Case No: HT-13-390

Neutral Citation Number: [2015] EWHC 1345 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Rolls Building, Fetter Lane,

London, EC4A 1NL

Date: 21 May 2015

Before :

THE HONOURABLE MR. JUSTICE COULSON

- -

Between:

CIP Properties (AIPT) Limited	**Cla**
- and -	
Galliford Try Infrastructure Limited	
- and -	
EIC Limited	**Defe**
- and -	**Third**
Kone PLC	**Fourth**
- and -	**Fifth**
DLG Architects LLP	**Sixth**
- and -	
Damond Lock Grabowski & Partners (a firm)	

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Andrew White QC, Frances Pigott and Mischa Balen

(instructed by **Squire Patton Boggs**) for the **Claimant**

Adam Constable QC and Richard Coplin

(instructed by **CMS Cameron McKenna**) for the **Defendant**

Joanna Smith QC and Michael Wheater (instructed by **Plexus Law**) for the **Third Party**

Kate Livesey (instructed by **Norton Rose Fulbright**) for the **Fourth Party**

Fiona Sinclair QC and Siân Merchandani

(instructed by **Mills and Reeve LLP**) for the **Fifth and Sixth Parties**

Hearing Date: 11 May 2015

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Judgment

Approved Judgment (No.3) AMENDMENTS

THE HON MR JUSTICE COULSON

JUDGMENT (No. 3) / AMENDMENTS

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1.
The Claimant is the owner of Broadway Plaza ("the Development") in Birmingham. In these proceedings, it brings claims against the defendant, pursuant to a warranty agreement dated 14 April 2005, in respect of alleged defects in the Development. The defendant, who was the design and build contractor, makes additional claims against the third party (the mechanical and electrical sub-contractors); the fourth party (the suppliers of the escalators and lifts); and the fifth and sixth parties (the architects).

2.
By applications dated 20 April and 30 April 2015, the claimant seeks to amend its particulars of claim and the lengthy schedules attached to them. The amendments are voluminous. However, the parties were able to categorise them in this way: category 1 consisted of the amendments relating to the remedial scheme, and therefore the quantum of the claim; category 2 concerned the addition of further allegations of breach, which generally related back to the breaches already pleaded; and category 3 concerned two new claims, one in respect of the car park smoke ventilation system, and one in respect of alleged defects in the roofs. As explained in more detail below, the parties were able to reach agreement in respect of the amendments in categories 1 and 2, subject to a significant shunt in the timetable leading up to the trial. The two new claims in category 3 are disputed.

3.
For reasons of time, it was not possible to give a full extempore judgment at the conclusion of the hearing. I gave a short oral ruling in which I explained why I declined to give permission for the category 3 amendments. I said that a full Judgment would be provided in due course.

4.
I set out in **Section 2** below the consequences of the amendments in categories 1 and 2. Then, moving on to consider the new claims in category 3, I summarise the relevant principles of law (**Section 3** below), before dealing with the smoke ventilation amendments (**Section 4** below), and the roof amendments (**Section 5** below).

2. CATEGORIES 1 AND 2

5.
As I have said, category 1 consisted of the amendments relating to the remedial scheme, and category 2 related to the further allegations/clarifications in respect of the case on breach. Because ultimately no objection was taken to those two categories of amendments, it is unnecessary for me to consider them in any great detail. However, what is important is the consequences of those amendments on the timetable for trial, because that is the background against which the contested amendments in category 3 have to be considered.

6.
This is a case with an unhappy procedural history. The pre-action protocol letter was written as long ago as 2011. The pre-action protocol process was extremely drawn out and, at an earlier hearing, Ramsey J noted that, within it, there had been a 17 month period where the claimant had done nothing to progress the claim. Eventually, these proceedings were started on 23 October 2013. Again, however, matters proceeded slowly and it was not until the case management conference before me on 3 October 2014 that a realistic timetable was set, leading up to a trial on 18 January 2016.

7.
One of the problems that was identified at the CMC on 3 October was the very high level of costs which the claimant had incurred and anticipated that it would incur in the future. That gave rise to a dispute as to whether costs management was appropriate in this case, the claimant contending that it was not. I ruled against the claimant in my first judgment ([2014] EWHC 3546 (TCC)). A whole day was then set aside to deal with the costs budgets themselves. This was principally because the claimant's total figure was so high, at over £9 million, that it attracted copious criticism from both the defendant and the additional parties. I upheld much of that criticism, and reduced the claimant's budget by a figure in excess of £4 million in my second judgment in this case at [2015] EWHC 481 (TCC).

