Neutral Citation Number: [2021] EWHC 1479 (Ch)

Case No: CH-2020-00153

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch. D)

ON APPEAL FROM DEPUTY MASTER LINWOOD

Date: Wednesday 2 June 2021

Before:

Ms Lesley Anderson QC sitting as a Deputy Judge of the High Court

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Between:

(1) NECESSITY SUPPLIES LIMITED
(2) PRIMECROWN LIMITED
(3) KETAN MEHTA
(4) BHARATKUMAR MEHTA
(5) BHOJA KARAVADRA

Appellants

- and -

(1) PRICEWATERHOUSECOOPERS LLP
(2) LANDWELL (A FORMER FIRM)

Respondents

- -
- -

Giles Goodfellow QC and Edward Waldegrave
(instructed by **RR Sanghvi & Co**) for the **Appellants**
Graham Chapman QC and Thomas Ogden (instructed by **Osborne Clarke LLP**) for the **Respondents**

Hearing date: Wednesday 19 May 2021

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JUDGMENT

Ms Lesley Anderson QC sitting as a Deputy High Court Judge:

Preliminary

1. This is my judgment following the hearing of an appeal against the order of Deputy Master Linwood dated 5 June 2020 and sealed on 22 June 2020 ("the Order"). Permission to appeal was granted by Mr Justice Miles by Order dated 27 October 2020. The appeal was held fully remotely using Microsoft Teams during the Covid-19 pandemic. The Appellants were represented by Giles Goodfellow QC and Edward Waldegrave and the Respondents by Graham Chapman QC and Thomas Ogden. I am grateful to all four Counsel for their helpful written and oral submissions and to their respective instructing solicitors for their careful preparation of the electronic bundles.

2. The Order was made on the application of the Appellants by Application Notice dated 20 October 2017 ("the Application") for permission to amend their Particulars of Claim. The Application was stayed in 2018 pending the determination of proceedings between the First Appellant, Necessity Supplies Limited ("NSL") and the Second Appellant, Primecrown Limited ("Primecrown") and HMRC in the First-tier Tribunal ("FTT"). Those proceedings in the FTT were eventually settled by settlement agreements dated 15 April 2019 and 6 August 2019.

3. NSL and Primecrown are involved in the wholesale retail of pharmaceutical goods. At all material times, the Third Appellant, Ketan Mehta ("KM") and the Fourth Appellant, Bharatkumar Mehta ("BM"), who are brothers, were shareholders and directors of, and the Fifth Appellant, Bhoja Karavadra ("BK") was employed by, NSL and Primecrown.

4. The underlying claim is for damages for professional negligence against the First Respondent, PricewaterhouseCoopers LLP ("PwC"), a provider of specialist accountancy and tax advisory services, and the Second Respondent, Landwell, ("Landwell"), its correspondent law firm.

5. Specifically, the claim arises from a bonus tax planning scheme which was entered into in 2004 by NSL and Primecrown for the benefit of KM, BM and

BK. The scheme is described in some detail in paragraphs [22] to [33] of the Particulars of Claim, but it is convenient for this purpose to adopt the parties' abbreviation "the Arrangements". It is common ground that the essential purpose of the Arrangements was to provide bonuses to KM, BM and BK without paying the income tax and national insurance contributions to which they would otherwise be subject. In summary, the Arrangements involved the purchase by NSL and Primecrown from a bank of valuable forward contracts to acquire gold at a specified price at a future date. At the point of purchase, NSL and Primecrown would pay a substantial proportion but not the whole of the purchase price leaving a balance outstanding. NSL and Primecrown would then grant (for no consideration) an option to the relevant employee entitling him to acquire the forward contract at a price which was significantly lower than its value. The options were then to be sold by each of KM, BM and BK to Basing View Limited ("the Trustee") as trustee of the respective settlements established by each for the benefit of his family. KM's family trust is known as the Matsyavati Trust; BM's family trust is the Machchhoo Trust and BK's trust is the Laxmi Trust. The trust would purchase the option at full value using monies borrowed from a bank leaving the employee with a substantial amount of cash. Pursuant, to the Arrangements, KM, BM and BK received sums of c.£20 million, c.£2 million and c.£2 million respectively representing the cash value of the forward contract. Finally, if the trustee then exercised the option to acquire the underlying forward contract, it could be sold and the proceeds of sale used to repay the amount borrowed to fund the purchase of the option.

