Nut Tree Limited v Dunnell Robertson Partnership Limited
Royal Court
3rd September, 2015

JUDGMENT 43/2015

Application by the Applicant to amend the original cause.

Approved Text
03.09.2015

IN THE ROYAL COURT OF GUERNSEY

(Ordinary Division)

Civil Case No 1806

BETWEEN:

NUT TREE LIMITED — **Plaintiff/ Applicant**

and

DUNNELL ROBERTSON PARTNERSHIP LIMITED — **Defendants/ Respondent**

Hearing dates: 14th - 15th July 2015

Judgment handed down: 3rd September 2015

Before: Her Hon Hazel Marshall QC, Lieutenant Bailiff

Counsel for the Plaintiff/Applicant: **Advocate P T R Ferbrache,**
Counsel for the Defendant/Respondents: **Advocate M G A Dunster**

Cases, texts and legislation referred to:

(a) Legislation:

Loi Rélative aux Préscriptions 1889 Art 1
Royal Court Civil Rules 2007 rr 10, 59

(b) Cases:

Guernsey

Ogier v Grande Havre Holdings Ltd [2000] 29 GLJ 80
Holdright Insurance Company v Willis Corroon Management (Royal Court) 25 August 2000
Yaddehige v Credit Suisse 2007-8 GLR 282

Jefcoate and anor v Spread Trustee and others, (Royal Court) Judgment 11/2013
Fairhead v Praxis Holdings Ltd, (Royal Court) Judgment 13/2014,

Jersey
Boyd v Pickersgill &Le Cornu 1999 JLR 284

England and Wales

Cooke v Gill 1873 LR 8CP 107
Collins v Hertfordshire County Council [1947] KB 598
Dornan v JW Wells & Co Ltd [1962] 1 QB 598
Letang v Cooper [1965] 1 QB 232
Steamship Mutual v Trollope & Colls (1968) 6 Con LR 11
Brickfield Properties Ltd v Newton [1971] 1 WLR 862
Circle Thirty Three Housing Trust v Fairview Estates (Housing) (1971) 8 Con LR 21
Idyll Ltd v Dinerman Davison [1971] 1 Const LJ
Paragon Finance plc v Thakerar & Co [1999] 1 All ER 400
Savings and Investment Bank v Fincken [2001] EWCA Civ 1639
Goode v Martin [2001] 3 All ER 562
Secretary of State for Transport v Pell Frischmann [2006] EWHC 2909 (TCC)
Lancaster City Council v Thomas Newall Limited [2013] EWCA Civ 802

JUDGMENT

Introduction

1. This application, dated 5th December 2014, is made by the Plaintiff, Nut Tree Limited, for leave to amend its cause in this action ("the Original Cause") dated 30th September 2013, by complete substitution of a proposed Amended Cause ("the Amended Cause") annexed to the Application.

2. The Defendant opposes the application. Its main objection is that much of the Amended Cause purports to introduce new causes of action against it, and that those causes of action have become time-barred since the date of the Original Cause, so that permitting the amendment would deprive it of an accrued defence because any amendment would date back to the date of the Original Cause. In respect of one particular claim in the Amended Cause, the Defendant says that that amendment ought not to be permitted because it would introduce a claim which is hopelessly inadequately pleaded and has no reasonable prospect of success.

3. The Plaintiff denies that the Amended Cause introduces new causes of action into the case at all, but says that even if it does, they arise out of the same, or substantially the same, facts as were pleaded in the Original Cause, such that the court has discretion to permit the amendments if this can be done without any injustice to the Defendant which cannot be compensated in costs; the Plaintiff says that it can.

4. In fact, the Plaintiff also disputes, in any event, that any causes of action contained in the Amended Cause had become time-barred at the effective date of the application to amend, invoking the doctrine of *empêchement d'agir.* Under this doctrine time does not begin to run against a Plaintiff who is effectively prevented from taking steps to pursue his claim, until he is freed from the relevant impediment. The Plaintiff says that in the circumstances of this case, that did not happen until within the relevant prescription period (six years in this case) before the effective date of the Amended Cause. The Plaintiff further argues that even if the court cannot make a final determination in its favour to this effect at this early procedural stage of the case (there having been only cause and defences tabled, and no further interlocutory processes carried out), it equally cannot make a determination to the contrary, in favour of the Defendant, so as to justify refusing leave to amend on this ground. This is because the issue of *empêchement* is fact-sensitive, and any dispute could only be resolved properly by a trial. The amendments

ought therefore to be allowed, albeit the court would have jurisdiction to do so on suitable terms to protect the Defendant's position with regard to prescription, if necessary. The Plaintiff says it would not object to such terms.

5. With regard to the relevant timings regarding the prescription point, it is to be noted that whilst the dates of actual issue of the Original Cause and of the Application to Amend the Cause are 30th September 2013 and 5th December 2014, those are not the dates which the court will have to apply when determining the issues on this application. This is because of the effect of a "standstill" agreement which was made, pragmatically and sensibly, between the parties. As a result of that agreement it was agreed before me that the Original Cause is to be deemed to have been issued on 31st May 2013, and the Application to Amend the Cause is to be deemed to have been made on 30th June 2014. Any references which I make to the "effective dates" of those matters are therefore references to these agreed dates.

Factual Background

6. The dispute in this action arises as set out below, and the facts I recount are largely common ground, certainly insofar as material for present purposes.

7. The Plaintiff company owns several hotel and restaurant operations in Guernsey. It is the business vehicle of Mr and Mrs Nussbaumer, who are its directors. The Defendant is a company of architects who offer and provide the usual range of architects' services with regard to the design, implementation, administration and supervision (I intend these descriptive words to have no legal significance) of building and construction projects. The Plaintiff has had a business relationship with the Defendant since the mid-1990s, using it for architectural services on various projects as they arose.

8. The Plaintiff acquired what is now the Farmhouse Hotel in about 2003. The premises are an old building, and the Plaintiff wanted to refurbish and improve the hotel. It began doing so in 2006. It employed the Defendant to provide architectural services for this. The first phase was a refurbishment of the ground floor which was completed in the early part of 2006 and is not the subject of these proceedings. A second phase of refurbishment and improvements, comprising the construction of a function suite, a staff accommodation block, the refurbishment of hotel bedrooms and an extension to the kitchen, was then proposed and undertaken. That phase is the subject of these proceedings. The Plaintiff again engaged the Defendant, but against the background of their longstanding relationship this happened somewhat informally.

9. The works were being designed and planned from about August 2006. The Plaintiff obviously wanted to complete them as quickly, and with as little disruption to lucrative seasonal trade, as was feasible. Exactly what happened is in dispute, but it seems that although two firms of builders - RG Falla and JW Rihoy & Son Ltd - were approached to provide estimates, only Rihoy actually did so, and their proposals contained many items based on provisional cost sums. However, the decision was made to go ahead with them, and they were allowed on site to commence works in November 2006, before any formal works contract was concluded.

10. A Building Contract was eventually signed on 21st March 2007. It was in the JCT Intermediate Form of Building Works Contract IFC 98 (1998 Edition with Amendments up to No 5: 2003). It was executed by the Plaintiff as Employer through Mr Nussbaumer, and by Rihoy as the Builder, and it named the Defendant as " 'the Architect'/'the Contract Administrator' " and also as " 'the Quantity Surveyor' " under the contract. It was made by reference to certain drawings provided by the Defendant and by Rondel & Rondel, interior design consultants. The contract price for the works was £2,128,988.55. The completion date was stated to be 1st June 2007. Liquidated damages were expressly to be "£0.00p". The Defects Liability Period was to be 12 months.

11. Rihoy subcontracted out the design and installation of the Mechanical and Electrical Services installations to Smart Manufacturing Limited. These were alterations and extensions of the electrical services, design and installation of ventilation equipment and plant for the kitchen, plumbing for bathrooms and a heating and ventilation system for the whole building, using a "Unico" system.

12. In the event, the works were completed late. A Certificate of Practical Completion was issued by the Defendant on 23rd October 2007, which I am told was 144 days late, although no extensions of time were certified under the contract terms. Rihoy's claimed final account came in at £2,924,044.42. The Plaintiff found this unsatisfactory, and in late 2007 it employed a third party Quantity Surveyor, a Mr Bruce Mansell, to negotiate this down. He negotiated a reduction of £224,044.62, to £2,700.000, in February 2008. He has made an affidavit stating that his negotiations did not include any account being taken of delays or defects in the works.

13. As is always the case, there remained items of 'snagging" to be dealt with after Practical Completion, as well as the remedying of any defects which might emerge. Some did. However, by 14th December 2009, the Defendant felt able to, and did, issue a Certificate of Making Good Defects and Final Certificate, thus triggering the obligation to pay the final retention payment of £17,500. The Defendant continued to have involvement regarding the building defects which did subsequently appear.

14. Following Practical Completion, the maintenance of the M & E installations had been carried out by Smart, but that company went out of business and into administration in September 2009. It went into voluntary liquidation on 1st July 2010.

15. The Plaintiff says, through an affidavit of Mrs Nussbaumer, that when they then sought a replacement maintenance contractor for the M&E installations, a catalogue of defects and poor workmanship began to be uncovered. In short, over the period from June 2010 to January 2012 the Plaintiff approached and engaged various specialists and consultants - Guernsey Air Conditioning, Amalgamated Facilities Management, the WT Partnership, the Quantum Group (specialist Unico servicing agents), Channel Design Consultants - and lastly, in that period, sought a full report from Mr Richard Spinney of the Henderson Green Partnership regarding M&E, and from Mr Peter Brewin of Hunt Brewin regarding building construction.