8.
At the CMC, leading counsel then appearing for the claimant informed the court and the other parties that there were no plans to amend the claim. However it appears that, ever since that date, the claimant has indeed been working on these detailed amendments. Despite that, the amendments in categories 1 and 2 were not provided to the defendant and the additional parties until last month. As already noted, the formal applications were not made until 20 April and 30 April 2015.

9.
The amount of work necessary on the part of the defendant and the additional parties to understand, investigate and respond to the amendments in categories 1 and 2 is formidable. I do not set out in this Judgment the detailed evidence in respect of those matters but I have in mind in particular sections 5 and 6 of the witness statement of Mr Davis for the defendant, and paragraphs 40-58 of the statement of Mr Wicks, for the third party.

10.
Ultimately, the amount of work involved in dealing with the amendments in categories 1 and 2, at a time when the pleadings had otherwise closed and disclosure had taken place, is best seen in the revised timetable proffered by Mr Davis at paragraph 6.11 of his statement. There he sets out his proposed adjusted dates for the new pleadings, the witness statements, the experts' meetings and the experts' reports. That revised timetable was subsequently agreed by all parties, including the claimant.

11.
It is a timetable which contains absolutely no room for manoeuvre. For a trial at the start of the new term in January 2016, it postulates the reopening of the pleadings, with completion of all amendments by 11 September 2015; witness statements being exchanged on 2 October 2015; experts to meet and produce a joint statement by 6 November 2015; and experts' reports being exchanged on 27 November 2015. As I made plain at the hearing, I consider those to be 'last-gasp' dates. They cannot be extended without necessitating an adjournment of the trial date.

12.

Indeed, in Mr Davis' original proposal, there was provision for supplemental experts' reports to be exchanged on 4 December 2015 and the pre-trial review to take place on 11 December 2015. I made clear at the hearing that I could not countenance either of those proposed directions. A pre-trial review immediately before the Christmas vacation, with the trial starting immediately after it, is simply too late to be a meaningful hearing. Furthermore, the whole point of experts' meeting and producing their joint statements before they provide their reports is so that those reports can be confined to those matters which are in dispute. This obviates the need for a further round of supplemental reports. However, it was only those modifications (a PTR in early December and no supplemental reports) which ensured that the adjusted timetable could still lead to the trial date of 18 January 2016.

13.
I am in no doubt that it is in the parties' best interests, and in accordance with the overriding objective, that the trial takes place on 18 January 2016, and that no question of its adjournment should even be entertained. Of course there are the usual reasons for that, including the importance of certainty for the parties and the need, where at all possible, to maintain the court's lists, because of the impact of adjournments on other court users. But in the present case, there is a particular imperative in requiring the trial to go ahead on the fixed date. I have already referred to the cost management disputes in this case. The costs are already far higher than I would have wished. Any adjournment of the trial date would increase those costs significantly, and any semblance of proportionality would then be lost. Accordingly, I have approached the disputed amendments on the basis that, whatever else happens, it is critical that the trial date of 18 January 2016 be maintained. No party sought to dissuade me from that approach.

3. THE LAW

14.
I was provided with a lever arch file which contained 20 authorities relating to amendments. A large number of those cases were referred to during the oral hearing. It is, I think, unnecessary for me to set out large chunks of the judgments in those cases. Instead I will cut to the chase and summarise the principles which are now applied in The Rolls Building to disputed applications to amend.

15.
In my view, the traditional approach outlined by Peter Gibson LJ in **Cobbold v Greenwich LBC** (1999 unreported), to the effect that "[a]mendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs…" is no longer the right starting point. Indeed it is arguable that it never was: in the earlier Court of Appeal decision of **Worldwide Corporation Ltd v GPT Ltd and another** [1998] WL 1120764, Waller LJ stressed that a payment in costs was not adequate compensation for the other party being 'mucked around' at the last moment. Subsequently, in **Savings and Investment Bank Ltd (in liquidation) v Fincken** [2003] EWCA Civ. 1630; [2004] 1 WLR 667, Rix LJ noted that **Worldwide** was authority for the proposition that "the older view that amendments should be allowed as of right if they could be compensated in costs without injustice had made way for a view which paid greater regard to all the circumstances which are now summed up in the overriding objective."

16.
The subsequent decision of the Court of Appeal in **Swain-Mason and Others v Mills and Reeve LLP** [2011] EWCA Civ. 14; [2011] 1 WLR 2735 also stressed that, when dealing with very late

amendments, the court should be less ready than in former times to grant a late application to amend. Moreover, Lloyd LJ said that, when considering the competing arguments of prejudice, the prejudice to the amending party in not being able to advance its amended case was a relevant factor, but was only one of the factors to be taken into account in reaching a conclusion. It was also stressed that a late amendment cannot be insufficient or deficient. And at paragraph 72 of his judgment, Lloyd LJ said:

"…a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court."

