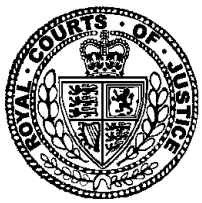

Neutral Citation Number: [2022] EWHC 1571 (TCC)

Case No: HT-2021-000406

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

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

Date: 20 June 2022

Before :

MR ALEXANDER NISSEN QC
(sitting as a Deputy High Court Judge)

- -

Between :

SPECIALIST BUILDING PRODUCTS LIMITED (trading as PROFILE 22 SYSTEMS)	**Claimant**
- and –	
NEW CENTURY DOORS LIMITED	**Defendant**

Jack Watson (instructed by Wright Hassall LLP) for the **Claimant**
Emma Hynes (instructed by Machins LLP) for the **Defendant**

APPROVED JUDGMENT

Hearing date: 7 June 2022

- -

MR ALEXANDER NISSEN QC:

Introduction

1. There are two live applications before the Court. The first in time is an application by the Defendant to amend its Defence and Counterclaim. The second is an application by the Claimant to strike out the Defence and Counterclaim and/or for summary judgment on the claim. The two applications are related in the sense that the outcome of the strike out or summary judgment applications may be impacted by any permission to amend and also because the Claimant opposes the amendments on the grounds they have no prospect of success, for reasons also advanced in its own application. For these reasons I heard submissions on both applications concurrently.

2. The hearing was also intended to deal with costs and case management matters if time permitted. In the event, there was insufficient time to deal with those matters save that the Court heard some submissions from both Mr Watson for the Claimant and Ms Hynes for the Defendant on the question of whether there should be a trial of preliminary issues. The CMC itself has been fixed for hearing on a separate occasion.

3. The proceedings are already very stale and, as noted, have yet to reach the case management stage. The Claimant issued proceedings as long ago as April 2019, claiming £21,193.01. A Defence and Counterclaim was issued in June 2019, admitting the claim subject to a defence of set off, counterclaim and indemnity. The set off was claimed in the sum of £127,160. Subsequent pleadings were issued over time. In the first of many iterations of a draft Amended Defence and Counterclaim issued in December 2020, the Defendant sought to increase the value of its set off and counterclaim by £700,000, making its total value £827,160. As a consequence, the parties consented to an order made on 1 March 2021 that the claim and the application in respect of it be transferred to the Technology and Construction Court. The hearing of the applications before me was the first substantive step in this Court.

4. As its name suggests, the Claimant is a supplier of specialist building products. This dispute concerns component parts of fire doors, supplied by the Claimant, which are assembled by purchasers, of which the Defendant was one, for onward sale. There is no dispute that the Defendant ordered and was supplied with components in the period

from June to August 2018. The Defendant originally defended the claim on the grounds that the products were defective in quality and non-compliant with the specification. The core complaint was that the fire doors and frames assembled from the Claimant's goods in accordance with the Claimant's system did not comply with the relevant Building Regulations and British Standards and that this was a breach of an over-arching contract for sale or a series of individual contracts made in respect of each purchase order ("Sale Contract(s)"). This defence is no longer maintained within the Amended Defence and Counterclaim for which permission is sought. Instead, the case is now made on the basis of breach of collateral warranties and/or in misrepresentation. No breach of any Sale Contract(s) is now advanced.

5. The draft Amended Defence and Counterclaim had undergone no less than four iterations before the hearing of the application. It also changed again during the course of the hearing. In the end, it was necessary for me to direct that a yet further final version of the amendment sought should be provided shortly after the hearing. I gave the Claimant an opportunity to comment in writing on the final version to the extent it felt necessary so it provided brief supplemental submissions. It was not necessary for the Defendant to respond and it declined to do so. This judgment is concerned with the question of whether permission to amend the Defence and Counterclaim should be granted in the form in which it was lodged on 8 June 2022.

Legal Principles

6. In respect of the application to amend, the applicable principles are agreed. Given that limitation issues potentially arise, CPR rule 17.4(2) applies. The relevant questions to be answered are conveniently summarised in Mulally & Co v Martlett Homes [2022] EWCA Civ 32 as follows:

    (a) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?
    (b) Do the proposed amendments seek to add or substitute a new cause of action?
    (c) Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?
    (d) Should the Court exercise its discretion to allow the amendment?