6. In July 2008 HMRC challenged the effectiveness of the Arrangements. Amongst other things, as summarised in paragraph [8] of the Appellants' Skeleton Argument for this appeal, HMRC argued that the Arrangements constituted a "cash delivery mechanism" and that the options did not constitute "rights" to acquire securities in the relevant sense required by Chapter 5 of Part 7 of the Income Tax (Earnings and Pensions) Act 2003. As I have already indicated, this led to proceedings in the FTT which were eventually settled on the basis that NSL and Primecrown were treated as having made payments which were to be treated, for tax and national insurance purposes, as income. NSL agreed it was liable to pay just under £10 million and Primecrown agreed

it was liable to pay just under £6.7 million to HMRC although I understand that Primecrown ceased trading before it had made any payment.

The Proceedings

7. I have been provided with an Outline Chronology at pages 63 to 68 of the Appeal Bundle which, although not agreed by the Respondents for all purposes, was agreed to be sufficient for the purpose of the hearing of the Application.

8. The proceedings were commenced by a Part 7 Claim Form issued on 23 June 2016 and Particulars of Claim were served on 18 October 2016, at a time when the dispute with HMRC was at an early stage. On 27 July 2017, the Respondents made a formal request for information ("RFI") to which a response was provided by the Appellants on 29 September 2017 ("the RFI Answer").

9. So far as the Application is concerned, I have been provided (at pages 69 to 125 of the Appeal Bundle), as was the Deputy Master, with a marked up version of the Particulars of Claim from which it is possible to compare: (a) the Particulars of Claim as originally served on 18 October 2016 ("the Original Version); with (b) the version which accompanied the Application in 2017 ("the 2017 Version") which shows the then proposed amendments in red; and (c) the further version produced on 25 October 2019 ("the 2019 Version") which shows in green italics those amendments to which the Respondents ultimately consented and in green ordinary script, the proposed amendments which were disputed ("the Disputed Amendments"). Aside from the Disputed Amendments, the principal difference between the 2019 Version compared with the 2017 Version is that by 2019 the Appellants had dropped a proposed amendment which pleaded a failure properly to advise them in relation to corporation tax.

10. The Application was supported by three witness statements of Urnisha Lakhani ("Ms Lakhani") of RR Sanghvi, the solicitors acting on behalf of the Appellants in these proceedings, dated 20 October 2017, 29 March 2018 and 8 April 2020 (although only the latter statement was before me) and a witness statement of BK dated 1 June 2020, which served was shortly before the hearing before the

Deputy Master on 3 June 2020. Tom Ellis, a partner in Osborne Clarke acting on behalf of the Respondents, had made two witness statements dated 31 October 2017 and 15 May 2020 (although again only the second of these was in the bundle for this appeal).

11. I will refer to the Deputy Master's judgment ("the Judgment") in more detail below. For present purposes, it is sufficient to note that the ultimate outcome was that he gave permission only for those amendments to which the Respondents had consented and refused permission for the others.

12. I note for completeness that pursuant to the Order, an Amended Defence dated 10 July 2020 has been filed (which responds to the amendments for which permission was granted by the Order) and an Amended Reply was then served on 7 August 2020.