16. They were assisted in their investigations by the fact that Rihoy returned, in January 2012, to carry out some minor remedial works at their own costs, and did some opening up in the process. As a result, it was suggested that major remedial works were required to deal with the deficiencies of the M&E installation, (in particular the Unico system having to be replaced, because it would never have worked properly) and also to remedy some aspects of the building works. These works would require significant opening up, and be very disruptive. It was only in early 2014 that Rihoy agreed to return and carry out some of the more significant remedial works at their own cost, with the Hotel having to be closed from January to March 2014.

17. In the meantime, in October 2013, but following notice of intended proceedings and the standstill agreement already referred to, this action was commenced, in the terms of the Original Cause. The essence of the claim in the Original Cause is that the Defendant was either negligent towards, or in negligent breach of contract with, the Defendant, in regard to the provision of its services in relation to the building works, and that as a result the Plaintiff has suffered loss, because of defects in the building which should not have been there and because of the works being completed late. Paragraph 13 of the Original Cause identifies nine matters of complaint, in rather general terms, in respect of which it is said that the Defendant was negligent or failed to exercise due professional skill and care in the provision of its services. A laconically phrased Schedule of Defects, which is a descriptive list of general deficiencies rather than anything more precise, is appended to the Cause and relied upon. Whilst loss and damages are pleaded as a bare fact, no details, nor any amounts, are given.

18. The Plaintiff says that the opening up work carried out in early 2014 enabled further inspections of otherwise inaccessible parts of the buildings to be carried out and revealed other defects, and that it was this which, in effect, brought about its wish to substitute the Amended Cause.

The Amended Cause

19. The Amended Cause was then prepared and, as already mentioned, is to be treated as if applied for on 30th June 2014. It is pleaded far more fully and elaborately than the Original Cause (as I shall have to examine) and contains a final Schedule of Defects. This now includes 27 items

identifying specific defects which either remain unremedied or which were remedied at the Plaintiff's own expense, and a further six items which relate to defects which the Plaintiff accepts have been rectified by Rihoy at its expense, but which the Plaintiff says caused it further or other costs or losses which it is entitled to recover from the Defendant. In respect of each item, details of the nature of the complaint are given in the new Schedule of Defects under a heading "breach" and figures for the claimed amounts of damage, cost, expense or loss are given.

20. The claim for losses is summarised in Paragraph 44 of the Amended Cause under 11 sub-paragraphs. The total of the claim there quantified is about £1.2M. One item (Paragraph 44.3) claims £160,732.56 being the total claimed in respect of the first 27 items of the Schedule. Another, at Paragraph 44.11, is a notable £581,000 odd, claimed in respect of costs of "diversion of management time spent in resolving the matters complained of", and being said to be an estimate of the directors' time thus spent expressed as a proportion of their remuneration. No calculations or underlying figures for this are given, and it is this claim which the Defendant objects to on the grounds of inadequate pleading and no reasonable prospect of success.

The law

21. The applicable law is largely common ground between the parties. Their differences lie in matters of interpretation, application, or even just emphasis. Each side naturally argues for the breadth or narrowness of the concept to be applied, depending on which better supports its position.

(1) <u>Amendment</u>

22. Under Guernsey law, the Plaintiff may not amend his Cause without the consent of all other parties or the leave of the Court (Royal Court Civil Rules 2007, r. 59), hence this application. Allowing an amendment is therefore a matter for the discretionary judgment of the court. The principles upon which the court will exercise its discretion to allow amendment, particularly in cases where there may be an issue of prescription, were considered and distilled by the Bailiff in <u>*Jefcoate and anor v Spread Trustee and others*</u> Royal Court, Judgment 11/2013, at paragraph [52], under 13 short and sequential sub-paragraphs:

> *"(a) The Court has a wide discretion under RCCR 59 to permit amendments where one or more of the parties have not consented.*
>
> *(b) The discretion must be exercised judicially having regard to legal principles.*
>
> *(c) The overriding objective requires that cases be dealt with justly.*
>
> *(d) What justice requires depends on the circumstances of the particular case but includes taking account of the matters particularised in RCCR 1(2), which will be of special importance when a late amendment is sought.*
>
> *(e) In general, amendments should be allowed so that the real dispute between the parties can be adjudicated provided that any injustice to the other party can be compensated for in costs.*
>
> *(f) In the ordinary course it will not be just to allow an amendment if it will defeat a defence of prescription that may otherwise be available.*
>
> *(g) If a defence of prescription may be defeated, it is necessary to establish whether the proposed amendment seeks to introduce a new cause of action.*
>
> *(h) What constitutes a new cause of action is not determined by the label attaching to the proposed claim but by the factual situation which is required to be proved to entitle the plaintiff's claim to succeed. If the new cause of action which is sought to be added or substituted arises out of the same facts or substantially the same facts as a cause of*

action already pleaded, the Court will not normally regard it as a new cause of action and hence will have a discretion to allow it.

(i) However, even if the new cause of action arises from similar, or substantially the same, facts as already pleaded, the court will disallow the amendment if the justice of the situation so requires.

(j) Where a new cause of action may be prescribed, the effective date as to when the limitation period expired is the date of the application although if the amendment is permitted, the effect is that it is deemed to date back to the date of the original proceedings.

(k) When considering the limitation period, it is necessary to have regard to any period of time during which the plaintiff was empêché d' agir.

(l) An amendment will not be allowed if the case introduced by it has no realistic prospect of success.

(m)Apart from considerations of prescription, the mere fact that the change effected by a proposed amendment would involve introducing a new cause of action or that it would substantially alter the character of the proceedings or the burden of conducting them is not a reason for refusing leave to amend provided that the change can be made without inflicting injustice on the other parties of a kind incapable of being compensated by an order for costs."

These are the principles, therefore, which I apply, although it may be convenient to deal with them in a different order.

23. Propositions (f), (g) and (j) require comment. An uncertainty arises from whether the use of the word "may" in (f) is fixing the test for refusing leave to amend as being that a defence of prescription "will" (definitely) be defeated by permitting the amendment (ie through causing the plea to date back to the original cause), or only as being the lower hurdle, that a defence of prescription "may" (possibly) be so defeated. The latter would mean that leave to amend is to be refused merely because the defendant might lose the possibility of arguing a prescription point, as contrasted with his actually being deprived of the availability of an effective prescription point.

24. Plainly it would be unjust to permit amendment in this second case, but the first approach, if applied as a rule, might well work unduly leniently towards a defendant, tending to give it the benefit of any doubt about the strength of any prescription argument which it could muster. Given that the Bailiff was here synthesising the principles noted and stated by Sumption JA in *Ogier v Grande Havre Holdings Ltd* [2000] 29 GLJ 80, and that the latter there uses the phrase "*would defeat a plea of prescription which would otherwise be available….*" (see page 42 at C-D; emphasis added), rather than "might defeat… (etc)", I would have interpreted the Bailiff's principles as intending the test to be that of clearly defeating a defence of prescription, so that his use of the phrase "may be defeated" in paragraph (g) was really a convenient shorthand for the concept he states at (f): *"will defeat a defence of prescription which may otherwise be available"*. However, on considering paragraphs [78]-[79] and [97] – [99] in the *Jefcoate* judgment, it seems to me that the Bailiff did proceed to apply principles (f) and (g) on the basis that an amendment of the Cause should not be permitted if it were simply possible that a prescription defence *might* thereby be defeated, having regard to the burden of proof in the context of an application to amend (see eg paragraph [97]).

25. This point has been judicially noted previously. In *Fairhead v Praxis Holdings Ltd* (Royal Court Judgment 13/2014, McMahon DB). The Deputy Bailiff there adopted the *Jefcoate* principles with approval. Noting this linguistic point at para [24], he stated

"This summary clearly applies the various elements derived from the Ogier case and, in my view, using "might" (as in in Para. 97) or "will" (as used in this paragraph) [sc *Jefcoate* Para [52]] *does not dilute the original use by Sumption JA of "would" . In a*

> *case such as this, the Court has to consider whether a defendant appears able to raise a valid prescription defence by taking the defendant's position viewed in the best light on the material before it, then proceeding to consider whether the plaintiff can deploy the doctrine of empêchement to reverse the defendant's potential prescription defence."*

The Deputy Bailiff thus appears to be supporting the "would" test, but he tempers this with the word "potential" and he in the event, reached a firm conclusion on the question of the strength of the plaintiff's *empêchement* argument, namely that it was not sustainable.

26. The difficulty I find with all of this is that the judgment whether and when a cause of action has become prescribed, or whether a Plaintiff can deploy the doctrine of *empêchement* may be acutely fact sensitive: see per Beloff JA in *Yaddehige v Credit Suisse* 2007-8 GLR 282 at [41]. Whilst it may be possible, in some cases (*Jefcoate* and *Fairhead* being cases in point), to make a confident judgment about the merits of such an argument at an early procedural stage when there is only affidavit evidence, there may well be cases in which the evidence is not sufficiently clear, and where the issue of *empêchement* could not be finally adjudicated on without a trial of the facts. In such a case it seems unsatisfactory to reduce the decision regarding permission to amend to one depending on the burden of proof, taken at an interlocutory stage.

27. In my judgment, the appropriate approach is to consider whether a decision can be made one way or the other on the basis of such a sufficiently clear impression as those which presented themselves in *Jefcoate* and *Fairhead*. If it cannot, then, if the justice of the case requires, the court can deal with this situation by permitting the relevant amendment to be made on condition that the plaintiff shall not argue at the trial that proceedings in respect of the particular cause(s) of action introduced by the amendment were initiated earlier than the date of the application to amend the cause. This would protect both the defendant's right to the benefit of a properly founded prescription defence accrued before the application to amend, and the plaintiff's properly arguable claim to the benefit of the doctrine of *empêchement* to rebut this, if proven.