7. In respect of the application to strike out, the Claimant contends that the Defence and Counterclaim (and, to the extent relevant) the draft Amended Defence and Counterclaim disclose no reasonable grounds for bringing it: see CPR 3.4(2)(a). In respect of summary judgment, the Claimant contends that the defence has no real prospect of success. The Claimant's submission was that, in the present context, there is no material difference between the tests in the two applications. As I have noted, the amendments are also opposed on the grounds they have no prospect of success.

8. The applicable principles in respect of these two applications have conveniently been summarised by O'Farrell J in Standard Life Assurance Ltd v Gleeds and others [2022] EWHC 1310, TCC. At paragraphs [30] to [33] she said:

> *"The applicable test*
>
> *30. CPR 3.4(2) provides that:*
>
> *"The court may strike out a statement of case if it appears to the court:*
>
> *...*
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim ..."*
>
> *31. The principles to be applied are as follows:*
>
> *i) If the pleaded facts do not disclose any legally recognisable claim against a defendant, it is liable to be struck out. However, the application must assume that the facts alleged in the pleaded case are true.*
>
> *ii) It is not appropriate to strike out a claim in an area of developing jurisprudence, since in such areas, decisions as to novel points of law should be based on actual findings of fact: Barratt v Enfield BC [2001] 2 AC 550 per Lord Browne-Wilkinson at p.557.*
>
> *iii) The court must be certain that the claim is bound to fail; unless it is certain, the case is inappropriate for striking out: Hughes v Colin Richards & Co [2004] EWCA Civ 266 per Peter Gibson LJ [22]-[23]; Rushbond v JS Design Partnership [2021] EWCA Civ 1889 per Coulson LJ at [41]-[42].*
>
> *32. CPR 24.2 provides that:*
>
> *"The court may give summary judgment against a claimant ... on the whole of a claim or on a particular issue if –*
>
> *(a) it considers that –*

> *(i) that claimant has no real prospect of succeeding on the claim or issue; … and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial."*
>
> *33. The principles to be applied on such applications are well-established and can be summarised as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91.*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8].*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman.*
>
> *iv) The court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5)[2001] EWCA Civ 550.*
>
> *v) The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63.*
>
> *vi) If the court is satisfied that it has before it all the evidence necessary for the proper determination of a short point of law or construction and the parties have had an adequate opportunity to address the question in argument, it should grasp the nettle and decide it. It is not enough to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.*
>
> *vii) The burden of proof remains on the defendants to establish that the claimants have no real prospect of success and that there is no other reason for a trial."*

The amendments

9. It is unnecessary to set out the amendments in their entirety. The extent of red deletions and underlining can be seen from the draft itself. Those amendments which are material to the objection can be summarised as follows:

(a) At the meeting in June 2011, which had already been pleaded, it is said that an offer was made to supply components based on certain features. The offer was based on the doorsets achieving 30-minute fire resistance so that they could be stated to be compartment fire doors complying with ADB; such doorsets could be relied on as having evidenced compliance with the Building Regulations; and the Defendant could construct and sell doorsets as compartment fire doors that complied with the Building Regulations

(b) At the meeting, representations were made that the doors containing the Claimant's components fixed in accordance with the instructions would, upon assembly, achieve 30-minute fire resistance; and that the Claimant had itself undertaken successful tests which passed the 30 minute resistance.

(c) The matters pleaded gave rise to Collateral Warranties as a result of which the Defendant entered into a Sale Contract or series of Sales Contracts.

(d) The collateral warranties were that the Defendant would be able to correctly claim that the assembled doors were capable of 30 minutes fire resistance if assembled in accordance with the Claimant's specification; they would have the benefit of a global assessment report supporting that claim; and that the Claimant would continue to facilitate certification on the same basis.

(e) Further or alternatively the Claimant made representations in a similar vein, and that the Defendant entered into the Sale Contract(s) on that basis.

