1% per month on any sums it actually drew down.

    ii) The Claimant would pay Ms Marks interest at 0.5% per month on any sums made available for drawing down but not in fact drawn down.

    iii) Interest would compound daily on both sums.

    iv) The Claimant would pay Ms Marks a management fee of £15,000 per month.

7. If permission to amend is granted, the further losses which the Claimant will claim as a result of the alleged loan agreement amount to approximately £730,000. In other words, the claim will almost double in value.

8. The amendment which the Claimant seeks to make to the Particulars of Claim has three components:

    i) A new §17 would insert details of the alleged loan between the Claimant and Ms Marks.

    ii) Additional text at the end of §20 would insert allegations that Ms Marks, speaking on behalf of the Claimant, informed a representative of the Defendant at a meeting on 3 October 2014 that the Claimant wanted to complete the development as soon as possible as it wished to minimise interest payable on loans and then refinance or sell flats in the Property to quickly repay the loans it had taken out. The significance of this amendment is that it will support the Claimant's contention that the Defendant had sufficient knowledge of the losses which would arise out of its agreement with Ms Marks to render those losses sufficiently proximate as to be recoverable under the second limb of *Hadley v Baxendale* (1854) 9 Exch 341 (damages "*as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it*").

iii) Amendments to §47(d) and (e), §48(c) to (e), and §49 would insert additional details of the Claimant's losses arising out of the alleged loan agreement.

Is the Claimant seeking to add a new claim?

9. The Defendant's primary response to the application is that the Claimant is seeking to add a new claim after the expiry of a limitation period and can only be permitted to do so in the circumstances prescribed by CPR 17.4:

"(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."

Rule 17.4 qualifies the discretion of the Court to permit an amendment to a statement of case pursuant to CPR 17.3.

10. The Defendant submits that (a) the Claimant is seeking to add a new claim for breach of contract, (b) (as is common ground), the limitation period for a breach of contract claim under s. 2 of the Limitation Act 1980 has expired, the relevant events having taken place in 2014-15, (c) the new claim does not arise out of the same facts or substantially the same facts as the claims currently pleaded, and (d) therefore the amendment falls outwith CPR 17.4 and cannot be permitted pursuant to CPR 17.3.

11. In my judgment, the proposed amendment does not seek to raise a new claim but rather to add a new head of loss allegedly flowing from the claim of breach of contract which is already pleaded.

12. There are a number of different judicial formulations of the litmus test for when a "new claim" is sought to be added or substituted, all of which are significantly easier to state than to apply. Hence, in *Co-Operative Group Limited v Birse Developments Limited & Anr.* [2013] EWCA Civ 474; [2013] BLR 383, Tomlinson LJ stated (§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."

13. There is a line of case-law dealing with how that test, and other similar formulations, should apply in a case where a claimant seeks to add a new head of loss which is said to arise out of an already pleaded breach of duty. Ordinarily, this will not amount to the addition of a new cause of action. In *Berezovsky v Abramovich* [2011] 1 WLR 229, Longmore LJ (with whom the other members of the Court agreed) stated:

"64. Thus the addition or substitution of a new loss is by no means necessarily the addition or substitution of a new cause of action. For a cause of action to arise in tort there must be a breach of duty which causes loss but it is permissible to add or substitute further losses if they all stem from an original breach of duty which has caused some loss. This happens every day in personal injury claims in which a loss of earnings claim may be added to (or substituted for) a claim for loss and suffering, even after the original time bar has expired; there is no question of a new cause of action being added or substituted because the loss all stems from the negligent act of the car driver or other tortfeasor: see, for example, Stock v London Underground Ltd The Times, 13 August 1999; [1999] CA Transcript No 1412, per Peter Gibson LJ, at pp 7—8; Savings and Investment Bank Ltd v Fincken [2001] EWCA Civ 1639 at [38], also per Peter Gibson LJ and Aldi Stores Ltd v Holmes Buildings plc [2005] PNLR 136, para 28, per Dyson LJ."

