Neutral Citation Number: [2020] EWHC 1418 (Ch)

Case No: BL-2019-MAN-000043

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 11th June 2020

Before:

HIS HONOUR JUDGE EYRE QC

- -

Between :

HEAT TRACE (UK) LTD	**Claimant**
- and -	
HEAT TRACE LIMITED	**Defendant**
-and-	
ALAN PEARSON	**Third Party**

- -
- -

James Newman (instructed by **Clear Commercial**) for the **Claimant and the Third Party**
Kate Holderness (instructed by **APP Law**) for the **Defendant**

Hearing date: 13th May 2020

- -

JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 2.00pm on 11th June 2020.

HH Judge Eyre QC:

Introduction.

1. The Defendant manufactures electric heat tracing cable. That is cable which contains a heating element and which is fixed to pipes, rails, and similar structures to maintain or raise their temperature. In the context of this case it is relevant that such cable can be used to keep oil pipelines at an appropriate temperature and to prevent the freezing of the rails on railway tracks. The Third Party has considerable experience in this field and is a director of the Claimant.

2. It is common ground that in November 2002 the Claimant and the Defendant entered a written agreement ("the Distribution Agreement") under which the Claimant was to be the sole distributor of the Defendant's products in the United Kingdom and in the Republic of Ireland. That agreement operated on the basis of the Claimant buying cable from the Defendant and selling it on at a profit. The parties disagree as to the time when that agreement came to an end; as to whether the Defendant is in breach of its obligations under the agreement; and as to the existence and effects of agreements which are said to have been made in addition to the Distribution Agreement.

The Structure of the Parties' Cases in the Absence of Amendment.

3. The Claimant began this action on 23rd April 2019. In the Particulars of Claim as originally formulated the Claimant made reference to the Distribution Agreement. The Claimant's case is that the Distribution Agreement continued until 7th September 2017 when it accepts that the notice given by the Defendant in August 2017 effected a termination.

4. The Particulars of Claim asserted that in addition to the Distribution Agreement there was a further agreement ("the Introducer Agreement"). This was alleged to have covered instances where the Claimant assisted potential clients seeking products or services falling outside the scope of the Distribution Agreement. It was said that the Claimant assisted such potential clients to develop their projects and then referred them to the Defendant. The Particulars of Claim alleged that by "custom and/or conduct" it was a term of the Introducer Agreement that the Claimant would receive commission at 10 – 20% of the gross value of sales made by the Defendant to such a client. It was said that in respect of such introductions the Claimant was a commercial agent of the Defendant within the meaning of the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations") alternatively an introduction agent at common law.

5. The Particulars of Claim said that the Claimant had been approached by Network Rail with a view to supplying a heating cable application for conductor rails. The Claimant alleged that it and the Defendant agreed to work on the project with a view to the Defendant manufacturing the cable and the Claimant then selling it to Network Rail pursuant to the Distribution Agreement. The process is said to have culminated in the Claimant placing an order for cable from the Defendant with the cable having been supplied in the period September to November 2011. That order is alleged to have contained implied terms as to fitness for purpose and quality. The Particulars of Claim proceed to allege

breaches of those terms and claim damages of just over £800,000 for the costs of attempted remedial works and loss of profits ("the Network Rail Claim"). In the Reply the Claimant seeks to recharacterize the claim as being in relation to a joint venture and asserts that the cause of action in respect of this claim accrued on or around 30th April 2013 being the date that the Claimant's contract with Network Rail was terminated.

6. The Particulars of Claim then proceed to contend that the Defendant had sold products to Reflexallen UK Ltd and to Erik's Ltd in breach of the terms of the Distribution Agreement. A compromise agreement was alleged under which the Defendant was to pay commission on sales to those companies. A breach of that compromise agreement is alleged by way of a failure to pay such commission. In the course of his submissions Mr. Newman for the Claimant explained that the Claimant is no longer pursuing this element of the claim.

7. In 2013 some former employees of the Claimant formed Trace Heating Projects Ltd. The Claimant says that it agreed with the Defendant that the latter could supply that company even though it operated within the area where the Claimant had exclusivity under the Distribution Agreement but that it was a term of the Defendant doing so that it paid the Claimant 10% of the gross sale value of the goods sold to Trace Heating Projects. It is said that the Defendant has failed to account for such goods sold since 10th December 2014 and the Claimant seeks an account of such sales and payment of the sum found to be due.

8. The Claimant alleged further breaches of the Distribution Agreement saying that it was to be inferred that the Defendant had been selling products to customers in the United Kingdom or the Republic of Ireland.

9. Next the Particulars of Claim asserted that the Defendant had concluded or would conclude sales as the result of the Claimant's actions under the Introducer Agreement and sought an account of all such sales with a direction for payment of such sum as was found due as a consequence. That claim has been abandoned in the proposed amended Particulars of Claim and I will not address it further.

10. Finally, the Claimant asserted that payment was due for its actions in referring to the Defendant the opportunity to provide cable to be used in developing a pipeline in East Africa ("the Uganda Project"). This is a project to extract oil from the Lake Alberta oilfield in Uganda and to pipe it to the coast. That would need the oil to flow for 1,450km through a pipeline and that pipeline would need to be heated to prevent the oil congealing. Commission in an amount to be determined is said to be due either by reason of the Introducer Agreement or as an entitlement under the Regulations.

11. The Defendant admitted the existence of the Distribution Agreement but said that it came to an end by mutual consent in November 2013. It denies that any sales thereafter in the United Kingdom or the Republic of Ireland were a breach of that agreement. The Defendant denies that there was an Introducer Agreement or that the Claimant was its commercial agent for the purposes of the Regulations. It says that any arrangements which were made for commission to be paid to the Claimant for introductions were ad hoc and specific to the particular introductions.

12. The Defendant denies the Network Rail Claim. It says that it sold the Claimant the cable which was then supplied to Network Rail under a straightforward contract of sale and purchase. It denies that there was any breach of a term as to fitness for purpose and says that in any event the claim is statute-barred because the Claimant's cause of action can only have arisen at the latest on the supply of the last of the cable in November 2011.

13. The Defendant agrees that there was an agreement that it would make payments to the Claimant in relation to the sales it made to Trace Heating Projects Ltd. However, it says that the agreement was made by an exchange of emails in March 2014 and provided for such payments to be made for a period of six months from the end of March 2014 and no longer. It says that this has been done and that there is no breach.

14. As to the Uganda Project the Defendant denies that the introduction came from the Claimant and says that there was no agreement for commission to be paid to the Claimant. It also points out that it has not been awarded any contract in respect of the Uganda Project and has no certainty that it will be so there is no scope for a commission claim.

15. Finally the Defendant counterclaims for £266,486 together with contractual interest which is said to be outstanding as overdue payment for cable sold to the Claimant. The Claimant admits that it is indebted to the Defendant but does not admit the amount of that debt. It says that its inability to make payment was caused by the Defendant's breaches of the Distribution Agreement and asserts a right to set off the sums claimed in the Particulars of Claim against the Counterclaim.

The Applications.

16. The Claimant and the Defendant each issued applications on 31st January 2020. The Claimant sought permission to amend its Particulars of Claim. For its part the Defendant applied for the claim to be struck out on the basis that it disclosed no reasonable grounds for bringing the claim and/or was an abuse of process by reason of a failure to plead the Claimant's case with sufficient precision alternatively for summary judgment. It was those applications which came before me on 13th May 2020 at a hearing conducted by way of Skype for Business.

17. Mr. Newman and Miss. Holderness for the Defendant were agreed that the appropriate course was for me to assess the particular elements of the claim separately determining in respect of each whether the Defendant had established that it should be struck out or that there should be summary judgment and then considering whether the proposed amendment would operate to preserve that part of the claim and, if so, whether the amendment should be allowed. In large part that is the course I will adopt though I will not do so in an overly mechanistic manner. The crucial question in respect of each element will be whether the Claimant has a case which should be permitted to proceed to trial whether as originally formulated or in an amended form. Where, as with the claim relating to the Network Rail dealings, the amendment amounts to the putting of a new case in substitution for that originally pleaded and to an implicit

concession that the claim as originally formulated is no longer being pursued attention will necessarily be focused on the case as amended. I will not address here those proposed amendments which are limited to uncontentious expansion or clarification of the existing claim.