(f) For reasons already explained in the original pleading, after July 2018, the doors could no longer be stated to achieve 30-minute fire resistance when tested to BS 467-22.

(g) A subsidiary of the Claimant assembled doorsets and learned that they had failed to achieve a fire resistance of 30 minutes.

(h) There was a breach of the collateral warranties and/or a misrepresentation in the respects identified.

(i) These have caused loss and damage in the sum of £656,728. This comprises £127,160 already pleaded together with a new head of claim valued at £529,568. This is a combination of a net loss and loss of expected profit in the period when the Defendant was unable to manufacture or sell doorsets until the time it was able to source an alternative product.

(j) In addition to the existing plea of contractual set off, the cross claim is pursued as an equitable set off.

(k) Breach of the Sale Contract(s) as such were deleted although a claim for a contractual indemnity remains.

Collateral Warranties

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

10. The Claimant submits that the Defendant's claim in respect of the collateral warranties is time-barred because the alleged warranties were given in 2011 and were breached on construction of the first fire doors being assembled in 2011 without the benefit of purported testing, which is more than six years before the date of this action.

11. The Defendant submits that the warranties were only breached when each set of components was provided in breach of those warranties. Since it is only the provision of components supplied since 2018 which are the subject of complaint, its case is that there is no time bar. This argument may, but need not depend on, the collateral warranties being repeated on the occasion of each individual sale.

12. These applications are normally considered by reference to the date of the application to amend. This application was made in December 2020 but the plea in respect of collateral warranties was first introduced in May 2022. The latter is therefore the relevant date to use when determining whether a claim issued in that form now would be time barred.

13. This being a contractual claim, the relevant trigger date to take into account is the date of breach. In my view, it will require a trial to establish whether, on analysis, breach of

any collateral warranties occurred only on the first occasion of supply or whether there were breaches which occurred on each occasion of supply. There are multiple considerations which will bear on this, not least the nature and extent of the alleged warranties and the question of whether there was one, or multiple, Sale Contract(s).

14. I am satisfied that it is reasonably arguable that the opposed amendments are made outside the applicable limitation period. On the other hand, in the context of the strike out application, I do not accept the Claimant's submission that the claim for breach of collateral warranties is "time barred on any view". As I have said, a trial is required to determine that question.

Do the proposed amendments seek to add or substitute a new cause of action?

15. It is accepted by the Defendant that a claim for breach of collateral warranties is a new cause of action.

Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?

16. The Defendant contends that the new plea arises out of the same or substantially the same facts as have already been put in issue. Its submission is that reliance continues to be placed on the facts set out in the original pleadings at paragraph 7 to 14. On its case, the amendment is simply a new legal way of describing the existing claim.

17. The Claimant contends that the terms pleaded in paragraph 17 do not arise from any of the facts previously pleaded. Its principal point, which I address separately, is that the plea in respect of collateral warranties is, itself, defective.

18. In the course of her submissions Ms Hynes sought to rely on a passage from Ballinger v Mercer [2014] EWCA Civ 996 which was itself cited in Mulally & Co v Martlet Homes at [49]. In my judgment, her reliance on that passage was misplaced given what Coulson LJ says at [50] of Mulally.

19. The basic facts said to give rise to these collateral warranties arise from a narrow compass. It all depends on what was said at a meeting in June 2011 and the

interpretation of what was said at the meeting. The meeting was already pleaded. So, too, were the basic facts of what is said to have happened at the meeting.

20. This is not a new case which wipes out the old one. From a technical perspective, the underlying complaint remains the same. The old case, and the new one, are concerned with the (alleged) stated ability of the Claimant's components to achieve 30 minutes fire resistance in accordance with the Building Regulations, provided that they were constructed in accordance with the Claimant's specification. The specification was pleaded previously.

21. In Mulally, the Court considered whether there was sufficient overlap between the old case and the new one, noting that the overlap did not have to be total. In my view there is more than sufficient overlap between the old and the new case to say that the new cause of action arises out of substantially the same facts and matters. It requires different analysis of what transpired at the meeting but the basic material is the same.

Should the Court exercise its discretion to allow the amendment?