28. However, the court is not obliged to take that course; it is simply an available option. Other considerations may still enter into the balance as to whether even granting conditional leave to amend would be a just course to take. Such considerations will include not only the apparent *prima facie* strength of the *empêchement* argument and the disadvantage which the plaintiff would suffer if leave to amend were refused without the opportunity to examine it, but also the disadvantage which the defendant would suffer if required, only now, to deal with the *empêchement* argument in a trial, and this may also lead to consideration of the reasons why this situation has occurred and why the new claim was not advanced earlier, quite apart from consideration of the factual matters going to prescription or to the founding of an *empêchement* argument itself.

29. With regard to the application of these principles generally in this case, Advocate Ferbrache urges that upon examination I should take the course of allowing any amendments which are objected to on the grounds of potential deprivation of a prescription defence but subject to such a condition as mentioned above, to which his client would have no objection. Advocate Dunster urges that on examination it can be seen that most of the amendments are really of the kind where the court fairly can, and therefore should, "grasp the nettle" at this point, and disallow the amendments. I will consider these submissions individually at the appropriate point.

(2) Particulars - New cause of action - "Same or substantially the same" facts

30. These topics can be conveniently taken together, because they merge into one another, and this illustrates the underlying approach of the law as to whether a plaintiff should be allowed to amend his cause so as to expand it even after a relevant period of prescription might have expired. This underlying principle is, in my judgment, that if the original claim has really put the defendant on adequate notice of the thrust of the claim now being sought to be introduced by the amendment, then there is no real injustice in permitting the amendment: see *Goode v Martin* [2001] 3 All ER 562. The central question, which is in two parts, is therefore whether an amendment can fairly be characterised as merely giving further detail of a cause of action or complaint already pleaded, or whether it departs from this so far that it must fairly be

characterised as a different and discrete cause of action or complaint, but if so, whether it can nonetheless be characterised as arising out of, at least substantially, the same facts as already pleaded and therefore brought to the defendant's attention. In both the first, and the third, situation the amendment is permissible.

31. The two classic definitions of a 'cause of action' – and this fundamental point is obviously the same in Guernsey law as in English law - are those of Brett J in *Cooke v Gill* 1873 LR 8CP 107 at 116:

> "*… every fact which is material to be proved to enable the plaintiff to succeed…."*

and of Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at 242:

> "*A cause of action is simply a factual situation which entitles one person to obtain from the court a remedy against another person…."*

32. In *Paragon Finance plc v Thakerar & Co* [1999] 1 All ER 400 Millett LJ (as he then was) considered these to mean the same thing, but stressed that the definition requires only material facts to be considered. Thus, the pleading of additional or unnecessary detail does not amount to pleading a distinct cause of action and

> *"The selection of the material facts to define the cause of action must be made at the highest level of abstraction."*

In *Savings and Investment Bank v Fincken* [2001] EWCA Civ 1639 Peter Gibson LJ adopted the above formulation, explaining the quotation as meaning only that "non-essential" facts must be omitted when considering what constitutes any relevant cause of action.

33. Advocate Ferbrache for the Plaintiff stresses the concept of the 'highest level of abstraction', and the difference between mere particulars and material facts. Emphasising that merely elaborating on a cause of action already pleaded is not pleading a new cause of action, he submits that this is all that the Amended Cause does. He relies, as illustration, on the two cases of *Collins v Hertfordshire County Council* [1947] KB 598 and *Dornan v JW Wells & Co Ltd* [1962] 1 QB 598. In *Collins*, the original negligence alleged was that of a deficient system for prescribing dangerous drugs and negligence by a medical officer and a visiting surgeon. It was held that there was no pleading of a new cause of action by adding a plea of negligence by the hospital pharmacist; this was held to be mere pleading of particulars of a general allegation of a cause of action for the negligent running of the hospital. In *Dornan*, a claim for personal injury caused *inter alia* by "*the negligence of the defendants, their servants or agents"* was held not to introduce a new cause of action when a plea of negligence by a fellow worker for whom the defendants were vicariously liable was added. This was held to be *"an extension of the case rather than a new case".* Advocate Ferbrache, stresses the latitude of these principles in support of his argument that no new cause of action is being pleaded here, and that the Amended Cause merely elaborates, or provides further particulars of, the negligence and/or breach of contract by the Defendant which is already pleaded.

34. On the further aspect of whether, even if a new cause of action is pleaded, amendment can (and he says should) still be permitted on the grounds that such new cause arises out of the "same or substantially the same facts" he cited *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862 and *Circle Thirty Three Housing Trust v Fairview Estates (Housing)* 8 Con LR 21 as cases in which claims of negligence in the design of buildings had been permitted to be added to a claim for negligence in relation to the supervision of construction of the buildings, on the grounds that these arose out of "substantially the same facts". The questions of design, construction and supervision of buildings and the building works were inextricably linked (see e.g. per Sachs LJ at [1972] 1 WLR 862 at 873). Similarly, he referred to *Idyll Ltd v Dinerman Davison* [1971] 1 Const LJ in which claims for damage to roofs of property caused through poor building were held to be either within the same cause of action, or to arise out of substantially the same facts, as claims already pleaded in respect of other defective aspects of the building works. The case is

notable for a rejection of the extreme argument that an allegation of defective laying of a wall comprising 700 bricks would involve 700 causes of action.

35. Advocate Dunster for the Defendant, on the other hand, draws attention to what he submits to be the leading English case on building defects, *Steamship Mutual v Trollope & Colls* (1968) 6 Con LR 11, where May LJ said

> *"….I do not think one can look only at the duty on a party, but one must look also to the nature and extent of the breach relied on, as well as to the nature and extent of the damage complained of, in deciding whether, as a matter of degree, a new cause of action is sought to be relied upon. The mere fact that one is considering what are, as it is said, after all only different defects in the same building does not necessarily mean in any way that they are constituents of one and the same cause of action."*

36. Advocate Dunster also cited *Secretary of State for Transport v Pell Frischmann* [2006] EWHC 2909 (TCC) where at [38], and in a building context, the following propositions are distilled:

> *"(i) If the claimant asserts a duty which was not previously pleaded and alleges a breach of such duty, this usually amounts to a new claim.*
>
> *(ii) If the claimant alleges a different breach of some previously pleaded duty it will be a question of fact and degree whether that constitutes a new claim.*
>
> *(iii) In the case of a construction project, if the claimant alleges breach of a previously pleaded duty causing damage to a different element of the building that will generally amount to a new claim.*
>
> *(iv) When considering whether one claim arises out of "substantially the same facts" as a previous claim, it is necessary to examine the extent to which the facts of the first claim and the facts of the second claim overlap and the extent to which they diverge. It will then be a matter of impression whether the test is satisfied."*

37. I find this last citation very helpful analytically, but in my judgment these cases are all illustrations of the underlying principle, which is in effect explicit in the last citation, that the question whether a new allegation amounts merely to elaboration (or further particulars) of a cause of action already pleaded, or to the introduction of a new cause of action, is a matter of fact, degree and impression, according to the circumstances of the case. It depends on the extent to which the pleaded new material, whether a new duty, or a further and hitherto unmentioned alleged act or omission of the defendant, or a further and hitherto unmentioned consequence of an act or omission of the defendant, creates the impression that a new complaint, which is really a different and discrete complaint from any so far alleged, is now being introduced. I find the authorities cited in a building context by both parties to be more illuminating than those cited by Advocate Ferbrache in a different area of the law, (personal injury), but none of this detracts from the general approach, which, as I have said is an assessment of fact degree and, ultimately, impression.

3. *Empêchement d'agir.*

38. The events of which complaint is made occurred in 2006-7. The original cause is to be treated as having been launched on 31st May 2013 and the application to amend to have been made on 30th June 2014. The causes of action alleged are (negligent) breach of contract and tortious negligence at common law. The prescription period under which each of these would be extinguished in Guernsey law is, in each case, 6 years from the accrual of the cause of action.

39. In contract this is 6 years from the date of the breach (*Loi Rélative aux Préscriptions 1889 Art 1).* As regards tort, both parties accept that for present purposes this should be treated as being 6 years from the date when relevant actionable damage occurred. Advocate Ferbrache expressly does not, in the light of the comments of the Bailiff in [79] of the *Jefcoate* judgment, seek to argue that the actual accrual of the cause of action in tort depends, in Guernsey law, on the

"reasonable discoverability " of the cause of action, a point which was rejected - but only at first instance and perhaps with reluctance - by Day DB, in *Holdright Insurance Company v Willis Corroon Management* (Royal Court) 25 August 2000, at p 41. In the event, this is not a far-reaching concession in the light of his further arguments below.

40. The doctrine of *empêchement d'agir* is a doctrine of fairness which tempers the strictness of the principle of prescription by providing that the accrual of a cause of action to a potential plaintiff is postponed, for the purposes of time running under prescription, so long as the plaintiff is "*empêché*", ie prevented in a manner deemed sufficient by the law from pursuing his claim. It divides into *empêchement de droit* and *empêchement de fait*, one being a legal impediment or disability and the other being a factual impediment or disability. I am here concerned with the latter.