The Relevant Principles.

18. Mr. Newman and Miss. Holderness were agreed that the approach to be taken to the question of summary judgment was that set out by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. In short the test is whether a line of defence or of claim has been shown which has a real rather than fanciful prospect of success. The court is not to conduct a mini-trial and is to be alert to the scope for expansion of a case at trial and for matters to appear rather different after cross-examination and oral explanation. However, the court must also guard against "Micawberism" and it is not sufficient for a party simply to assert that something will turn up to bolster its case. Although not conducting a mini-trial the court does not have to accept a party's assertions at face value if they are incompatible with contemporaneous documents or with inherent likelihood.

19. Any proposed amendment must be comprehensible and must include those elements which are required by the CPR for the pleading of the relevant claim or defence. An amendment which asserts a case which has no real prospect of success will not be allowed. This is because it would be futile to allow an amendment when the amended claim or defence would immediately be defeated by a summary judgment application.

20. If an amendment puts forward a new claim regard has to be had to the question of limitation. Where the new claim is one which would be statute-barred if commenced at the time of the amendment but which would not have been if it had been commenced at the time the proceedings were issued then regard is to be had to Section 35 of the Limitation Act 1980 and to CPR Pt 17.4. The parties are agreed that the effect of these provisions is that a new claim can only be added by way of amendment in such circumstances if it arises out of "the same facts or substantially the same facts" as a claim already made in the proceedings. I will consider below the disagreement between them as to the way in which that requirement is to be interpreted and more particularly as to its application here.

The Distribution Agreement and the Claims under it.

21. The Claimant's case is that the Distribution Agreement continued until 7th September 2017 and that the Defendant is in breach of that agreement by having itself made sales in the United Kingdom and the Republic of Ireland in the period to September 2017. The Claimant says that it suffered loss in the amount of the profit it would have made through making those sales itself. It asserts a figure of £1.872m but says it cannot fully particularise its loss because of the Defendant's failure to provide full details of all the sales made. At the hearing it was accepted on behalf of the Defendant that unredacted details of only about 80% of the sales had been provided on the basis of proportionality. The proposed amendment expands the pleading of the terms of the Distribution Agreement but that is in the context of the claim in relation to the alleged

Introducer Agreement and does not alter the case on the Distribution Agreement.

22. The Defendant says that the Distribution Agreement was terminated with immediate effect on 6th November 2013 by the Claimant's email reply to the Defendant's letter of 1st November 2013. In the alternative if that exchange did not effect an immediate termination the Defendant says that it operated as a variation of the Distribution Agreement or that by accepting the Preferential Customer arrangements which the Defendant put in place the Claimant is estopped from denying the termination of the Distribution Agreement. The Defendant disputes the alleged losses saying that the Claimant would not have made the sales itself and that its loss of profit is negligible.

23. In her skeleton argument and before me Miss. Holderness advanced a further argument. In summary she contended that the Distribution Agreement related to Authorised Contracts which were defined as being those within the capacity of the Claimant. As the Claimant had failed to make payment for earlier supplies (which is accepted by the Claimant and which forms the basis of the counterclaim) Miss. Holderness contended that the Defendant would have been entitled to conclude that the Claimant did not have the capacity to make purchases from it and to make sales itself in the area of exclusivity with the consequence that the Claimant would not have been able to make the sales in question itself. The line of argument is not set out either in the Defence and Counterclaim or in the evidence in support of the summary judgment application and in those circumstances it cannot be relied on as a basis for summary judgment.

24. The Claimant's position is that the exchanges in November 2013 and thereafter were with a view to coming to an agreed termination but that no agreement was made and that the Distribution Agreement continued in force.

25. The Defendant's letter of 1st November 2013 followed discussions between Mr. Pearson of the Claimant and Mr. Bonner of the Defendant. The letter extended over two closely typed pages and was headed "Termination of Distribution Agreement". In it Mr. Bonner began by saying:

> "Further to our discussions on Wednesday 30th Oct concerning the above, I thank you for the courtesy extended during our meeting over this particularly difficult subject. While our discussions were only preliminary in establishing a positive way forward for both our companies, I trust our initial proposals have given you an option to consider that may not have been previously apparent. As requested | detail the main points of our discussion in writing, summarising as bullet points. This should be considered a framework upon which some detail needs to be agreed. If there is anything I have missed I apologise. Please feel free to highlight any omission in your response"

26. There then follow a series of bullet points the first of which says "the distribution agreement to be dissolved and the Heat Trace UK company/companies to be renamed."

27. The letter concluded thus:

> "We trust you will give the above every consideration. We look forward to your response which should be directly to Dan Berrisford and copied to Neil Malone and myself. I know you will do what is best for your family, company and employees and hope your decision is favourable but whatever it may be, the process of dissolving the agreement needs to begin. We would like an indication of your intentions within the next 7-10 days. Meanwhile some preparations relating to the subject matter will be taking place on our side."

28. The parties are agreed that Mr. Pearson replied by email on 6th November 2013 and each has quoted parts of the email but neither put the full text in evidence before me. The Defendant relied on the words:

> "HTUK have not requested this termination or desire it. Having said that I understand that HTL have made their decisions and we need to deal with the outcome … I acknowledge the points listed in the letter and have nothing further to add. We will look to change the Heat Trace (UK) Ltd company name as soon as practical … As I mentioned to you previously Dan we will continue to do our best for HTL and honour our commitments. Once we have changed the company name I will inform you."

29. The Claimant points out that Mr. Pearson's email had also said "in the time frame we have been given for a response we have not had time to seek any external advice so please read my comments with this in mind."

30. The exchanges in November 2013 were followed by further correspondence. There was an exchange of emails on 23rd December 2013 about contact between the Defendant and the ex-employees of the Claimant who set up Trace Heating Projects Ltd but it is of note that the email from Mr. Berrisford of the Defendant included these words:

> "I had hoped to get a "heads of agreement" letter to you before Christmas related to the termination but I'm afraid the HTL server isn't working with remote access. It will now get to you after Christmas and I hope that it will reassure you that we still expect to enjoy a fruitful business relationship with you going forward."

31. On 7th January 2014 the Defendant wrote to the Claimant in a letter headed "Termination of Distribution Agreement – Heads of Agreement". The opening paragraph said:

> "I refer to Steve Bonner's letter to you of 1st November and our subsequent emails. As you know we propose that a formal Termination Agreement is put in place. As Steve acknowledged in his letter there is quite a bit yet to be considered and clarified. Before incurring the expense of preparing the detailed Agreement, therefore, we would like to establish that we are in agreement in principle on the remaining points".

32. The letter then set out what was effectively a draft agreement. The first proposed clause set out definitions and stated "Termination Date means the [TBC]." At some point "1st March" was added in manuscript alongside those words. Paragraph 2 was then headed "Termination of Distribution Agreement" and provided that:

> "With effect from midnight on the Termination Date the Distribution Agreement will be terminated by mutual consent on and subject to the terms of a formal Termination Agreement (see paragraph 18 below)".

33. Paragraph 18 said:

> "Once all the matters remaining to be negotiated as above have been agreed a formal legal Termination Agreement will be prepared setting out the detailed terms to clarity and security for the parties."

34. There were further exchanges and the bundle contains a draft "Agreement for Termination of Distribution Agreement" dated 26th February 2014. This was drawn up by the Defendant's solicitors and in substance sets out in the structure of a formally drafted agreement the terms foreshadowed in the letter of 7th January 2014. However, it is of note that it defines the termination date as being 31st March 2014. There are, moreover, two recitals. The first records that the Defendant and the Claimant are parties to the Distribution Agreement and the second says:

> "The parties have agreed that the Distribution Agreement shall be terminated by mutual consent with effect from midnight on 31st March 2014 on and subject to the terms of this agreement and that both it and the Adherence Agreement shall be superseded by this agreement."

