No Reason to Reply? Martlet Homes Ltd v Mullalley & Co Ltd [2021] EWHC 296 (TCC)

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On 16 February 2021 the High Court handed down judgment in *Martlet Homes Ltd v Mullalley & Co Ltd* [2021] EWHC 296 (TCC), which gives guidance to practitioners on the often misunderstood role and remit of a Reply to Defence.

To read the full judgment, click here.

The Facts

Martlet was not a personal injury claim. For the purpose of this blog it is sufficient to summarise the facts of the case as follows:

- The Claimant owned a group of high-rise towers in Hampshire.
- The Defendant contracted to complete works on the Claimant's towers, including design and installation of external cladding between 5 December 2006 and 7 April 2008.
- On 11 December 2019 the Claimant issued proceedings against the Defendant seeking damages in negligence and breach of contract.
- As the contract had been entered into by deed, the limitation period was twelve years. The claim was therefore issued right up against limitation.
- The Claim Form and Particulars of Claim were served on 9 April 2020, the very last working day on which proceedings could be served pursuant to CPR 7.5. This not being a personal injury claim, the Claimant could not invite the Court to exercise its discretion under s33 of the Limitation Act 1980.
- The claim was founded on three broad allegations of defective design or workmanship which related to fire barrier defects, insulation defects and substrate defects.
- A Defence was served on 4 June 2020. The Defendant admitted some breaches of duty but pleaded that those breaches were not causative. The causation defence was mounted on the requirement of the Claimant to replace the combustible expanded polystyrene cladding following the tragic events at Grenfell Tower in 2017.

On 9 July 2020 the Claimant served a Reply to Defence which introduced an 'alternative case'. Namely, that the Defendant was in breach of contract for using the combustible expanded polystyrene cladding on the exterior of the towers.

The Strike Out Application

On receipt of the Reply the Defendant applied to strike out the paragraphs which pleaded the Claimant's 'alternative case', pursuant to CPR 3.4(2)(a). The crux of the Defendant's argument was that paragraphs 80-83 of the Reply (the 'alternative case') were not a response to the Defence but an attempt to set up a new claim out of time. Those paragraphs of the Reply were, on a true interpretation, an amendment to the Particulars of Claim.

Resisting the application, the Claimant's main argument was that paragraphs 80-83 of the Reply were a response to the causation defence. It was inevitable that a Reply would raise new issues from those contained within the Particulars of Claim, or it would serve no purpose. As the Reply was not inconsistent with the Claimant's pleaded case, it did not fall foul of paragraph 9.2 of PD16. The Claimant relied upon *Herbert v Vaughan* [1972] 1 WLR 1128.

The Judgment

In striking out paragraphs 80-83 of the Reply, Pepperall J concluded as follows at [20]-[23]:

- Considering the contents of the Particulars of Claim (CPR 16.4(1)(a)), the fact that a Reply is optional (CPR 15.8 and 16.7), the rules restricting further statements of case (CPR 15.9) and the guidance on the contents of a Reply at paragraph 9.2 of PD16, it is clear that any ground of claim must be pleaded in the Particulars of Claim.
- If a new ground of claim is to be relied upon, it is a 'new claim' and must be added by amendment of the Particulars of Claim.
- Matters that can be properly pleaded in a Reply include:
  - "*a later date of knowledge pursuant to ss14 or 14A of the Limitation Act 1980, or that the court should disapply the primary limitation period pursuant to s32A or s33 of the Act, in answer to a plea in the Defence that the claim is statute barred*";
  - "*that an exemption or limitation clause was not incorporated into the parties' contract or that it was of no effect in excluding or limiting liability because the clause did not satisfy the condition of reasonableness within the meaning of the Unfair Contract Terms Act 1977*"; or
  - "*that the defendant is estopped by some earlier judgment or representation from relying upon a particular defence.*"
- The distinction between the examples above, and the present case, was that in the examples the Claimant was "*pleading new facts in order to refute a defence, but it would not be pleading a new claim*": [23]. The Claimant in this case was not pleading the new breaches as a shield, but as a sword with which it intended to establish liability.
- A Reply can also be used to admit a fact to narrow the issues at trial. Further, it can explain why that admitted fact does not constitute a defence.
- A Reply can also be used to deny an allegation of fact and explain why it is wrong.

Pepperall J concluded at [21]:

> *"Not only is the proposition that one can advance a new claim in a Reply contrary to the clear terms of the Practice Direction, but it is also inherently undesirable and contrary to the overriding objective of dealing with cases justly and at proportionate cost. If such practice were to be condoned, claimants would not need to be precise in their formulation of the Particulars of Claim since they could always have a second bite of the cherry when pleading the Reply. Defendants would have to seek permission from the court in order to answer by way of Rejoinder any new claims pleaded in the Reply, which might in turn call for a Surrejoinder from the claimant. Further, a claimant seeking to bring a new claim after the expiry of the limitation period could sidestep CPR 17.4 altogether (although possibly not s.35 of the Limitation Act 1980) by avoiding the need to make any amendment)."*

Ultimately, the Claimant's cross-application to amend pursuant to CPR 17.4 was successful and the new allegations of breach of contract were allowed in out of time.

Conclusion

It is an abuse of process to use a Reply to plead a new 'ground of claim'. This is a new claim and requires formal amendment of the Particulars of Claim. This Judgment has provided clarity on this issue and serves as a warning to Claimants (or Part 20 Claimants) who seek to add particulars of negligence or breach of contract by way of Reply.

Though not covered in this blog, this case also touches on the issues to which the Court should direct itself in considering applications to amend out of time (CPR 17.4).