41. The test whether a plaintiff can invoke the doctrine of *empêchement de fait* is whether the relevant circumstances made it "practically impossible" for him to appreciate and therefore pursue his claim: see *Boyd v Pickersgill & Le Cornu* [1999] JLR 284 per Beloff JA (with whom Sumption JA agreed) at p. 290, l. 15, and per Southwell JA at p. 294, l.19 - a Jersey case but cited with approval in both *Yaddehige* and *Jefcoate* (supra) at [100]. The application of the test is one of realism and common sense, with "practical impossibility" being used in contradistinction to "theoretical impossibility". Where a plaintiff is prevented by such practical impossibility from exercising his right to bring legal proceedings, time begins to run against him only when the relevant impediment is lifted.

42. It is also to be noted that the test is an objective one, and not a subjective one; it is by reference to "*a reasonable person in the particular circumstances in which the plaintiff was placed*" rather than simply the plaintiff's own perception or evidence (see per Southwell JA in *Boyd* (supra) at p 294, l. 23).

43. The possibility of exercising one's right to bring legal proceedings depends on sufficiently knowing, both the facts which found a possible cause of action and the further fact that, in law, those facts do amount to a potential cause of action. Many of the cases therefore turn on the extent to which ignorance of some matter, and in particular the latter aspect, is fairly viewed as creating a "practical impossibility" of pursuing the relevant claim. As this is all part of an objective test, this has led to the test being described as the "reasonable discoverability" of the fact of a possible cause of action. Thus, whether the actual plaintiff can rely on his ignorance of some material fact or matter will depend on whether a person in his particular circumstances could reasonably be expected to have appreciated or discovered such fact or matter.

44. (It is this test for *empêchement* which is the reason why Advocate Ferbrache's acceptance that the time of the accrual of a cause of action in tort is the time when damage occurs, rather than the reasonable discoverability of having the cause of action, is of no great significance in this situation. The Plaintiff's argument as to when time starts running becomes, by application of the doctrine of *empêchement*, the same as under the competing argument of reasonable discoverability as the time when a cause of action in tort arises in the first place.)

45. Under this argument, Advocate Ferbrache stresses that where a layman is complaining about the negligence of his professional advisers, so long as he continues to be advised by those advisers it will be reasonable for him to be ignorant of the existence of a cause of action against them. He relies, in particular, on the judgment of Carey JA in *Yaddehige* (supra), where he said (at [49]):

> *"For my part I consider, in an age where the prudent man is encouraged to leave his affairs, be they legal, medical, financial or otherwise, in the hands of professional consultants, that the client should be entitled to rely on such advice or services as being rendered to him with competence and with care. It is not for the client in such circumstances, where he does not have any expertise of his own, to be continuously auditing or obtaining secondary advice on what is being done for him by those experts. I venture to suggest that it may be inequitable for that consultant when the client claims there has been a failure on the part of the consultant, giving grounds for action against him in contract or in tort, to be able to use prescription as a shield by alleging that the*

> *client should have been aware of the failings claimed to give rise to the cause of action at a time when the client was relying on and was still entitled to be relying on the consultant to discharge the duties for which he had been retained…"*

He points out that the Defendant continued to act for the Plaintiff, being actively involved, until at least the issue of the Certificate of Making Good of Defects on 14th December 2009 (and even beyond this), which was clearly within 6 years before the effective date of the application to amend, namely 30th June 2014. Thus, he submits, the Plaintiff was *empêché* until at least that date in respect of its complaints about the Defendant's advisory services, and until at least mid-2010 (being the date on which significant opening up works were first undertaken) in respect of complaints arising from physical defects in the building works.

46. Advocate Dunster accepts the relevance of the authorities cited by Advocate Ferbrache, but places different emphasis on them. He relies in particular on Sumption JA's warning in *Boyd* (supra) that for "ignorance" to be operable in the context of *empêchement*, it must be such ignorance as the law regards as "reasonable" as a matter of legal policy. This underlines both the objectivity of the test of reasonable ignorance, and that the test itself imports policy considerations and not merely factual ones. "Mere ignorance" is not enough, and (he submits) the test in law must not be allowed to descend to such a low hurdle, or the policy of prescription, which is to prevent the bringing of stale claims by dilatory plaintiffs, will be too easily subverted. As a matter of policy, there must be something more than just the ignorance, and which provides some justification for that ignorance.

47. As regards policy considerations, Advocate Dunster further submits, from a general perspective, that the emphasis in Guernsey law and procedure is on the contents of the Cause being properly stated from the outset. In Guernsey procedure, a Cause is tabled fully pleaded from the start. There is no dual stage approach, as there is in English procedure, with the possibility of a brief indorsement of the general nature of the claim at the initiation stage and the subsequent service of a fully particularised statement of the claim as part of the early interlocutory process. He submits that this shows that parties are expected to "get on", and investigate, and bring any claim which they may believe they have, with proper speed and diligence, and this means that the court will take a relatively strict attitude to dilatoriness and be less ready to excuse the consequences of apparent tardiness or lack of appropriate thoroughness in initiating a claim. Thus, he submits, that the court should be unsympathetic to a plaintiff who seeks the indulgence of being allowed to make wholesale amendment to a cause, when the original and now supposedly defective claim was only issued very late in the day, after all the events of complaint (even those in the amended cause) were known, and with no good explanation as to why the cause was not initially drafted informatively and as it is now claimed it ought to be, but was almost embarrassingly devoid of proper detail, nor of why it should have taken as long as a further 15 months after the original issue of the cause to produce a version which, only now, is said to comprehend all the claims which the Plaintiff had, and which it wants to make.

48. Advocate Ferbrache rejects those criticisms, relying on the evidence of Mrs Nussbaumer as to the piecemeal discovery of matters of valid complaint, and in particular the fact that many were not discovered, or discoverable until major opening up works were done in early 2014, after issue of the original cause. He submits that insofar as the court may not feel able to accept his argument that the Plaintiff was *empêché* until sometime after 30th June 2008, but is at all inclined to accede to the argument that any *empêchement* must have ceased before that date, such a dispute could only be decided after a factual investigation which is neither possible nor appropriate at this stage of proceedings; the court should therefore, if necessary, grant conditional leave to amend as mentioned above. I will consider these matters below.

Scope of the amendments - the current allegations

49. I turn therefore, to the proposed amendments. Usually, it is quite easy to examine what is or is not new in an amended pleading, because the amendment will be done by a marked up version of the original pleading. This is by far the most helpful way, to the court, of presenting an amended pleading. Here, however, the application to amend is an application for the wholesale substitution of a new document, which not only expands greatly on the old document in its

content, but is very different in its structure and expression. Of course, this is permissible under the rules. The necessary exercise remains, though, that of considering the existing pleading and comparing the content of the new pleading, in order to apply the ***Jefcoate*** principles.

50. The Original Cause pleads the case broadly as follows. The first 12 paragraphs plead the background, and facts including the Building Contract at Clauses 3 and 5. (As an aside, it only refers to the Building Contract as relating to the construction of the function suite and the alteration and extension of hotel bedrooms, but I would be prepared to accept that referring to the Building Contract itself would be wide enough to encompass the whole of its actual scope.) At Clause 4 it states that the Building Contract was prepared by Rihoy – an allegation apparently abandoned in the Amended Cause, although admitted in the Defences.

51. Clause 6 of the Original Cause pleads that

> *"In or around 2006 the Plaintiff engaged the Defendant to act as the architect, contract administrator and quantity surveyor in respect of the Works* [sc. under the Building Contract]…"

and that the Defendant was named in those capacities in the **"Building Works Contract**". This engagement is designated **"The Contract**". There is no express statement that such engagement was for reward, although I would accept that this would reasonably be implicit.

52. The ensuing clauses plead the Defendant's implied contractual duty

> *"…to exercise all due professional skill and care in the performance of its services thereunder"*

and a "*like duty of care*" in tort. Paragraph 12 pleads the relevant defects in the works by reference to a Schedule and these are then defined as "**The Defects**".

53. Clause 13 pleads "**The Defendant's Breach**" in the following terms:

> *"13. Negligently and in breach of contract, the Defendant failed to exercise all due professional skill and care in the performance of its services in that it:*
>
> *13.1 Failed to design the Works so as to ensure that they were free from the Defects.*
>
> *13.2 Failed to identify that the M&E Works were defective, and failed to insist that Smart remedy the same.*
>
> *13.3 Failed to identify that JWR's workmanship was defective and failed to insist that JWR remedy the same.*
>
> *13.4 Failed to supervise the performance of the works so as to ensure that the Works were completed as contemplated by the Building Works Contract.*
>
> *13.5 Failed to adequately prepare and advise the Plaintiff in relation to the Building Works Contract.*
>
> *13.6 Failed to administer the Building Works Contract so as to achieve completion of the Works by the Date for Completion.*
>
> *13.7 Failed to properly inspect the Works prior to issuing the Certificate of Practical Completion;*
>
> *13.8 Failed to ensure that the Works were not certified and paid for as being properly executed; and*
>
> *13.9 Failed adequately to perform the role of Quantity Surveyor."*

54. As already mentioned, Paragraph 14 then pleads in bare terms that these breaches caused the Plaintiff loss and damage, which is left unspecified.