The legal basis of the appeal

13. This is an appeal to the High Court within the meaning of CPR Rule 52.1(1)(b). CPR Rule 52.21 provides that every appeal is limited to a review of the decision below unless (a) a practice direction makes different provision for a particular category of appeal; or (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing. CPR Rule 52.21(3) provides that the appeal court will allow an appeal where the decision of the lower court was (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

14. CPR Rule 52.20(1) provides that in relation to an appeal the appeal court has all the powers of the lower court and rule 52.20(2) makes clear that this includes the power to: (a) affirm, set aside or vary any order or judgment made or given by the lower court; (b) refer any claim or issue for determination by the lower court; (c) order a new trial or hearing; (d) make orders for the payment of interest and (e) make a costs order.

15. I was also reminded by both parties of the well-established limits on appeals against the exercise by a Judge of a discretion set out in the judgment of Brooke LJ in *Tanfern Ltd v Cameron MacDonald* [2000] 1 WLR 1311 at [31] and [32]

and the quoted observation of Lord Fraser of Tullybelton in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647 at 652:

> "*All these various expressions were used in order to emphasise the point that the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible"*.

The law on amendments

16. As before the Deputy Master, the parties are largely agreed as to the relevant legal principles when deciding whether to permit a party to amend its claim. CPR 17.4 applies where (a) a party applies to amend his statement of case in one of the ways mentioned in the rule; and (b) a relevant period of limitation period such as under the Limitation Act 1980 has expired. CPR 17.4 reflects the doctrine of relation back in section 35(1) of the Limitation Act 1980. It is common ground that the relevant limitation period for the first category of proposed amended claims here, which arise in contract and/or tort, has expired. CPR Rule 17.4(2) applies such that 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 applying for permission has already claimed a remedy in the proceedings.

17. It was also common ground that the applicable principles when determining whether proposed amendments constitute a new claim are properly summarised in the decision of the Court of Appeal in *Co-Operative Group Limited v Birse Developments Limited* [2013] EWCA Civ. 474 at [19] to [22].

18. First, a cause of action is "*a factual situation the existence of which entitles one person to obtain from the court a remedy against another person"* [19].

19. Secondly, in the quest for what constitutes a "new" cause of action, it is the essential factual allegations upon which the original and the proposed new or different claims are reliant which must be compared. This is to be abstracted

from the "*bare minimum of essential facts"* rather than instances or particulars [20] and [21].

20. Thirdly, when an amendment involves pleading a duty which is different from that pleaded in the original action, it will usually assert a new cause of action [22].

21. Fourthly, where different facts are alleged to constitute a breach of an already pleaded duty, the courts have more difficulty in deciding whether a new cause of action is pleaded and the question is then one of fact and degree [22].

22. Fifthly, if the new breach does not arise out of the same or substantially the same facts as those already in issue on a claim previously made in the original action it is likely to be a new cause of action [22].

23. It is not in dispute before me that the Deputy Master properly directed himself that these were the applicable principles – see paragraph [36] of the Judgment. I have been reminded by Mr Chapman QC for the Respondents that the Deputy Master also had in mind the principle that just because an existing claim is pleaded in negligence, that does not of itself mean that a different set of facts which would also give rise to a remedy for negligence, is not a new cause of action for these purposes – see paragraphs [38] and [39] of the Judgment and the citation of the decision of Stuart Smith J. in *Harrison Jalla and others v Royal Dutch Shell Plc and others* [2020] EWHC 459 (TCC) at [161].

24. The relevant legal principles applicable to the second limb were also not in issue and again it is not suggested that the Deputy Master misdirected himself as to the law. They were and can be largely derived from the observations of Tomlinson L.J. in *Ballinger v Mercer Ltd* [2014] 1 WLR 3597 at [34] to [38]:

> "***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, 558 where 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 Lloyds Bank v Rogers [1997] TLR 164 Hobhouse LJ said on 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.*

***38**. I acknowledge straightaway, as did counsel before us, that on this part of the case we were given far more assistance than was the judge. Whilst I would accept that the judge did not misdirect himself, he did not in my view carry out a sufficient analysis of the extent to which the defendants would be required by the new claims to embark on an investigation of fact which they would not previously have been concerned to investigate."*

