Neutral Citation Number: [2021] EWHC 1971 (TCC)

Case No: D40BS957

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN BRISTOL
TECHNOLOGY & CONSTRUCTION COURT (QBD)

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 19/07/2021

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

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Between :

D R JONES YEOVIL LIMITED	**Claimant**
- and -	
DRAYTON BEAUMONT SERVICES LIMITED	**Defendant**

- -
- -

James Frampton (instructed by **Reeves James Solicitors Ltd**) for the **Claimant**
Peter Land (instructed by **Beswicks Legal**) for the **Defendant**

Hearing date: 11 June 2021

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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.

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HH JUDGE RUSSEN QC

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 10.00 on 19 July 2021.

HHJ Russen QC:

INTRODUCTION

1. This is my judgment on a hard-fought application to re-amend the Particulars of Claim which was heard on 11 June 2021. Although they were not anticipated at the conclusion of the hearing, the parties' submissions were later supplemented by further written submissions, from Mr Frampton on behalf of the Claimant on 28 June and from Mr Land on behalf of the Defendant on 9 July 2021. Those supplemental submissions concerned the *Mastercard* basis of amendment addressed below. Mr Frampton offered the court some further submissions in response to Mr Land's argument that the court had no power to proceed on that basis, in the absence of the parties' consent. However, having clarified that he did not wish to rely upon any further authorities than those already cited, I thought it best to proceed with my analysis of them without a further round of submissions.

2. In these proceedings the Claimant ("**DRJ**") sues the Defendant ("**DBS**") in respect of works undertaken by DBS from late 2010 into 2011 on a property known at the time as Adderley Green Care Village, Stoke on Trent. The development comprised a collection of apartments with a care home. DRJ was the main contractor and engaged DBS under the Sub-Contract between them for mechanical services installations in what were known as Blocks A and B.

3. In late 2011 DRJ's employer under the main contract became insolvent. There were issues over payment and DBS suspended its works in December 2011. In around 2014 or 2015 a new employer (referred to as "**Badby**") was identified and in 2015 DRJ was engaged by that new employer both to bring works already carried out up to their original specification and to carry out further works at the site to convert it to a neurological unit.

4. DRJ commenced these proceedings against DBS on 18 April 2017 and they were served on 16 August 2017. DRJ alleged that DBS's works were defective and incomplete and that, in consequence, this caused loss and damage to DRJ in the form of the costs of remedial work, completion work, attendance on-site and management and supervision costs. DRJ also alleged it has also overpaid DBS by £8,072.21. An initial amendment to the Particulars of Claim added a claim to recover losses incurred by DRJ in connection with a failed adjudication by DBS in December 2017. The claim was put at £181,935 plus £7,275 (and any recoverable VAT element) in respect of the adjudication.

5. DBS's Defence and Counterclaim said that it had been entitled to suspend works on grounds of non-payment and admitted that its works were incomplete only in a few, relatively minor respects. It said that any further works that DRJ were required to carry out were the consequence of the later decision to convert the property to a neurological unit. In broad terms, DBS denies the defects and responsibility and alleges that it has been underpaid by DRJ. DBS counterclaims the sum of £35,112 (including interest) based upon the difference between the £978,639 which DRJ paid it and what is said to be the proper valuation of DBS's final account.

6. Following a Case Management Conference on 12 March 2018 the claim and counterclaim were listed for trial over 7 days commencing 18 March 2019. However, that trial did not take place because in January 2019 DRJ discovered that DBS had attended the property in late 2018, without DRJ's knowledge, to carry out attempted remedial works to the fire dampers it had earlier installed ("**the 2018 Works**"). DRJ's response to the 2018 Works was to apply on 11 February 2019 to vacate the trial.

7. That application was heard by me on 1 March 2019 along with an application by DBS to re-amend its Defence and Counterclaim. I decided to vacate the trial, not least because DRJ's expert evidence had taken no account of the 2018 Works.

8. The Order which resulted from the hearing on 1 March 2019 was dated 5 April 2019. I gave permission for the re-amendment of the Defence and Counterclaim. So far as DRJ's contemplated amendment in the light of the 2018 Works was concerned, the Order provided that DRJ should prepare Re-Amended Particulars of Claim by 21 May 2019 for DBS's consideration. It directed that, in the event of any objection by DBS, DRJ should apply for permission to amend by 14 June 2019. As things turned out there were six subsequent consent orders which pushed that date back. The last one dated 19 February 2021 provided that, in the event of objection by DBS, DRJ should apply for permission no later than 23 March 2021.

9. Reverting to the Order dated 5 April 2019, Mr Frampton drew my attention to paragraph 12 in connection with DBS's present position in relation to the costs of the amendments by DRJ which it does not oppose in principle. It said: "*The costs of and occasioned by any amendments by the Claimant in Re-Amended Particulars of Claim shall, absent agreement between the parties, be reserved to the next case management conference (above).*" Under the latest Order dated 19 February 2021 a CMC was to be listed on the first available date after 15 May 2021. The listing of one has obviously been held in abeyance pending the outcome of the present application.

10. By an Application Notice dated 23 March 2021 DRJ now seeks permission to re-amend its Particulars of Claim.

11. I mention the timing of the present application in the context of the proceedings to date because DBS's grounds of opposition to the disputed amendments include its contentions that the claims sought to be introduced by those amendments are now statute-barred, so that they cannot be permitted, and, alternatively, they are made too late, so that they should not be permitted.

12. The amendments now proposed are summarised by what is said in paragraph 4 of the draft Re-Amended Particulars of Claim ("**the RAPOC**"): "*The Re-Amended Particulars of Claim reflect the remedial works carried out by DBS without [DRJ's] knowledge, as well as further claims raised against [DRJ] by the employer and the operator of the Site following those remedial works*."

13. DBS does in not principle oppose some of the proposed amendments, subject to an entitlement to costs which it says the court should address now (and not at a further CMC) by making an appropriate order in its favour. These amendments relate to the deletion of the claim for water damage in Block B (paragraph 70(2) of the RAPOC) and what DRJ says is an admission of its existing claim of defective workmanship in

the form of DBS's purported remedial works to 65 fire dampers as part of the 2018 Works (paragraph 71A of the RAPOC).

14. The proposed amendments which DBS opposes appear in paragraphs 71B to 71D of the RAPOC and are said by DRJ to arise out of an exposure to liability to Badby. DRJ has denied liability to Badby but says, if established, any such liability and resulting damage which is referable to damper and pipework defects was caused by DBS's breaches of duty. Paragraph 71C mentions a letter from Badby's solicitors to DRJ's solicitors which refers to the incurred costs of investigation and remedial work and estimated future costs or remedial work (which involves cabling and conduits as well as dampers and pipework) in the total sum of £867,561.

15. That said, Mr Land says it is important to note that the Badby allegations which DRJ seeks to pass down to DBS relate only to the alleged requirement for the dampers to be triggered by smoke (as well as heat) and that there is no allegation by Badby arising from the method of fixing (frame versus direct fit) or the identity of the manufacturer of the dampers.

16. I will return below to the detail of the proposed amendments but in essence the new claims which DRJ seeks to introduce are:

    (a) to allege that DBS is responsible for any design defects in the fire dampers raised by Badby (paragraph 71D(1)) ("**the Damper Design Claim**") and

    (b) to allege that DBS is responsible for any lack of fire-stopping to the pipework raised by Badby and/or Elysium (paragraph 71D(2)) ("**the Pipework Fire-Stopping Claim**").

17. Against DBS's protest about the lateness of this amendment application DRJ says a fair wind is set behind the application by what I said in my judgment of 1 March 2019 when vacating the trial (at the hearing that day DRJ and DBS were represented by different counsel, Mr Owen for DRJ and Ms Adams for DBS).

18. In that judgment I referred to the 6th witness statement of Mr Reeves which dealt with what DRJ's representative had seen when inspecting the property in the light of the works undertaken by DBS in recent months. The witness statement had referred to DRJ's discovery that previously concealed pipes had not been fitted with fire collars when DRJ's expert (Mr Doherty) was of the view that DBS was obliged to fit them under the sub-contract. In the light of that evidence I said:

    "*37. That is some evidence to indicate that there may (I emphasise <u>may</u>) be cause for thinking that the claimant's claim in respect of dampers is not to be reduced, as the gist of Mr Beaumont's communications with Mr Jones might indicate, but, nay, enhanced if in fact the defects are greater than initially perceived to be.*

    38. Whether what was done in November/December ameliorates the claim or enhances it brings me back to the fundamental point that whichever it is to be, or a combination of the two, Mr Doherty has not had an opportunity to investigate further. I am told in the evidence and have no difficulty accepting that in circumstances where Mr Hewitt will not complete his own investigations until 8 March 2019, and it would then take Mr Doherty a further five days on from that to

update his report, that all of that leads to the impossible scenario of expert evidence being prepared almost on the eve of the trial commencing two weeks Monday. It is a totally unworkable position.

39. As to the risk that the claim by the claimant against the present defendant has increased, counsel have helpfully addressed me on the prospect that the circumstances and effect of what was done in November/December are such that the present owner of the property might have further cause for complaint against the claimant if indeed things are worse in relation to the alleged defects in these two items than were previously perceived to be. I have been shown a letter from DAC Beachcroft on behalf of the owner which in effect reserves the owner's position as against the present claimant for responsibility for all and any actual defects that may exist in relation to the works.