17.
In **Andrew Brown and Others v Innovatorone PLC and Others** [2011] EWHC 3221 (Comm), Hamblen J said that parties had a legitimate expectation that trial dates would be met and they would not be put back or delayed without good reason. At paragraph 14 of his judgment, the judge set out some of the likely factors that would be involved in striking a fair balance. They were:

"(1) the history as regards the amendment and the explanation as to why it is being made late;

(2) the prejudice which will be caused to the applicant if the amendment is refused;

(3) the prejudice which will be caused to the resisting party if the amendment is allowed;

(4) whether the text of the amendment is satisfactory in terms of clarity and particularity."

18.
As part of the Jackson reforms to the CPR, the overriding objective, which is the starting-point for any consideration by the court of late amendments, was amended. It now expressly provides that the court must deal with cases "justly and at proportionate cost". Proportionality is vital, not only to this application, but to the vast majority of applications to amend late. For those reasons, I pay particular attention to four more recent cases concerned with amendments, the majority of which post-date this change to the overriding objective. They are:

(a)
Archlane Ltd v Johnson Controls Ltd [2012] EWHC B12 (TCC), in which Edwards-Stuart J said that "to the extent that the First Defendant will suffer prejudice by the refusal of this amendment, which I accept is a clear possibility, it seems to me clear also that it is very substantially the author of that prejudice".

(b)
Hague Plant Ltd v Hague and Others [2014] EWCA Civ. 1609, in which Briggs LJ said:

"32. In that succinct passage the judge clearly distinguished between the "very late" amendment cases such as **Swain-Mason** where the risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be heavily loaded against the grant of permission, and "late" amendments in which the consequence of the large scale reformulation of the Particulars of Claim, after the completion of Defences and Part 18 exchanges, will risk undermining work already done on response to the original Particulars of Claim, and causing a duplication of cost and effort. It is evident, for example from paragraph 60 and 61, and elsewhere in the judgment, that it was this aspect of lateness, namely the consequence that, if permitted, the amendments would cause

existing work to be wasted and substantial further work and expense incurred, that weighed in the judge's mind.

33. I consider that the judge was entitled to approach the relevance of lateness in this way. Lateness is not an absolute but a relative concept. As Mr. Randall put it, a tightly focussed, properly explained and fully particularised short amendment in August may not be too late, whereas a lengthy, ill-defined, unfocussed and unexplained amendment proffered in the previous March may be too late. It all depends upon a careful review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of its consequences in terms of work wasted and consequential work to be done."

The court upheld the decision of the first instance judge, HHJ Behrens, to refuse the amendments.

(c)
Bourke and another v Favre and another [2015] EWHC 277 (Ch) in which Nugee J refused the amendments some months before trial because of the 'significant pressure' that having to deal with the new claim would put on the defendants, whilst there was no corresponding pressure on the claimants because they had already prepared their evidence with this new claim in mind. In that case, a second action was considered inevitable, and Nugee J indicated that such fresh proceedings would not be caught by the rule in **Henderson v Henderson**.

(d)
Wani LLP v Royal Bank of Scotland PLC and another [2015] EWHC 1181 (Ch) in which Henderson J refused amendments which neither side said necessitated the adjournment of the trial if they were allowed. He rejected the suggestion that it made a difference that the application was being made two months before the trial, citing the passage in **Hague Plant** referred to above. He also applied the approach in **Brown**, although he dealt with the four points in a slightly different sequence. As to lateness, he found that the amendments could have been made much earlier than they were, and they lacked proper clarity and particularity.

19.
In summary, therefore, I consider that the right approach to amendments is as follows:

(a)
The lateness by which an amendment is produced is a relative concept (**Hague Plant**). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.

(b)
An amendment can be regarded as 'very late' if permission to amend threatens the trial date (**Swain-Mason**), even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (**Brown**).

(c)
The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (**Brown**; **Wani**). In essence, there must be a good reason for the delay (**Brown**).

(d)

The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (**Swain Mason**; **Hague Plant**; **Wani**).

(e)
The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' (**Worldwide**), to the disruption of and additional pressure on their lawyers in the run-up to trial (**Bourke**), and the duplication of cost and effort (**Hague Plant**) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (**Swain Mason**).

(f)
Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (**Swain-Mason**). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (**Archlane**).

4. THE SMOKE VENTILATION AMENDMENT

4.1
General Approach

20.
Mr White QC maintained that, because the trial date was 8 months away, these amendments could not be classified as 'late'. The defendant and the additional parties disagreed, and relied on **Hague Plant**, and the reference to lateness being a relative concept.