25. In *Mastercard Inc v Deutsche Bahn AG & Others* [2017] EWCA Civ 272, Sales L.J. at [35] and [36] stressed that CPR 17.4(2) is clear in requiring that the condition, namely that the new claim arises out of the same or substantially the same facts as the existing claim, must be satisfied before permission to amend can be granted:

"*35. In some cases, that may involve an evaluative judgment by the court in which it is possible to say that there is more than one answer which could*

rationally be given on the point, and in relation to which it could not be said of any of those answers on appeal that it is "wrong" such that an appeal should be allowed (CPR Part 52.21(3)(a)). In other cases, the issue may be more clear-cut and admit of a single answer which is right, so that if a different answer is given by a judge it can readily be seen on appeal to be wrong. In both sorts of case it is, strictly, a matter of analysis whether the judge has made the proper or an acceptable evaluation on the question whether the condition has been satisfied".

"*36. This is a substantive question of law, and an important one. Parliament has decided that valuable limitation defences which it has introduced for the benefit of defendants should only be circumvented by operation of the "relation back" rule where the precondition has been satisfied. This is not a matter of discretion for a judge."*

26. It is clear from the Judgment at [25] that the Deputy Master also properly directed himself by reference to the Agreed List of Issues on the hearing of the Application which had recorded that the sole question of the Court was whether the Appellants should be granted permission to make the Disputed Amendments and involved consideration of the three following sub-issues:

(1) do the Disputed Amendments introduce a new claim, such that the requirements of CPR Rules 17.4(2) must be satisfied?

(2) If the Disputed Amendments do introduce a new claim does the new claim arise out of the same facts or substantially the same facts as a claim in respect of which the Appellants have already claimed a remedy in the proceedings?

(3) Assuming either that the requirements of CPR Rule 17.4 do not need to be satisfied, or alternatively that they are satisfied, should the court exercise its discretion to allow the Disputed Amendments?

27. Finally, the Deputy Master correctly directed himself at [26] of the Judgment that the burden of proof on the Application was on the Appellants.

The Disputed Amendments

28. Although the parties adopt different terminology for them, it is common ground that the proposed amendments fall into two different categories. I identify them more fully below, but it is important to stress that, in line with the relevant legal

principles, the starting point for the exercise involves a careful comparison of the pleading containing the new material with the existing pleading. This is a substantive issue of law not a matter of discretion or case-management.

29. The first category of amendments (described by the Appellants as the "Automatic Implementation Passages") are contained in the following paragraphs of the 2019 Version: [2], [17], [18], [20], [21], [87A], [91], [100] to [105], [109] to [111], [113aa], [113ab], [113ac], [113la], [116aa], [116ab], [116ac], [116la], [122B] to [122D].

30. The thrust of this group of amendments is summarised in paragraph [2] as an allegation that "*PWC also (i) breached its duties to advise the Claimants in relation to certain risks involved in the Arrangements, and how those risks could be minimised"* as a result of which "*NSL's and Primecrown's cases were materially weakened and in light of such weaknesses each decided it was necessary and/or sensible to settle their disputes with HMRC"*. The amendments in paragraphs [17], [18], [20] and [21] are to the same substantive effect.

31. New paragraph [87A] contains the following new allegations of fact:

> "*On 17 September 2004, Thasan Yoganathan sent KM copies of the various transaction documents (including drafts of letters) by which the Arrangements were to be implemented. He later brought hard copies of the relevant documents to the offices of NSL and Primecrown. On the advice of Thasan Yoganathan, these were signed in short succession by KM, BM and BK, as appropriate (but not dated). The Claimants understood some of the steps involved in the Arrangements in broad terms but did not consider, and were not advised to consider, any of the transaction documents or the transaction itself in detail. As far as the Claimants were concerned, the Arrangements proceeded "automatically" after the meeting with Thasan Yoganathan on 17 September, and they played no active role in relation to their subsequent implementation. In particular, all relevant prices were determined by PwC and/or Landwell. (In paragraphs 88 to 111 below any statement to the effect that one or more of the Claimants executed a document on a particular date should be taken as a statement to the effect that PwC dated the document in question with the relevant date and that such document had previously been drafted and/or approved by Landwell or PwC and signed by one of more of the Claimants on 17 September in the presence, and on the advice of, Thasan Yoganathan)".*