35. That draft appears to have been sent to the Claimant as an attachment to an email of 11th March 2014 from Mr. Berrisford. In that email Mr. Berrisford said:

> "As discussed, the first draft of the full termination agreement is attached Everything should reflect our discussions in Wetherby. I have set the termination date as 31st March but obviously we can move this if further discussions are required."

36. Mr. Berrisford went on to say "please take a look at the agreement and let me know if you have any issues" and concluded by suggesting that he and Mr. Pearson meet "to discuss the implications of the agreement and any issues that need resolving."

37. The proposed formal termination agreement was never concluded. Indeed until after the issue of proceedings it appears to have been the Defendant's case that the Distribution Agreement had been varied but that it had not been terminated until September 2017. Thus in their letter of 27th March 2019 the Defendant's solicitors said it was common ground that the Distribution Agreement had ended on 6th September 2017. In that letter the Defendant's solicitors referred to "the draft Termination Agreement which [the Defendant] had put forward in 2014" saying that "its terms were not agreed and it was never put in place."

38. The exchanges after November 2013 are strongly suggestive of the parties negotiating with a view to terminating the Distribution Agreement through a formal agreement to take effect on a particular date but with no agreement having in fact been concluded. That would have had the consequence that the Distribution Agreement remained in force until September 2017. As I have just noted that was the view of the Defendant's solicitors as recently as March 2019. None of that would prevent the court concluding that the Distribution Agreement had in reality been terminated on 6th November 2013 if that was the

effect of the Defendant's letter of 1st November and the Claimant's email of 6th November properly interpreted. However, that cannot be said to be the position beyond argument. Indeed at this stage the better interpretation appears to be that the exchange of the letter and the email operated as confirmation of the parties' willingness to enter negotiations as to termination with a view to reaching agreement on the terms of termination. However, the exchanges did not effect a termination immediately. If agreement on the terms were to be reached then the termination would be on the basis of a formal agreement giving effect to those terms. However, no final agreement was reached with the consequence that the Distribution Agreement remained in place. Certainly that interpretation of the dealings is one which has a real prospect of success. If that is correct the Claimant also has a real prospect of defeating the argument that it is estopped from denying the termination of the Distribution Agreement. It could not be said that the Claimant had made any representation that the Distribution Agreement had ended or that the parties proceeded on that basis. At least the argument against estoppel has a real prospect of success.

39. It follows that the Claimant has a real prospect of establishing that the Distribution Agreement remained in force until September 2017. It is common ground that the Defendant made direct sales in the United Kingdom and the Republic of Ireland in that period. Whether those sales were breaches of the Distribution Agreement and if so whether they caused loss to the Claimant and in what amounts are issues of contention. However, it cannot be said at this stage that the Claimant's contentions in that regard do not have real prospects of success.

40. The Claimant through Mr. Newman accepts that its claim in respect of sales made by the Defendant before 23rd April 2013 is statute-barred. To that extent the Defendant's application for summary judgment succeeds but it and the striking out application fail in respect of the balance of the claim under the Distribution Agreement.

The Claim for Commission on the Defendant's Sales to Trace Heating Projects.

41. The Defendant seeks summary judgment saying that when properly interpreted the agreement in relation to Trace Heating Projects can only be seen as one for commission to be paid to the end of 2104 (it is common ground that this has been done) alternatively that the Claimant's particularisation of the agreement is so inadequate as to merit the striking out of the claim or summary judgment.

42. The relevant email of the Defendant is Mr. Berrisford's email of 11th March 2014 which attached the draft Termination Agreement and part of which I have quoted above. Clause 6.5 of the draft Termination Agreement provided for the Defendant to be entitled to make sales to Trace Heating Projects but for a 15% commission to be paid to the Claimant on such sales for the period of six months from 1st April 2014 (ie immediately after the termination date proposed in that draft agreement). In respect of sales to Trace Heating Projects Mr. Berrisford's email said that he accepted that some of what the ex-employees had done was wrong but that he wished to be able to sell to them adding:

> "However, I propose to provide you with a commission on all HTL sales to Trace Heating Projects. The agreement states for 6 months from termination date but I will also include the period between 1st January 2014 and the termination date."

43. The potential claim here depends on the interpretation of those words. Was the Defendant offering to pay commission on the sales during the course of the Distribution Agreement and for six months thereafter or just for six months or only if the Termination Agreement was concluded? The email was sent in the context of the proposed Termination Agreement but that was not concluded. The conclusion as to the proper interpretation of these dealings will be influenced by the conclusion which is reached on the question of whether the Distribution Agreement was terminated in November 2013. If it was then the exchange is likely to be seen as giving a right limited to the period to December 2014. If, however, the Distribution Agreement was not terminated until September 2017 there will be scope for the conclusion that there was a continuing obligation on the Defendant to make payments in respect of sales to Trace Heating Projects. Those questions are not apt for determination at this stage and I have already explained that the Claimant's contention that the Distribution Agreement continued until September 2017 has a real prospect of success. In the light of that it cannot be said that the Claimant's claim does not have a real prospect of success. Although the agreement could and should have been pleaded more fully the Claimant's case is sufficiently clear and it does not fall to be struck out by reason of any deficiency of the pleading.

The Uganda Project Claim.

44. As originally formulated the Claimant's case was that it was approached in connexion with the Uganda Project and that it recommended the Defendant pursuant to the Introducer Agreement. It was said that Mr. Pearson had "been informed by various sources that the Defendant has concluded or is about to conclude a significant sales contract with the main contractor of the Uganda Project". Commission was said to be due by reason of the Introducer Agreement or by virtue of the Claimant's position as the Defendant's commercial agent. The relief sought in the event that a contract had not yet been concluded was a declaration that the Claimant was entitled to 10% of the gross sales value of any contract which the Defendant did conclude.

45. In the proposed amended Particulars of Claim the allegation that the Introducer Agreement was formed by custom or conduct has been deleted and is replaced by the contention that it was agreed orally. The circumstances of the alleged oral agreement are not set out but it is said that at "various board meetings" Mr. Pearson was encouraged to seek out capital projects "on the understanding that if any referrals that were made to the Defendant resulted in a contract of sale" the Claimant would receive commission.

46. At [7A] the amended pleading sets out meetings and correspondence in which it is said that the Claimant attempted to regularise the circumstances in which and the rate at which commission would be paid. It says that although agreement was not reached as to the specific amount of commission which would be payable the Defendant gave repeated assurances that commission would be paid if a referral from the Claimant resulted in a sale by the Defendant.

47. At [7B] the Claimant says that the existence of the Introducer Agreement was evidenced by three matters. First, the payment by the Defendant of commission to the Claimant in respect of the Claimant's referral of Technip Ltd to the Defendant for a project to provide heat tracing for an underwater cable. Second, an email of 30th August 2012 in relation to the Uganda Project. Finally, the alleged fact that it was common practice for the Defendant to enter such agreements with its distributors with the Claimant saying that an agreement between the Defendant and its Argentinian distributor showed that practice.

48. Then the Claimant says, at [7C], that the Defendant is estopped from denying that the Claimant is entitled to commission on introductions by its conduct in benefiting from introductions which it knew the Claimant was making on the basis that commission would be paid.

49. There is a modest expansion of the case as to commercial agency and the Claimant maintains its contention that in respect of the introductions it was a commercial agent within the meaning of the Regulations.

50. There is a more substantial amendment by the addition of the contention that the Claimant is entitled to remuneration on a *quantum meruit* basis for the work done on the Uganda Project. It says that the Defendant has been enriched by those services which were provided by the Claimant and accepted by the Defendant on the basis that they were not being provided gratuitously.

51. The Defendant says that none of these alternative claims put forward by the Claimant have a real prospect of success. In addition Miss. Holderness contended that elements of the claims were liable to be struck out as failing to allege a properly pleaded cause of action. In particular it was said that the alleged oral agreement of the Introducer Agreement was not pleaded with the necessary particularity as to the parties to the discussion or discussions in question.