40. Miss Adams says on any view that cannot be a matter properly raised within these proceedings. She makes the point that whilst the present defendant was engaged as a subcontractor where the main contract was entered into in or around 2010, there was a further contract entered into by the claimant with the then owner in 2015 for completion of the works. So, how, Ms Adams rhetorically asks, can the present defendant, whose only contractual nexus with the property was under the first contract by way of a subcontractor [sic], *can it be responsible for anything done under the later contract?*

41. All of those matters, if they come about by prompting of the present owner, may well be worthy of further detailed argument, but the very essence of the submission by the defendant brings me back to the point that it is the oddity, on that analysis, of the former subcontractor returning to the property some six/seven years on from its last presence there when it left the site, to carry out works for the three reasons identified by Mr Beaumont in his witness statement. That situation leads to the predicament that I do have to address, here and now. The fact is, whether or not there are intermediate contracts that disrupted the present defendant's status as a subcontractor, it has gone back to undertake works on the very works that are the subject of the present claim. Although I form no final view upon the matter should it ever need to be addressed, there must be a strong argument that if the present claimant is exposed to wider claims by the owner of the property, then those claims are properly raised in the present proceedings."

19. At the outset of his submissions on the present application Mr Frampton asked me to remind myself of what I had said in those paragraphs because he said the disputed amendments did not go beyond what was then contemplated. He is right to say that a potential claim in respect of the pipework fire-stopping was flagged. That said, having reflected further upon what I said in that extempore judgment for the purposes of preparing the present one, it is obvious that what I said in paragraph 41 did not reflect any consideration of a limitation point or the implications of CPR 17.4(2) which I address below. In fairness to him, Mr Frampton did not suggest otherwise.

20. Before turning to the nature of the disputed amendments I need to address the legal principles which were canvassed by counsel in their rival submissions and which bear upon the court's power to permit the disputed amendments.

LEGAL PRINCIPLES ON AMENDMENT

21. The court's approach to an amendment application of the present type is governed by the principles addressed in paragraphs 23 to 80 below. As a result of the further written submissions on behalf of DRJ made after the hearing, the basis on which the parties had proceeded at the hearing in relation to one of them (which rests upon the principle of relation back referred to in the case of *Ballinger v Mercer* addressed below) came to be qualified by reference to further authority.

22. Where there is an issue between the parties over the applicability or scope of any particular principle for the purposes of determining the present application then I express my conclusion upon it in this section of the judgment. I address their rival submissions as to where the application of the principles leads in the section below which contains my decision on the proposed amendments.

Limitation – the Conventional Approach

23. When the application was launched DRJ was proceeding on the basis that it was a sufficient trigger for the court's discretion to permit the amendment that it had a reasonably arguable case for overcoming the anticipated limitation defence of DBS. However, the authorities are clear in showing that the defendant to a new cause of action only has to establish that its limitation defence is reasonably arguable for the purpose of defeating the amendment. It is not enough, as Mr Reeves' 8th witness statement on behalf of DRJ had suggested, for DRJ to show that it had a reasonably arguable case that the new claim is governed by the 12 year limitation period upon which DRJ relied. As Mr Reeves' 9th witness statement now expressly recognises, what has to be shown is the absence of any reasonable argument by DBS that the claim is caught by a 6 year limitation period. The amending claimant needs to knock out the defendant's intended reliance upon a limitation defence by showing it does not meet the test of being even reasonably arguable.

24. I have described this as the conventional approach to an amendment application which raises limitation issues in order to distinguish it from the *Mastercard* basis of amendment, subsequently relied upon by DRJ and addressed below.

25. In *Ballinger v Mercer Ltd* [2014] EWCA Civ 996; 1 WLR 3597, at [25]-[27], Tomlinson LJ clarified that the burden of establishing that the limitation defence was not reasonably arguable was the correct one when the doctrine of relation back (by which any new claim for which permission is given is treated as having been brought on the same date as the original action) means that the court, by permitting the amendment, is therefore necessarily precluding the defendant from thereafter pleading and arguing at trial that it is statute barred. Therefore, the court ought not to permit an amendment where the defendant does have a limitation defence which is reasonably arguable. Instead, the claimant should be left to bring a fresh claim so that the limitation defence can be aired and decided at the trial of it.

26. Having recognised the burden on his client in his 9th witness statement, Mr Reeves also referred to the other option open to the court. As an alternative to considering the anticipated limitation defence by reference to the threshold test of "reasonably

arguable" the court may in an appropriate case determine the limitation defence as a preliminary issue. However, Mr Reeves recognised that the cases where it would be appropriate to try the issue of limitation as a preliminary one would be relatively rare. In *Ballinger v Mercer*, at [26], the court cited part of a passage in the judgment of Jackson LJ in *Chandra v Brooke North* [2013] EWCA Civ 1559; 151 Con LR 113, at [66]-[70], where the availability of this second option was mentioned. In the earlier case Jackson LJ indicated it was very much an alternative to the "*usual*" course of entertaining a conventional amendment application and that *"[i]n practice, this course will seldom be appropriate*".

27. Whereas the court, on the conventional application, will not descend into factual issues which are seriously in dispute, any order for the trial of the preliminary issue of limitation would have taken account of the ramifications mentioned in *Chandra*, at [70]: the potential overlap of witness evidence at two separate trials; the impact upon the overall time and cost devoted to the litigation; and potential difficulties in the determination of a point on which the pleadings may be inchoate and which may prompt an appeal before the main trial. In *Chandra* the Court of Appeal noted that there had been no order for the trial of a preliminary issue and that the judge had fallen into error in making definitive findings and a declaration against a limitation defence which the appeal court found to be properly arguable.

28. I recognise that, determining a limitation defence in favour of a claimant by way of a preliminary issue, on oral evidence and by reference to the conventional burden of proof, would avoid any lingering concern which might arise if the court felt its summary decision that the defendant did not even have a limitation point worthy of argument at trial (whether that be the substantive trial or on the point as a preliminary issue) was perhaps too robust.

29. Mr Frampton submitted that the present case did not feature any similar obstacles in the way of a declaratory finding that DBS has no limitation defence to the claims sought to be introduced and that the point could safely be decided as a preliminary issue on the papers. However, both as a matter of principle and procedure, it would in my judgment be wrong to proceed in that way. DRJ's application was issued as a conventional amendment application. Without an express qualification as to the date upon which the amendment relates back (see the *Mastercard* basis of amendment addressed below) success for DRJ on the application would carry with it an equally definitive conclusion on the absence of a limitation defence for the reason explained in *Ballinger v Mercer*. But that comes at the price of DRJ having to establish one is not even reasonably arguable. The danger in proceeding in the manner suggested is that DRJ might obtain its definitive finding by reference to the lesser standard of civil proof applicable to the determination of a preliminary issue. In fairness to Mr Frampton he did talk of the court granting summary judgment on the application, as would be appropriate for a determination on written evidence only.

30. However, in my view proceeding in that way would also potentially, and unfairly, worsen the odds for DBS by shifting the focus away from the inquiry as to whether or not the limitation defence was reasonably arguable to whether or not it had a real prospect of succeeding on the defence at trial. It is clear that this latter test for summary judgment purposes puts no store by that which is "*merely arguable*" and there is to my mind a danger that a limitation defence which could be shown to be *reasonably* arguable, but no more attractive than that, might also fall foul of the summary judgment

test. In addressing below the burden upon DRJ to show that its new claims have sufficient merit to justify the court's exercise of its discretion in favour of permitting them I tentatively suggest that, expressing matters in terms of gradations of "arguability", the summary judgment test appears to amount to requiring the respondent to show he has, at its lowest, a good arguable case. There may not be much if any difference between that and a *reasonably* arguable one. They both indicate a case which is serious and has a plausible evidential basis. However, the potential for doubt on the point confirms my view that DBS should not lose the benefit of it by me proceeding to treat the present application as if it is one for summary judgment against the limitation defence.

31. In my judgment, therefore, DRJ should be held on what was a conventional amendment application when issued to the heavier burden of establishing that DBS's limitation defence is not seriously arguable.

32. Mr Frampton said his client was capable of discharging that burden on the evidence before the court. That remains DRJ's position but I have mentioned above that further written submissions were made after the hearing by which DRJ relied in the alternative upon authority which, it says, would support the amendments without DBS's limitation defence being prejudiced. However, it is logical for me to consider the cases relied upon for that fall-back argument after first addressing the provisions of CPR 17.4(2) which were aired in argument at the hearing.

CPR 17.4(2)

33. DRJ's proposed amendment in relation to the dampers (though not pipework fire-stopping) raises an issue between the parties as to the application of CPR 17.4 which permits a new cause of action to be introduced by amendment, notwithstanding that it would otherwise be statute-barred, where it arises out of the same or substantially the same facts as those already in issue. As an alternative to its primary argument on limitation, DRJ contends that the new damper design claim arises out of the same or substantially the same facts as are already in issue.