21.
In my view, although this application is being heard some months before the trial date, this is a late amendment because permission is sought for it at a time when the pleadings are closed and disclosure has been completed. On my analysis, it is a very late amendment because, as explained below, permission for it would threaten the trial date fixed last October. The principles noted above, and in particular the questions formulated by Hamblen J in **Brown**, therefore apply to my consideration of the application. For the reasons noted below, I consider that the 'heavy onus' on the claimant to justify the amendments has not been discharged.

4.2
History

22.
In the schedule attached to the pre-action protocol claim letter dated 26 August 2011, the claimant alleged that the smoke ventilation system in the car park was defective (i.e. when the system was in 'fire' condition). There was also an allegation that the ventilation system was inadequate to deal with the carbon monoxide emissions (i.e. when the system was in normal operating mode). However, when the defects schedule was served in the proceedings more than two years later, the allegations in respect of the car park ventilation were worded in a completely different way. Now, only the carbon monoxide case was pleaded, and even that was in a very different form to the way the claim had previously been put. There was no longer any mention of any defects when the system was in 'fire' mode. The 'Route Map' provided by the claimant, a lengthy document in itself and to be read alongside the schedule, said expressly that "certain items have been removed as no longer claimed".

On its face, therefore, the smoke ventilation claim had been omitted because it was no longer pursued.

23.
It is the claimant's case now that the smoke ventilation claim was omitted accidentally. That is what Mr Bradley says in his statements. He also says that this omission only became apparent when the relevant experts met in November 2014. However, the claimant did not suggest that it wanted to add back this claim, by way of amendment, until February 2015 and, when this was challenged by the defendant, no proposed amendment was put forward until April 2015.

24.
Mr Bradley's assertion that the claim in respect of the smoke ventilation claim was omitted accidentally is just that: a bald assertion. No particulars of any kind are provided as to how or why or when this omission occurred or any of the circumstances surrounding the alleged error. I am bound to say that I am unable to accept this explanation. There are two reasons for that.

25.
First, the position in respect of the car park ventilation system was clearly reconsidered after the pre-action protocol stage, because it was put into a completely different form when the claim was pleaded in these proceedings. One claim was revamped; the other was removed. The only fair inference must be that, whilst the whole issue was being reconsidered, somebody decided that the smoke ventilation claim should not be pursued. This is not a situation where a sentence or a paragraph of the original claim was simply missed out; the whole item was deliberately changed for the purposes of the litigation. Therefore I find that the smoke ventilation item was one of those claims which the drafters of the Route Map said had been removed "because it was no longer claimed".

26.
I should add that it is unnecessary for me to consider, let alone resolve, the question of whether or not the smoke ventilation claim could be said to have been withdrawn (the defendant's and third party's case). First, I agree with Mr White QC that the proper term is 'discontinued' not withdrawn (see the judgment of Lewison LJ in **Spicer v Tuli** [2012] EWCA Civ 845; [2012] 1 WLR 1308). But second, that is irrelevant to the only issue for me on this point, which is whether this item of claim was not pursued into the court proceedings deliberately or accidentally.

27.
Secondly, by reason of the claimant's costs budget, the circumstances in which this claim could plausibly have been omitted by accident do not appear to have arisen. Miss Smith QC submitted that the Precedent H costs budget provided by the claimant shows that perhaps as much as £900,000 was spent on formulating the particulars of claim and the schedules. A large team of lawyers and experts are said by the claimant to have combed through the defects case in order to plead the claim properly. Again, if the omission was, say, a sentence or paragraph being omitted from the pre-action claim, then a case of accident might be understandable; but given the fact that this item was completely revamped, and then passed through this large team for checking purposes, it is implausible now to say that the smoke ventilation claim was accidentally (rather than deliberately) omitted.

28.
The further difficulty for the claimant is that, even if it was accidentally omitted, on its own case, the claimant realised that omission no later than October/November 2014, and possibly earlier. And yet it did not instruct a smoke expert (Mr Barnfield) until April 2015, and made no application to amend until later in April, an additional delay of at least six months. No explanation of any kind has been

given for that delay; it has nothing to do with the alleged accidental omission in 2013. In circumstances where, as the authorities make plain, the onus is on the claimant as the amending party to explain how the late amendment came about, the lack of any explanation for this further 6 month delay is significant. In my view, the effect on the timetable is the single most important aspect of this application, and in the circumstances here, it is unacceptable for the claimant to take six months just to produce a first pleading of the new claim.