55. It is perfectly obvious that this pleading is, as Advocate Dunster has submitted, grossly deficient in particularity. Only Paragraphs 13.1 and 13.6 come anywhere near to enabling the actual matters of complaint to be identified at a level which would allow their merit to be evaluated, and Paragraphs 13.4, and 13.8 add nothing to the generality of the other paragraphs. However, no formal *exception de forme* was taken, nor was any attempt made to strike out the Cause or any part of it for disclosing no reasonable cause of action or for being embarrassing, etc. Instead, Defences were tabled, albeit pleading various objections to the Cause for being embarrassing for lack of particularity, such that the Defendant was unable to plead to its allegations. This is not a criticism of the Defendant's course of action or pleading (except insofar as it was erroneously asserted that expert evidence was required to be ***pleaded*** in support of allegations of professional negligence: see RCCR r10 (2)), as there may have been perfectly sound reasons for merely seeking to point out pleading deficiencies in the Cause, rather than formally demanding more detail. The consequence would, I think, be that under the Original Cause as formulated and therefore currently governing the scope of the action, the Plaintiff would be entitled to adduce evidence of any matter of complaint which could fairly be said to be comprehended within the complaints pleaded, lacking in specificity though they may be. However, whether this can be said to amount to *pleading* all such matters, when it comes to considering how far causes of action have in fact been pleaded for present purposes, is not the same question.

56. The question for me to decide is whether any revised allegation amounts to a mere elaboration of a cause of action already contained in the Original Cause as pleaded, or adds or substitutes a new cause of action. I must pay appropriate regard to the breadth of what is in fact already pleaded, as the Plaintiff is procedurally entitled to the benefit of this. However, and by the same token, the generality of the pleading leaves no room, in my judgment for a benevolent interpretation of what is within the extent of the existing pleading either as a matter of construction or of implication. This is because the practical purpose of the Cause is to tell the Defendant what the case against him is, and the purpose of examining the Cause on this application is to see how far the Defendant can reasonably be found to have been alerted by the Original Cause to the possibility of allegations such as those newly proposed so as to see (a) of what causes of action he has effectively been informed and (b) what degree of prejudice he might suffer if he only now becomes obliged to deal with such new material. The breadth and generality of the pleading of the Original Cause therefore affects the scope for argument that any "new" cause of action arises out of "substantially" the same facts as are already pleaded, because so few facts at the appropriate level of specificity have actually been pleaded. Simply because the pleader has managed to plead a cause of action which, if left to trial, would enable it to adduce evidence of a wide range of facts within its general ambit, does not, in my judgment, mean that all that range of facts can be treated, in the Plaintiff's favour for present purposes, as if they have been pleaded by implication, when they simply have not.

Scope of the amendments - The new allegations

57. The Amended Cause now pleads the claim which the Plaintiff wants to make in some detail. The first nine paragraphs relate background facts; nothing appears to turn on these. The engagement of the Defendant in 2006 is pleaded at more length than previously in the new Paragraph 10, and is now described as "**The Retainer**", but this seems to me merely to re-state at greater length the facts formerly alleged at the old Paragraph 6.

58. The old Paragraph 13 pleaded the Defendant's alleged contractual and tortious duties relied upon by the mechanism of reciting the claimed breaches of each of these. Instead, the new Paragraph 11 now expressly pleads 15 individual alleged duties of the Defendant under The Retainer as implied terms thereof. Paragraph 12 pleads the Defendant's implied duty of skill and care in such matters, and Paragraph 14 pleads a co-extensive duty of care in tort.

59. The intervening Paragraph 13 makes a new plea that the Defendant expressly agreed to review drawings issued by Rondel & Rondel, the Plaintiff's interior design consultants, for any errors or

omissions. There does not appear, though, to be any later allegation of damage founded on or linked to this assertion.

60. Paragraphs 15 again pleads the Building Contract of 21 March 2007, but Paragraph 16 now pleads particular terms of the Contract on which the Plaintiff relies. Paragraphs 17 and 18 briefly re-plead the late completion of the work, the Certificate of Practical Completion, the subsequent discovery and partial remedy of defects, and the closure of the Hotel between January and March 2014 for rectification works.

61. Paragraphs 19-43 plead the Plaintiff's now complaints under three sections. Paragraphs 20-25 raise complaints about "**Design of the Works and Supervision of the Tender Process**". The essence of this complaint is that the Defendant negligently

    (a) failed to advise the Plaintiff to seek further tenders for the work (which would have been cheaper because an alternative tenderer would have been found who sought a lower figure for profit and overheads than Rihoy) instead of proceeding with Rihoy, the only builder who had submitted an estimate, and

    (b) permitted the Defendants (or failed to advise them against this) to allow Rihoy into possession to commence the works in November 2006 on the basis of an estimate which included many "Provisional Cost" figures because the design had not been sufficiently finalized to enable a fixed price contract to be agreed, thereby causing the Plaintiff "*additional costs which would have been avoided*" if the Works had commenced only later, when the design was more advanced.

62. Paragraphs 26-36 raise complaints about "**Defects in the Works**", referring to the attached Schedule of Defects mentioned above. These defects are related to allegations of breach of duty and negligence by the Defendant in four respects, namely

    (a) failing to advise the Plaintiff to appoint a specialist M&E consultant to design the M&E works, prepare performance and quality standards and supervise the M&E installation, so as to avoid the defects which emerged in such installations,

    (b) failing to liaise with *"other* [unspecified] *consultants*" and incorporate their input into the design and construction information,

    (c) failing either to identify, or to instruct rectification of, defective works by Rihoy; and

    (d) failing to advise on and secure planning consents for roof plant.

    At Paragraph 33 it is alleged that "*as a result* [of these matters of negligence] *the Works as constructed were defective*". Paragraphs 34-36 plead the closure of the Farmhouse during January-March 2014 to carry out necessary remedial works, and claim

        (i) the net loss of revenue for that period,

        (ii) the cost of rectifying defects not repaired by Rihoys free of charge, and

        (iii) the estimated excessive expenditure on water and oil caused by operating the deficient system until it was replaced.

63. Paragraphs 37-43 raise complaints about "**Delay in the Date for Completion**". They complain that the Defendant negligently failed to advise the Plaintiff about the operation of a liquidated damages clause as a "genuine pre-estimate of" the Plaintiff's expected losses as a result of the delay, that inserting "£0.00" as the sum for this item in the Building Contract would prevent the Plaintiff from recovering damages from Rihoy for delay in completing the Works, and that the Defendant also wrongly advised the Plaintiff (at an unspecified time) that

> *"….liquidated damages could not be enforced against [Rihoy] because once the existing building was opened up, the Building Contract would be rendered null and void"*.

At Paragraph 39 it is pleaded that but for the Defendant's alleged negligence, the Building Contract would have provided for a rate of liquidated damages equivalent to the Plaintiff's actual losses and, there being no extension of time or suchlike granted to Rihoy under the Building Contract, the Plaintiff would therefore have been able to recover its actual losses from Rihoy by way of damages. It is then pleaded "further or alternatively" (though it must be the latter) at Paragraph 42, that the Defendant negligently failed to administer the Building Contract so as to achieve its timely completion, thereby causing the Plaintiff the same losses in that way. The losses claimed are

(i) loss of profit during the delay period,

(ii) an apparently estimated £10,000 figure for alleged utility costs during the extended duration of the works,

(iii) consequent additional storage costs, and

(iv) a sum specifically related to costs of extra works to prepare the Hotel to host a wedding on 9 July 2007.

64. Under the heading "**Losses**", Paragraph 44 then lists 11 items of claimed loss, of which the first ten are the heads of loss identified above. Paragraph 44.11 is a claim for

> *"additional costs associated with the diversion of management time spent in resolving the matters complained of; the Plaintiff estimates these costs, which have been incurred from around 23 October 2007, are in the region of £581,229.00 reflecting the time spent by the Plaintiff's directors in resolving the matters complained of, expressed as a proportion of their remuneration*"

The Amended Cause ends with a formal and conventional claim for interest.

General submissions

65. For the Plaintiff, Advocate Ferbrache argues comprehensively that all the matters now pleaded are within the scope of the Original Cause, and are merely elaboration or further particularisation, of the case there made. Alternatively, he argues that they arise from the same or substantially the same facts as those already pleaded.

66. The amended complaints about "**Design of the Works and Supervision of the Tender Process**" are comprehended within the former Paragraph 13.5 complaint of "*Failed to adequately … advise the Plaintiff in relation to the Building Contract*" if necessary read in combination with Paragraph 13.1 as to "Design" and 13.4 as to "Supervision of Tender Process". Paragraph 13.1 puts in issue the competence of the Defendant's design service, Paragraph 13.4 puts in issue the competence of the Defendant's contract administration services, and Paragraph13.5 puts in issue the competence of the Defendant's advice in relation to the Building Contract, and so the new complaints are either further examples of these previously pleaded incompetencies or they "arise out of the same or substantially the same facts" because these competencies have been put in issue. Likewise, the amended complaints regarding "***Delay to the Date of Completion***" are comprehended within the same former Paragraph 13.5 (above), or the combination of this and Paragraph 13.4; they are within the wide complaints of inadequate advice "in relation to" the Building Contract under Paragraph 13.5 (because they relate to the date for completion and the liquidated damages clause, which were terms of that contract), and, as complaints about consequences of failure to achieve the date for completion, they are comprehended within the complaint in Paragraph 13.4, of the Defendant's failure to supervise the works so as to achieve this. The amended complaints of "**Defects with the Works**" are comprehended within the several complaints in the former Paragraphs 13.1-13.5 and 13.7. As causation and loss have been pleaded in the Original Cause,

the instances given in the Amended Cause and listed in Paragraph 44 are merely particulars of this, and thus of a cause or causes of action already pleaded.