22. The Defendant rightly submits that the Court has a general discretion whether to allow an amendment, citing the principles identified in Pearce v East & North Herts NHS Trust [2020] EWHC 1504, QB at [10]. That case summarises the earlier decisions in CIP Properties (AIPT) ltd v Galliford Try Infrastructure Ltd [2015] EWHC 1345, TCC and Quah Su Ling v Goldman Sachs International [2015] EWHC 759, Comm. The principles are well known and need no further recitation.

23. In the course of his submissions, Mr Watson for the Claimant did not particularly focus on these factors. Rather, his focus was very much on the contention that the amendment lacked any prospect of success, which I accept would be a good reason to refuse the amendment, and its poor particularisation.

24. The Defendant submits that its new case has real prospects of success. It relies on evidence of Mr Hughes of the Defendant who was at the meeting in June 2011. Ms Hynes did not seek to dispute the complaints about a lack of particularisation.

25. In respect of the argument that the amendment lacks any prospect of success, the Claimant founded its submission on the effect of two contractual provisions within the

Defendant's standard terms of contract. It notes that, on the Defendant's own case, these terms and conditions applied to the over-arching or individual Sales Contract(s).

26. Clauses 1 and 15 respectively provided as follows:

> *"This Agreement may not be added to, modified or otherwise altered, except by writing signed by an authorised NCD representative."*
>
> *"This Agreement is the complete, final and exclusive statement of the terms of the agreement between the parties and supersedes any and all other prior and contemporaneous negotiations and agreements, whether oral or written, between them relating to the subject matter hereof."*

27. The Claimant's primary case is that these terms and conditions were not applicable to any of the Defendant's purchases, which is a traditional battle of the forms dispute, but, if they were applicable, its submission is that these provisions prevent the Defendant from establishing either of the collateral warranties for which it contends. It submits that I should decide these applications on the basis most favourable to the Defendant i.e., that the Defendant's terms prevail. However, in the event that the Claimant's own terms prevail, which is the Claimant's case, the Claimant relies on the same argument by reference to clause 1 thereof which states:

> *"No order shall be subject to any conditions, whether additional to or inconsistent with these conditions, unless the Seller expressly so provides or assents to the same in writing."*

28. The potential relevance of these provisions had been far greater when, during an earlier iteration of the draft amended pleading, the Defendant's case had been that the Sale Contract(s) contained implied terms in respect of which the Claimant was said to be in breach. Only during the hearing did it become clear that the Defendant no longer maintained a case that the Claimant was in breach of the Sale Contract(s). The only pure contractual remedy sought was and remained a claim based on the indemnity.

29. Nonetheless, the Claimant's case was that these clauses also precluded any cases based on collateral warranties. Reliance was placed on MWB Business Exchange Centres v Rock Advertising Ltd [2019] AC 119, SC. In that case Lord Sumption said at [14]:

> *"The same point may be made in a purely English context by reference to the treatment of entire agreement clauses, which give rise to very similar issues. Entire agreement clauses generally provide that they "set out the entire agreement between the parties and supersede all proposals and prior*

agreements, arrangements and understandings between the parties." An abbreviated form of the clause is contained in the first two sentences of clause 7.6 of the agreement in issue in this case. Such clauses are commonly coupled (as they are here) with No Oral Modification clauses addressing the position after the contract is made. Both are intended to achieve contractual certainty about the terms agreed, in the case of entire agreement clauses by nullifying prior collateral agreements relating to the same subject-matter. As Lightman J put it in Inntrepreneur Pub Co (GL) v East Crown Ltd [2000] 2 Lloyd's Rep 611, para 7:

> *"The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence as is suggested in Chitty on Contract 28th ed Vol 1 para 12-102: it is to denude what would otherwise constitute a collateral warranty of legal effect."*