14. In *Harland and Wolff Pension Trustees Ltd v Aon Consulting Financial Services Ltd* [2009] EWHC 1557 (Ch); [2010] ICR 121, Warren J permitted an amendment to add a new head of loss which was alleged to flow out of negligent advice given, in breach of contract, by the defendant to the claimant pension trustees. The claimant relied upon *Aldi Stores Ltd v Holmes Buildings plc* [2005] PNLR 9 for the proposition that "*in the case of a negligence claim, the introduction of a new head of loss (even if involving new allegations of causation) does not involve the introduction of a new cause of action"* (§50). The Judge responded to that submission as follows (§58):

"I do not think that Aldi's case goes quite as far as Mr Nugee submits. I would, however, agree with him to this extent: I consider that his proposition is correct provided that the substance of the new claim can be pleaded simply as a consequence of the facts originally pleaded. For example, in a case of negligent advice, it is permissible to expand the relief to claim further loss arising as a consequence of actions taken in reliance upon the advice where those actions and reliance were pleaded in the original claim. But the limits of the proposition must be kept carefully in mind; the court must be satisfied that the amendment to the pleaded case is simply to add a new head of loss and not to introduce, for example, a new act of negligence which is relied on other than as part of the chain of causation leading from the original breach."

15. Warren J proceeded to note that there may be a distinction to be drawn between tort claims, where damage is an essential part of the cause of action, and contract claims where it is not (§60).

"*60. Where a claim is founded in contract, then a single action or failure which gives rise to a breach of contract can, it seems to me, give rise to only one cause of action in contract. The question will be whether a loss which is claimed was caused by the breach. .. But where the case is analysed as a single action or failure, there is only one breach of contract and, so it seems to me, only one cause of action in contract.*

61. It does not necessarily follow, in a particular case, from the fact that there is only one cause of action in contract in relation to separate heads of loss claimed that there is a single cause of action in tort as well in relation to those separate heads of loss. Take, for instance, a case of solicitors negligence. The solicitor gives one piece of advice at time T1 which is negligently wrong. The client acts on that advice shortly afterwards, at time T2. Then without taking further advice, perhaps even after the retainer has come to an end, the client acts on that advice again at time T3. As a result of each act of reliance on the advice, the client suffers loss.

62. It seems to me that there is a single breach of contract at time T1 and the question of recovery of loss is simply one of causation. There is a single cause of action. ..

63. It is also clear that there is, in that example, only a single breach of duty which could give rise to a claim in negligence. However, it will be a mixed question of law and fact (the details of which would need to be investigated) whether the two losses claimed are part and parcel of the same cause of action. It might be said that the new reliance on the original advice, giving rise to an entirely different loss, is enough to constitute a separate cause of action. In other words, reliance in a contractual context can be seen as part of the issue of causation of loss and not as a component of the cause of action for limitation purposes; but that same reliance may, in the context of the tort of negligence, be seen as giving rise to a separate cause of action."

16. Warren J's analysis is not entirely applicable to the present case. Here, the new head of loss does not simply flow from already pleaded facts but involves the pleading of additional facts in the aid of establishing that loss flowing from the Claimant's financing arrangements was within the contemplation of the Defendant when the parties contracted. Similarly, and with reference to the example given in *Berezovsky*, the situation in the present case is more complicated than adding a new head of loss arising out of a car accident. It appears to be accepted by the Claimant that the new head of loss may be out of the usual run of losses which an architect might be expected to guard against, hence it was thought necessary to seek to fix the Defendant with particular knowledge that delay would cause increased finance costs. Nevertheless, it does seem to me to be highly significant that the Claimant is relying upon the same contractual duties and the same breaches of contract as originally pleaded, and wishes only to rely upon an additional consequence which is said to have flowed from these breaches of contract. In my judgment, that does not amount to an addition to, or substitution for, the cause of action in breach of contract which is already pleaded.