67. This is a high level approach to interpretation, and I reject it as too broad brush. The "material facts" which require to be pleaded in order to identify a cause of action for present purposes must, in my judgment, be at least one level of specificity below a statement comprising merely a generalised assertion of a breach of a contractual term or a breach of a duty of care. A cause of action comprises (i) the facts giving rise to the relevant duty (ie a contractual obligation in contract, or a relationship or assumption of responsibility in tort), (ii) what the defendant did or did not do in alleged breach of that duty, and (iii) what the consequent damage allegedly was to the Plaintiff. A sufficiently significant difference in either of the first two factors, and possibly even in the third, will *prima facie* make the cause of action a different one. It is at this level that pleadings operate, and it is at this level that the question whether an identified cause of action has or has not (yet) been pleaded must be decided.

68. Of course, the above pleading requirement does not have to be performed in a particular manner. A generalised assertion of a breach of contract or duty may therefore be saved, and rendered sufficiently specific, by a sufficiently specific description of the loss or damage alleged to have been caused. It is, however, a matter of construction and interpretation what information a pleading conveys and thus what causes of action or "bundles of material facts to be proved" are contained within it in the necessary practical detail. The mere fact that a complaint using the word "design" or "supervision" has been pleaded does not mean that all aspects of that function can be taken to have been included in the pleading. It is a question of construction how far they have been. It is therefore necessary to examine the content and meaning of the relevant paragraphs of the Original Cause on a much closer basis than Advocate Ferbrache proposes in order to decide whether they do or do not encompass the complaints now expressed as causes of action in the Amended Cause.

69. If he is wrong in the above submission and the Amended Cause is held to introduce new causes of action which cannot be said to arise from even substantially the same facts as already pleaded, Advocate Ferbrache submits that they are not out of time (so there can be no objection on that score to their being permitted) because they could have been the subject of a fresh action brought at the effective date of the application to amend, which would not have been vulnerable to being struck out because of prescription. This is because the Plaintiff was *empêché* during the period whilst the Defendant was acting for it (ie until at least December 2009, see above) being during this period reasonably ignorant that it had a potential claim against its professional adviser for negligent advice with regard to the matters on which they were engaged, until that engagement was in practice concluded. He submits that the Plaintiff's new claims arising out of defects in the building works must be regarded as further suspended until such time as they could reasonably have discovered the physical facts of such defects, which was not until the opening up works in early 2014.

70. As regards the former argument in support of *empêchement*, that with regard to the continuing engagement of an allegedly negligent professional adviser, this is not, in my judgment, a rule of law, but rather a matter to be demonstrated as fact. If the continued engagement of a professional adviser does, on the evidence and applying reasonable common sense judgment, operate as in impediment which makes it objectively reasonable for the plaintiff to be ignorant of having a potential cause of action against him, then the doctrine of *empêchement* will operate. However if, on the particular facts, it would have been obvious to a reasonable person in the circumstances of the actual plaintiff that he must have, or even was likely to have, a cause of action against his adviser, then the plaintiff cannot claim to have been *empêché* simply on the grounds that the adviser was continuing to act for him. The question is whether the continuing engagement of the adviser, and the relationship created by it, really did create a genuine impediment to the plaintiff's appreciating the possibility of its having the relevant claim. It is not simply to be presumed that it did so.

71. As regards the latter argument, insofar as deficiencies in the relevant Works were actually uncovered only as a result of the opening up works (or as a result of inspections by other parties) taking place after 30th June 2008, then it is *prima facie* likely that the Plaintiff could not

reasonably have been expected to discover its cause of action in that regard prior to that time, and therefore causes of action in that regard contained in the Amended Cause *prima facie* cannot be out of time, and should be permitted.

72. There might logically be issues as to whether some building defects now being complained of did or did not fall within this class, but I did not understand it to be so, from the arguments made before me. Rather, as I understood the position, Advocate Dunster accepted that most of the complaints which he called the "Remedial Defects" were amendments which ought to be allowed to be made, because they did stem from the same or substantially the same facts as causes of action which had been sufficiently pleaded in the original cause and/or because the Plaintiff was entitled to invoke the doctrine of *empêchement d'agir* in respect of them. That, however, was the furthest extent of the Defendant's acceptance of the Amended Cause.

73. In his own argument, Advocate Dunster, helpfully set out his objections to the substituted Amended Cause in more focus, and in six groups related to the heads of loss identified conveniently in Paragraph 44 of the Amended Cause, and the paragraphs supporting them. I find this a convenient analysis, and therefore set out the basis of my final decision under these heads.

(i) "Design costs" - Amended Cause Paragraph 44.1 – Amount TBA

74. This is the claim to recover the allegedly additional costs which "*would have been avoided if the Works had been commenced when the design work was more advanced*". The alleged breach of contractual duty in this respect is negligent advice that the design "*was sufficiently advanced to proceed with the Works*" - (although it is to be noted that Rihoy did, in fact, "proceed with the Works", so that precisely what is meant by this is not fully clear) - and/or failure to advise that the costs of the Works might increase, and that there might be delays, if the Works were commenced before the design work was more advanced, and sufficiently advanced that a fixed, or more firmly fixed, price contract could be obtained.

75. The only duty relating to design pleaded in the Original Cause is at Paragraph 13.1. It is specifically stated to be a duty to design the works so that they were "free from **The Defects**" (as there defined.) The duty now alleged is therefore significantly different from that duty. The only other possibly material duty pleaded in the Original Cause is at Paragraph 13.5 which alleged a "*fail[ure] to adequately prepare, and advise the Plaintiff in relation to, the Building Works Contract.*" However, even construing this allegation benevolently as an allegation of negligence in relation to the preparation of the terms of the Building Contract, rather than as to the implementation of it (which I find to be the more natural meaning), this does not, in my judgment, fairly refer to and comprehend the complaint now being made. This complaint is, in essence, of a negligent failure to advise the Plaintiff not to let the Builders in to start works, nor enter into a Building Contact at all, before the design had reached a sufficiently advanced stage that a *different* contract from the "Building Works Contract", (ie a fixed price contract), could be achieved. This is materially different from, and not reasonably comprehended by, a claim for negligently "*failing to adequately prepare, or advise… in relation to, <u>the</u> Building Works Contract*". I find therefore, that this claim is a different and new cause of action.

76. I therefore consider whether this cause of action is, or may have been, extinguished before the relevant date of 30th June 2008. Whenever the cause of action, whether in contract or tort, arose (ie possibly when the Defendant "allowed" the Plaintiff to commit itself to the works on the basis of the alleged negligence by letting the builders in in November 2006, but certainly by March 2007 when the Building Contract was signed), the damage which the Plaintiff is alleged to have suffered is pleaded as that caused by having to pay "increased costs" (which must mean increased over and above the original, acceptable, estimate and contract sum), or suffering losses caused by the delay in completion, and which costs or losses it would otherwise have avoided. However, the extent of the increased costs incurred was perfectly apparent when Rihoy's final account came in at £2.9M instead of the original contract price of £2.1M (a significant overrun), and could only be negotiated down, as a reasonable price for the work actually done, to £2.7M.

77. The circumstances in which this had happened were clear and were known at the time. So were the facts surrounding the delay. By this stage, Practical Completion had been achieved and the

Defendant's involvement in the project was limited to dealing with any snags or defects and eventually giving the Final Certificate of Making Good of Defects and being brought back for consultation on any problems which arose. I am quite satisfied that, in that situation - where the Plaintiff's dissatisfaction with the level of costs incurred would already have been well in the forefront of the minds of those running it – the Plaintiff knew all the relevant facts before 30th June 2008, sufficiently that the claim which is now alleged was reasonably discoverable before that time. In other words, the continued involvement of the Defendant in the project did not, I am quite satisfied, cause any practical impediment to the Plaintiff's appreciating the possibility of such a claim against DRP as their professional adviser, or taking steps towards pursuing this claim, from a time before 30th June 2008.

78. The standard of what is required for "reasonable discoverability" is to be viewed in the context that it merely triggers a prescription period of as long as six years, for the plaintiff to make the necessary investigations and assessments and make up its mind whether or not to commence proceedings. I am quite satisfied that the claim here was reasonably discoverable in this sense before 30th June 2008, in that by that time the alleged damage was obvious, and the possibility that it might have been caused by the kind of fault now being alleged against the Defendant was also a sufficiently obvious possibility. Indeed I can see no other material discovery made by the Plaintiff subsequently which changed the position as it was known or discoverable prior to 30th June 2008. In the words of the Deputy Bailiff in *Fairhead* (above), at [29],

> "*those in whom this cause of action vested were always capable of having identified this as a cause of action*"

before that date.

79. I therefore find that this claim is a new cause of action, which is brought out of time at the effective date of the application to amend, and that allowing the amendment would defeat a good defence of prescription. I will not, therefore, permit amendment to the Cause in this regard.

80. I should add that Advocate Dunster further argued that this claim ought not to be allowed into the claim by amendment on the ground that it was inadequately pleaded, as particulars of the alleged loss and damage were not given. I would have had sympathy with this argument, especially as the cause of action pleaded seems to me to be somewhat speculative, involving, as it does, an assertion that the Defendant should have brought about a postponement of the whole of the project until a time when design work was further advanced, with the result that a different contract would have been entered into at a different time, but as a result of which the Plaintiff would have been better off. However, as a result of my earlier conclusion I do not need to consider this point further.

(ii) "Tender Costs" – Paragraph 44.2 - £85,510

81. This is the claim to recover additional costs said to have been incurred because the Plaintiff let the Building Contract to Rihoy who were the only tendering party. The complaint made is that the Defendant was negligent in failing to advise the Plaintiff to seek additional or alternative tenders to that of Rihoy. The amount claimed is the difference between Rihoy's figure for Overheads and Profit of 13.1% of the Contract Sum, and an alleged "typical" figure for this as regards similar projects, of 8%. It is alleged that if the Plaintiff had invited additional tenders for the works it "*would have secured*" a commensurately reduced figure.