34. It is clear from the decision in *Martlet Homes Ltd v Mulalley and Co Ltd* [2021] EWHC 296 (TCC), at [36], that the test in CPR 17.4(2) may be satisfied by considering facts raised by the Defence. In that case Pepperall J applied an earlier Court of Appeal decision which read into the language of the rule words which widened its reference to an existing claim to a remedy so as to cover facts which are the same or substantially the same as those "*already in issue*" on such a claim. The judge went on to reject a submission that the new claim must arise from precisely the same facts as are already put in issue by the defendant.

35. No difficulty arises in testing whether the new claim arises from the same facts as those already in issue. However, the phrase "substantially the same" necessarily carries with it a degree of flexibility. In *Ballinger v Mercer*, at [34], the Court of Appeal adopted the guidance offered by Colman J in *BP plc v Aon Ltd* [2005] EWHC 2554 (Comm). The words qualifying the court's power to permit an otherwise barred claim were there 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."*

36. This policy aim would not be subverted if the defendant will already have had to investigate the same or substantially the same facts for the purpose of defending the existing claims.

37. In *Ballinger v Mercer* the court went on to say that "substantially the same" does not mean the same as "similar" and to endorse other earlier judicial observations to the effect that whereas in a borderline case the court's resolution of the point will largely be a matter of impression, in others it must be a question of analysis.

38. Mr Frampton placed emphasis upon the Court of Appeal's reference to matters "*completely outside*" those facts which the defendant could "*reasonably be assumed to have investigated*."

39. He also cited the decision of HHJ Eyre QC in *Oliver Morley v Royal Bank of Scotland* [2019] EWHC 270 (Ch), at [20], for the proposition that the court should "*take a wide view of which matters are within the ambit of or related to the facts which a party could reasonably be to assumed to have investigated on the current pleadings*." The judge also said "*the boundary is to be flung quite wide*" whilst recognising that, nonetheless, the rule created a boundary. These were observations made in the light of the language in *Ballinger v Mercer* quoted above (and a more recent decision drawing upon it) and upon which Mr Frampton laid emphasis. He also cited the decision of Deputy Master Nurse (whose decision was affirmed on appeal) in *Abbey Life Securities Ltd v Blake Lapthorn LLP* [2014] 1 WLUK 609, at [50] who, in addressing this issue, observed that any new claim "*must involve a claimant having to prove, and a defendant having to defend an allegation about at least one new alleged fact*."

40. In my judgment, and following the guidance of the Court of Appeal in *Ballinger v Mercer*, before any resort is had to a more general impressionistic approach the court must attempt to delineate the scope of the boundary under CPR 17.4(2) first and foremost through an analysis of the existing pleadings and the scope of the factual investigations which they might reasonably be assumed to have prompted. The court's ability to make reasonable assumptions on that front may enable it objectively to push the boundary beyond where the defendant would draw it but, whereas the court retains a residual discretion to refuse an amendment even though it falls within the scope of CPR 17.4(2), the language of the rule and the guidance in *Ballinger v Mercer* obviously point firmly against any kind of discretion to permit a new claim which is not within its scope.

The "Mastercard" Basis of Amendment

41. By his post-hearing supplemental submissions Mr Frampton submitted that, if the court was against DRJ on the conventional approach to the amendments and the application of CPR 17.4, the Court still does have a discretion to, and should, permit the

amendments on what was referred to as the *Mastercard* basis. By this he meant that the court should order that DRJ's two amendments are permitted but will be treated as having been issued for limitation purposes on the date of the hearing. Doing so would mean that DRJ would not benefit from the principle of relation back (to the date of the issue of the Claim) but, instead, the two new claims would be treated as having been issued for limitation purposes on 11 June 2021. This would not therefore operate to deprive DBS of a limitation defence aimed at persuading the court at trial that the June 2021 date falls outside a limitation period which is to be correctly identified as being 6 years rather than 12 years from the accrual of the cause of action.

42. Mr Land objected to the court proceeding on the *Mastercard* basis, saying the court had no power to adopt it when the parties did not consent to it doing so. On a point of detail, he said the relevant date for an amendment on that basis would in any event be the date of this judgment on the amendment application, not the date of the hearing. He referred to a passage in the 2021 White Book (at para. 17.4.2) and the decision of the Court of Appeal in *Bajwa v Furini* [2004] EWCA Civ 412; 1 WLR 1971.

43. Mr Frampton drew my attention to a number of authorities, the name of the first providing DRJ with its description of the *Mastercard* basis of amendment. These were: *WM Morrison v Mastercard* [2013] EWHC 3271 (Comm) at [20]-[21]; *Mastercard v Deutsche Bahn* [2017] EWCA Civ 272, [2017] C.P. Rep. 26 at [4]; *Libyan Investment Authority v King* [2020] EWCA Civ 1690, 1 WLR 2659 at [22]; and *Advanced Control Systems, Inc v Efacec Engenharia e Sistemas S.A* [2021] EWHC 914 (TCC) at [31]-[50].

44. As the three later cases noted the reasoning in the first, I need only quote what Field J said in *Morrison v Mastercard* to explain what is meant by the *Mastercard* basis of amendment. Having held that CPR 17.4(2) did not avail the claimant, the judge said (with Mr Frampton's emphasis):

> "*20. [Counsel for D] accepted that an amendment whose effect was limited to a six year limitation period could be brought by amendment of the Particulars of Claim. In my judgment that is a sensible approach; it would be a quite unnecessary waste of costs for a separate claim to have to be brought and then for that claim to be consolidated with the present claim.*
>
> *21. Accordingly, I will give leave for an amendment to plead the new claim on the basis that its effect is not to achieve a relation back to the start of the limitation period of the pre-existing claim but merely relates back to six years from today's date, 8 October 2013*."

45. In *Mastercard v Deutsche Bahn*, at [4], Sales LJ said the limitation upon the relation back principle can be achieved either by the court refusing permission for an amendment unless the new pleaded claim expressly pleads the new cause of action only from the date the amendment was sought or by the court making an order stipulating the relevant date for limitation purposes. In the *Libyan Investment Authority* case, at [22], Nugee LJ said this was a useful practice which in some cases can avoid what might otherwise be a lengthy and costly interlocutory battle over CPR 17.4(2), leaving it to the trial judge to decide whether the claimant benefited from that rule and the principle of relation back. *Mastercard v Deutsche Bahn* had involved argument over the application of CPR 17.4(2) both at first instance and on appeal.

46. The *Mastercard* basis of amendment therefore avoids the relation-back principle which underpins the conventional approach to potentially time-barred amendments. It is clear that any agreement between the parties or exercise of the court's discretion to proceed on the *Mastercard* basis appears to rest, significantly to my mind, upon a recognition at the amendment stage that fresh proceedings (of the kind contemplated by the reasoning in *Ballinger v Mercer*) might otherwise be brought without the new claim, or at least not the entirety of it, facing an obvious limitation defence. Moreover, any such fresh proceedings would probably have to be consolidated, or perhaps at least heard together, with the existing proceedings: see *Morrison v Mastercard*, at [20], and *Advanced Control Systems v Efacec* at [47].

47. In my judgment, these observations help to identify the class of case where an amendment might appropriately be permitted on the *Mastercard* basis. They are cases where the defendant and/or the court feels able to recognise, at the amendment stage, that the claimant would appear to be able to bring a fresh claim where at least part of it may well not be statute barred. Further, and also material to a positive exercise of the court's discretion, the cause or causes of action that would comprise the new claim are sufficiently bound up with the issues in the existing proceedings to make an order for consolidation (or trial together) likely or perhaps even inevitable. I have already noted that in the *Libyan Investment Authority* decision Nugee LJ contemplated there may be cases where the CPR 17.4 issue is held over to trial with the potential for the claimant to establish that the new cause of action in fact benefits from the same limitation period as that which governs the original one(s).

48. With one arguable exception, each of the cases relied upon by Mr Frampton appears to have involved the defendant's recognition of a chink in its position that it had a reasonably arguable limitation defence to the new cause of action (i.e. all of it). It is this chink which admits the *Mastercard* basis of amendment through a shift away from the focus under the conventional approach upon whether or not the defendant has a reasonably arguable limitation defence to *the claim*. The focus is instead upon permitting a *pro tanto* amendment which reflects the conclusion that there can be no limitation defence to part of the claim but that there might be one established at trial to another part of it.

49. In *Morrison v Mastercard* the new cause of action was based upon an alleged continuing breach of competition law, and a continuing infringement of the claimant's rights, from November 2004 onwards. By its decision in October 2013, based upon the defendant's concession that a new claim limited to a 6 year limitation period could be made, the court permitted an amendment which recognised the claimant could claim for the period from October 2007 but (in the light of the finding on CPR 17.4(2)) not for the previous 3 years.

50. In *Mastercard v Deutsche Bahn* the new cause of action again involved a claim for damages based upon ongoing breaches of competition law. The defendant accepted that it could be introduced by an amendment which would relate back to the date of service of the application to amend so that (in relation to those claims governed by English law and its 6 year limitation period) damages for the period since August 2009 could be claimed even though the alleged wrongdoing dated back to 1992.