17. The Defendant submitted that the addition of a new head of loss necessarily entailed a change to the originally pleaded cause of action, because it involved asserting that the scope of the Defendant's duty extended to guarding against a new and different type of loss, namely that arising out of the Claimant's financing arrangements. The Defendant relied upon *Manchester Building Society v Grant Thornton* [2021] UKSC 20, [2021] 3 WLR 81 where Lord Hodge and Lord Sales, speaking for the majority of the Supreme Court stated the following:

"4. In summary, our view is that (i) the scope of duty question should be located within a general conceptual framework in the law of the tort of negligence; (ii) the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is

being given (in the context of this judgment, we use the expression "purpose of the duty" in this sense); …

6. .. When a claimant seeks damages from a defendant in the tort of negligence, a series of questions arise: (1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question) (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question) (3) Did the defendant breach his or her duty by his or her act or omission? (the breach question) (4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question) (5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question) (6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)."

17. Therefore, in our view, in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk."

18. *Manchester Building Society* was a claim in tort for negligent advice given by the defendant auditors and the passages relied upon by the Defendant form part of the Supreme Court's analysis of whether the duty of care owed by the auditors extended to the principal head of loss which was being claimed. The Court made clear that its analysis of the duty of care would apply equally in a claim for negligent advice founded on breach of contract (§2).

19. The first difficulty faced by the Defendants argument based on *Manchester Building Society* is that it is directed to the claim of breach of contractual duty to take reasonable care, whereas the claim as currently pleaded also relies upon other, express and implied, contractual terms (see §2(v) above). Insofar as breach of those latter terms is concerned, it is not suggested that the additional head of loss widens the scope of the relevant contractual duties. The new head of loss will require to be justified on *Hadley v Baxendale* principles but there is no question that the new head of loss is premised upon or implies different contractual duties.

20. As for the contractual negligence claim, the Defendant is of course entitled to say, by way of defence to the new head of loss, that its contractual duty of care did not extend so far as to protect the Claimant from increased finance costs arising out of delay to the project. That is the "scope of duty question" identified in *Manchester Building Society*, as further investigated by the "duty nexus question" and potentially also the "legal responsibility question". However, it does not follow from that line of defence that the Claimant is thereby adding a new cause of action. In my judgment, the better analysis is that, consistent with the proposed revised terms of the Particulars of Claim, the pleaded cause of action for breach of contract comprised of a failure to take reasonable care is unchanged but can be argued by the Defendant to be an inadequate basis for the widened claim for loss.

21. Accordingly, I conclude that the proposed amendment is permitted in principle under CPR 17.4, and therefore must be considered under CPR 17.3.

Would a new claim arise out of the same or substantially the same facts as an existing claim?

22. Given that conclusion, the issue of whether a new claim would arise out of the same or substantially the same facts does not fall for determination. For completeness, however, I consider that if the Claimant's addition of a new head of loss does constitute a new cause of action then it would be a cause of action which arises out of the same or substantially the same facts in respect of which a remedy has already been sought.

23. In *Ballinger v Mercer Limited & Anr* [2014] EWCA Civ 996; [2014] 1 WLR 3597, Tomlinson LJ noted the following principles drawn from previous authority (§34):

> *"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."*
>
> *"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."*
>
> *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."*

24. The new head of loss raises two new areas for factual investigation. The first is whether Ms Marks referred to the Claimant's financing arrangements, as alleged, at a meeting on 3 October 2014. Since the Defendant will already have to adduce evidence as to what transpired at that meeting, it could not create significant prejudice for this additional issue to be covered. The second is whether the Claimant's financing arrangements were indeed as now alleged. This would be a genuinely new area for factual investigation but it is not a matter about which the Defendant could be expected to have independent knowledge, or indeed any means of investigating itself (as opposed to interrogating the evidence produced by the Claimant). No further investigation will be required of the principal issues in the case namely the terms of the contract and the manner in which it is alleged that the contract was breached.

25. I would also note that the Defendant's objection under CPR 17.4 to the addition of the new head of loss did not, on analysis, extend to that loss being claimed as a consequence of breach of contract other than by negligence (see §19 above). As I intend to permit at least that amendment as matter of discretion (see §31 below), I proceed on the basis that the Defendant will in any event be required to investigate (so far as possible) the additional factual matters. It follows that no prejudice would be caused by allowing an

amendment pursuant to CPR 17.4 in relation to the negligence claim either. In these circumstances, it seems to me to be clear that that amendment, if it does amount to a new cause of action, is one which arises out of the same or substantially the same facts as those which are already in issue (or at least will be in issue given the non-negligence amendment).