52. It follows that the question at this stage is whether the Claimant has shown a properly pleaded case with a real prospect of success in relation to the Uganda Project. Has it shown that any of the claims whether by way of the alleged Introducer Agreement or commercial agency or *quantum meruit* have a real prospect of success? In addition I will consider the question of whether even if there was not an overarching Introducer Agreement there was a particular agreement for the payment of commission in relation to the Uganda Project. If and to the extent that the Claimant has a real prospect of success then the claim is to continue in relation to those elements where that prospect has been shown. Conversely if and to the extent such prospect has not been shown there is to be judgment for the Defendant and/or removal of a particular element from the claim and/or refusal of permission to amend.

53. The Claimant accepts in the witness statement of Mr. Pearson that the Defendant has not been awarded a contract to supply heat tracing cable for the pipeline. However, Mr. Pearson says that he believes that such a contract is imminent. He refers to press reports and actions which are said to have been taken by the Defendant as indication of this. He also says that it is a "foregone conclusion" that the Defendant will get the contract because it is the only supplier of the heat

trace longline technology which is to be used in the project. In his statement on behalf of the Defendant Stephen Bonner says that the position is not that straightforward. He says that there is at least one other supplier of the relevant technology; gives an alternative explanation of the matters on which Mr. Pearson relies to say that a contract is imminent; and essentially says that although the Defendant hopes to be engaged to provide heat tracing for the project it cannot be confident that it will be engaged let alone that it will be engaged imminently. Clearly that factual dispute cannot be resolved at the summary judgment stage and it is of minimal relevance to the issues I have to decide.

54. Against that background I turn to the question of whether the Defendant has shown that the Claimant has no real prospect of succeeding in the contention that there was an Introducer Agreement between the Claimant and the Defendant.

55. The inadequacy of the Claimant's pleading is a significant weakness in its case. The original contention was that the agreement had been formed by "custom and/or conduct" but that is replaced in the proposed amended pleading by the assertion that the agreement was made orally. Although the nature of the agreement is stated albeit in rather general terms no particulars are given of when or between whom the operative conversations are said to have taken place. The amended pleading does not satisfy the requirement of CPR PD 16 paragraph 7.4 that it should "set out the contractual words used and state by whom to whom, when, and where they were spoken". This deficiency is not remedied by Mr. Pearson's witness statement. Although Mr. Pearson refers to the agreement he gives no details of any conversation or conversations in which it was made. Instead he refers to the contention in the Particulars of Claim that he was encouraged to seek out larger projects and that this was on the understanding that a commission would be paid but there is a marked failure to provide precise particulars.

56. In the absence of particulars of the operative conversations the position has to be assessed in the light of the parties' actions and the contemporaneous documents. Indeed this is the course taken by the Claimant which bases its case that there was such an agreement on these. However, in my judgement these do not point to the existence of such an agreement and in a number of instances are strongly suggestive that there was no agreement.

57. The Claimant points to the fact that commission was paid on occasions when it had introduced potential customers to the Defendant. It makes particular reference to the commission paid following the contract entered between the Defendant and Technip after the Claimant's introduction of the latter to the former. This does not greatly advance matters. It indicates that there was scope for commission to be paid to the Claimant if it made effective introductions to the Defendant but is not indicative of a general agreement to that effect.

58. The evidence about the Defendant's dealings with its Argentinian distributor similarly does not advance matters. The documents appear to show a one-off arrangement in respect of a particular transaction or purchaser. Even if the Defendant's agreement with its Argentinian distributor provided for a

continuing entitlement to commission that simply demonstrates that the Defendant was prepared to enter such an agreement with that distributor it does not establish that the Defendant did so with the Claimant.

59. The email exchanges of 30th August 2012 were directed expressly to the Uganda Project and demonstrate that the parties were contemplating a commission being paid in relation to that. However, they do not show agreement of a particular rate and they do not indicate an overarching agreement of the kind alleged by the Claimant rather than the contemplation of an arrangement confined to the Uganda Project.

60. In February 2013 Mr. Pearson sent an email to Mr. Berrisford of the Defendant. He attached a document headed "collaboration framework" which referred to a meeting in July 2012 where it had been agreed that steps would be taken to "promote a more collaborative working relationship" between the Claimant and the Defendant. This contained a passage under the heading "proposal" making provision for commission to be paid by the Defendant to the Claimant in the event of "applications" being referred to the former by the latter. The proposal provided for a 10% commission to be paid if the Claimant did not have any input into the sales or engineering and for an "agreed" commission to be paid in other circumstances. The document and the exchanges indicate that there was no Introducer Agreement at that stage otherwise reference would have been made to it. Mr. Pearson's email was followed by other emails between the parties which indicate that discussions were taking place with a view to reaching an agreement but which also indicate that no agreement was in place.

61. As noted above in the latter part of 2013 and the beginning of 2014 there were discussions and correspondence between the parties about the possible termination of the Distribution Agreement. I have already addressed the competing contentions as to the effect of those dealings. In its letter of 1st November 2013 the Defendant recorded matters which had been addressed in discussions on 30th October 2013. That letter contained the following passage:

> "Commissions relating to any specific long term projects/sales leads need to be agreed separately. In particular the UGANDA project is such a case. HTL stated that with such a potentially high project value, regular-level commissions (10%) would not be possible. This project while live, is long-term (2-3 years before fruition). HTUK advised monies had been expended chasing this business. This was acknowledged. SB advised we are now receiving the enquiry coming from other sources outside of the UK through pro-insulated pipe manufacturers."

62. At [56] the proposed amended Particulars of Claim quote that passage and aver that it was an acknowledgement by the Defendant that the Claimant had referred the Uganda Project to the Defendant; that the Claimant had incurred costs; and that the Claimant was "entitled to commission in an amount to be determined."

63. The Claimant also relied on the Defendant's letter of 7th January 2014 which said that as a result of the dealings since 1st November 2013 the Defendant proposed that a formal termination agreement be put in place. It said that "there is quite a bit yet to be considered and clarified" and that before incurring the expense of preparing the detailed agreement the Defendant wished to establish

that there was agreement in principle on a number of points. There then followed a series of numbered paragraphs taking the form of a draft agreement and at paragraphs 11 – 13 there was provision for commission to be paid to the Claimant. In particular at 12 it said:

> "HTUK will not have any ongoing representative or business introduction role on behalf of HTL, but HTUK will be entitled to a commission or some other remuneration should any of certain specified long term projects and sales leads in which HTUK has been involved come to fruition. The list of such projects/leads, and the appropriate levels of commission or remuneration in each case, will need to be discussed and agreed."

64. These documents from late 2013 and early 2014 do not support the Claimant's case that there was an Introducer Agreement under which it was entitled as of right to commission. Indeed they are inconsistent with such an agreement having been in place. The documents indicate that introductions had been made by the Claimant and that it was envisaged that commission would be paid. The reference to "regular level commissions (10%)" in the November 2013 letter indicates that commission was normally being paid at that level. However, the references are made in the context of discussions as to the matters which would have to be agreed in the context of the termination of the Distribution Agreement. They contain no indication that there was already a separate Introducer Agreement covering the payment of commission for introductions and if there had been such an agreement there would have been no need for a new agreement of the commission arrangements. It is also of note that the references are in exchanges which on the Claimant's case did not lead to an agreed termination of the Distribution Agreement.

65. I have reminded myself that the question of whether there was an Introducer Agreement is being addressed in the context of summary judgment without oral evidence and with the prospect of further expansion or explanation being provided at trial. In that regard I note the warning from the editors of the White Book at 24.2.5 and to which Mr. Newman referred me namely that choosing between competing factual evidence is the role of the trial judge and not of a judge at the summary judgment stage. Nonetheless, I have concluded that there is no real prospect of the Claimant succeeding in establishing that there was an Introducer Agreement of the form alleged namely an overarching agreement entitling the Claimant to commission on introductions made to the Defendant. Here the particularisation of the alleged oral agreement is deficient so that I am faced not with competing evidence about an alleged conversation but with the Claimant asserting an oral agreement without giving the prescribed details of the circumstances in which it was made. Moreover the sundry contemporaneous documents are inconsistent with there having been such an agreement. The picture shown by the documents is that of a series of ad hoc agreements in relation to particular introductions; of an understanding that an introduction from the Claimant would be likely to result in the payment of commission; and of an acknowledgement that in the context of the ending of the Distribution Agreement thought had to be given to what commission would be due if existing introductions came to fruition but not of an agreement giving an entitlement to commission as of right. Even on the basis of the position as set out in Mr.