29.
There have been other delays. On behalf of the fifth and sixth parties, Ms Sinclair QC noted that her solicitors had written on three separate occasions seeking information relating to this claim, but none of those letters had ever been answered.

30.
In addition, I accept the submission of Mr Constable QC to the effect that, even if the court accepted Mr Bradley's explanation for the delay (the accidental omission) that still fails to get the claimant home. As Hamblen J made clear in **Brown**, the reason for the delay has to be a good reason. There is nothing in any authority, and I would suggest that it flies in the face of common sense, to suggest that an avoidable mistake by the amending party constitutes a good reason for the delay in advancing the claim.

31.
Accordingly, I find that, not only has the claimant not properly explained the lateness of the application to amend to add the smoke ventilation claim but that also, on the face of the documents, the claim was deliberately omitted when these proceedings were commenced. If the claimant had wanted to pursue this claim, it could and should have done so in 2013. Even if (which I do not accept) the claim was omitted by accident in 2013 that is not a good reason to explain the delay until April 2015. Moreover, the delay from November 2014 to April 2015 has been ignored altogether. The application is therefore late and not properly explained or justified.

4.3
Clarity and Particularity

32.
The relevant new item in the schedule is 70B. It is pleaded that the Building Regulations provide for a standard solution which requires that the system is capable of ten air changes per hour under "fire conditions". It is asserted that the system as provided did not do that. It goes on to suggest possible alternative solutions. In relation to remedial works, it postulates two potential remedial schemes, scheme A and scheme B, and the evidence makes clear that further investigations are required before a conclusion could be reached as to which remedial scheme was appropriate.

33.
This is not a tightly drawn pleading. It is not clear which parts of the Building Regulations or other contractual documents/standards are relied on for the assertion that the defendant was obliged to provide a system capable of ten air changes per hour under fire conditions, and that anything less would constitute a breach of contract. It is not clear how and why it is said that the system as provided did not achieve that; indeed, there is no plea as to how the alleged defects breach the terms or standards relied on. The pleading does not say which alternative solution should have been adopted or why. Although there are numerous references to ceiling heights, there is no link between those and an allegedly inappropriate design. Thus the allegations concerning the relevant terms, and the allegations that those terms have been breached, will require proper particularisation.

34.
In respect of remedial work and damages, the position is even less clear because, on the claimant's own case, it is yet to be decided which remedial scheme is appropriate: because of the lateness of this new claim, the claimant accepts that further investigations are going to be required. This is not a small point: whilst scheme A is said to cost just under £1.2 million, scheme B is said to cost just under £2.4 million. Mr Barnfield's statement makes clear the detailed further work required (through testing and the like) before the precise inadequacies can be identified and a remedial scheme recommended.

35.
Accordingly, I consider that the pleading of the relevant terms and the breaches is crying out for further particularisation, whilst the plea in respect of remedial work and damages is, on any view, equivocal and will remain so until after the further testing and investigations have been carried out. The pleading is not therefore of the tightly-drawn and focussed kind which would ordinarily be permitted as a late amendment.

4.4
Prejudice To The Defendant (And Additional Parties) If The Amendments Are Allowed

36.
In my view, the principal prejudice that will be suffered by the defendant and the additional parties if these amendments are allowed is that the trial would inevitably have to be adjourned, with all of the disruption and increased costs consequences noted above. I have already said that I consider that an adjournment of this trial, in view of the costs already incurred and to be incurred, is not a feasible option. I have concluded that the timetable leading up to that trial is, because of the category 1 and category 2 amendments, only just possible. I accept the evidence from the defendant and the additional parties that the inclusion of the smoke ventilation claim would make the trial date impossible. I regard this as the single most important reason why the amendment in respect of the smoke ventilation claim should be refused.

37.
It is unnecessary to set out the extensive evidence, again principally from Mr Davis and Mr Wicks, in which they set out the procedural consequences if the amendment in relation to smoke ventilation is allowed. I have in mind in particular section 9 of Mr Davis' statement and section L of Mr Wicks' statement. These set out in detail how and why the inclusion of the smoke ventilation claim would make the current trial date impossible. As I have said, I accept that evidence.

38.
During the course of his clear submissions on this point, Mr White QC politely suggested that, on this aspect of the case, the evidence of the defendant and the additional parties was over-stated. I do not agree. The statements to which I have referred are rational in their explanation of the further work that will be required if the smoke ventilation claim is permitted, and the impossibility of fitting that work into the already disrupted timetable. Furthermore, I am bound to note that the claimant has not put in any evidence which challenges the analysis of Mr Davis and Mr Wicks (notwithstanding a 25 page statement in reply from Mr Bradley). I conclude that the evidence from Mr Davis and Mr Wicks as to the effect of the proposed amendments is unanswerable.

