JUDGMENT : MR JUSTICE JACKSON: TCC. 13th November 2006.

1. This judgment is in six parts, namely Part 1 – Introduction; Part 2 – The Facts: Part 3 – The Present Proceedings; Part 4 – The Proposed Amendments; Part 5 – The Law; Part 6 – Decision.

Part 1: Introduction

2. This is an application to amend particulars of claim after expiry of the limitation period. The claimant in these proceedings, and the applicant for amendment, is the Secretary of State for Transport. The defendant in these proceedings, and the respondent to the application to amend, is Pell Frischmann Consultants Limited. The defendant in a related action is AMEC Civil Engineering Limited. I shall refer to these parties respectively as "the Secretary of State", "Pell Frischmann" and "AMEC".

3. In this judgment I shall refer to the Limitation Act 1980 as "the 1980 Act". I shall refer to the Civil Procedure Rules 1998 as "CPR". I shall refer to the Rules of the Supreme Court 1965 as "RSC". There is an Italian manufacturer of bearings called FIP Industriale SPA. I shall refer to this company as "FIP". Stanger Material Science is a well known testing house which features in the narrative of events. I shall refer to this organisation as "Stanger".

4. After this brief introduction I must now turn to the facts.

Part 2: The Facts

5. Thelwall Viaduct is a massive structure which carries the M6 motorway across the Manchester Ship Canal, the River Mersey, and Warrington Road. By a written contract made on 31st March 1995 ("the Contract") the Secretary of State engaged AMEC to carry out renovation works to Thelwall Viaduct. The work which was specified in the contract included the replacement of the existing reinforced concrete deck slab of Thelwall Viaduct and the provision of new roller bearings, which would permit the slab or other elements of the viaduct to move.

6. Clause 8B of the contract provided as follows:

"(1) The contractor shall design parts of the permanent works as required in accordance with the provisions of the specification and submit drawings and specifications of his design to the Engineer. The contractor may submit a design prepared on his behalf by a sub-contractor or professional designer or propose a design prepared by the manufacturer.

(2) The Engineer shall examine and check the contractor's design or proposal and inform the contractor in writing, within a reasonable period after receipt of full particulars, either:

(a) that the design or proposal has the approval of the Engineer, or

(b) in what respects in the opinion of the Engineer the design or proposal fails to meet the requirements of the specification.

In the latter event the contractor shall take such steps or make such changes to the design or proposal as may be necessary to meet the Engineer's requirements and to obtain his approval…"

7. Pell Frischmann was named as the Engineer in the contract. Pell Frischmann was providing professional services to the Secretary of State pursuant to a separate agreement dated 17th February 1988.

8. AMEC carried out the renovation works during 1995 and 1996. The roller bearings, which are the subject of the present litigation, were installed in 1996. The renovation works to Thelwall Viaduct were substantially completed by December 1996.

9. In June 2002 defects came to light. One of the roller bearings on Pier V failed. Furthermore, it appeared that other bearings had deteriorated. The Highways Agency carried out investigations. As a result of those investigations the Highways Agency decided to remove and replace all of the roller bearings which had been installed by AMEC. These and other remedial works were carried out between September 2002 and December 2004.

10. The costs of the remedial works were substantial. In order to recover those costs, the Secretary of State commenced the present proceedings.

Part 3: The Present Proceedings

11. On 18th December 2002 the Secretary of State issued a claim form in the Technology and Construction Court against AMEC, Pell Frischmann and another firm of engineers (who are no longer involved) claiming damages in respect of the roller bearings and the web panels on Thelwall Viaduct. These proceedings were begun in some haste because the problems had only come to light shortly before the end of the limitation period.

12. The Pre-action Protocol for Construction and Engineering Disputes ("the Protocol") expressly provides for the situation which had arisen in the present case. Section 6 of the Protocol provides that proceedings which have been started at the end of the limitation period may then be stayed to facilitate compliance with the Protocol. In this case the parties, very sensibly, agreed that the litigation should be stayed whilst they complied with the Protocol and exchanged information about their respective cases. This exercise was referred to by the parties as "the protocol process".