82. The only duty alleged in the Original Cause which remotely bears on this claim is, again, that of 13.5, "*fail[ure] to .....advise in relation to the Building Works Contract*". However, in my judgment this claim again does not fall within the natural scope of that duty, even despite the general breadth of its wording. The essence of the claim is that the Defendant did not advise that there should be more tenderers, and that a better price – and in fact a contract different from the Building Works Contract if only because with a different party – could and would have been entered into if it had. Put another way, it is a complaint about negligent tender analysis. That is, in my judgment, a different and new cause of action from any which is sufficiently alleged in the

Original Cause. There is simply no hint there of any criticism of the Defendant's conduct in relation to considering tenders.

83. I therefore consider whether this cause of action is, or may have been, extinguished before the relevant date of 30th June 2008. Once again, whether the cause of action is in contract or tort, it accrued either when the Plaintiff committed itself to going forward with Rihoy in November 2006, or, at the latest, when it entered into the Building Contract with Rihoy in March 2007. The issue is then, again, whether this cause of action was reasonably discoverable before 30th June 2008. Once again, in my judgment it was.

84. The essence of this complaint is that the Defendant negligently allowed, or advised, the Plaintiff to enter into a contract on which there had been only one tenderer (although, of course, this is in the context that there had been a second invitation to tender, which was apparently declined) resulting in the loss of an opportunity to contract with a builder who would charge a lower price. In my judgment, the possibility that if one contracts with the only tenderer for a building project, one might well be forgoing the opportunity to contract with a builder who would charge a lower price, is so obvious in principle that it does not require professional advice or expertise to appreciate it. Mr and Mrs Nussbaumer are plainly successful business people of no less than ordinary intelligence, and they have previous experience of building works projects. They can hardly have failed to see this possibility in principle, and with Rihoy's final account being the subject of dispute and obvious close examination when it was delivered in December 2007, and whilst it was being negotiated up to February 2008, the logical possibility that if other tenders had been invited they might have been lower can hardly have been unapparent at this point. This matter was, in my judgment, plainly "reasonably discoverable" at and from that time.

85. The only possible issue then is whether the precise basis on which this claim is pleaded makes any difference to this. The allegation that a cheaper price could have been obtained rests simply on an assertion that Rihoy's actual charge for Overheads and Profit (13.1%) was higher than an allegedly "typical" builder's charge of 8%. However, the basis for this appears to be mere assertion or argument; its discovery as a fact is neither referred to nor alleged as a matter of evidence. I infer that this point is advanced as a matter of argument supporting an appropriate quantification of the general claim that there "would" have been a lower tender available if other tenders had been sought. In all the circumstances I therefore remain of the view that this was a cause of action which was reasonably discoverable from at least the time when Rihoy's account and its make-up was being scrutinised by the Plaintiff, and on its behalf by persons other than the Defendant. Indeed, the fact that the Plaintiff was sufficiently independent of the Defendant's influence to go to a third party Quantity Surveyor to negotiate Rihoy's account lends support to my general view that the engagement and continuing involvement of the Defendant was not a factor which actually inhibited the Plaintiff from casting a suitably critical eye over what had happened, and why the costs of this project had been so high, so as sufficiently to appreciate the possibility of a complaint or cause of action such as this against the Defendant, before 30th June 2008.

86. In the circumstances, therefore, I again find that this claim is a new cause of action which is brought out of time at the effective date of the application to amend, and that to allow the amendment would defeat a good defence of prescription. I will not, therefore, permit amendment to the Cause in this regard.

(iii) "Remedial Costs" - Paragraphs 44.3, 44.5 and 44.6 (£289,848.92)

(iv) "Inefficiency Costs – Paragraph 44.4 - £48,122.00

87. I take these together because they arise from the same set of complaints. The first three items consist of

(i) costs of actual remedial works not carried out free of charge by Rihoy (Items 1 – 27 on the
Schedule of Defects annexed to the Amended Cause)

(ii) costs of instructing experts in relation to these works, and

(iii) net loss of revenue caused by closure during the time required to do these works in early 2014.

The Defendant has always accepted that these three claims are properly allowed in by amendment, so long as they relate to the items in the Schedule of Defects, because they then do arise out of the same or substantially the same facts as a cause of action already pleaded. As mentioned, I am not aware that there is any longer any dispute about the Defendant's qualification to its acceptance of this position. The hearing eventually proceeded on the basis that the Defendant conceded that the claims supporting these Paragraphs should be permitted.

88. There was some discussion in the Defendant's skeleton argument about an allegation in the Amended Cause, noted above under the complaints formulated with regard to "**Defects in the Works**" and hence feeding into these "Remedial Costs", with regard to a claimed negligent failure by the Defendant to advise the Plaintiff that an M&E consultant should be appointed (see Paragraph 30 of the Amended Cause) and also a generalized alleged failure to incorporate the works of other consultants into the design process. Advocate Dunster pointed out that any such claims must relate to matters taking place before the Building Contract had been signed, and were therefore a new cause of action which was time-barred (and as to which he again submitted no credible argument of *empêchement* could be raised). In the event, these points were not really pursued or fully argued at the hearing. I understand this to have been on the basis that the arguments in relation to the failure to advise that an M&E consultant be appointed, - and which I record is emphatically disputed by the Defendant as a matter of fact, as it says that it did so advise - would add nothing to the complaints about the Defendant's role in failing to identify design or construction defects in those systems, anyway. The same argument would seem to me to apply to the further claim as regards not incorporating input from other, unnamed, consultants. However, I record that I have sympathy with the argument that if this latter aspect of proposed amendment is to go forward, it should only be permitted on the basis that there be proper particulars with regard to who, and what, is being referred to.

89. Initially the Defendant contested the inclusion of the "Inefficiency Costs" claim, (ie the additional oil and water costs claimed to have been expended as a result of the defective operation of the original M&E system which had to be replaced,) on the grounds that this was a new cause of action which was time barred. In the course of the hearing Advocate Dunster accepted that if the court concluded that it *was* a new cause of action, then the issue of *empêchement* would be fact sensitive and should be left over to the trial of the action upon terms. In my judgment, however, this claim is only a further consequential claim dependent on complaints made from the commencement of the action and going only to damages. It seems to me that the Plaintiff has always claimed to lay the consequences of the unsuitable and defective installation of the M&E systems at the Defendant's door from the start of the action, and whether those consequences were the need for repair, modification or replacement of the system, or greater expenditure on oil or water than should have been necessary in the interim, this all arises, very much, from substantially the same facts on a common sense basis.

90. Advocate Dunster submitted that the "Inefficiency Costs" claim was really a complaint about design and therefore really of the same nature as the new "Design Costs" claim under the new Paragraph 44.1. I disagree. The new "Design Costs" complaint was not to do with deficiencies of the actual design, but to do with the design not having been sufficiently advanced to be sensibly put forward for tender. The original complaint was that the actual ultimate design was defective in a physical sense, for not being fit for purpose and having defects. The new "Inefficiency Costs" complaint is a consequence of the latter and not the former.

91. In the event, therefore I hold that this claim also should be permitted to be made by amendment in principle.

92. The upshot is that I will give leave for the claims made in these four sub-paragraphs (44.3 – 44.7) to be made in principle, on the basis that the appropriate supporting material will also be pleaded.

This is to be without prejudice to any further proper objections which may be taken when a revised proposed Amended Cause is produced in response to the order which I will make.

(v) "Delay Costs" Paragraphs 44.7 – 44.10.

93. These four paragraphs in effect plead the Plaintiff's claimed actual losses as the result of the Building Works being completed 144 days later than the contract date.

94. Paragraph 42 of the Amended Cause repeats the original claim at Paragraph 13.6 that the Defendant negligently failed to administer the Building Contract so as to ensure that it was completed on time. This claim in effect makes the Defendant guarantor of the builder's timeous completion of the works. Whatever the merits of that claim, it has been clearly pleaded since the start of the action, and there can be no objection to the new Paragraph 42.

95. However, by the Amended Cause this paragraph is now an alternative to a plea that the Defendant negligently failed to advise about, and insert a liquidated damages figure in the Building Contract, but, instead, inserted the figure of "£0,00", thereby preventing the Plaintiff from recovering any damages from Rihoy for any delay. The claim as pleaded goes even further, however, and asserts that the Defendant's negligence lay in not ensuring that a figure was inserted for liquidated damages which would in practice actually correspond to the Plaintiff's losses, as they have turned out to be. The rationale for this is that liquidated damages are intended as a "genuine pre-estimate of the party's likely loss" and that therefore this is the figure which should have been provided in the Building Contract, and would therefore have been recoverable but for the Defendant's alleged negligence.

96. Once again, in my judgment, the only duty pleaded in the Original Cause which relates to this claim is that of paragraph 13.5: *"fail[ure] to adequately prepare, and advise the Plaintiff in relation, to the Building Works Contract"* , although this is to be read in the context that the pleading refers to the delay in completion in Paragraphs 11 and 13.6 of the Original Cause.

97. One difficulty with this claim arises out of the ambitious way in which it is quantified. Liquidated damages in building contracts are a matter for negotiation between the parties, requiring the builder's agreement as well as the employer's aspirations, and their amount may well affect the contract price. The rubric that they are a "genuine pre-estimate of the party's loss" reflects the fact that they need to be such in order not to be struck down as a penalty, and in a case where it is in each side's practical interest to have an agreed fixed sum recoverable as damages for delay, rather than a possible intricate and expensive argument about any actual damages, appropriate, negotiated, figures will be likely to be the best commercial option. The assertion that, in effect, a liquidated damages sum can be taken to be such as will actually compensate the plaintiff for its actual losses, owes more to theory than practice. For that reason the Plaintiff's quantification of its claim appears to me to be somewhat unrealistic and contrived.