Pearson's witness statement there is no real prospect of a finding that there was a concluded agreement in the terms of the alleged Introducer Agreement.

66. The Claimant's primary case was that the Introducer Agreement was independent of the Distribution Agreement. It puts forward an alternative case that the Distribution Agreement was varied by consent to incorporate the Introducer Agreement. That alternative case depends on the contention that there was an agreement in the form of the Introducer Agreement and so can have no more prospect of success than the primary case.

67. At [7C] the Claimant puts a further case. It is said that the Defendant is estopped from alleging that the Claimant was not entitled to commission on introductions made by it. The estoppel is said to arise from the Defendant's acceptance of introductions from the Claimant knowing that the latter was relying on "the Defendant's apparent agreement to pay commission". That contention also has no real prospect of success and cannot stand in the light of the contemporaneous documents. Those are consistent with the parties having an expectation that commission would be paid on introductions made by the Claimant but also show that the payment of commission and in particular the level of commission was to be a matter of negotiation and agreement in each case. The proposed estoppel would only avail the Claimant if it could be said that the Defendant was estopped from denying an entitlement to the payment of commission at a particular rate and that is neither alleged nor consistent with the parties' contemporaneous exchanges.

68. I can deal shortly with the theoretical possibility of there having been an agreement in relation to the Uganda Project alone. The Claimant does not allege such an agreement and the correspondence summarised above shows that the parties were proceeding on the basis that the payment of commission for that introduction was a matter to be agreed rather than a matter which had been agreed. It follows that even if the claim were to be reformulated to make such an allegation there would not be a real prospect of success.

69. The Claimant's assertion of an entitlement pursuant to the Regulations can also be disposed of shortly. Before me Mr. Newman and Miss. Holderness engaged in debate as to whether the Claimant fell within the scope of the Regulations but I do not need to address the details of that debate. This is because the Particulars of Claim in both the original form and in the proposed amended form allege a commercial agency deriving from the Introducer Agreement. It is that alleged agreement which is said to give rise to the commercial agency and to the entitlement under the Regulations. The Claimant does not allege that there was a commercial agency in the absence of such an agreement. It follows from my conclusion that there is no real prospect of establishing that there was an agreement in the terms of the Introducer Agreement that the Claimant has no real prospect of establishing a commercial agency whether for the purpose of the Regulations or otherwise.

70. The claim for a sum by way of a *quantum meruit* is made for the first time in the proposed amended pleading. The Claimant says that it provided services in relation to the Uganda Project and incurred expense in doing so. The expense is alleged to be £137,700. In the Defence the Defendant disputes the amount of

the work allegedly done and the expense incurred by the Claimant but it is not suggested that no work was done. It is to be noted that the letter of 1st November 2013 as quoted at [61] above recorded the Defendant's acknowledgement that the Claimant had incurred expense in this regard. The services are said to have conferred a benefit on the Defendant in the form either of the agreement which it will obtain or the chance of entering such an agreement. The Claimant says that the Defendant knew that its services were not being provided gratuitously and that in those circumstances the Defendant has been unjustly enriched by acceptance of the services.

71. The Defendant says that it has not been enriched by the services because it has obtained no benefit and contends that this is not one of those rare cases where such a claim is available in the absence of benefit. Miss. Holderness referred me to the decision of the House of Lords in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 and to the speech of Lord Scott at [40] – [42]. She contended that the reality here was that the Claimant was proceeding in the hope of obtaining commission if the Defendant was successful in obtaining the contract and if agreement was reached as to the commission due but was taking the risk of recovering nothing if the Defendant failed to get the contract or if there was no agreement as to commission.

72. There is force in Miss. Holderness's submission that the Claimant was taking the risk of having wasted its expenditure if the Defendant did not get the contract in relation to the Uganda Project. However, in that regard there is a live factual dispute as to the Defendant's prospects of being awarded the contract. Mr. Pearson's statement makes a number of factual assertions in that regard. The Defendant has responded through Mr. Bonner's statement but that conflict cannot be resolved at this stage. There is a real prospect of the Claimant establishing at trial that at the lowest the Defendant has good prospects of obtaining the contract.

73. Similarly there is at least a real prospect of a finding at trial that both sides proceeded on the basis that if the Defendant obtained the contract then the Claimant would receive payment. I have already concluded that the Claimant will be unable to establish either the alleged Introducer Agreement or an agreement for commission at a particular level but it does not follow from that that the *quantum meruit* claim must necessarily fail. The approach in *Cobbe v Yeoman's Row Management Ltd* is of relevance. The claimant in that case was a property developer who had obtained planning permission benefiting the defendants' land. He had done so in circumstances where the oral agreement for the purchase of the land was unenforceable and where he had taken a commercial risk with his eyes open knowing that there was no legally binding contract. The House of Lords concluded that a proprietary estoppel did not arise in those circumstances but did conclude that there had been unjust enrichment of the defendants the amount of which was to be determined by the value of the claimant's services and directed a *quantum meruit* payment (see per Lord Scott at [40] – [42] and per Lord Walker at [93]). There are similarities to the position here where the Claimant was not intending to provide its services gratuitously but where there was no enforceable agreement with the Defendant and where the Claimant was running the risk that the expenditure might be entirely in vain

(as would be the case here if the Defendant did not obtain the contract or as it would have been in *Cobbe's case* if planning permission had not been obtained).

74. The claim for a *quantum meruit* is by no means bound to succeed but it has a real prospect of success and in the light of that it is appropriate to give the Claimant permission to amend the Particulars of Claim to include that claim and to decline the Defendant summary judgment in that regard.

The Network Rail Claim.

75. In the Particulars of Claim the Claimant said that it had been approached by Network Rail in 2010 with a view to meeting the latter's need for a heating application for conductor rails. The unusual feature of what was being proposed was that the power supply for the heating application was to be derived from the conductor rail itself. The Particulars of Claim alleged that there had been negotiations between the Claimant and the Defendant as to whether the Defendant could produce a cable to meet the needs of Network Rail. The Claimant said that at a meeting on 21st September 2010 the Defendant gave assurances that it could produce such a cable. The Particulars of Claim then asserted that it was on this basis that the Claimant invited the Defendant to work with it on the project and that it was agreed orally that if the Claimant's tender to Network Rail was successful "the Defendant would manufacture the cable and the Claimant would sell it on to Network Rail pursuant to the [Distribution Agreement]".

76. The pleading asserted that the Claimant and the Defendant jointly prepared design statements which were incorporated in the tender and that the Defendant went on to develop a cable purporting to meet the needs of Network Rail. The Claimant's success in obtaining the Network Rail contract was pleaded and at [25] the Particulars of Claim assert that the Claimant then "raised a purchase order with the Defendant" and that this was "pursuant to the agreement set out in paragraph 16". The reference was in fact to the agreement pleaded at paragraph 15 of Particulars of Claim which was the alleged oral agreement said to have been made at the meeting on 21st September 2010. The Claimant alleged that it had placed the purchase order relying on the Defendant's skill and judgment and on representations made by the Defendant. It was said that the agreement was subject to three implied terms being warranties as to the fitness for purpose and satisfactory quality of the cable and that the Defendant would "exercise reasonable care and skill in the research development and production of the cable".

77. The Particulars of Claim plead delivery of the cable between September and November 2011. They then set out problems encountered by Network Rail and the unsuccessful efforts to address them culminating in Network Rail's termination of its contract with the Claimant by an email dated 30th April 2013. The pleading says that the Claimant will "rely on the email [ie that from Network Rail] to establish the Defendant's breaches of the implied terms". Those words conclude [32] and then at [33] the breach alleged is described thus "in breach of the implied terms set out at paragraph 27 the cable developed and manufactured by the Defendant was not compliant with Network Rail requirements in that the inrush current exceeded 6 times the steady state

current." It is to be noted that the Particulars of Claim contains no further particularisation of the breaches. The loss allegedly caused by the Defendant's breaches is then set out.