26. Accordingly, the amendment sought by the Claimant is not prohibited by CPR 17.4 and whether or not it should be permitted must depend upon an exercise of discretion pursuant to CPR 17.3.

Application of CPR 17.3

27. A helpful summary of the principles to be applied when exercising discretion under CPR 17.3 is to be found in the judgment of O'Farrell J in *The Front Door (UK) Limited (t/a Richard Reid Associates) v The Lower Mill Estate Ltd* [2021] EWHC 2324 (TCC), §29:

> *"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: SPR North Ltd v Swiss Post International (UK) Ltd [2019] EWHC 2004 (Ch). 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."*

28. This guidance is applicable because the proposed amendment in the present case is not a late amendment, in that allowing it would have no impact upon the trial date. The trial is listed for March 2023 and directions to trial made by Waksman J on 21 March 2022 made provision for the amendment application and any consequences for the proceedings should the amendment be allowed.

29. The Defendant argues that the amendment should not be permitted because it has no real prospect of success. First, it is said to be not arguable that the scope of the

Defendant's duty of care extended to guarding against losses caused by additional financing costs. The Defendant says that a duty to guard against this type of loss would go beyond the scope of duty normally assumed where an architect was asked to assist with a planning application, that the Defendant could only owe such a duty if it had specifically assumed responsibility for such losses, yet no assumption of responsibility is alleged, and even if the Defendant did owe a duty in principle to guard against losses caused by financing costs, it was not reasonably foreseeable that the financing arrangements between the Claimant and Ms Marks would be on such exceptionally onerous (for the Claimant) terms.

30. I do not doubt that the Defendant may have significant arguments at trial to the effect that the new claim of loss is legally flawed and implausible as a matter of fact. However, I am not in a position to say at this stage that the Claimant has no realistic prospect of recovering the losses which it now wishes to claim. The legal tests set out in the *Manchester Building Society* case, on which the Defendant relies, are complex and their formulation in that case is a new one. The position is complicated in the present case by the fact that only some of the claims of breach of contract are negligence-based, and therefore subject to the *Manchester Building Society* analysis. For the other claims, the issue is more likely to be whether the relevant losses were in the reasonable contemplation of both parties. It does not strike me as wholly implausible that, even without the specific notice which the Claimant says was given in this case, an architect might reasonably contemplate that delay in the development of a building for sale would cause losses to the building owner in the form of additional financing costs. Whilst the alleged terms of the arrangement between the Claimant and Ms Marks do appear onerous so far as the Claimant is concerned, the Defendant did not file any evidence in response to the application and there is no factual basis on which I could decide at this stage that the Claimant's liabilities under the arrangement are so out of the ordinary as not to be recoverable.

31. Again, therefore, I reject the Defendant's submission that the amendment must be disallowed and proceed on the basis that I have a discretion as to whether or not it should be allowed. As to the exercise of that discretion:

    i) The Claimant has not put forward a satisfactory explanation as to why the amendment is being brought forward at this stage. I could not follow the purported explanation, that Ms Marks had believed, until the *Manchester Building Society* case, that the new head of loss – which had been mooted in pre-action correspondence - could not be claimed. There was, in any event, a further significant delay after that judgment was handed down in June 2021.

    ii) That said, the proposed amendment will not disrupt the progress of the proceedings towards trial and will not cause significant prejudice to the Defendant for that, or any other, reason. The additional work which the new head of claim will entail can be compensated for in costs if the claim is unsuccessful.

    iii) Whilst it would have been preferable for the new head of loss to have been pleaded from the outset, the greater injustice would be caused to the Claimant if it were not permitted to amend its claim.

iv) This is, therefore, a case where the Court should come down on the side of ensuring that the full ambit of the dispute between the parties is determined.

Conclusion

32. For the reasons set out above, I allow the proposed amendment.