13. As between the Secretary of State and Pell Frischmann, the protocol process effectively continued from April 2003 until April 2005. During this period two important events occurred in the litigation. In July 2003 AMEC exercised its contractual right to have the Secretary of State's claim against AMEC referred to arbitration. In the same month the Secretary of State served his particulars of claim against Pell Frischmann, setting out the

Secretary of State's claims both in respect of the web panels and the roller bearings. During the protocol process a substantial amount of information was exchanged between the parties. In addition, Stanger was appointed to carry out tests on the bearings on behalf of all parties.

14. The stay of the action, pursuant to section 6 of the Protocol, effectively came to an end on 6th May 2005. On that date a case management conference was held, at which I ordered a split trial of the action. I also set a timetable leading to the trial of the web panels claim in February 2006. In December 2005 the issues concerning web panels were resolved between the parties. Accordingly, the trial fixed for February 2006 was vacated.

15. In March 2006 Stanger produced a report, for the benefit of all parties, setting out the results of Stanger's tests on the bearings.

16. On 30th May 2006 the Secretary of State provided Pell Frischmann with a draft amended particulars of claim concerning the bearings claim. That draft underwent further revisions. On 18th September 2006 the Secretary of State served the final version of his draft amended particulars of claim. Pell Frischmann's solicitors have helpfully indicated that they consent to all of the proposed amendments except for paragraph 43(h) and paragraph 44 of the draft. This court set aside a day in November to hear argument about the disputed amendments and related matters.

17. On 18th October 2006 there was new development in the litigation. The Secretary of State and AMEC agreed to switch from arbitration to litigation. On that date the Secretary of State commenced a fresh action against AMEC in the Technology and Construction Court, on the understanding that the existing pleadings in the arbitration would be treated as pleadings in the action. It was anticipated on all sides that this court would manage both actions concerning Thelwall Viaduct together, so that all parties would, in effect, gain the procedural benefits of being involved in a multi party action.

18. On Thursday 9th November a case management conference was held in both actions. The morning was taken up with procedural issues. I gave directions that both actions should be tried together over a period of eight to ten weeks commencing in January 2008. There were numerous procedural directions given in both actions, and also in Pell Frischmann's contribution proceedings against its sub-consultant, Weeks Technical Services Limited.

19. The afternoon of Thursday, 9th November was taken up with argument concerning the Secretary of State's proposed amendments of the particulars of claim. Counsels' submissions on both sides were detailed and thorough. I am grateful to all counsel for their considerable assistance. I have now considered counsels' submissions, as well as the authorities which they asked me to read, and am in a position to give my decision on the application to amend. Before coming to that decision, however, I must first set out the proposed amendments and identify the relevant legal principles.

Part 4: The Proposed Amendments

20. In order to set the proposed amendments in context, I must first outline the original unamended particulars of claim as served in July 2003. I would summarise the Secretary of State's original pleaded case relating to roller bearings as follows:
    (i) Pell Frischmann owed contractual and tortious duties to the Secretary of State to perform its functions under Clause 8B of the Contract with reasonable skill and care.
    (ii) The Contract specification allowed AMEC three options in respect of steel for the bearings.
    (iii) AMEC sub-contracted the design and supply of the roller bearings to FIP.
    (iv) Pell Frischmann approved the bearings design, which was produced by FIP and adopted by AMEC.
    (v) The bearings were made of steel which was too hard and/or not in a permanent oil bath. Also, the rollers and bearings have been affected by corrosion. The steel used did not comply with the requirements of the specification.
    (vi) Pell Frischmann was negligent and in breach of contract in that it failed to spot that AMEC's design for the rollers and bearings did not comply with the requirements of the specification.

21. It was inevitable that following the protocol process, the testing by Stanger and the work of the various experts, the Secretary of State would wish to make some amendments to his particulars of claim. I will deal with the unopposed amendments first and then with the amendments which are opposed.

22. The effect of the unopposed amendments is as follows:
    (i) A great deal more detail is given about the design of the roller bearings and the narrative history of events.
    (ii) The mechanism of failure, in particular the development of stress corrosion, is pleaded in greater detail.
    (iii) The particulars of breach of duty pleaded in paragraph 43 of the particulars of claim are substantially expanded. In particular sub-paragraph (c) is expanded to allege that Pell Frischmann ought to have spotted flaws in the design relating to the hardness of the steel, the composition of the steel and propensity to corrosion. In relation to corrosion, the Secretary of State's case is further amplified in a new sub-paragraph (g).