*But what if the parties make a collateral agreement anyway, and it would otherwise have bound them? In Brikom Investments Ltd v Carr [1979] QB 467, 480, Lord Denning MR brushed aside an entire agreement clause, observing that "the cases are legion in which such a clause is of no effect in the face of an express promise or representation on which the other side has relied." In fact there were at that time no cases in which the courts had declined to give effect to such clauses, and the one case which Lord Denning cited J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 WLR 1078) was really a case of estoppel and concerned a different sort of clause altogether. In Ryanair Ltd v SR Technics Ireland Ltd [2007] EWHC 3089 (QB)*https://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWHC/QB/2007/3089.html*, at paras 137-143,* Gray J *treated Lord Denning's dictum as a general statement of the law. But in my view it cannot be supported save possibly in relation to estoppel. The true position is that if the collateral agreement is capable of operating as an independent agreement, and is supported by its own consideration, then most standard forms of entire agreement clause will not prevent its enforcement: see Business Environment Bow Lane Ltd v Deanwater Estates Ltd [2007] L & TR 26 (CA), [2007] EWCA Civ 662 , at para 43, and North Eastern Properties Ltd v Coleman [2010] 1 WLR 2715 at paras 57 (Briggs J), 82-83 (Longmore*

> *LJ). But if the clause is relied upon as modifying what would otherwise be the effect of the agreement which contains it, the courts will apply it according to its terms and decline to give effect to the collateral agreement. As Longmore LJ observed in the North Eastern Properties Ltd case, at para 82:*
>
> > *"if the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said."*
>
> *Thus in McGrath v Shah (1989) 57 P & CR 452, 459, John Chadwick QC (sitting as a Deputy Judge of the Chancery Division) applied an entire agreement clause in a contract for the sale of land, where the clause served the important function of ensuring that the contract was not avoided under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 on the ground that the terms were not all contained on one document. Outside the domain, in some ways rather special, of contracts for the sale of land, in Deepak Fertilisers and Petrochemical Corpn v ICI Chemicals & Polymers Ltd [1998] 2 Lloyd's Rep 139, 168 (Rix J) and [1999] 1 Lloyd's Rep 387, para 34 (CA), both Rix J and the Court of Appeal treated the question as one of construction and gave effect to the clause according to its terms. Lightman J did the same in the Inntrepreneur case. Since then, entire agreement clauses have been routinely applied: see Matchbet Ltd v Openbet Retail Ltd [2013] EWHC 3067 (Ch), para 112; Mileform Ltd v Interserve Security Ltd [2013] EWHC 3386 (QB), paras 93-101; Moran Yacht & Ship Inc v Pisarev [2016] 1 Lloyd's Rep 625 (CA), para 18; First Tower Trustees Ltd v CDS (Superstores International) Ltd [2017] 4 WLR 73, paras 17, 26; Adibe v National Westminster Bank Plc [2017] EWHC 1655 (Ch), para 29; Triple Point Technology Inc v PTT Public Co Ltd [2017] EWHC 2178, (TCC), para 68; ZCCM Investments Holdings Plc v Konkola Copper Mines Plc [2017] EWHC 3288 (Comm), para 21."*

30. The Claimant's submission is that the Defendant's plea is really an example of it seeking to modify what would otherwise be the effect of the Sale Contract(s) and it therefore falls foul of the entire agreement clauses. Although it is unclear, the Claimant understood the Defendant's case to be that the collateral warranties formed part of the Sale Contract(s). The Claimant also emphasised the unusual feature of clause 15, namely that it sought to exclude the application of any "contemporaneous …agreements" which, it said, must apply to collateral warranties. Lastly, the Claimant submitted that the alleged warranties suffered from other defects. One warranty was inconsistent with the Assembly Specification which recommended that the fabricator should undertake its own fire test. The other warranty was said to be contradictory. The Claimant also submitted that it could never have warranted that future global assessment reports would, invariably, enable the Defendant to correctly claim that the

doorsets would be capable of achieving 30-minutes fire resistance when tested to BS476-22. It was unclear whether the Defendant was so suggesting.

31. The Defendant had (admittedly belatedly) recognised the potential significance of these contractual provisions which led it to abandoning any case based on breach of additional terms of the Sale Contract(s). Nonetheless, its case in response is that the collateral warranties for which it contends are capable of operating as independent agreements supported by their own consideration. Insofar as its own terms apply, the Defendant submits that clause 15 merely precludes negotiations and agreements "relating to the subject matter hereof" which, in this context means the Goods in clause 1. The collateral warranties for which it contends do not relate to the Goods themselves but to the fire-related properties that could subsequently be claimed in respect of them.