51. The *Libyan Investment Authority* case did not involve an allegation of continuing wrongdoing for limitation purposes. In the Court of Appeal the legal principle at issue

related to CPR 17.4(2) and whether or not the judge's earlier decision to "strike out" the claimants' Re-Amended Particulars of Claim meant that there was nothing upon which the rule could bite when they later sought permission to re-re-amend in reliance upon the rule. The decision was not directly concerned with the Mastercard basis of amendment and the observations of Nugee LJ, at [22], related to the position adopted by the first defendant (against whom the claim remained dismissed) at the hearing at which the initial re-amendment foundered. Nugee LJ recorded that the first defendant had not opposed the amendment application on limitation grounds but instead said that any amendment should be on the *Mastercard* basis so that it related back to the date of the application to amend rather than the date of issue of the claim.

52. That was the first defendant's position in that case even though the first instance judgment reveals that counsel for the claimants and the first defendant were well aware of the conventional approach to a limitation defence in the context of an amendment and had cited *Ballinger v Mercer*, at [27]: see [2018] EWHC 2877 (Ch), at [25]. In the Court of Appeal, Floyd LJ, at [137], noted that the judge had remarked at the handing down of his judgment that limitation was not an issue because the allegations were ones of dishonesty. The new causes of action which the claimants had sought unsuccessfully to introduce against the first defendant were ones of deceit, breach of fiduciary duty and unlawful means conspiracy. It may therefore be the case that an assumption was made by the first defendant and/or the court that a limitation defence might not provide a complete defence to one or more of those new claims. In any event, it is clear that the *Libyan Investment Authority* case is one the defendant did not make a stand under the conventional approach but instead made a concession (ultimately of no consequence) that an amendment on the *Mastercard* basis might be made.

53. The one arguable exception in this line of cases, based upon the defendant's recognition that its seriously arguable defence of limitation was nevertheless not a complete one, is *Advanced Control Systems* case, a decision of Mr Roger Ter Haar QC sitting as a deputy High Court judge. In that case the claimant's counsel had proposed that the amendment should be on the Mastercard basis to "*side-step*" the problem that "*at least some of [the] claims put forward in the Amended Particulars of Claim may be statute-barred although he does not concede that is so*": see [30]-[31].

54. The amendment in *Advanced Control Systems* involved a number of new claims and the defendant had argued that some of them were time barred and that permission should therefore be refused on the conventional approach (even though the judge appeared to regard the claimant's position under CPR 17.4(2) as a strong one). However, the defendant's doubt as to whether or not others were statute barred led the claimant to propose the introduction of all of them on the *Mastercard* basis. The defendant resisted the amendment on that basis, correctly saying that in each of the cases relied upon by the claimant and considered by the deputy judge (and by me above) the procedural device had been deployed without objection from the party against whom the amendment was sought. On the conventional approach, the existence of a reasonably arguable limitation defence to some of the new claims would see the amendment to introduce those claims refused (leaving the claimant to bring a fresh claim or, as the claimant had indicated in pre-action correspondence, raising them as a defence to the counterclaim).

55. The deputy judge, at [44], rejected the argument that the *Mastercard* basis was limited to cases where there is agreement between the parties, observing that the agreement of

the parties could not validate a manner of proceeding if it were prohibited by statute. He was referring to section 35(3) of the Limitation Act 1980 from which the provisions of CPR 17.4 are derived. He concluded that the Mastercard basis of amendment was appropriate despite the defendant's resistance. He then expressed himself (at [48]) in terms which suggest that, on the material before him, those provisions might well have supported an amendment without the Mastercard qualification.

56. Mr Land submitted that the judge was wrong to reach that conclusion and that I should not follow his decision. He submitted that the outcome in the three earlier cases was wholly unsurprising when it was based upon an agreement between the parties which, when recorded in a court order, would operate to estop the claimant from asserting the new claim benefited from the full period of relation-back. As he pointed out, an amendment can be agreed in writing on such terms without the involvement of the court: see CPR 17.1(2)(a)). In the absence of such agreement, Mr Land submitted the court could not override the mandatory terms of section 35(3) of the Limitation Act 1980 which, for present purposes where the provisions of section 33 are irrelevant, ordains that no court "*shall allow a new claim within section (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim*" (with his emphasis added).

57. However, as I have sought to explain, an amendment on the *Mastercard* basis expressly recognises that the court is not permitting an amendment to introduce a new claim to the prejudice of a limitation period which would affect any fresh action brought upon it. Whether or not a decision upon the relevance of CPR 17.4(2) is made at the time, as in *Mastercard v Deutsche* Bahn, or deferred, as contemplated by the *Libyan Investment Authority* case and (it seems) in the *Advanced Control Systems* case, the court's order allowing the new claim does nothing to undermine a limitation defence which would or (if that issue is deferred) might affect it. The qualification upon the relation-back principle is based upon the court's recognition that it has no discretion to allow a time barred claim: see *Mastercard v Deutsche Bahn*, at [3] and [36], per Sales LJ.

58. I therefore agree with Mr Ter Haar QC to the extent that it must be open to the court to analyse the new claim sought to be introduced by the proposed amendment and conclude that there clearly cannot be an arguable limitation defence to the entirety of it. Even if the defendant does not concede the point and consent, the absence of a limitation defence to the whole of the period upon which the new claim is based means that an amendment on the *Mastercard* basis is permissible.

59. Whether or not it should be permitted is another question which turns on a wider range of discretionary factors. I have already noted that two of the decisions reflect an assumption that any separate proceedings would inevitably be consolidated with the existing proceedings. The *Libyan Investment Authority* case contemplates that permission might even be granted on a flexible basis, leaving the deemed date of issue to be established by a conclusion at trial upon the implications of CPR 17.4(2). Having regard to the purpose behind the qualification upon the court's power to permit by amendment an otherwise statute barred claim and the potential for wasteful expenditure investigating matters which may prove to be of no consequence (see paragraph 35 above) it may be that such cases will be relatively rare. Given that purpose, a defendant might have a powerful argument that the amending claimant should be forced to engage

with the argument over CPR 17.4(2) as the price of persuading the court to accede to a *Mastercard* based amendment.

60. The deputy judge in *Advanced Control Systems* went on to say, at [45]: "*Nor do I regard the reasoning in any of the three cases to limit the application of the "Mastercard exception" to particular types of claim*." It is on this point that I am not persuaded by his decision and, in my judgment, Mr Land's objection to the decision finds a different expression in the context of the exercise of the court's discretion.

61. It is true that neither in *Morrison v Mastercard* nor *Mastercard v Deutsche Bahn* did the court expressly confine the Mastercard basis of amendment to cases involving an ongoing accrual of the cause of action into the 6 year period prior to amendment. Nevertheless, it is obvious that its endorsement of the defendant's acceptance of that position reflected the nature of the claim. The reasoning behind the defendant's position in the *Libyan Investment Authority* case is more difficult to discern, as Floyd LJ appears to have found, but it is clear that the court assumed its limitation defence might not be a complete one.

62. However, in my judgment there is a class of case where the court should not exercise its discretion in a way which side-steps the conventional approach to deciding the limitation point at the amendment stage. This is where the defendant contends it has a reasonably arguable limitation defence to the entirety of the new cause of action sought to be introduced, having regard to the date of its accrual, which cannot be overcome by recourse to CPR 17.4(2).

63. Both the conventional approach and the *Mastercard* basis of amendment are aimed at preserving a defendant's limitation defence. The conventional approach is in my judgment the appropriate one to adopt where the defendant has a serious argument that the whole of the new claim is statute barred. As the relevant works were undertaken in 2010 and 2011, that is DBS's position on the present application.

64. In these circumstances, I am not persuaded that the *Mastercard* basis of amendment should be regarded as having any significance on the present application. This is particularly so when the parties' primary submissions have comprehensively engaged not only with the question of the applicable limitation period but also the impact of CPR 17.4(2) (cf. the *Advanced Control Systems* cases and the situation envisaged in the *Libyan Investment Authority* case). The material necessary for determining the amendment application on the conventional basis has not in fact been side-stepped in the present case. Instead, it formed a significant part of the evidence and argument relied upon at the hearing.

65. For completeness, I should say that had I considered it appropriate to proceed on the Mastercard basis then I would have been persuaded by Mr Land's submission that the new claims should be treated for limitation purposes as having been made as at the date of this judgment, not least because the qualification to the relation-back principle was not suggested until after the hearing of the application.

Discretion

66. In cases where there is no scope for proceeding on the *Mastercard* basis and the proposed amendment appears to face a limitation problem on the application of the

primary limitation period, the court does not have any discretion to permit it unless the claimant can knock out the limitation defence (on a summary determination by reference to the "*reasonably arguable*" threshold test) or he can bring it within CPR 17.4(2): see *Bellinger v Mercer*, at [15], and *Diamandis v Wills* [2015] EWHC 312 (Ch), at [46]-[47].

67. When the court's discretion does arise the factors operating upon its exercise are those summarised in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), at [38], *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* (No. 3), at 19], and *Vilca v Xstrata Ltd* [2017] EWHC 2096 (QB) at [28]-[29]. The points made in the first two of those decisions were summarised again by Lambert J in *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB), at [10], which Mr Frampton quoted in his skeleton argument, but without the qualification in *Vilca* (mentioned below) that a good explanation for delay is not actually a prerequisite to success with a late amendment.