39.
In addition to the procedural prejudice, Mr Constable QC, on behalf of the defendant, also raised concerns, that if this new claim was allowed in at this late stage, it would cause prejudice to the defendant because any claim it had over (either against the fifth/sixth parties or against the company

which produced the Fire Strategy Report, or the third party, the M & E sub-contractors) would be statute-barred. There was a debate about whether the claim for an indemnity had already accrued or did not accrue until the defendant actually suffered loss. There was an even more abstruse argument as to the nature of the contribution claim made by the defendant against the fifth and sixth parties, because it was suggested on behalf of the claimant that, in respect of that claim too, there were no limitation difficulties.

40.
I do not consider it necessary to rule on these various arguments. I accept that it has not been possible for the defendant to show, even on the balance of probabilities, any form of irretrievable prejudice if the amendments were allowed: for example, the clear and unarguable loss of a claim over against another party, because of the claimant's delay. On the other hand, the defendant has demonstrated a risk that, if these amendments were allowed, because of the delays, it would be in a worse position as against Pointer and the fifth/sixth parties than it would have been in if the claim had been made at the start of proceedings. That is therefore an additional factor for me to bear in mind when considering the balancing exercise but, on my analysis, it is nowhere near as important as the adjournment issue to which I have already referred.

4.5
Prejudice To The Claimant If The Amendments Are Refused

41.
Subject to Mr White QC's overarching point about the possibility of fresh proceedings, which I deal with in **Section 4.6** below, the claimant's principal argument as to prejudice was that, if the amendments are refused, it would be prejudiced because it would not be able to pursue the smoke ventilation claim in these proceedings. That is certainly a factor for the court to take into account in the balancing exercise. However, as the authorities make plain, the force of that point is significantly diluted if, on the facts, the lateness of the amendments was the claimant's responsibility in the first place.

42.
I am in no doubt, given what I have said about the history in **Section 4.2** above, that this late amendment is indeed the claimant's sole responsibility. First, it appears to have made a deliberate decision not to pursue this claim at the start of these proceedings, which is why the car park smoke ventilation case is pleaded (in draft form now) in a completely different way to how it had appeared in the pre-action protocol letter. The fact that it now wishes to add the claim back in is plainly the claimant's responsibility.

43.
Furthermore, as I have said, I am startled by the lack of any proper explanation for the delay between October/November 2014, when this omission was apparently drawn to the claimant's attention, and late April 2015, when the application to amend was made. That length of delay, in the preparation for a major trial, is inexcusable. The claimant makes no attempt to justify such a lengthy period. Again therefore, the prejudice is the claimant's own fault.

44.
It follows from what I have said that, when considering the four likely issues as set out in **Brown**, the first three all militate against allowing the amendments and the fourth acknowledges that, whilst there might be prejudice to the claimant if the late claim cannot be pursued, the lateness is the claimant's own fault. Accordingly, the balancing exercise comes down firmly against allowing the

amendments. Indeed I agree with paragraph 35 of the skeleton submissions prepared by Ms Smith QC and Mr Wheater, that this is a similar situation to that in **Bourke** where Nugee J said:

"41. In circumstances where the amendment is made late; where no good explanation has been given for so late an amendment; where to permit the amendment might force the defendants to ask for an adjournment but where, even if it does not, it would require a significant amount of extra work and would put the defendants at the disadvantage that I have referred to, as compared to the claimants - a disadvantage entirely down, it seems to me, to the claimants' decision not to apply to amend before exchange of witness statements - it is, in my judgment, more consistent with the overriding objective to refuse the amendment. This may indeed cause prejudice to the claimants but, if so, they only really have themselves to blame."

Finally, it is necessary to go on to consider Mr White QC's overarching point.

4.6

Fresh Proceedings

45.

In his submissions in reply, Mr White QC said that, in effect, the outcome of all of these issues was immaterial because the decisive factor in the claimant's favour was that it could commence fresh proceedings in respect of the smoke ventilation claim in any event. He argued that, since fresh proceedings were not in the interests of any of the parties to the case, the claimant ought to be allowed simply to make the amendments and raise the new claim in the existing proceedings. For the reasons noted below, I do not accept that submission.

46.

First, as in **Bourke**, the defendant and the third, fifth and sixth parties are aware of the risk of fresh proceedings, but continue to maintain their opposition to this amendment. That is because of what they would regard as the procedural catastrophe of an adjournment that would ensue if these amendments were allowed into these proceedings at this late stage. Accordingly, the claimant cannot simply put a gun to the head of the defendant and the additional parties (and indeed the court) and say that, regardless of all the relevant principles, the amendments should be allowed because otherwise there would be fresh proceedings. The defendant and the affected additional parties have chosen to object to the amendments in reliance on the authorities, and I have upheld those objections on that basis. To that extent, therefore, I consider that the risk of fresh proceedings is nothing to the point.