23. It seems to me that Pell Frischmann are right not to oppose those amendments which I have summarised. I shall therefore make an order permitting those amendments to the particulars of claim on the usual terms as to costs.

24. Let me now turn to the amendments which are opposed. These fall into two parts. First, there is a new sub-paragraph (h) which is added to the particulars of breach in paragraph 43 of the particulars of claim. The new sub-paragraph (h) reads as follows: *"Further, PF ought to have established and/or ascertained that AMEC's design*

of the roller bearings meant that (i) the non working faces of stainless roller plates were attached to structural steel upper and base plates, which were sprayed with aluminium and that this allowed two dissimilar metals (namely, the aluminium and the stainless steel of the roller plates) (ii) the ends of the stainless rollers were covered by tin bronze end plates (referred by FIP in their drawings as 'guide low friction strips') and that this allowed contact, and the trapping of moisture, between two dissimilar metals (namely, the tin bronze of the end plates and the stainless steel of the rollers) and that AMEC's design thereby failed to take any or any adequate account of paragraph 6.3 of BS5400: Part 9: Section 9.2 and/or paragraph 6 of the Guidance Notes. Further, PF should have known and/or ascertained that this led to the risk of electrolytic action between the metals and any increased risk of corrosion".

25. Secondly, the Secretary of State seeks to insert into his particulars of claim a new paragraph 44, which reads as follows: *"Further, in breach of the duty of care pleaded at paragraph 20 above, Pell Frischmann failed to exercise reasonable skill and care in its role as engineer under the SST/AMEC Contract and/or in the directing and supervising of the works in that:*

(a) Pell Frischmann failed to check adequately or at all whether the steel and/or the bearings in fact supplied complied with SST/AMEC Contract. In particular, Pell Frischmann should have checked and ascertained (whether by consideration of material certificates and or heat treatment certificates or otherwise):
(i) The hardness of the steel in fact supplied
(ii) The composition of the steel in fact supplied

If PF had done so, it would have discovered that the bearings did not comply with the SST/AMEC Contract by virtue of their hardness and composition and should have refused to allow AMEC to use the materials on the Viaduct. The SST refers to and further relies upon paragraph 43 above and Appendices 7 and 8.

(b) PF failed to inspect the installation of the bearings adequately or at all in that it should have discovered that steel supplied and/or installed was corroding and/or exhibiting rust staining (a photograph dated 20th February 1997 of an installed roller bearing exhibiting rust staining is attached at appendix). As a result, PF should have appreciated that the steel was not non corroding and/or did not have adequate corrosion resistant properties and therefore did not comply with the AIP or BS5400: Part 9: Section 9.1, that AMEC had not used adequate corrosion protection measures and/or systems (contrary to Clause 6.2 of BS5400: Part 9: Section 9.2 and despite FIP's technical report number RC95046) and that this led to risks of corrosion on other roller bearings, that the required co-efficient of friction (in the order of 0.01) would be exceeded and of maintenance problems.

(c) PF failed to warn or advise the SST that:
(i) The steel of the rollers and roller plates was not non corroding, was not adequately corrosion resistant for use in the environment on the Viaduct and/or was not adequately protected against corrosion.
(ii) Inner skirts were to be and/or were installed only on a total of 16 roller bearings at piers A,U1, II and JJ, and that no such inner skirts were to be provided to the other bearings. The SST does not know, in advance of disclosure, whether PF or AMEC intended such skirts to provide any protection from corrosion but avers, in any event, they were only installed on a limited number of bearings".

26. Before grappling with the question of whether these amendments should be allowed, I must first identify the relevant legal principles.