78. The Defence takes issue with various aspects of the Claimant's case arising from the Network Rail project but the significant point for present purposes is the Defendant's contention that the claim is statute-barred. It says that the claim is for breach of the terms of a contract of sale of cable. The breach alleged must be that of a deficiency in the qualities of the cable such that it was not fit for purpose or of satisfactory quality or produced with reasonable care. The Defendant says that the breach or breaches must have occurred when the cable was delivered which was by the end of November 2011 and that the Claimant's cause of action accrued then with the consequence that this claim was statute-barred when the proceedings were commenced in April 2019.

79. In respect of the Network Rail Claim as set out in the Particulars of Claim the limitation defence is compelling and there is no real prospect of the Claimant overcoming it. Mr. Newman accepted that the general rule is that the cause of action in breach of contract for a failure to supply goods of the requisite quality accrues on delivery because that is when the breach occurs. Indeed that is an elementary principle of contract law. Mr. Newman, however, sought to argue that the Claimant's claim was not necessarily caught by that general rule. Instead it was his contention that in appropriate circumstances the court can imply a term that goods will be of proper quality for a reasonable time after delivery. Mr. Newman contended that at the lowest there was sufficient prospect of such an approach being adopted at trial in this case for it to be said that the unamended claim had a real prospect of success. That argument is unsustainable not only in the light of the way the case is pleaded but also on analysis of the authorities relied on by Mr. Newman.

80. The Claimant's case is pleaded in clear terms in the Particulars of Claim. The breach is said to lie in the deficiency in the cable "developed and manufactured" by the Defendant. That cable is pleaded at [29] as having been delivered in the period of September to November 2011. At [30] the Claimant sets out its case as to the problems which were faced by the cable installation and says that the Claimant and the Defendant "liaised with Network Rail to find a solution". It is said that this led to "proposals for the redesigns of the cable and the electricity supply protection systems" which were ultimately unsuccessful. The difficulty for the Claimant is that the case as pleaded asserts a purchase order and says that the cable delivered in performance of that purchase order was defective. Moreover, the agreement asserted is said to have been one for manufacture by the Defendant coupled with sale to the Claimant. The case set out in the Particulars of Claim is predicated on a breach by the Defendant at the time of delivery and at [33] the averment is of a breach caused by the failure to develop or manufacture a satisfactory cable. The fact that efforts were made to find a solution when the problems came to light cannot alter the position that the failure on the part of the Defendant which caused those problems and which is the basis of the Claimant's case was a failure to deliver cable of the right quality and that failure occurred in November 2011.

81. Similarly the authorities relied on by Mr. Newman do not assist. He referred me to the approach of the Court of Appeal in *Viskase Ltd v Paul Kiefel GmbH* [1993] 3 All ER 362. However, the analysis by Chadwick LJ (with which Morritt LJ agreed) is contrary to the argument being advanced by Mr. Newman. Chadwick LJ explained that a failure of a machine at some time after delivery could be an indication that in breach of contract the machine had not been fit for purpose when delivered because if it had been fit for purpose it would not have failed when it did. However, the breach was a single breach and occurred at the time of delivery (see at [16], [18], and [20]). Mr. Newman accepted that the majority in *VAI Industries (UK) Ltd v Bostock & Bramley* [2003] EWCA Civ 1069, [2003] BLR 359 had rejected the argument that in that case there was a warranty that for each day of a two year period the equipment in question would be free from defects with scope accordingly for a breach to occur at any point in that period. However, Mr. Newman points out that, at [51], Carnwath LJ left open the possibility of such a continuing obligation arising. It is to be noted that Carnwath LJ regarded *Viskase Ltd v Paul Kiefel GmbH* as illustrating a general rule that there is a single breach at the time of delivery. Although the prospect of a contract in a particular case imposing a continuing obligation was left open Carnwath LJ clearly regarded such a case as exceptional and said that clear words would be needed to create such an obligation. That does not assist here where the Claimant's case as pleaded asserts implied terms of fitness for purpose; satisfactory quality; and of the taking of care in the development and production of the cable. Those are not matters of continuing obligation. As set out in the Particulars of Claim the agreement between the Claimant and the Defendant is one of sale and purchase albeit against the background of their joint engagement in the exercise of developing a cable which would meet the needs of Network Rail.

82. In the Reply the Claimant attempted to address these difficulties by averring that the agreement was to work jointly on the project; that this took the form of a joint venture for the continued development of a prototype product; and that the cable as delivered in November 2011 was not the final product but was "subject to retesting and refinement". This cannot assist the Claimant. As Miss. Holderness pointed out if the claim as formulated in the Particulars of Claim was statute-barred it was not open to the Claimant to recast it in a different and inconsistent form in the Reply

83. It follows that the Network Rail claim as set out in the Particulars of Claim has no real prospect of success and it is to be noted that the proposed amendment does not seek to rely on the agreement originally asserted. Accordingly, the question becomes one of whether the proposed amendment should be allowed.

84. It will be necessary to analyse the proposed amendment in some detail but its general nature can be stated shortly. It is said that the dealings in 2010 gave rise to an agreement ("the Joint Venture Agreement") whereby the Claimant and the Defendant agreed to work collaboratively to develop a cable to meet Network Rail's needs. That agreement is said to have imposed on the Defendant obligations to act in good faith and to produce a cable of satisfactory quality. It is alleged that in breach of the terms of the Joint Venture Agreement the Defendant failed to develop a cable meeting Network Rail's requirements and

failed to provide the Claimant and Network Rail with the information which should have been provided.

85. Mr. Newman accepted that the amendment put forward a new claim for the purposes of section 35 of the Limitation Act 1980 and also accepted that if proceedings based on that claim had been commenced on 31st January 2020, when the application for permission to amend was made, the same would have been statute-barred. Consequently he accepted that permission could only be given for the amendment if the new cause of action arose out of the same or substantially the same facts as were already in issue.

86. The proper approach to the application of that test has been set out by the Court of Appeal in its decisions in *Society of Lloyds v Henderson* [2007] EWCA Civ 930, [2008] 1 WLR 2255 and *Ballinger v Mercer* [2014] EWCA Civ 996, [2014] 1 WLR 3597.

87. In *Society of Lloyds v Henderson* Buxton LJ explained the relevant approach thus at [53] – [54]:

> "53 Before us, it was argued that a new claim sufficiently "arises out of" the same facts as an existing claim if there is a sufficient nexus between the old and the new claim, in the sense that some or a substantial part of the facts relied on to promote the new claim were relied on to promote the old claim. That takes far too broad an approach to the rule, which it effectively rewrites. The new claim does not arise out of the facts on which the old claim was based if, in order to prove it, new facts have to be added. That is why this court has said that the basic test is whether the plea introduces new facts: *Goode v Martin* [2002] 1WLR 1828, para 42.
>
> "54 The additional possibility that the new facts are substantially the same as those already relied on is limited *P & O Nedlloyd BV v Arab Metals Co* [2005] 1WLR 3733, para 42, per Colman J, to:
>
> > "something going no further than minor differences likely to be the subject of inquiry but not involving any major investigation and/or differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success."

88. In *Ballinger v Mercer* Tomlinson LJ said this at [34] – [37]:

> "34 Helpful guidance as to the proper approach to the resolution of this question was given by Colman J in *BP plc v Aon Ltd* [2006] 1 Lloyd's Rep 549, 55 8where he said:
>
> > "52. At first instance in *Goode v Martin* [2001] 3 All ER 562 I considered the purpose of section 35(5) in the following passage: "Whether one factual basis is `substantially the same' as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could

> reasonably be assumed to have investigated for the purpose of defending the unamended claim."
> "53. In *Lloyd's Bank plc v Rogers* [1997] TLR 154 Hobhouse LJ said of section 35: `The policy of the section was that, if factual issues were in any event going to be litigated between the parties, the parties should be able to rely on any cause of action which substantially arises from those facts.'
> "54. The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts."

> "35 In the *Welsh Development Agency* case [1994] 1 WLR 1409 Glidewell LJ said, in an often quoted passage at p 1418, that whether or not a new cause of action arises out of substantially the same facts as those already pleaded is substantially a matter of impression.