47.

However, just as in **Bourke**, there was some argument as to whether any fresh proceedings would be an abuse of process of the court, because of the rule in **Henderson v Henderson** [1843] 3 Hare 100. Mr Constable QC argued that, on the authorities, I should find that it was probable that the court would not permit the claimant to pursue separate proceedings in respect of the smoke ventilation amendments. By reference to **Henderson v Henderson**, he argued that the court would not permit "the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case". This rule has been restated in the modern context in **Johnson v Gore Wood and Co (a firm)** [2002] 2 AC 1; **Aldi Stores v WSP Group PLC** [2007] EWCA Civ. 1260 and **Seele Austria GmbH Co v Tokyo Marine Europe Insurance Limited** [2009] EWHC 255 (TCC).

48.
To the extent that it is relevant to my consideration of the application to amend, I conclude that there is a strong prima facie case that it would not be open to the claimant to commence fresh proceedings in respect of the smoke ventilation claim. That is because, not only was that a claim which could have been brought forward in these proceedings, but it was also a claim which, on my findings, the claimant deliberately choose not to bring forward from the pre-action protocol phase, notwithstanding the fact that other aspects of the car park ventilation system, in respect of carbon monoxide, were maintained. If the claimant had wanted to pursue the smoke ventilation claim, it could and should have done so.

49.
Again, in respect of the **Henderson v Henderson** point, it is unnecessary for me to decide whether or not the smoke ventilation claim had been discontinued in 2013. It is sufficient for present purposes to conclude that there is a strong prima facie case that, if that is what the claimant wanted, this claim could and should have been pursued at the outset of proceedings in 2013.

50.
Accordingly, for these reasons, I do not consider that the fact that the claimant may choose to issue fresh proceedings is any sort of answer to the opposition from the defendant and the additional parties to the proposed amendment. What is more, in relation to that claim, I consider that there is a strong prima facie case that the new proceedings may be caught by the rule in **Henderson v Henderson** and therefore not open to the claimant in any event.

4.7
Summary

51.
For reasons set out above, permission to make the proposed amendments in respect of the smoke ventilation claim, being one part of the category 3 claims, is refused.

5. THE ROOF DEFECTS AMENDMENTS

5.1
General Approach

52.
In my view, in respect of the roof defects, the same analysis as that set out in paragraphs 20 and 21 above (in relation to the smoke ventilation claim) applies again.

5.2
History

53.
The most important evidence in relation to the history of the amendments in respect of roof leaks comes from Mr Webb, the Centre Manager at the Plaza. His statement, dated 6 May 2015 says this:

“5. During the past 24 months I have seen water leaks develop in various roof locations. During patch repairs roofing contractors have commented to me that the construction was poor. The number of leaks being notified got to a point where I considered it was necessary to do some further investigations.

6. The roof areas that have suffered leaks during the past 24 months are: [15 separate locations identified].

7. The most recent roof repairs were to Purple Apartment 38 notified to me by email on the 19 September 2014 by the residential managing agents Remus Management and to Unit 17 Nuffield Health Gym above windows in the original façade.

…

10. Following exposure of the roof above Unit 17 on 20 January 2015 the Central Group Roofing Building Contractor commented to myself and the C & W building surveyor that the existing flashing did not conform to industry standards in respect of overlaps or cutting into the brickwork. He also showed us that the hot melt roof covering had not adhered to the concrete and was lifting in numerous areas, he also commented that the hot melt layer thickness was inadequate. This work was completed in January 2015…"

54.
Although other evidence was shown to me which suggested that the problem with the roof leaks may have occurred more than 24 months ago, so before May 2013, I am content for present purposes to take what Mr Webb says at face value, namely that there have been ongoing roof leak problems at Broadway Plaza since at least May 2013.

55.
It seems to me that this evidence is squarely against the claimant for the purposes of this application. On one view of that evidence, the problems with the roofs were known months before these proceedings were commenced in October 2013, so there is no reason why the claim in respect of the roofs was not included in the original pleading. That obvious point simply has not been addressed in the claimant's evidence.

56.
But, on any view, Mr Webb's evidence makes clear that the problem with the roofs was extensive and was known to be a substantial problem by September 2014, when the most recent of the 15 separate leaks had been notified and dealt with. So that raises the question as to why this problem was not then acted upon and made the subject of an amendment, either in time for the CMC on 3 October 2014 (when leading counsel said that no amendments were planned) or shortly after that CMC? There is no explanation for how and why the claimant realised that there was a serious roof leak problem at the latest in September 2014, but did not bring forward amendments to raise the new claim until April 2015.