Part 5: The Law

27. Section 35 of the 1980 Act provides:

"(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced:
(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
(b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set off or counterclaim, and any claim involving either:
(a) the addition or substitution of a new cause of action; or
(b) the addition or substitution of a new party…

(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any County Court shall allow a claim within sub-section (1)(b) above other than an original set off or counterclaim to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to reinforce that claim…

(4) Rules of court may provide for allowing a new claim to which sub-section (3) above applies to be made as they are mentioned, but only if the condition specified in sub-section (5) below are satisfied and subject to any further restrictions the rules may impose.

(5) The conditions referred to in sub-section (4) above are the following:
(a) In the case a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and…"

28. CPR rule 17.4 provides:

"(1) This rule applies where:
(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
(b) a period of limitation has expired under:

(i) the Limitation Act of 1980…

(2) The court may allow an amendment whose effect will be to add or substitute a new claim but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party apply for permission has already claimed a remedy in the proceedings".

29. It can be seen from section 35 of the 1980 Act that the phrase 'new claim' in some contexts, and in particular for present purposes, means a cause of action which was not previously pleaded.

30. In ***Letang v Cooper*** [1965] 1 QB 232 Diplock L.J. explained the meaning of cause of action as follows: *"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person"*

That definition has subsequently been adopted on many occasions.

31. In ***Brickfield Properties Limited v Newton*** [1971] 1 WLR 862 the plaintiffs issued a writ claiming *"damages for negligence and breach of duty by the defendant as an architect employed by the plaintiffs in supervising the building of six blocks of flats"*. After expiry of the limitation period the plaintiffs applied to amend their writ by inserting the words *"designing and…"* before *"supervising"*. The Court of Appeal held that the claim relating to design constituted a different cause of action from negligent supervision. However, the design claim and the supervision claim arose out of "substantially the same facts" within the meaning of RSC Order 20 rule 5(5). It should be noted that the RSC Order 20 rule 5(5) was the predecessor of CPR rule 17.4(2). The Court of Appeal held that in all the circumstances the amendment should be allowed. At page 873 Sachs L.J. said this:

"Where there are found in completed buildings serious defects of the type here under review the facts relating to design, execution and superintendence are inextricably entangled until such time as the court succeeds in elucidating the position through evidence. The design has inevitably to be closely examined even if the only claim relates to superintendence, and all the more so if the designs are, as is further alleged here, experimental or such as need amplification in the construction progresses. The architect is under a continuing duty to check that his design will work in practice and to correct any errors as they emerge. It savours of the ridiculous for the architect to be able to say, as it was here suggested to him that he could say: 'true, my design was faulty, but, of course, I saw to it that the contractors followed it faithfully' and be enabled on that ground to succeed in the action.

The same, or substantially the same set of facts, falls to be investigated in relation to the design claim and the superintendence claim. The plans and specifications and ancillary documents are relevant to the superintendence claim as well as to the designer claim: hence the inability of the defendant to allege prejudice with regard to the preparation of his defence if this appeal is allowed. Accordingly, the "new cause of action" falls within the ambit of RSC Ord. 20 r. 5(5), and it is one which the court has jurisdiction to permit to be pursued".

At page 879 G Edmund Davies L.J. expressed his complete agreement with Sachs L.J. on this point. At page 880 Cross L.J. said this: *"It is no objection to amendment under Ord. 20, r. (5) that some of the facts out of which the new cause of action arises are peculiar to it, and some of the facts out of which the old cause of action arises are peculiar to it. It is enough if the overlap is so great that the new cause of action can fairly be said to arise out of substantially the same facts as the old cause of action. For the reasons given by Sachs L.J. I think that this is the case here and that there was power to allow the amendment in question under Ord. 20, r. 5(5)"*

32. In ***Steamship Mutual Underwriting Association Limited v Trollope & Colls (City) Limited*** (1986) 33 Building Law Reports 77 the plaintiff claimed damages against the defendant contractors and architects for defects in the air conditioning system. After expiry of the limitation period the plaintiffs sought to re-amend their statement of claim in order to allege defects in the walls. The Court of Appeal held that there was no jurisdiction to allow the amendment. At pages 98 to 99 May L.J. said this:

"In the present case, if one remembers what a cause of action is (for instance, to refer back to the dictum in Letang), if one looks to the size of this particular building, to its complexities, to other matters of degree, to the statement of claim before the proposed re-amendment, to the attitude of the appellants' solicitors in the correspondence at the material time, to which I have referred, and avoids what I think are unnecessary subtleties, I feel bound to agree with the learned judge where he concluded, having referred to the cases on what is a cause of action, the statement in both its original and amended form related only to the air conditioning. I think that its effect was to narrow the causes of action so that they became confined to breaches of contract concerned with air conditioning and negligence resulting in damages to the air conditioning. In the light of the definitions of a cause of action already referred to, I do not think one can look only to the duty on a party, but one must also look to the nature and extent of the breach relied upon, as well as to the nature and extent of the damage complained of n deciding whether, as a matter of degree, a new cause of action is sought to be relied upon. The mere fact that one is considering what are, as it is said, after all only different defects to the same building does not necessarily mean in any way that they are constituents of one and the same cause of action.

Thus I conclude that whether there is a new cause of action in any circumstances is a mixed question of law and fact. I am satisfied that the learned judge correctly directed himself on the law on this point, and not only am I unable to say that he applied that law incorrectly to the facts of the case, I think positively that he applied that law correctly to the facts of the case.

Thus I must consider whether the contended for new cause of action arises out of the same, or substantially the same, set of facts as is provided for by Order 20 r. 5(5). Although exception was taken to the proposition in the course of

the argument, I am still of the view that in the context of this particular case the position on this aspect is a fortiori the position on the first aspect, to which I have referred. Again, it must be a question of degree. The learned judge decided that there was insufficient overlap, relying upon a dictum from the judgment of Cross L.J. in Brickfield's case, to which I have already referred.

I respectfully agree with the conclusion to which the learned judge came that there was insufficient overlap. Thus the learned judge (I think correctly) held that he had no jurisdiction to allow the sought for re-amendment of the statement of claim in this case".

Both Lloyd L.J. and Caulfield J. agreed with that judgment. At page 101 Lloyd L.J. said this: "*It may seem hard on the plaintiffs in this case that they cannot amend their statement of claim to include damage to the brickwork. But in general, the proposition for which Mr. Harvey contends would work against the interests of building owners. Thus, if in the present case there had been no question of limitation, and if the plaintiffs had brought an action for damage to the air conditioning and recovered judgment at a time when the damage to the brickwork had not yet occurred, then, if Mr. Harvey's propositions were correct, it would be too late for the plaintiffs to bring an action for the brickwork, not because of any question of limitation, but because of the so-called rule in Conquer v Boot under which a plaintiff must bring forward his entire case in respect of one and the same cause of action at the same time. That rule could work obvious injustice to a plaintiff if Mr. Harvey's universal proposition were correct. In general, justice between the parties to a building contract will best be served by allowing that there may be separate causes of action in relation to the same building, depending upon the facts of the case. Where the limitation has intervened between pleading the first cause of action and applying for leave to amend to plead the second cause of action, as it may have done here, then RSC Order 20, r. 5 goes at least some way to mitigate the hardship to the building owner".*

33. In ***Hydrocarbons Great Britain Limited v Cammell Laird Shipbuilders Limited*** (1991) 25 Con LR 131 the first third party in an action arising out of a ship-building dispute sought to amend its claim against a fourth party after expiry of the limitation period. The original claim was for negligent inspection and certification The proposed amended claim was for negligent mis-statement. His Honour Judge Thayne Forbes QC (as he then was), sitting as Official Referee, held that the court had no jurisdiction to allow such amendment. At pages 140 to 141 Judge Forbes said this:

"Mr. Steel argued that the new cause of action does not arise out of the same or substantially the same facts as the pleaded claim. He submitted that the material facts upon which the new cause of action has to be founded are significantly different and go much further than the material facts that were pleaded in support of the unamended cause of action. He submitted that there was insufficient overlap between the material facts of the a cause of which alleges negligent inspection and certificate of the castings with that which alleges reliance by APPH on negligently made misstatements in both Black Clawson and Lloyds Register certificates. Mr. .Steel summed up the position by submitting that one only had to look at the facts in ***McNaughton*** *and compare the unamended pleading with those factors. It was clear that to embark upon the new cause of action was to embark upon quite a different exercise from that involved in the original cause of action. He pointed out that this was emphasised by the extent and scope of the proposed amendment.*