32. The factual amendments to paragraphs [91], [100] to [105] and [109] to [111] are to the same substantive effect and concern the alleged failure to advise KM,

BM and BJ and/or their Trustee to give "independent consideration" at various stages in the Arrangements.

33. The new allegations of breach against PwC are in paragraph [113]:

"aa. It failed to advise each of KM, BM and BK to give independent consideration to whether to sell the NSL KM Option, the Primecrown KM Option, the NSL BM Option, the Primecrown BM Option, the NSL BK Option, and the Primecrown BK Option (as appropriate) to Basing View Limited (as trustee of the Matsayavati Trust, the Machchoo Trust, and the Laxmi Trust) and, if so, on what terms (including as to price), and it failed to advise the Claimants as to the risks inherent in proceeding otherwise;

ab. It determined the times at which and terms (including in particular as to price) on which the various Options would be sold without reference to KM, BM and BK (as appropriate), and in the cases of the NSL KM Option and the Primecrown KM Option inserted the wrong prices into the relevant transaction documents, or failed to ensure that the correct prices had been inserted;

ac. It failed to advise Basing View Limited to give independent consideration to whether to exercise the NSL Options or the Primecrown Options (or one or more of them), and it failed to advise the Claimants of the risks which would arise if Basing View Limited did not so act;

…

la. It failed to advise Basing View Limited to give independent consideration to whether to assign the NSL Forward Contracts and the Primecrown Forward Contracts (or one or more of them) to Investec UK and, if so, on what terms (including as to price), and it failed to advise the Claimants of the risks which would arise if Basing View Limited did not so act".

34. The new allegations of breach against Landwell are in substantively the same terms and are set out in paragraph [116].

35. Finally, on this group of amendments, the Appellants plead out the alleged consequences of the new breaches of duty in paragraphs [122B] to [122D]. It is sufficient for present purposes to set out only one of these paragraphs which are all to the same substantive effect:

"*122B. As a result of breaches of duty by PwC and/or Landwell, none of KM, BM, and BK gave independent consideration to whether to sell the relevant Options to Basing View Limited (as trustee of the various Trusts) or as to the terms of any such sales. NSL and Primecrown reasonably took the view that this would make it easier for HMRC to contend that the Arrangements demonstrated "artificiality" (including by virtue of being "pre-ordained"), and to allege that the relevant documents were not intended to and/or did not create*

rights and obligations of the sort which must be respected in applying the relevant tax provisions. The relevant breaches of duty by PwC and/or Landwell therefore materially diminished the Claimants' prospects of achieving successful outcomes in their disputes with HMRC".

36. The second category of amendments (described by the Appellants as the "Position of Individuals Passages") are contained in the following paragraphs of the 2019 Version: [127A], [127B], [127C] and [129A]. As summarised in paragraph [2], the new allegation is that "*KM, BM and BK are or may become liable to pay amounts in consequence of the settlements reached by NSL and Primecrown with HMRC which would not have been due but for the Defendants' breaches. Alternatively, they have suffered a substantial chance of avoiding or reducing such liabilities. They have therefore suffered a loss".*

37. More particularly, the factual underpinning for the second category of amendments is in new paragraphs [127A], [127B] and [127C] and the new plea of loss is in [129A]:

"*127A Notwithstanding the entry by NSL and Primecrown into (respectively) the NSL Settlement and the Primecrown Settlement, KM and BM have suffered loss and they, together with BK, may suffer further loss because of the Defendants' breaches of their duties and/or of the Representations.*