57.
It is incorrect to say, as the claimant sought to do, that it only discovered the scale of the problem when some further opening-up work was done in January 2015. It is right that, following that work, Mr Heighway, the claimant's building surveyor, was called in to carry out inspection works in March 2015. But he has been the claimant's expert building surveyor for some time, and there was no explanation as to why he was not called in by Mr Webb, or anyone else at the claimant, in 2014 or even 2013, in order to investigate the roof leaks.

58.
Again therefore, the history in respect of the roof defects is similar to that relating to the smoke ventilation claim. The claimant has, without explanation or justification, allowed itself the maximum

possible time to make its new claim, thereby ensuring that the defendant and the relevant additional parties have insufficient time to respond to it within the existing timetable.

5.3

Clarity and Particularity

59.

In my view the position is again similar to that relating to the smoke ventilation amendment. I regard the pleading of this new claim as a first draft; again it lacks proper particularity. In respect of each defect, a number of different faults are asserted. However, it is not made plain how and why these are said to be a breach of the contract provisions which are referred to generically in the next column of the schedule. The locations are not identified. More importantly perhaps, it is not clear which of the alleged defects identified under each individual roof leak is said to be the cause of the water ingress. Indeed, the pleading is not clear as to how and why the matters said to be defects have given rise to water ingress at all.

60.

In addition, I note from paragraphs 8 and 9 of Mr Heighway's statement that he is not happy with the pleading of this new case on liability as it presently stands, and is suggesting some amendments. Although he calls them "relatively minor corrections" they show the hurried way in which these new pleadings have been put together.

61.

Furthermore, it is accepted by the claimant that the roof leak part of the case needs to be the subject of further investigation and consideration. The damages claim figure, currently put at around £500,000, may well alter. Indeed, I would expect the pleading of this new claim to be put into much tighter and clearer form following the investigations. Thus, I find that the current pleading of the roof leak claim represents the start of a pleading process, rather than the end; it is not in the focussed and clear form that I would have expected for a late amendment.

5.4

Prejudice To The Defendant (And Additional Parties) If The Amendment Is Allowed

62.

The position is the same as set out in **Section 4.4** above in respect of the smoke ventilation amendments. If these new claims in respect of the roof are permitted, then the trial would have to be adjourned. The evidence of the defendant and the additional parties is unequivocal on that point, and is not contradicted. For reasons of proportionality, an adjournment of this 6-8 week trial is wholly inappropriate. Again, that is the single most important factor militating against allowing this amendment.

63.

Again, in respect of claims over against other parties, there is a risk that the defendant is in a worse position because of the lateness of these amendments than it would otherwise have been in. However, as far as I can tell, such a risk is a modest one and does not therefore make any significant difference to the balancing exercise which I have to undertake.

5.5

Prejudice To The Claimant If The Amendments Are Not Allowed

64.

The position is the same as noted in **Section 4.5** above. There would be prejudice to the claimant if this amendment were not allowed but, for the reasons set out in **Section 5.2** above, the delay in making these allegations is wholly the responsibility of the claimant. This is not therefore a factor on which the claimant can properly rely.

65.
For those reasons therefore, on application of the usual principles, the roof amendments should be refused.

5.6
Fresh Proceedings

66.
For the reasons set out in **Section 4.5** above, I do not accept the suggestion that, because the claimant considers that it can issue fresh proceedings in respect of the roof defects, that renders futile any opposition to the proposed amendments.

67.
I accept that, in respect of the alleged roof defects, the **Henderson v Henderson** argument is different to that in respect to the smoke ventilation amendment, and may be less strong from the defendant's point of view. That is principally because the roof defects were not an item which had originally been in the pre-action claim, and then omitted from the court proceedings. That said, I consider that there is force in Mr Constable QC's submission that, in any subsequent proceedings, the court might consider that the claimant had its opportunity to bring the roof defects claim within its one juggernaut building defects case, and should not be allowed now to run fresh proceedings in respect of the roofs which could have been included in those comprehensive proceedings.

68.
So, although the argument is more nuanced than in respect of the smoke ventilation claim, I still think that there is a prima facie case that the roof defects claim would be caught by the rule in **Henderson v Henderson**, particularly because of the sheer length of time in which this roof leak problem has been apparent to the claimant (stretching back to a period before these proceedings were even commenced) but was not the subject of a formal claim.

5.7
Summary

69.
For the reasons set out above, therefore, I do not allow the amendments in respect of the alleged roof defects.