32. In my judgement, the case sought to be advanced by the Defendant is properly arguable. It will require a trial and further argument to finally determine whether the collateral warranties for which it contends are excluded by whichever terms and conditions are applicable. Although it is conventionally the case that an application to strike out is determined on the facts pleaded by the Defendant, the Court cannot ignore the Claimant's case that the Defendant's terms do not apply. Without making any final determination, it would be fair to say that the potential reach of clause 1 of the Claimant's own terms is not as great as that clause 15 of the Defendant's terms. I am also satisfied that the Defendant has an arguable case that "the subject matter hereof" is a limiting factor in the application of clause 15 even if, as the Claimant submitted, clause 15 had the effect of excluding the impact of any contemporaneous agreements. It is also arguable that the pleaded collateral warranties are capable of operating as independent agreements supported by their own consideration. In other words, I accept that the alleged collateral warranties could co-exist with the terms and conditions of the Sale Contract(s).

33. I do not accept the Claimant's submission that the argument as to the existence of the collateral warranty is necessarily fatally undermined by the statement in the Assembly Specification that recommended the fabricator should undertake its own test. One possibility is that this recommendation meant no more than the full doorset had to be tested once assembled, to test the quality of subsequent workmanship, rather than the

products provided by the Claimant. Otherwise, the first sentence could be rendered meaningless. Another possibility is that, as the Defendant submitted, the Exova report sufficed as the separate test referred to in this sentence.

34. I accept that there are other potential difficulties with the pleas in respect of the warranties but, in my judgement, those are at least capable of being answered and it will require a trial to determine whether or not they ultimately can be.

35. It follows that the Claimant's contention, that the amendment in respect of collateral warranties has no prospect of success, fails.

36. It therefore remains to consider whether there is any other reason to refuse permission to amend in respect of the collateral warranties. I have in mind the overriding objective and the need to strike a balance between injustice to the Defendant if the amendment is refused and injustice to the Claimant and other litigants if the amendment is permitted. I agree with the Defendant that this balance is firmly in its favour. If the amendment is refused, it will be unable to maintain the case for which it now contends, leaving it with the case based on breach of the Sale Contract(s) for which it no longer has any enthusiasm. Importantly, the Claimant has never suggested it cannot deal with the new case (subject to it being properly particularised). No prejudice of any sort is alleged. As the Defendant submits, there will be no additional disclosure and the relevant inquiry of fact will largely be that which already existed. The amendment is very late in the sense that it has taken years to be formulated but, procedurally, it is still early in the life of these proceedings for which no CMC has yet taken place. The Defendant's explanation for the delay is that it only subsequently became apparent that the Claimant was taking a point about the entire agreement clause. I do not regard that as a good reason for the delay. It ought not to have required the Claimant to point out the potential difficulties with the Defendant's own case. If the Defendant wanted to base its case on a new cause of action, that was always a matter for it. But, although the Defendant bears responsibility for the delay, and the multiple iterations of the draft pleading which have been produced in the 18-month period since the application was issued, the claim is, as I have said, at a relatively early procedural stage.

37. On the other hand, there is force in the Claimant's fall-back submission that the plea in respect of collateral warranties lacks particularisation. In particular, the point is made that there is no clarity as to whether they constitute a single set of warranties or a series of warranties bolted on to a series of Sale Contract(s). Issues about a lack of particularisation can be addressed by means of a Part 18 request and are not, and not said to be, a reason to refuse permission to amend.

38. In all the circumstances, and having regard to the overriding objective, I am satisfied that permission to amend in respect of the claim for collateral warranties should be given.

Misrepresentation

39. The second category of amendment concerns a plea in respect of misrepresentation pursuant to s.2(1) Misrepresentation Act 1967. During the course of oral submissions, it became clear that the Defendant was relying not only on one written representation said to arise from the Assembly Specification but also on another statement in that document together with further oral representations now pleaded in paragraph 18A of the draft. The Claimant points out it is highly surprising that these oral representations were not pleaded previously.