Mr. Steel referred me to the decision of Court of Appeal and the judgment of May L.J. in ***Steamship Mutual v Trollope & Colls (****1986) 6 Con LR 11 at 24 and submitted that it was a question of degree and involved forming a broad impression as to whether or not there was a sufficient overlap in the facts giving rise to the two causes of action. He argued that, although there was an overlap, it was insufficient. I agree with Mr. Steeel's submission. I accept that it is a matter of degree. It is true that a certain amount of factual material is common to both causes of action such as the role of Lloyds Register in the inspection and certification of the steel castings being manufactured by Black Clawson for Redman Broughton for APPH. I am prepared to accept that the facts relating to the manner in which Lloyds Register carried out their inspection and certification are relevant to deciding whether the misstatements made in the certificates (if misstatements there be) were made negligently. However, I agree with Mr. Steel that the cause of action for negligent misstatement does represent a significant change in the nature of the proceedings and will involve a consideration of factual material which did not arise on the original claim. I agree that an impression of the potentially significant extent of this can be seen by comparing the unamended pleading with the guidelines in McNaughton and Caparo. In my opinion, the most obvious way in which my conclusion that there is an insufficient overlap between the facts out of which the two causes of action arise is the serious prejudice to which I am persuaded Lloyds Register would be exposed in dealing with the factual matters raised by the proposed amendment (as to which, see below). I have therefore come to the conclusion that the facts of the new cause of action are not the same or substantially the same as the pleaded case. Accordingly, in my judgment, I have not got jurisdiction to allow the amendment".*

34. In ***Welsh Development Agency v Redpath Dorman Long Ltd*** [1994] 1 WLR 1409 Judge Hicks Q.C. allowed some amendments after expiry of the limitation period, but disallowed others. The details are not important for present purposes. The Court of Appeal, upholding the judge's decision, stated at page 1418: *"Whether or not the new cause of action arises out of substantially the same facts as that already pleaded is substantially a matter of impression".*

The Court of Appeal also considered the effect of other amendments which were being allowed upon the amendments under consideration. At page 1416 the court said this: *"He (the judge) started by deciding that the correct approach was to assume that the amendments which he had already allowed to add the plea of breach of contract had been made. In this respect we are confident that he was correct".*

35. A similar view about the effect of amendments already allowed was expressed by the Court of Appeal in ***Lloyds Bank PLC v Rogers*** (Court of Appeal Transcript 20th December 1996). See the fifth age of the transcript.

36. In ***Darlington Building Society v O'Rourke James Scourfield & McCarthy*** [1999] PNLR 365 two building societies claimed damages against a firm of solicitors for breach of contract, breach of fiduciary duty and negligence in relation to the purchase and mortgage of a residential property. After expiry of the limitation period the plaintiffs sought to amend their statement of claim by alleging (a) that the solicitors knew that mortgagors were acting fraudulently, (b) that as a result the solicitors came under a duty to reveal confidential information to the plaintiffs, and (c) that the solicitors acted in breach of that duty. The Court of Appeal held that such an amendment was not permitted by section 35 of the 1980 Act or RSC Ord. 20 r. 5(5). Sir Iain Glidewell gave the leading judgment, with which Waller L.J. and Nourse L.J. agreed. At page 370 Sir Iain Glidewell said:

"In my view where an amendment pleads a duty which differs from that pleaded in the original statement of claim it will, or certainly will usually, raise a new cause of action. If there is no allegation of a different duty but different fats are alleged to constitute a breach of the duty it is more difficult to decide whether a new cause of action is pleaded. Several of the cases to which we were referred during the course of argument seem to me to come into this caregory, namely ***Brickfield Properties Limited v Newton*** *[1971] 1 WLR 862;* ***Steamship Mutual v Trollope & Colls*** *(referred to above) and* ***Hamlin v Edward Evans*** *(1996) PNLR 398".*