68. The command in CPR 1.2 to give effect to the overriding objective (which Carr J in *Quah* described as being of the greatest importance) embraces the various considerations identified in those cases. So far as the aims of achieving fairness, saving expense and ensuring compliance with rules and orders are concerned, three observations in those decisions bear upon the present application and the arguments of counsel.

69. The first goes to the timing of the application for permission to amend. The authorities confirm that lateness is a relative concept. A "*very late amendment*" is one which prejudices an existing trial date. In *Quah* the application to amend was issued some 3 weeks before the trial date and its consequences meant it was categorised as "*very late*"; whereas the less prejudicial consequences of the application heard in *Vilca* some 2 months respectively before the trial meant it was "*late*" but not "*very late*".

70. The second observation relates to the history behind the amendment. Whatever the degree of lateness, the decisions in *Quah* and *Vilca* show that the applicant should provide a good explanation for the delay. However, the absence of one is not necessarily fatal to success on the application but instead just one of the factors to be considered in deciding it fairly. This was also recognised by the decision in *Essex County Council v UBB Waste (Essex) Ltd* addressed below.

71. The third observation goes to the force of the new case sought to be introduced by the proposed amendment. The court is likely to look less kindly upon an amendment which is not tightly drawn or focused. Mr Land referred to the Court of Appeal's decision in *Swain-Mason v Mills & Reeve LLP* (Practice Note) [2011] EWCA Civ 114; [2011] 1 WLR 2735, at [73], for the proposition that an amendment should be clearly expressed so that the opposing party knows from the moment it is made what is the amended case he has to meet. So far as the merits behind any new claim are concerned, the authorities which address the court's amendment power under CPR 17.3 show that the burden upon the applicant involves the same benchmark as that applied (negatively) on an application for summary judgment. The amending party needs to show that the new claim has a real prospect of success. In *Quah* the claimant failed to establish that the merits of the new claim were sufficiently compelling to justify the amendment whereas in *Vilca* (which concerned an amendment to plead a Peruvian law limitation defence)

the claimant took no point over the clarity of the defendant's proposed amendment and conceded that the defence had a real prospect of success.

72. Mr Land also referred to the passage in the White Book (para. 17.3.6) for a summary of the test to be applied when scrutinising the merits of the proposed amendment. One of the decisions cited in that passage is that of Mr Andrew Hochhauser QC in *SPI North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch), at [5]-[7], where the deputy judge applied the real prospect of success test to the various amendments proposed. For good forensic reasons Mr Frampton made the submission that the application of this test meant that DRJ only needs to show that it has a better than merely arguable case. That certainly holds true, on the application of the negative test, for a respondent seeking to escape the clutches of an application for summary judgment by shouldering the evidential burden of showing he has a "realistic" case worthy of trial.

73. Mr Frampton also relied upon the decision in *Essex County Council v UBB Waste (Essex) Ltd* [2019] EWHC 819 (TCC), at [10]-[11], where Pepperall J addressed the merits behind the amendment, alongside the other factors mentioned in *Quah* and *Vilca*, by talking of claims or defences which are "*intelligible and apparently credible*". If the weighing of the competing outcomes of permission or refusal of the amendment application meant that the balance of injustice favours the amending party, the judge's view was that amendments carrying that degree of conviction should be allowed.

74. There is probably either no difference or a barely perceptible one between that test and the one recognised in *SPI North* but, for the purposes of the present application on which the persuasive burden is wholly upon DRJ, I would approach any exercise of discretion by simply applying the real prospect of success test to the proposed amendment. The application of that test in the analysis and evaluation of DRJ's new claims will require DRJ to show that they are sufficiently strong to justify the conclusion that they are more than merely arguable even though DRJ does not have to establish they are likely to succeed. In a different interlocutory context that would equate to a "good arguable case" (recognising that the same phrase can in yet another such context mean something more in requiring the applicant to demonstrate he has the better, possibly much the better, of the evidence and argument to support his case).

75. In relation to DRJ's proposed new claim in respect of the fire damper claim (specifically the alleged duty to warn addressed below in the next section of this judgment) Mr Land relied upon the well-known decision in *Pantelli Associates Ltd v Corporate City Developments Number Two Ltd* [2010] EWHC 3189 (TCC)), at [16]-[17]. He said the new case against DBS was akin to an allegation of professional negligence which should be fully and clearly pleaded, and with support for them in the form of expert evidence when there was none. This, he said, undermined the conclusion that it had a real prospect of succeeding at trial. Mr Frampton responded by saying that respondents to worthy amendment applications often resort to the principle in *Pantelli* in a last ditch effort of resistance (an observation which, in my experience, has some force but begs the question on the present application) and that DBS's reliance upon it was misplaced when the proposed amendment was quite specific and related to the work of an M&E contractor.

76. The duty to warn alleged against DBS provides some traction for Mr Land's submission based upon *Pantelli*. The duty appears to be based upon a more general duty of care rather than one fixed by reference to express or implied contractual obligations said to

have been owed by DBS; and the trigger for it is said to be DBS's departure from some of those obligations primarily alleged. However, I am not persuaded that *Pantelli* has any real impact upon the present application. The reasoning in that case (when the pleading before the court was entirely vague as to the particular obligations alleged against the claimant quantity surveyors) was the need to ensure that there was some objective support for an allegation of professional negligence through the views expressed by a professional qualified in that area. It is notable that Coulson J, as he was, recognised the exception in cases of solicitors' negligence where legal textbooks may be relied upon in support of the alleged duty. In my judgment, the existence or otherwise of the duty to warn really turns upon a legal analysis of the contractual position between the parties rather than the views of an expert within the construction industry.

77. Mr Frampton submitted that one of the reasons why the court should exercise its discretion in favour of the amendments was because DRJ would, subject to amendment of its Defence to Counterclaim, in any event be able to rely upon the very same complaints about damper design and pipework fire-stopping in resisting DBS' counterclaim for the balance of sums said to be due on the final account. He cited *Cockell v Holton* [2015] EWHC 1117 (TCC), at [97] where Edwards-Stuart J observed that it was settled law that an employer under a building contract can defend the contractor's claim for the balance of the price by asserting the work was defective and not worth the sum claimed. Doing so involves a simple defence rather than a set-off or counterclaim. The judge said that in the context of refusing the defendant relief from sanction to rely upon such matters in support of what would have been a substantially more valuable counterclaim.

78. Mr Frampton said that no limitation argument could prevent DRJ from introducing its two new complaints in this defensive context. Mr Frampton recognised that the *pro tanto* nature of an abatement defence would mean that, as a defence, the value of these two new complaints about DBS's workmanship would, alongside the existing ones, be capped at the value of DBS' counterclaim. His point was that the very same matters would have to be investigated for the purposes of determining the abatement defence and that was a reason why the court should be persuaded to see them introduced by way of causes of action for their full value.

79. Mr Land countered by saying that, if the court had not been persuaded to grant the amendment of the Particulars of Claim to introduce these matters then it was unlikely it would be receptive to an attempt to introduce them by means of an amendment to the Defence to Counterclaim. Permission would be needed to amend that pleading. Mr Land therefore resisted the idea that consideration of these new complaints at a trial was somehow inevitable when other factors (most obviously what he said was the lack of merit in the complaints) militated against the exercise of discretion.

80. With the legal principles summarised above, I now turn to the two contentious amendments and summarise the parties' rival positions on the issue of limitation. I express my conclusions upon their submissions on that issue and on matters going to the exercise of discretion in the later section of this judgment containing my decision on the two amendments.

THE PROPOSED AMENDMENTS

The Damper Design Claim

81. As appears from the introductory section of this judgment, DRJ's original claim against DBS included a claim for the estimated cost of remedial works to address what it says was DBS's inadequate fixing of some 200 fire dampers.

82. Paragraph 71D(1) of the RAPOC involves new allegations that DBS:

> (a) changed the manufacturer, model and fixing method of the fire dampers and as a result assumed wholesale responsibility for the design of the fire dampers including the fact they were activated only by fire and not smoke. This was said to have been done without the approval of DRJ or Houghton Greenlees & Associates ("**HGA**"), the M&E engineers who had designed the M&E works required under the main contract;
>
> (b) had an obligation to design and specify the dampers with skill and care and/or to carry out a design that complied with certain regulations and standards; and
>
> (c) had a duty to warn DRJ if the design or specification for the dampers did not accord with those regulations and standards.

83. DRJ relies upon the Scope of Works identified in the Sub-Contract Order Form and the statement within it that DBS were to provide details of any changes from HGA's Specification for HGA's acceptance. DRJ says that, so far as it is aware, HGA's approval to the change in dampers was not obtained and that the absence of approval is a relatively recent discovery as a result of solicitors' correspondence in the summer of 2020.

84. Shortly before the hearing, on 9 June 2021, DRJ served an amended draft pleading which not only clarified the description of one type of fire damper that DBS had installed by a direct fix with no frame ("circular") but also introduced a reference to another type of square or rectangular damper which had been fixed with a HVAC frame.