40. At the hearing there had been considerable debate about the extent to which a claim made in misrepresentation was time barred, giving rise to the application of the four-part test in Mulally. However, in its well-judged written submissions made following the hearing, the Claimant rightly accepted that the question of whether representations, including oral representations, were made was not something which was subject to summary determination. It followed that the proposed amendment in respect of misrepresentation raised an arguable case. The Claimant also accepted that, although misrepresentation was a new cause of action, a proper analysis was required of any losses in fact suffered before it could be determined that the claim was time-barred. The Claimant accepted, as a pragmatic step, that this was an issue best left to trial. On that basis, the Claimant further accepted that the Defendant should be permitted to argue the misrepresentation claim, including amendments to paragraphs 8, 9, 18A and 34 of

the draft, but on the basis that the Claimant is able to argue, at trial, that the loss was suffered earlier than 2018 and that the misrepresentation claim was time barred.

41. I therefore grant permission to amend in respect of misrepresentation.

Other amendments

42. There are other amendments beyond the two new causes of action. For example, the Defendant has added reference to a defence of equitable set off and inserted a new head of loss. In an earlier draft, this claim had been pleaded as a "loss of income" in the sum of £700,000. In the course of the hearing there had been a suggestion that the true figure for a loss of profit would be considerably less but, ultimately, the Defendant has now pleaded a loss of profit of £529,568.

43. Whilst the other amendments may well be susceptible to a request for further information, e.g., the claim for loss of profit, I do not consider that a lack of particularisation means that the amendment should be refused as an amendment. There will be ample time for the Claimant to request and the Defendant to provide such further information as may be appropriate.

44. I should also record that Ms Hynes, for the Defendant, made it clear in the course of the hearing that the Defendant was not advancing any claim that the doorsets would actually fail to achieve fire resistance of 30-minutes when tested to BS 476-22. Rather, its case is that, in the events which occurred, it lost the ability to sell doors with the claimed benefits of fire resistance and support from a global assessment report.

Claimant's applications

45. For the reasons given above, I am also satisfied that it is appropriate to dismiss the Claimant's claim for summary judgment and/or to strike out the Defence and Counterclaim. The applications have been overtaken by the amendments which include the deletion of the contractual causes of action. The Defendant has an arguable claim in respect of the new claims in respect of collateral warranties and misrepresentations.

Preliminary Issues

46. The Claimant proposed a trial of preliminary issues although it rightly accepted that the appropriate scope of any such issues was, ultimately, dependent on those amendments

for which permission may be granted. Suggestions as to possible issues were made in the course of argument. Whilst not wanting to firmly shut the door on any such application as may be pursued at the CMC, I must express some reservations about a trial of preliminary issues in this case. The reason is a simple one. Both parties have agreed that this entire case can be determined in four days. A trial of preliminary issues would take at least one and more probably two days. It is difficult to see how a trial of preliminary issues would significantly reduce the scope and costs of the main trial. Preliminary issues are often suitable when the costs of a much longer trial can, potentially, be avoided by a decision on a short point capable of separate, early, determination. Here there is unlikely to be any saving. Indeed, overall, the costs may increase.

47. Although the matter was not fully explored, both parties were attracted by the idea of a split trial which determined liability first, albeit with causation being included in the first trial. Again, I express some reservations about that. Questions of loss are potentially material to the Claimant's limitation defence and, if there is incomplete evidence about loss, these questions may be difficult to decide. I also have in mind that, on reviewing the proposed costs budgets, any savings in respect of disclosure and expert quantum evidence would be relatively modest.

48. Accordingly, whilst I do not intend to shut out either party from applying for these matters to be further considered at the CMC, my present view is that the most appropriate course is for all matters to be determined in a single trial.

Consequential matters

49. I will leave it to the parties to draw up an appropriate order reflecting the decisions above. A consequential hearing will be necessary to deal with questions of costs arising from the applications, not least because the Claimant has notified its intention to seek the costs of the action to date, including the costs of the applications.