> "36 Less well known perhaps is the cautionary note added by Millett LJ in the *Paragon Finance* case [1999] 1 All ER 400, 418, where he said, after citing the passage from Glidewell LJ to which I have just referred: `In borderline cases this may be so. In others it must be a question of analysis.'

> "37 I would also point out, as did Briggs LJ in the course of the argument, that "the same or substantially the same" is not synonymous with "similar". The word "similar" is often used in this context, but it should not be regarded as anything more than a convenient shorthand. It may serve to divert attention from the appropriate inquiry."

89. The importance of a close analysis of the extent to which the amended pleading will require the investigation of facts which would not have been previously investigated is shown by Tomlinson LJ's assessment at [38] that the judgment below had been deficient in that regard.

90. The effect of that guidance is that a new cause of action does not arise out of the "same" facts as an already pleaded claim if facts additional to those on which the original claim was based have to be proved to establish the new claim. The extension of the scope for permission to cases where the facts founding the new claim are "substantially the same" as those already in issue is a limited one. The approach to be taken is not to be artificially narrow but analysis is required in the course of which the court is to remember that "substantially the same" does not mean "similar". The court is to have regard to the purpose of the rule and so to the extent to which the facts on which the new claim is based would or would not have been investigated in any event in the context of the unamended claim. In many cases that will be a matter of degree.

91. Mr. Newman drew my attention to Glidewell LJ's assessment in *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 1 WLR 1409 that it is a matter of impression as to whether a new claim arises out of substantially the same facts as an existing claim. However, that assessment must be seen in the light of Tomlinson LJ's adoption as quoted above of Millett LJ's cautionary note in that regard. Moreover, it is to be noted that while the proposed

amendment in the *Welsh Development Agency* case had a significant financial impact it had very little factual impact because the contention was that the same negligence already alleged in respect of the design and site works on a building development had affected further properties.

92. In his submissions as to the approach to be taken Mr. Newman also referred to *Steamship Mutual Underwriting Assoc v Trollope & Colls* [1986] 33 BLR 77. He relied on that decision to say that the concept of *res judicata* was of assistance in determining whether an amended claim was based on the same or substantially the same facts as an existing claim. He said that regard should be had to whether a fresh action brought on the proposed amended pleading after the conclusion of an action on the existing pleadings would be met by a successful defence of *res judicata* or by invocation of the principle in *Henderson v Henderson.* If such a defence would be successful that would, in Mr. Newman's submission, be "strong evidence that the facts arise out of the same cause of action". I reject that submission. In *Steamship Mutual Underwriting Assoc v Trollope & Colls* there was dispute both as to whether the proposed amended pleading was asserting a new cause of action and as to whether if it did such claim arose out of the same or substantially the same facts as the existing claim. The references to the potential relevance of *res judicata* were directed to the former and not the latter issue and logically can have no relevance to the latter issue. Here the Claimant accepts that the amendments in relation to the Network Rail Claim assert a new claim and so consideration of the potential application of a *res judicata* defence to a new action in the terms of the amended claim does not advance matters.

93. In summary the Claimant's contention was that resolution of the claim as originally pleaded would require consideration of what was said and done between the parties in the negotiations in 2010 and that the court would in any event need to assess the conclusions properly to be drawn from those dealings. It is said that in addressing that claim the Defendant would have needed to investigate and prepare evidence in relation to the 2010 negotiations as a whole. The Claimant's contention is that it is the course of those negotiations as a whole together with Network Rail's requirements and the qualities of the cable which form the factual matrix which would have to be investigated on the original claim and it is the same factual matrix which will need to be investigated if the amendment is permitted. The Claimant says that the same or substantially the same facts will be before the court and that the difference in reality is only that the Claimant is contending for a different conclusion as to the effect which the same dealings had as a matter of contractual analysis.

94. In support of that contention Mr. Newman referred me to the approach taken in *Senior v Pearson & Ward* [2001] EWCA Civ 229. That was a case where allegations of negligence and related conduct in respect of the sale of a business were made against solicitors. Holman J, with whom Mummery LJ agreed, concluded that an allegation that a solicitor ought to have known that a representation was false arose out of the same or substantially the same facts as an allegation that he knew it was false. That was because the same material was being relied upon for the allegation that the solicitor ought to have known of the falsity as was relied upon as evidence of actual knowledge. However,

potentially of more significance is Holman J's conclusion (at [28]) that allegations of failures to advise arose out of the same or substantially the same facts as the existing allegation that a letter was sent negligently and contrary to instructions. That conclusion flowed from Holman J's assessment that the existing pleading had put in issue the question of the instructions given to the solicitors and that in order to resolve that it would have been necessary in any event "to analyze all that was said and also what was not said" between the parties. It is right to note that the decision does provide support for a broad view being taken of the facts which are put in issue by an allegation relating to past dealings. However, it is to be noted that there was no suggestion that any new principle was being laid down and that the decision preceded the analysis of the applicable approach undertaken in *Society of Lloyds v Henderson* and in *Ballinger v Mercer* as set out above. Also of significance is the assessment which Holman J set out at [27] as to the very limited assistance to be derived from the conclusions reached on the facts of particular cases saying:

> "The 1980 Act and the rule both focus very specifically upon the facts of the instant case. It does not seem to me helpful to try to resolve the factual situation in a given case by over-analysis of the view taken on quite different factual situations in other cases."

95. It is for that reason that I can derive little assistance from the decisions reached on the facts in *Senior v Pearson & Ward* and in the other cases to which I was referred.

96. The Defendant says that the amended claim is not based on the same or substantially the same facts as the existing claim. Miss. Holderness pointed to the extent of the amendment and to the reasons given for it. I will consider the former below. As to the latter Miss. Holderness pointed to the explanation which had been given for the amendment by Miss. Modasia of the Claimant's solicitors. Miss Modasia had said that the Claimant had originally provided its solicitors with two lever-arch files of documentation but that when the Defence was considered it provided a further four such files and that when subsequently the Defendant's response by way of correspondence to the Reply was considered it became apparent that "there was still further information and detail" that Mr. Pearson was able to recall. It was the further material which led to the change in the formulation of the Claimant's case which appeared in the Reply and then in the proposed amended Particulars of Claim. The Defendant says that this demonstrates that the new claim is not based on the same facts as the original claim and shows the Claimant itself saying that it was the consideration of further material which caused the amendment. In addition Miss. Holderness made reference to pre-action correspondence from the Claimant's solicitors in which it had been said that the Claimant and the Defendant had not been operating under "any formal joint venture agreement" to say that a different case was now being advanced. The latter point does not advance matters because the Claimant accepts that the amended pleading raises a new claim. Moreover, when read as a whole the letters in question were asserting that the Claimant and the Defendant had been operating together and that obligations arose from that fact even though a formal joint venture agreement had not been entered. The distinction between that and the case as now advanced is by no means as stark as Miss. Holderness contends.

97. I turn accordingly to an analysis of the original claim and the proposed amendment.

98. The Particulars of Claim alleged at [14] that "negotiations took place in early 2010 between representatives of the Claimant and the Defendant" but did not specify the negotiations or the representatives in any more detail. At [15] is said that a meeting took place "in the course of those negotiations" on 21st September 2010. The agreement was said to have been made at that meeting when having received assurances from the Defendant's representatives the Claimant invited the Defendant to work with it on the project. The pleading proceeded to say that between that meeting and the placing of the purchase order the Claimant and the Defendant jointly prepared the design statements for inclusion in the tender and approved the tender; that the Defendant developed the cable; and that the Defendant assisted the Claimant in responding to queries from Network Rail.

99. At [27] the Particulars of Claim alleged three terms which were said to have been implied terms of the purchase order namely fitness for purpose; satisfactory quality; and the exercise of reasonable care and skill in the research, development, and production of the cable. At [30] installation problems were alleged. Four problems were specified although the problems were said not to be limited to those. At [31] it is said that there was liaison with a view to resolving the problems.

100. At [32] the Particulars of Claim quote from Network Rail's email of 30th April 2013 and say that the Claimant will rely on that email "to establish the Defendant's breaches of the implied terms". Then [33] sets out the breach alleged in these terms:

> "In breach of the implied terms set out at paragraph 27 (above) the Cable developed and manufactured by the Defendant was not compliant with Network Rail requirements, in that the inrush current exceeded 6 times the steady state current."