At page 372 Sir Iain Glidewell said this: *"I turn therefore to consider whether the facts pleaded in the proposed amendment are "the same…or substantially the same" as those originally pleaded in the unamended statement of claim. In* ***Welsh Development Agency v Redpath Dorman Long Ltd*** *[1994] 1 WLR 1409 a division of this court of which I was a member said that "whether or not the new cause of action arises out of substantially the same facts as that already pleaded is substantially a matter of impression" (at page 1418D). I do not resile from that description. Having in the present case considered the facts alleged in the unamended statement of claim and the facts sought to be added by way of amendment it is my clear impression that the second set of facts are not "the same … or substantially the same …" as those originally pleaded".*

37. In ***Goode v Martin*** [2001] 3 All ER 562 the Court of Appeal gave an extended meaning to CPR r. 17.4(2), in order to conform with the requirements of the Human Rights Act 1998. It should be noted, however, that no human rights point arises in the present case.

38. This completes my review of the authorities which counsel cited in argument. From this review I derive five propositions which are relevant to the present case:
(i) If the claimant asserts a duty which was not previously pleaded and alleges a breach of such duty, this usually amounts to a new claim.
(ii) If the claimant alleges a different breach of some previously pleaded duty, it will be a question of fact and degree whether that constitutes a new claim.
(iii) In the case of a construction project, if the claimant alleges breach of a previously pleaded duty causing damage to a different element of the building, that will generally amount to a new claim.
(iv) When considering whether one claim arises out of "substantially the same facts" as a previous claim, it is necessary to examine the extent to which the facts of the first claim and the facts of the second claim overlap, and the extent to which they diverge. It will then be a matter of impression whether the test is satisfied.
(v) When carrying out the analysis required by section 35 of the 1980 Act and CPR r. 17.4, the judge must treat as part of the original claim those amendments which he has already decided to allow.

39. With the benefit of this guidance from the authorities I must now tackle the issues in the present case.

Part 6: Decision

40. Let me deal first with paragraph 43(h) of the draft amended particulars of claim. Mr. Jeremy Nicholson Q.C., for Pell Frischmann, contends that this amounts to a new claim, because it alleges a new cause of action. Mr. John Marrin Q.C., for the Secretary of State, contends that paragraph 43(h) does not amount to a new claim.

41. On this issue I have come to the conclusion that paragraph 43(h) does not amount to a new claim. I reach this conclusion for six reasons. These are as follows:
(i) Sub-paragraph (h) alleges breach of a duty which has previously been pleaded.
(ii) The breach alleged in sub-paragraph (h) is causative of damage to the same element of the Viaduct as previously pleaded, namely the roller bearings.
(iii) The mechanism of failure flowing from sub-paragraph (h), namely corrosion, has previously been pleaded.
(iv) The Secretary of State's case on corrosion has been expanded by those amendments which (by consent) I have decided to allow. Sub-paragraph (h) is only a modest extension of those other pleaded allegations.
(v) One of the drawings relied upon by the Secretary of State in relation to paragraph 43(h) is FIP's drawing A13924. This shows the tin bronze end plates referred to in paragraph 43(h). This drawing is already pleaded in amended paragraph 30(f) of the particulars of claim (an amendment which is being made by consent).
(vi) The loss and damage flowing from this breach is the same as that already pleaded, namely the cost of removing and replacing the roller bearings.

42. Since paragraph 43(h) does not raise a new claim, or plead a new cause of action, the proposed amendment does not give rise to any limitation problem. Therefore, the next question to consider is whether as a matter of discretion the amendment should be allowed. I have no doubt that it should be allowed. The need for the

amendment arises from information which has been exchanged and work which has been done by the experts during the protocol process. Pell Frischmann is not prejudiced by the amendment. Pell Frischmann has quite sufficient time in which to investigate paragraph 43(h) and to put forward its defence to that particular allegation.

43. Let me now draw the threads together. For the reasons set out above, the proposed paragraph 43(h) does not raise a new claim. It is not caught by section 35 of the 1980 Act. In the exercise of my discretion I allow that amendment.

44. I turn next to the proposed new paragraph 44. This paragraph asserts breaches of a new category of duty, namely Pell Frischmann's duty to exercise reasonable skill and care in supervising the works. In the original particulars of claim Pell Frischmann made no criticism in relation to the roller bearings of Pell Frischmann's supervision of the works. The Secretary of State concedes, in my view rightly, that the allegations in paragraph 44 constitute a new claim.