85. I should note that Mr Land made a particular objection to this refinement of the draft amendment. He said that DBS had not had sufficient opportunity to explore with HGA the question of whether or not their approval had been obtained for the type of damper fixed with a HVAC frame. However, Mr Frampton drew my attention to correspondence between the solicitors in July 2020, in which Reeves James were asking Beswicks for copies of all correspondence between DBS and HGA that might bear upon any approval by HGA to the departure from the specified model of damper. This shows that DBS would not have been prejudiced by the refinement of the claim to refer to a second model of damper actually installed.

86. DRJ accepts that paragraph 71D(1) contains a new cause of action. DRJ's position is that DBS does not have a reasonably arguable limitation defence on the basis that it is governed by a 12 year limitation period and has been brought within time. This is based upon the contention that DBS's defence that DRJ's Conditions 3.0 were not incorporated into their subcontract is not one that can be said to be reasonably arguable.

It is not disputed that, if incorporated, Conditions 3.0 provide for a 12 year limitation period.

87. I address these rival arguments below. I have already explained why I am not persuaded to proceed on the basis of the refinement introduced by DRJ in argument, which is to determine this point by way of a preliminary issue. Likewise, the *Mastercard* basis of amendment is not in play for reasons also explained above.

88. As I have also already explained, as an alternative to reliance upon the 12 year limitation period, DRJ's fall-back argument on this head of claim rests upon the provisions of CPR 17.4(2) and section 33(3)-(5) of the Limitation Act 1980. In particular, DRJ points to the causation defence which DBS has already taken in response to DRJ's existing case that DBS's workmanship in installing the fire dampers was defective. In its Defence (and response to the Scott Schedule) DBS alleges that the design of the dampers was defective and so they need to be replaced in any event. DRJ says the design of the dampers is therefore already in issue in the proceedings. For DBS, Mr Land said that the new allegations went beyond the mere fact of whether there was a design defect in the dampers and the matters to be investigated in support of them took the amendment outside the scope of CPR 17.4(2). Again, I address these arguments below.

The Pipework Fire-Stopping Claim

89. In paragraph 71D(2) of the RAPOC it is alleged that, if Badby is correct in relation to its allegations as to the defective nature of the fire-stopping to plastic pipework, then DBS is in breach of contract. DRJ says DBS installed the pipework at site and was responsible for the fire-stopping of that pipework. Paragraph 71D(2) contains allegations that DBS failed to carry out the fire-stopping of pipework in a good and workmanlike manner or with reasonable skill and care and failed to ensure that it complied with certain regulations and standards. Reliance is placed upon entries in spreadsheets prepared by Badby summarising reports by Independent Fire Inspections Limited in December 2019. They would form a new Annex 12 to the RAPOC.

90. DRJ accept that this is a new cause of action. DRJ also recognises that there is no existing claim or issue to support reliance upon CPR 17.4(2). Therefore, DRJ's ability to invoke the court's discretion to permit the amendment rests solely upon its case for a 12 year limitation period and what they say is the absence of any reasonable argument to displace the incorporation of Conditions 3.0.

91. As with the Damper Design Claim, DRJ came to rely in the alternative upon the Mastercard principle of amendment which I have rejected.

DECISION

92. The following paragraphs 93 to 141 contain my conclusions upon the issues raised by DRJ's application. I have reached them having reflected further upon counsel's helpful

written and oral submissions. I have taken each of their points into account even if not all of their detail is rehearsed below.

Limitation

93. I have already indicated why the nature of the amendments proposed by DRJ and DBS's opposition to them mean it is not appropriate to adopt the Mastercard basis of amendment. The proposed new claims relate to the works undertaken by DBS in 2010 and 2011 pursuant to the Sub-Contract. The alleged duty to warn which is advanced in connection with the new claim on the dampers is not suggested to be a continuing duty but is instead said to be one which accompanied the fitting of the dampers at that time.

94. It is therefore appropriate to decide whether DBS has a reasonably arguable case that the Sub-Contract is governed by a 6 year limitation period which, subject to the argument under CPR 17.4(2) in relation to the dampers, precludes the amendments being made.

The incorporation of DRJ's Conditions 3.0

95. Whether or not the new claims are governed by a 12 year limitation period or a 6 year one depends upon the incorporation of DRJ's Conditions 3.0 into the Sub-Contract. The main contract between DRJ and the employer was executed as a deed. Clause 2.1 of Conditions 3.0 provided as follows:

> "*Where the Principal Contract is executed as a deed, the Sub-Contract will be deemed for the purpose only of the calculation of any period of limitation prescribed by law, to be executed as a deed and the Sub-Contractor will not assert in any action or arbitration any shorter period of limitation than is prescribed for contracts executed as a deed*."

96. DRJ's case is that the Sub-Contract with DBS was either contained in or evidenced by a Sub-Contract Order Form which initially by conduct (by proceeding with the initial sub-contract works) and then by signature, on or about 10 December 2010, DBS recognised to be the basis of the Sub-Contract. Although Conditions 3.0 were not attached to the Sub-Contract Order Form, DRJ say that actual notice, alternatively reasonable notice, was given of their incorporation into the Sub-Contract by statements within the form.

97. DBS's Defence denies that DRJ's Conditions 3.0 were incorporated into the Sub-Contract. DBS says there is a substantial factual dispute about the parties' dealings in November and December 2010 which must be determined to answer the questions of contract formation and whether DRJ's Conditions 3.0 were incorporated. The essential points made by DBS are that the contract between the parties (referred to in the Defence as "*the DBS Contract*") was concluded by an exchange of correspondence or by conduct (a pleading of an oral contract having been abandoned by amendment) before DRJ made any reference to Conditions 3.0 and/or that DBS did not agree to their incorporation at the later time of signing the Sub-Contract Order Form. Mr Land

submitted that the issues relating to the formation of the contract in late 2010 cannot be determined without the court hearing from the relevant witnesses. He said DBS's position on contract formation is at least properly arguable, so permission for the amendment must be denied.

98. I should note that this has been DBS's position from the outset. It follows that none of the re-amendments of the Defence and Counterclaim permitted at the hearing on 1 March 2019 (to which DRJ had indicated its consent provided the imminent trial was vacated but which in principle were subject to the *SPI North* test so far as the prospects of success on the amended case were concerned) create any tension between my conclusion on this aspect of the present application and my earlier grant of permission for that re-amendment.

99. Mr Frampton cited *Leggott v Barrett* (1980) 15 Ch D 306, at 311, where Brett LJ confirmed that:

> *"… where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed; and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document*."

100. In that case the parties had made what the court described as an executory or preliminary contract which provided that a proper deed for the dissolution of their partnership would be executed in order to implement it.

101. Mr Frampton also relied upon the decision of the Court of Appeal in *Internaut Shipping GmbH v Fercometal Sarl* [2003] 2 Lloyds LR 430, at [53], for the following proposition:

> "*The signature is, as it were, the party's seal upon the contract; and that remains the case even where, as here, the contract has already been made (in the fixture telexes). Prima facie a person does not sign a document without intending to be bound under it, or, to put that thought in the objective rather than subjective form, without properly being regarded as intending to be bound under it*."

102. And in Amiri Flight Authority v BAE Systems Plc [2003] EWCA Civ 1447, 2 Lloyd's Rep 767, at [16], the Court of Appeal again stated that:

> "*Normally, in the absence of any misrepresentation, the signature of a contractual document must operate as an incorporation and acceptance of all its terms*."

103. Mr Land said the point in *Leggott v Barrett* did not meet his client's case that the parties had concluded a contract which was complete rather than executory so that there was no place for any subsequent contract between them. So far as the decisions in *Internaut* and *Amiri* were concerned, he said that they described the "*normal*" or "*prima facie*" position, so that necessarily there will be cases which prove to be the exception. He pointed out that in *Internaut* the signature went to the basic point about the identity of

the owner of the vessel and contracting party under the charter-party. The decision in *Amiri* concerned the question whether a particular term had been incorporated in the contract. Therefore, Mr Land submitted, neither decision undermined his client's defence that a contract between the parties had been fully formed before DBS signed the Sub-Contract.

104. Whether or not the parties have entered into a contract on certain terms and whether some of those terms take effect by virtue of a contractual estoppel (in the present case to preclude DBS from denying that the sub-contract is to be treated as having been executed as a deed when it was not) involves an objective inquiry. The court looks for the outward appearance of accord between the parties which will not be undermined by any unexpressed reservations of one of them. There will be cases where their prior dealings over the subject matter of the contract potentially give rise to rights and obligations which are clearly intended by both parties to be superseded by a comprehensive written contract. The court's recognition of such cases is entirely consistent with its reluctance to strike down the agreement between them on the ground of vagueness or uncertainty over its terms. These cases cannot in my view be confined to situations where their dealings (and the existence of such rights and obligations) are expressly made "subject to contract".

105. In the present case it is clear in my judgment that, even though DBS may have commenced works at the site before the contract was formally concluded, any rights or obligations which may have existed between the parties prior to it being concluded were superseded by terms identified by the Sub-Contract Order Form. The evidence, including that from DBS, is clear in demonstrating that the parties intended their rights and obligations to be as set out in the terms of that written contract. I am also satisfied that DBS acknowledged that those terms included Conditions 3.0.