101. Turning to the proposed amended claim the first change is at [12A] where the Claimant sets out the terms of an email sent by the Defendant on 8th July 2010 and this is followed by the pleading at [12C] of an email of 9th September 2010 from the Defendant.

102. Then the former references to negotiations are deleted and replaced by an expanded reference to the meeting of 21st September 2010 and a reference to a report of the meeting prepared on 25th September 2010. At [15A] the Claimant pleads that oral assurances were given by the Defendant after the meeting.

103. At [15B] the Claimant alleges that the parties made an agreement to work collaboratively to develop and produce a cable that satisfied Network Rail's requirements (`the Joint Venture Agreement')". It is said that the matters in [12A] to [15A] are evidence of that agreement which is said to have been "partly oral and partly in writing". [15B] continues with an averment of four express terms as to the parties' respective roles in the development exercise. Then at [15C] three implied terms are alleged mirroring those alleged in the original Particulars of Claim. At [15D] the Claimant makes averments as to the nature

of the parties' historic working relationship and the requirements of the Network Rail project contending that these gave rise to an implied duty of good faith.

104. At [15G] and [15H] the Claimant makes new allegations in respect of the dealings in 2010 and 2011. Then at [18] to [26] the Claimant deletes some elements of the original Particulars of Claim and makes a number of allegations as to actions and omissions on the part of the Defendant in the period to the placing of the purchase order. These include at [19A] – [19H] a series of separate contentions as to particular items of correspondence and discussion.

105. At [26] the Claimant makes a new allegation of a failure on the part of the Defendant to advise that Network Rail should check the suitability of its existing protection system.

106. At [29A] – [29H] the Claimant makes a number of allegations as to the parties' dealings in the period after the discovery of problems with the cable. Then [33] is recast to allege breaches of the express and implied terms of the Joint Venture Agreement. Particulars of the alleged breaches are set out and run from (a) to (m). Particulars (j) to (m) are general allegations thus (l) says that the preceding matters show a failure to exercise reasonable care and skill. However, (a) to (i) set out nine separate instances of breach. The allegations at (a) to (h) are of breaches which are said to have consisted in failures to take particular steps "at any time prior to 30th April 2013".

107. At [33A] the Claimant sets out an allegation as to the consequences of the Defendant's failure to produce a cable complying with the relevant factsheet and at [34(c)] alleges that if the Defendant had properly advised the Claimant as to the inadequacy of the cable the Claimant would not have placed the purchase order.

108. Finally by way of alteration of the original Particulars of Claim the Claimant says at [34A] that the Defendant had a continuing obligation to meet its obligations under the terms set out at [15B] – [15D] until Network Rail's termination of the contract with the Claimant.

109. It follows that the original Particulars of Claim asserted an oral agreement made at a particular meeting; set out three terms said to have been implied into that agreement; and pleaded a single breach consisting of a failure to produce a cable meeting the requirements of Network Rail. Although the same meeting is at the core of the amended claim the Claimant no longer says the agreement was formed at that meeting. Instead there is reliance on emails before it and assurances given after it with the agreement being said to be partly oral and partly written and apparently being a contract concluded by conduct. Additional terms are alleged and a multiplicity of breaches pleaded with reference being made to failings alleged to have occurred both before and after the delivery of the cable.

110. It hardly needs to be said that the new claim does not arise out of the same facts as the original claim. A number of additional facts are put forward and this is not an instance of a party simply putting forward a different or additional interpretation of the same factual allegations. The real question in this case is

whether the facts now relied on are substantially the same as those already in issue. Do the proposed allegations relate to matters which the Defendant could be assumed to have investigated in responding to the original claim? This is to some extent a matter of degree. The Defendant would have had to engage in some investigation of the 2010 negotiations and the parties' dealings in relation to the supply of the cable. However, I am satisfied that the factual investigation which the Defendant will need to undertake if the proposed amendment is permitted goes very significantly beyond that which would have been needed to address the original case. Not only is this because there are a number of specific factual allegations which are new but also because the nature of the agreement alleged has changed. Those aspects mean that there will need to be a markedly more extensive investigation of the parties' dealings than required in addressing the original case. Even more significant is the contrast between the two cases in relation to the terms of the contract and the alleged breaches. In the original claim the Claimant was alleging a limited number of implied terms with a breach consisting of a failure to supply cable which was fit for purpose. The defence of that claim would have required the gathering of evidence as to the question of the implication of the alleged terms and as to the qualities of the cable at the time of delivery. In particular this would involve consideration of the requirements which the Defendant was to meet and whether it supplied a cable meeting those requirements and it is of note that this was the focus of the Defence. The proposed new claim alleges additional express terms and makes a number of new contentions as to particular breaches requiring evidence to be gathered addressing those particular contentions and extending into the period to April 2013. In those circumstances the proposed new claim does not arise out of substantially the same facts as are already in issue.

111. That conclusion means that the proposed amendment cannot be permitted. The Claimant no longer in reality seeks to advance the claim as originally formulated but as already explained there is no real prospect of that claim surmounting the limitation defence and so there is to be summary judgment for the Defendant on the Network Rail claim.

The Position in relation to the Counterclaim.

112. The Defendant seeks summary judgment on the counterclaim. The Claimant accepts that it is indebted to the Defendant but does not accept the figures asserted by the Defendant. There are several separate elements to the defence to the counterclaim. First, the Claimant seeks to set off the sums claimed in the Particulars of Claim against the counterclaim. The force of this contention will depend on the success or failure of the claim in the Particulars of Claim. Second, the Claimant says that its inability to pay the Defendant was caused by the Defendant's breach of the Distribution Agreement in that while the Claimant could sell only the Defendant's products the Defendant competed against the Claimant in the United Kingdom and the Republic of Ireland. In my judgment this does not advance matters to the extent that it seeks to go beyond a set off of the claim because while the Distribution Agreement prevented the Claimant from selling products competing with those of the Defendant in the United Kingdom and the Republic of Ireland it did not prevent it engaging in other business. Next, it is said that there is no liability in respect of those elements of the indebtedness which related to the Network Rail project and which the

Claimant says were caused by the Defendant's breach. That argument cannot be sustained in the light of the award of summary judgment to the Defendant in respect of the Network Rail claim. Then, the Claimant contends that if (as is the Defendant's case) the Distribution Agreement was replaced by a Preferential Customer arrangement there were terms of good faith and/or that the Defendant would not supply to the Claimant's former customers and that there was a breach of this term. This argument was not developed before me but the alleged grounds for implication of terms derived from business efficacy and/or obviousness or necessity are not apparent from the pleading or the other material and on the evidence before me I am not persuaded that such an argument would have any real prospect of success. Finally, the Defendant is said to be estopped from recovering any sum from the Claimant. The estoppel is said to arise from the Claimant's action in placing orders with the Defendant in reliance on a representation, which is not particularised, that the Defendant would allow the Claimant to sell its products at preferential rates and would not solicit the Claimant's clients. Even if such a representation were to be established it would not give rise to an estoppel precluding the Defendant from seeking payment for goods supplied to the Claimant.

113. The effect is that the question of whether the Claimant's defence to the counterclaim has a real prospect of success depends on whether there is a tenable set off. I have given the Defendant summary judgment on a significant part of the claim but the Claimant's claims for damages for breach of the Distribution Agreement and for a *quantum meruit* remain. The former is in a substantial sum and in the light of that the Claimant does have a defence to the counterclaim which has a real prospect of success.

Conclusion.

114. It follows that the Defendant will be awarded summary judgment in respect of the Network Rail claim and permission will be refused for amendment in that regard. There will be summary judgment for the Defendant on the claim in relation to the Uganda Project save to the extent of the *quantum meruit* claim in relation to which permission to amend will be given. The Defendant's application for summary judgment fails in respect of the claims for damages caused by breach of the Distribution Agreement and for commission on sales made to Trace Heating Projects and the amendments relating to those aspects of the Particulars of Claim will be permitted. Finally, the application for summary judgment on the counterclaim fails.