45. The first issue which I must address in relation to paragraph 44 is whether the claim advanced in that paragraph arises out of "substantially the same facts" as some other claim which has already been pleaded. Mr. Marrin for the Secretary of State contends that it does, Mr. Nicholson for Pell Frischmann contends that it does not.

46. In relation to this issue, I must examine the extent to which the facts alleged in paragraph 44 overlap with the facts already pleaded in support of the Secretary of State's existing claims. For the purposes of this exercise I must treat the whole of the amended particulars of claim, apart from paragraph 44, as constituting the Secretary of State's existing pleading. I have duly carried out this exercise, bearing in mind the guidance given in the authorities cited earlier. I have come to the conclusion that the overlap of facts is sufficient for the purposes of CPR r. 17.4(2). The new claim pleaded in paragraph 44 does arise out of "substantially the same facts" as the other claims pleaded in the amended particulars of claim.

47. I reach this conclusion essentially as a matter of impression. Nevertheless, the following six factors have influenced me in reaching that conclusion:
    (i) The matters which Pell Frischmann allegedly overlooked while supervising are essentially the same as the matters which, allegedly, Pell Frischmann failed to foresee when checking AMEC's design.
    (ii) The defects which allegedly flowed from the breaches alleged in paragraph 44 are the same as the defects already pleaded, namely deterioration and failure of the roller bearings.
    (iii) The mechanism of failure allegedly flowing from the breaches set out in paragraph 44 is the same as the mechanism of failure already pleaded.
    (iv) The loss and damage flowing from the breaches alleged in paragraph 44 are precisely the same as the loss and damage already pleaded.
    (v) Both paragraph 43 and paragraph 44 of the amended particulars of claim allege breaches of Pell Frischmann's checking duties. Although the checking function in paragraph 43 is performed before the checking function in paragraph 44, both checking functions are broadly similar.
    (vi) The reasoning of the Court of Appeal in ***Brickfield Properties Limited v Newton*** [1971] 1 WLR 862 would suggest that the degree of factual overlap in the present case is quite sufficient. Mr. Nicholson has submitted that I ought not to follow the approach of the Court of Appeal in *Brickfield*. I reject that submission. The Court of Appeal was applying a provision of the RSC which has re-appeared in section 35 of the 1980 Act and in CPR r. 17.4(2). ***Brickfield*** has been followed or cited with approval on many occasions. The Court of Appeal's decision in ***Brickfield*** is binding upon me.

48. Finally, on this issue, I come to the exercise of this court's discretion. In a witness statement filed on behalf of Pell Frischmann, Ms. Alexander of Beale & Co. maintains at paragraph 38 that Pell Frischmann is prejudiced by the introduction of paragraph 44 at this late stage. Mr. Matthews of the Treasury Solicitor's Department has responded on the issue of prejudice in a witness statement dated 9th November. I have carefully considered the evidence on both sides. In my view, the timing of this amendment will not cause significant prejudice to Pell Frischmann. Everything which has been removed, or installed, during the course of the remedial works has been documented and recorded. There are also extensive records of what each party did during the course of the original renovation works. Furthermore, I do not accept that the non-destructive testing so far carried out on the bearings will inhibit any further investigation which Pell Frischmann might wish to conduct in relation to paragraph 44 of the amended particulars of claim.

49. It seems to me that the amendments contained in paragraph 44 of the draft amended particulars of claim ought to be allowed. Those amendments arise from work which has been done during the protocol process. Pell Frischmann will have ample time to deal with those new allegations before the trial starts on 14th January 2008. Having regard to all the circumstances, and in the exercise of my discretion, I allow the Secretary of State to amend his particulars of claim by introducing paragraph 44.

50. Let me now bring this judgment to a conclusion. For the reasons set out in Parts 4, 5 and 6 of this judgment I allow all of the disputed amendments to the particulars of claim.

Mr John Marrin QC and Ms Sarah Hannaford (instructed by the Treasury Solicitor) appeared for the Claimant
Mr Jeremy Nicolson QC and Mr James Cross QC (instructed by Beale & Co) appeared for the defendant