106. Despite DBS's evidence on the application suggesting that DRJ should be held to earlier statements which might be read as recognising that the issue of their incorporation was a matter for trial, there is in my judgment no serious argument open to DBS which undermines the incorporation of Conditions 3.0 into the Sub-Contract. It follows that the claims made by DRJ, including the new ones proposed, are therefore governed by a 12 year limitation period, not 6 years, and DBS does not have a seriously arguable case in support of the shorter period.

107. The pre-contract minutes dated 14 October 2010 (the meeting being for the purpose of finalising terms to enable DRJ to place the Sub-Contract Order with DBS) confirmed the main contract was executed as a deed. On 7 December 2010 DRJ sent the Sub-Contract Order Form to DBS saying it had to be signed before DRJ processed any payments. The form was sent by Mrs Rusling of DRJ who attached it "*along with a copy of our terms and conditions*". Mrs Rusling made a witness statement whose exhibit made it clear that DBS had been sent DRJ's Conditions 1.0 (the standard conditions). DRJ does not contend that Conditions 3.0 (the supplementary conditions) were also sent but clause 1 of the standard conditions made it clear that they were incorporated and that the Sub-Contract Order form, incorporating both sets of conditions, represented the entire understanding between the parties.

108. The Sub-Contract Order Form also said of Conditions 3.0: "*These are available upon request if not attached*."

109. The witness statement of Mr Steven Beaumont (of DBS) dated 28 September 2018 says he considered that the sub-contract had been concluded before the signature of the Sub-Contract Order Form but also confirmed that DBS signed the form on 10 December 2010, in response to the letter of 7 December, in order to secure payment. This is clear evidence that DBS accepted the incorporation of Conditions 3.0 of which reasonable notice (and an offer to provide a copy) had been given.

110. Mr Land relied upon the manuscript removal (and countersignature) by DBS of a reference to "chases" in the scope of works identified by the Sub-Contract Order Form. He said this meant that DBS's signature of the form was to be regarded as a counter-offer by DBS rather than an acceptance of it (and any terms incorporated by it). This left it open for DBS's reservation of its position in a letter sent a few days later (see next) to be of some significance. However, Mr Frampton drew my attention to the fact that the parties had already agreed in early November 2010 that DBS would not be responsible for electrical chasing. This shows that DBS's manuscript amendment was one of form not substance and one which has no impact upon an objective assessment of the state of accord between the parties as at 10 December 2010.

111. Mr Land also relied upon a letter dated 13 December 2010 which DBS says it sent to DRJ's quantity surveyor at an address in Bristol. The letter asserted that DRJ's terms and conditions had not been disclosed with the Sub-Contract Order Form (when they had been) and said that DBS would need review them before they could be agreed in writing. Mr Frampton said there was doubt as to whether that letter had ever been received as it had not been sent to DRJ's offices in Yeovil. He accepted this could not be resolved on the present application but correctly observed that DBS had already confirmed the acceptance of Conditions 3.0 by the return of the Sub-Contract Order Form. He pointed out that, whereas DBS's first application for payment had referred to an order number "*TBA*", the second and subsequent applications for payment had included the reference number on the Sub-Contract Order Form. Again, this shows that DBS recognised the significance of the Sub-Contract Order Form and cannot say its signature came too late to be of contractual significance.

112. An objective analysis of the evidence clearly shows that DBS knew and accepted that the Sub-Contract was governed by the 12 year period.

113. For completeness, I should say that there is no tension between this conclusion and the re-amendment of the Defence and Counterclaim for which I gave permission in March 2019 and Mr Land did not suggest there would be any. Although that re-amendment did pick up again DBS's challenge to the incorporation of DRJ's Conditions 1.0, DBS's case that the parties had contracted on the basis of "the DBS Contract" – excluding Conditions 1.0 and 3.0 – was always part of its original case which has not previously been scrutinised on its merits.

CPR 17.4(2)

114. It follows that I do not need to decide the point concerning the application of CPR 17.4(2) to the Damper Design Claim. However, the point was fully argued and I should address it for completeness.

115. I have already explained that DRJ's position is that the design of the dampers is already in issue in the proceedings as a result of the causation defence taken by DBS, which is that the alleged defective installation has caused no loss because their defective design means they have to be replaced in any event.

116. For DBS, Mr Land responded by saying that the new claim was not within the scope of CPR 17.4(2) because of the range of matters which would have to be investigated if the claim was introduced but which were not in issue on the causation defence. These extended to whether DBS had express obligations relating to the design of the fire dampers; whether, by installing dampers from a different manufacturer with a different means of fixing, DBS thereby assumed responsibility for their design so far as their trigger only by fire (as opposed to both fire and smoke) was concerned; and whether DBS had a duty to warn DRJ in relation to inadequacies in their design specification. He said all three matters would require factual and expert investigation which would not have been undertaken and cannot reasonably be assumed to have been undertaken for the purposes of the existing claim and defence. Mr Land also said that the introduction of the new claim over dampers would radically alter the inquiry over quantum from one where DBS's causation defence goes to the non-recoverability of the cost of remedial works to dampers of an unsuitable type to a wide-ranging inquiry into the cost of their replacements throughout.

117. It is important to note that the focus under the rule is upon an overlap of *facts* relevant both to the new claim and to matters already in issue. I have already expressed my view, in response to Mr Land's reliance upon the *Pantelli* principle, that the existence or otherwise of the duty to warn which DRJ wishes to allege against DBS is something which appears to first and foremost upon analysis of the contractual relationship between them rather further expert evidence of a kind which is not reasonably required on the existing pleadings. In saying that I do not mean to suggest that an application to adduce expert evidence to address the point – and I have most obviously in mind DBS wishing to adduce expert evidence to dispel the notion of a duty to warn - would be doomed to fail. In fact, the existing Joint Statement of the experts instructed on the existing issues contains their opinion that DBS had no duty to query HGA's design specification; though that view did not reflect DRJ's proposed claim based upon DBS's decision to depart from the specified type of damper without seeking HGA's approval.

118. However, the point I do emphasise is that an investigation into the alleged responsibilities of DBS in relation to the design and specification of the fire dampers (per paragraph 71D(1) of the RAPOC) is one that, in my judgment, cannot be said to be completely outside the ambit of the investigation which is presently required to determine DBS's responsibility for their allegedly defective installation. The existing claim in respect of the fire dampers reasonably requires an investigation into DBS's contractual responsibilities which (on the language of para. 71D(1)b)) are said to support the new claim. Further, as Mr Frampton pointed out, DBS's causation defence on the existing claim has prompted DBS to aver (at paragraph 52 of the Re-Amended Defence and its Annex which is a response to DRJ's Scott Schedule) that HGA not DBS were responsible for the design of the specification of the fire dampers and to deny that DBS is liable for any defective or incomplete design or its effects. To quote from the Annex to the Defence: "*The HGA Specification did not require smoke or smoke and heat activated dampers*."

119. I was told that, due to an oversight, the Re-Amended Defence and Counterclaim has yet to be formally served. Nevertheless, permission for its service was given by the Order dated 5 April 2019 and DBS clearly intends to rely upon it. The averment and denial just mentioned are therefore relevant to the CPR 17.4(2) test. The point about design responsibility shows that, probably without appreciating it at the time, DBS has anticipated the gist of the new claim. In my judgment, therefore, the underlying facts which are pertinent to the new duties alleged against DBS can fairly be said to be ones which DBS already has investigated.

120. Mr Frampton persuasively argued that the present case was very similar to the situation addressed in *Martlet v Mulalley* where an initial claim based upon defective installation of fire barriers necessitating the replacement of cladding had led the defendant to say that the cladding had to be replaced in any event because it comprised combustible material. That line of defence prompted the amendment to plead that the defendant was in breach through the installation of combustible cladding.

121. Mr Land was therefore right to highlight the court's observation in *Martlet v Mulalley* that the loss and damage claimed through the amendment was the same as in the original claim. The fact that DRJ's proposed claim against DBS for the cost of replacement dampers does not match or even dovetail with the existing claim for the cost of remedial work to those actually installed raises a nice point about what is meant by investigation and evidence which is "*completely outside the ambit of, and unrelated to facts*" the facts relevant to the existing inquiry into quantum. On balance, however, I have concluded that DBS's causation defence (to the effect that the dampers need to be replaced in any event) means that an investigation into the cost of replacing the dampers is sufficiently connected to the existing dispute to bring DRJ within the boundary set by CPR 17.4(2). In any event, the point only relates to the quantum of the proposed new claim on which the investigation of liability is, in my judgment, clearly within that boundary. The observation in *Abbey Life Securities v Blake Lapthorn* (see paragraph 39 above) supports the view that an amendment cannot fail the CPR 17.4(2) test simply because the new claim brings with it a different head of loss.

122. For these reasons, had I concluded that DBS had a reasonably arguable defence based upon a 6 year limitation period the Damper Design Claim would still fall within the scope of CPR 17.4(2).

Discretion

123. In my judgment the only factor bearing upon the exercise of my discretion to permit the two non-time barred amendments is that focussing upon the merits of each proposed new claim.