98. In order to evaluate this part of the amendments sought to be made, I have therefore asked myself whether, if it had been formulated as an assertion that a particular "reasonable sum" for liquidated damages ought to have been negotiated and inserted in the contract, and that the Plaintiff has been deprived of the ability to recover that sum by the Defendant's alleged negligence, I would have accepted that such a claim arose from substantially the same facts as those already pleaded, and was therefore one which should be allowed in by amendment in principle.

99. On balance, however, I would not. The real problem lies, in my judgment, in a complete lack of any plea in the Original Cause that the Plaintiff has suffered any damage as a result of this particular alleged deficiency in the terms of the Building Contract. The essence of the new claim is that the unusual drafting of the liquidated damages clause for which the Defendant bears responsibility, prevented the Plaintiff from recovering damages from the Builder for unwarranted delay in completion. This fact, ie the fact of such prevention, is simply not pleaded, nor even hinted at, in the Original Cause, either expressly, or through a reference to or description of the actual term of the Building Contract relied upon, or by reference to loss as a consequence of the *combination* of delay and the effect of the relevant contractual term. I therefore just do not find

that this actual cause of action is pleaded, or even almost pleaded, in the Original Cause. In consequence I find that it is a new cause of action.

100. Once again, I therefore have to consider the question whether any cause of action on this score was extinguished before 30th June 2008. Once again, although I have been slightly more troubled by this, I have come to the conclusion that it was.

101. As regards the accrual of the cause of action, the alleged breach of contract occurred at the time of execution of the Building Contract in March 2007, and in my judgment the relevant damage, ie the risk of the exposure to being unable to recover damages from Rihoy in respect of unjustified delay, occurred at the same time. Even if this were wrong and the damage in tort occurred only when actually suffered, this would have occurred immediately after the contractual completion date which was not met (June 2007) or, at the latest, by the time Practical Completion was actually achieved, in October 2007.

102. Thus, the issue once again is whether the Plaintiff has a sufficiently strong basis for denying that this cause of action was reasonably discoverable by it, in all the circumstances, prior to 30th June 2008. Once again and for much the same reasons, I have come to the conclusion that it was. All the facts which are now said to give rise to the inability of the Plaintiff to recover any damages from Rihoy arising from the delay were apparent prior to this date. The fact that the Plaintiff might have been concentrating more on recovering from Rihoy in respect of physical defective works did not, in my judgment, make these matters any less apparent nor the availability of a potential cause of action against the Defendant any less appreciable. Once again, I do not consider that the Defendant's continuing involvement in the project presented any genuine impediment to the necessary discoverability.

103. For those reasons, again, I will not permit this new cause of action to be introduced into this case by amendment, although I repeat that this proscription does not apply to the new Paragraph 42.

(vi) "Management costs" - Paragraph 44.11 - £581,299.00

104. The objection to this pleading being permitted by amendment is not that it is a new cause of action. It is (in my judgment correctly) conceded that, at least insofar as it relates to losses caused by wasted management time spent dealing with building defects as pleaded in the Original Cause, or as additionally allowed under new Paragraphs 44.3-44.6, it is a further allegation of consequential loss which is merely a particular of an existing cause of action.

105. The objection raised is that this allegation should not be allowed because it is both wholly lacking in particulars and in any event stands no reasonable prospect of success – at least as currently drafted. This is because any claim by a company to have suffered consequential loss as a result of wasted management time caused by other matters of complaint must be demonstrated as an actual loss to the company. At present, all that is pleaded is an assertion that management spent time on these matters, and a figure representing what they were allegedly paid by the company which is attributable and attributed to that time spent. Advocate Dunster referred to ***Lancaster City Council v Thomas Newall Limited*** [2013] EWCA Civ 802 in particular at [31] where Mummery LJ, dealing with a similar situation on appeal, held that mere assertion of a loss arising from the fact of management time having been devoted to the relevant disputes or problems caused by a defendant's tort or breach of contract was insufficient to justify an award of damages. Merely proving the fact of devotion of such time to the relevant matters did not link that devotion of time sufficiently to any actual loss impacting on the company, and this loss had to be proved, as a matter of fact, by evidence. In other words, loss could not simply be inferred from the fact of management time being shown to have been taken up. The further fact of this causing a loss to the company needed to be proved by the usual process of adducing appropriate factual evidence of this, upon which, if necessary, to base argument.

106. I indicated in the course of the hearing that I accepted this objection, and was not prepared to let this amendment go forward as it stood, although I would allow the Plaintiff the opportunity of re-pleading the basis for this claim, which is accepted to be in the nature of particulars of loss and damage arising from a cause of action which is already pleaded against the Defendant. Given

that the claims which I am prepared to allow to go forward by amendment are now actually fewer than those proposed in the Amended Cause, the necessity to relate this claimed head of consequential loss to causes of action which are the subject of the eventual Cause in this case will be apparent. I will give directions accordingly.

Miscellaneous

107. Before summarizing my final conclusion, I record two further points.

108. First, as a general point, in respect of the amended claims which I have disallowed, ie the "Design Costs", the "Tender Costs" and the new part of the "Delay Costs" claims, I have done so on the basis of being satisfied that these introduced new causes of action not arising out of the same or substantially the same facts as those already pleaded, and the introduction of which would, I find, defeat a good defence of prescription which has accrued since the deemed date of issue of the Original Cause. I was sufficiently satisfied, at this stage of the case, that the Plaintiff's argument based on *empêchement* had no reasonable prospect of defeating the defendant's potential prescription defence, to refuse permission to amend. However, I should add that even if I had not been fully so satisfied, or had concluded that these claims might be said to arise out of substantially the same facts, I would in any event, have been minded to refuse to permit these claims to be now advanced by amendment of the Cause, even upon terms, as a matter of my discretion.

109. This is because of the unexplained tardiness with which these further claims, with their rather speculative nature on which I have already commented, have come to be advanced at all. Mrs Nussbaumer accepts and even asserts, in her affidavit, that the matters of which complaint is now made had become apparent because of the Reports obtained from other advisers by at least (she naturally says "only") mid-2011. Despite this, the Original Cause, actually issued two years later, did not contain any hint of them. In addition, these further claims even then took another 15 months after the issue of the original cause to see the light of day. Even recognising the standstill agreement that the parties had entered into, I regard this as too long, and unreasonably too long, to reveal such new and unheralded claims There has been no convincing justification or explanation for the delays that I can see. The opening up works done in early 2014 did not relate to the matters of alleged insufficiently completed design, and negligent advice as to contract terms and tender analysis which have now been advanced.

110. When a claim has been instituted near to the end of the primary prescription period, and it is later sought to add further claims by amendment, whether alleging that they arise out of the same facts or that the Plaintiff has been *empêché*, it is incumbent on the Plaintiff to bring forward such claims with dispatch. The basic prescription period is lengthy, some would say generous in the internet age, and the prejudice suffered by a defendant in having to begin to investigate, evaluate and defend a case only after a lapse of such time is considerable. The Plaintiff seeking amendment is asking the court to exercise a discretion in its favour, and it will have a significantly less strong and meritorious claim to the benefit of such discretion if it unnecessarily causes any further prejudicial lapse of time in putting forward its further claim, and bringing their basis to the defendant's attention, without a good and demonstrable justification for any delay on its part. As a matter going to the court's discretion, this is a quite separate issue from time limits fixed by the rules of prescription.

111. Second, and a specific point, I noted above that the new Paragraph 13 of the Amended Cause pleads an obligation by the Defendant, allegedly expressly contained in "the Retainer", albeit not contracted until 14th March 2007, to review the drawings issued by Rondel & Rondel for any errors or omissions, but that no further allegation dependent on this appeared to be made in the Amended Cause. I therefore heard no argument directed particularly at this paragraph. My initial impression is, however, that it alleges a fact which is entirely separate from and additional to the matters alleged in the Original Cause, and thus appears to relate to a new cause of action. It is therefore likely to be an allegation which ought not to be allowed into this action by the route of an Amended Cause, but as I have heard no clear argument as regards its materiality in this application, I will say no more about it unless and until it becomes an issue.

Conclusion

112. To progress this matter, I will therefore take a similar course to that taken by the Bailiff in *Jefcoate* (above). I have indicated in general terms what is and is not to be permitted by way of amendment, and it will be for the Plaintiff's Advocates now to reformulate the Amended Cause which the Plaintiff wishes to pursue in accordance with the terms of this judgment, and to submit this reformulation to the Defendant's Advocate to seek to agree that this version does comply with the terms of this judgment and the principles I have set out. If agreement can be reached, then I can later make an order permitting amendment of the Cause on paper. If it cannot, then the parties will have to apply to me for a further ruling on the remaining objections or disputes.

113. I will therefore formally make no order on this application, save that the Plaintiff do have permission to prepare a further Amended Cause in accordance with the terms of this judgment which it shall then seek to agree with the Defendant pursuant to RCCR r 53, with permission to either party to apply. With regard to the costs of this application and hearing, it appears to me that on any basis the Plaintiff ought to pay the Defendant's costs. Unless either party wishes to make submissions, I will therefore simply make an order that the Plaintiff pay the Defendant's costs of and incidental to this application on the recoverable basis.

Her Honour Hazel Marshall QC Lieutenant Bailiff
3rd September 2015