

AMENDING PARTICULARS OF CLAIM may be tricky at best of times and worse impermissible if the amendment does not arise out of the same or substantially the same facts as are already in issue under the original action.

Co-operative Group Limited v (1) Birse Developments Limited (in Liquidation) (2) Stuarts Industrial Flooring Limited (in administration) 93) Jubb & Partners (A Firm) 2014 EWCA Civ 707

In the aforesaid case the appellant had failed to persuade Akenhead J sitting in the TCC that the re-amendment arose from the same or substantially the same issues as in the original action and Akenhead J found that the re-amendment was a new cause of action which fell outside s.35 of the Limitation Act 1980 and CPR 17.4(2).

The gravamen of **Co-op's** original pleadings at para 28(iii)(b) was that the slab had a fundamental design fault that is; cracking of the concrete slab, damaged arrises and localised areas of insufficient thickness. The localised areas of insufficient thickness were said to require patchwork repairs at a cost of approximately £823k.

At some point later it was pointed out to the **Co-op** that the slab could not withstand a pallet racking leg load of 70KN attributable to the shortfall of steel fibre content. The consequences being that the entire floor required to be replaced as opposed to localised areas. Accordingly Co-op sought to re-amend its particulars. At para 33(v) the amendment brought in a separate cause for the replacement of the entire floor slab. Upon analysis there were now two causes for replacing the floor slab:

- a) Insufficient thickness
- b) Lack of steel fibre content

On appeal Lord Justice Tomlinson was hesitant as to whether it was plausible to suggest that the cause of the action in the proposed form arose out of the same or substantially the same facts as are already in issue on the claim as pleaded. The appellant argued that the character of the essential complaint was unchanged it was simply that the number of areas thought to be thin had been found to be greater than first thought; and the issue was not of qualitative but pure quantitative.

Lord Justice Tomlinson did not consider it fair, reasonable or accurate to characterise this new case as arising out of substantially the same facts as area already in issue on the pleaded case and accordingly Lord Justice Tomlinson dismissed the appeal on the basis that the amendments were qualitative rather than quantitative inasmuch as the amendment was at the very least a difference in degree which amounted to a difference in kind.

Those embarking on litigation must ensure that experts are brought in at the very beginning to establish all causes of defects and the remedial work required. The cost of bringing in experts at the outset is expensive and front

loaded in costs as a result claimants often seek to balance this cost by putting off experts until later down the line. As this case illustrates there can be a risk in doing so.

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