124. Mr Land said it was too late for the amendments to be permitted. He pointed to correspondence which showed that DRJ had known about the manufacturer of the fire dampers since 2011 and that DRJ's expert had identified the issue about them not being triggered by (cold) smoke by February 2018. In relation to pipework fire-stopping he said that the mention of this in the original Particulars of Claim served in 2017 showed that (although not developed into a claim at the time) DRJ clearly had some suspicions about it. Mr Frampton responded by saying that the amendments could not be regarded

as late when they were prompted by DRJ's discovery in 2020 that HGA appear not to have approved the change in damper manufacturer and that Badby were seeking to hold DRJ to account for those installed and allegedly defective pipework fire-stopping.

125. However, quite apart from that explanation, I do not consider the timing of the amendment application to be of any real significance. The fact of the matter is that my ruling in March 2019 operated as a re-set in this litigation. As one would expect when the trial had been fixed to take place around that time, the factual and expert evidence at that stage was thought to be largely complete and there is no doubt that pursuit of these new claims would require both to be re-visited. However, the parties recognised at that time that the re-set justified the need for a further CMC at which further pre-trial directions (consequential upon the amendments then contemplated) would be made. Thereafter, there were the numerous agreed extensions mentioned above. They meant that the present application was made within the deadline agreed by the parties. In those circumstances I do not think the application can properly be categorised as a late one.

126. So far as the merits of the two new claims are concerned, I have come to the conclusion that the Damper Design Claim lacks sufficient merit to support the proposed amendment but that the Pipework Fire-Stopping Claim should be permitted.

The Damper Design Claim

127. DRJ says that DBS is a specialist in M&E engineering, design and construction and has experience of buildings where smoke activated dampers may need to be fitted. DBS does not dispute that it installed dampers of a different manufacturer, model and (at least in some cases) fixing type to those set out in the HGA Specifications. So far as DRJ is aware this was done without the approval of HGA to the change and it says that, in the circumstances, there is a real prospect of establishing that DBS assumed responsibility for the design and/or specification of the dampers and/or had a duty to warn Jones if that specification was defective, particularly if there was a risk to life.

128. Mr Land described this case as hopeless. If I had felt able to accept that categorisation I would not have deliberated so long over this aspect of my judgment which I have found to be the most difficult point within it. Nevertheless, I have been persuaded that the DRJ's argument summarised above is not good enough to support the proposed amendment on the application of the SPI North test.

129. DBS is in my judgment right to say that both the duty to warn allegation and the allegation that DBS assumed wholesale responsibility for the design of the dampers (in particular that they were activated only by fire and not smoke which is the complaint made by Badby) are novel. DBS's obligations under the Sub-Contract were ones of supply and fit. Mr Land referred to the pre-contract minutes dated 14 October 2010 which confirmed "*No design*" in relation to the design responsibility of DBS. HGA's original specification provided for dampers which were activated only by fire and not also smoke and that design aspect did not change with the dampers fitted by DBS. The new duties alleged do not focus upon a breach which is said to have been committed by the particular choice of a different manufacturer (and mounting) of the damper. Instead, the allegation is that by making a choice which differed from HGA's "*DBS thereby assumed responsibility for the design and/or specification of the fire dampers*." Mr

Land said that the source of the new alleged duties and the legal basis for the assumption of responsibility (in respect of an unchanged element of the design) had not been pleaded at all, let alone with the degree of particularity required in the circumstances.

130. Paragraph 71D(1) of the RAPOC does refer back to its paragraph 36 and the contractual duties already alleged against DBS. They include duties to carry out the Sub-Contract Works with reasonable skill and care and without defects. A statutory duty to supply goods of satisfactory quality is also alleged. However, the duties alleged in the new paragraph necessarily seek to expand upon the existing ones. As I see it, the difficulty in doing so lies in the fact that, unlike the paragraph 36 duties, these new ones run counter to the express terms and fundamental nature of the Sub-Contract. Nor would I regard it as fair, just or reasonable to impose upon DBS a duty to warn DRJ about the design and specification limitations of the fire dampers when it was HGA who were responsible for specifying a type of damper with the limitation - the absence of a trigger by smoke - that forms the basis of DRJ's (and Badby's) complaint.

131. I have already indicated that the existence the new duties alleged would appear to rest upon legal analysis more than the views of experts. However, with that caveat and also noting that when doing so the experts observed the current Particulars of Claim included no complaint about the dampers not being activated by smoke, their Joint Statement does say *"[DBS] had no duty to query HGA's design in this respect*." This does point to the novelty of the alleged duties and supports my conclusion that the Damper Design Claim has no real prospect of success.

The Pipework Fire-Stopping Claim

132. DRJ's case for this amendment is that DBS installed the pipework in Blocks A and B and was responsible for the fire-stopping of that pipework. As with the Damper Design Claim, paragraph 71D(2) of the RAPOC refers back to the duties alleged in paragraph 36.

133. If the amendment is permitted it would seem that DBS would admit that it did not carry out any fire-stopping to much of the pipework it installed. DBS's argument on the application was that its only obligation in relation to fire-stopping was as set out in Part 3 of the HGA Specification – "*Particular Specification for Mechanical Services*" - which, at item 56 required:

> "*where waste pipework passes through a fire barrier, including floor slabs, the pipework shall be complete with an intumescent crush collar rated to the same specification as the barrier itself*".

134. DBS has produced evidence to show that those crush collars were installed. DBS also relied upon evidence from a former employee of DRJ, Mr Adrian Barnett, whose witness statement said that pipework fire-stopping was undertaken by a specialist contractor JW Simpkin Limited.

135. Mr Land submitted that more general fire-stopping aspects were set out in Part 2 of HGA's Specification – "*Standard Specification for Mechanical Services*" – but, whereas other aspects of Part 3 referred back to Part 2 (e.g. item 43 in relation to

ductwork) these were not "called in" by item 31 of Part 3 referring to pipework and valves. Item 31 was silent in relation to fire-stopping of pipework.

136. DBS also relied upon the fact that when, in November 2011, a question was raised of DRJ in connection about fire collars for the purposes of obtaining Building Regulations approval DRJ did not involve DBS in its response and provided confirmation which was consistent with the extent of pipework fire-stopping being as set out in item 56. Mr Land relied upon a passage in Chitty on Contracts (32nd ed), Vol. 1 para. 13-36, for the proposition that, whereas the subsequent actions of the parties are generally inadmissible for the purpose of interpreting the contract between them, one exception exists where they go to the question whether or not there was a contract and what terms it comprised. He cited the decision of the Court of Appeal in *Great North Eastern Railway Ltd v Avon Insurance Plc* [2001] EWCA Civ 780, at [29], in support of that proposition.

137. DRJ's case in support of a more general fire-stopping obligation upon DBS in part rests upon the terms of item 1 of Part 3 of HGA's Specification: "*This specification shall be read in conjunction with parts 1 & 2 of this specification*." As Mr Frampton observed, DRJ's case for saying that the fire-stopping works identified at items 31, 32 and 52 of Part 2 were the responsibility of DBS is also supported by the references to HGA's Specification (as a whole) at several points in the pre-contract minutes dated 14 October 2010 and then in the Scope of Works identified by the Sub-Contract Order Form.

138. DRJ's evidence on the application was that JW Simpkin were responsible for large-scale, structural fire-stopping rather than small-scale work such as fitting pipe collars to the pipes installed by DBS.

139. On the basis of this material I am satisfied that DRJ has a good arguable case that DBS's fire-stopping obligations were wider than has been accepted and that the claim introduced by paragraph 71D(2) has a real prospect of success.

140. I am unpersuaded, for the purposes of determining the present application, that the reasoning in the *Great North Eastern* case assists DBS. The issue between the parties is about what obligations the HGA Specification as a whole (i.e. Parts 1, 2 and 3) carried for DBS on its true interpretation. The distinction drawn by Mr Land between Parts 2 and 3 reinforce this point. It is not the kind of issue where (as in *Great North Eastern*) the court looks at the post-contract actions of the parties to clarify which documents form the contract to be interpreted and enforced.

141. Mr Land also criticised the way the fire-stopping claim had been pleaded. He said that the source of DBS's obligation had not been pleaded and that it was not acceptable to make a general allegation of deficient fire-stopping by reference to the huge schedule which is the new Annex 12. However, I am satisfied that the pleading is clear and adequate in alleging DBS's contractual responsibility for fire-stopping of pipework and that, although it is effectively a Scott Schedule (as Mr Frampton put it) which covers many other items, the identification of fire-stopping under "*Item Type*" will enable DBS to address the particularity of the claim.

CONCLUSIONS

142. For the reasons set out above I therefore:

i) refuse DRJ permission to amend to bring the Damper Design Claim advanced in paragraphs 71B, 71C and 71D(1) of the RAPOC. However, although it is not clear to me that there are any such matters, I wish to clarify that I am refusing DRJ permission to advance the claim based upon the alleged design duty and the alleged duty to warn; and I do not intend to prevent DRJ from relying upon any matter mentioned in those paragraphs which might be relied upon in support of the existing claim in respect of allegedly incomplete or defective work which is summarised in paragraph 66 of the RAPOC; and

ii) grant permission to DRJ to bring the Pipework Fire-Stopping Claim advanced in paragraphs 71B, 71C and 71D(2) of the RAPOC.

143. I intend to hand down this judgment without the parties attending. The costs consequences of this decision and of the other amendments which DBS did not oppose in principle should be addressed at the next CMC with an appropriate time estimate to allow for argument and a ruling.