127B. In order to prevent additional income tax liabilities arising for NSL and Primecrown as a result of the Settlement Agreements pursuant to section 223 of ITEPA 2003, it was necessary for each company to indicate to HMRC that KM and BM will "make good" to NSL and/or Primecrown the amount of income tax which either NSL or Primecrown pays to HMRC by the NSL Settlement Agreement or the Primecrown Settlement Agreement in respect of employment income paid to KM and BM respectively under the Arrangements. To the extent that KM and BM make such payments to NSL and/or Primecrown they will have suffered loss as a result of the Defendants' breaches of their duties and/or of the Representations.

127C. All of KM, BM and BK may suffer further loss in the event that HMRC seek to take any action to make them (or any one of them) liable for those parts of the NSL Settlement Amount or the Primecrown Settlement Amount which relate to PAYE income tax and/or employee NIC liabilities and/or interest."

129A. By reason of the foregoing each of KM, BM and BK have suffered loss, and may suffer further loss, as identified in paragraphs 127A to 127C above."

38. The second category of Disputed Amendments differs from the first category of Disputed Amendments because it is common ground that they do not involve a

new cause of action. Accordingly, whether to admit those amendments is a matter of discretion.

Appeal Ground 1

39. The first ground of appeal is whether the Deputy Master erred in concluding that the Category One Disputed Amendments constituted a new claim within the meaning of CPR rule 17.4. Specifically, it is said that he was wrong to conclude that the Disputed Amendments sought to introduce a new duty and breaches on the part of the Respondents which were different from the duties and breaches originally pleaded and relied upon.

40. The Deputy Master dealt with this in the Judgment at [44]. He considered that the Category One Disputed Amendments amounted to a new claim for the following reasons:

(i) The Disputed Amendments pleaded a new allegation of a duty to give "independent consideration" plus breach when the RFI had disavowed reliance upon advice of PwC as to the risk of failure.

(ii) The Appellants were relying on each of the new breaches diminishing the prospect of persuading HMRC to accept the Arrangements and thereby the tax relief and so each must be a separate and new cause of action.

(iii) The pleading of a requirement that the Appellants or trustees should give "independent consideration" was new because it was not a part of the Arrangements or the contemporaneous advice of Stephen Brandon QC at the time that such should be given and so was not part of the implementation of the Arrangements.

(iv) Implementation duties as originally pleaded are very different from a duty to advise and design the scheme to the standard of a reasonable professional adviser.

(v) The breaches in the Disputed Amendments were distinct and separate and relied on new and different obligations from those currently pleaded and could not be part of a broad coverall of negligence.

(vi) The Deputy Master drew an analogy with the factual position in the *Co-operative Group* case.

41. The central strand of Mr Goodfellow QC's submissions on Ground 1 was that the Deputy Master had fallen into error because his analysis of the existing pleaded case in the Original Version was flawed. As a result of this error, he submitted, the comparison exercise was based on a false perception that the existing claim was concerned only with the alleged errors of the Respondents in implementing the Arrangements and did not concern the advice which was, or ought to have been, provided to the Appellants.

42. In support of this general point, he then took me through the Particulars of Claim in some detail with a view to demonstrating that, on proper analysis, the Disputed Amendments were merely further particulars of an existing duty and breach which gave rise to the same loss caused in the same way. Alternatively, he submitted that if the allegation in paragraph [113] was a new, rather than existing, breach, it was underpinned by the same facts and the same path to causation and loss so that it was an example of the same essential facts giving rise to the same remedy.

43. Mr Chapman QC's position was that it is clear on the face of the pleading that the duty relied upon is a new one at least as regards PwC (and he pointed, in particular, to paragraphs [17], [18], [19], [20] and [21]). The new duty was to advise as to risks. He also rejected that the new allegations of breach fell within the existing implementation duty and pointed to the reliance placed by the Appellants on the new breaches and the existing breaches as separate causes of action.

44. When identifying the scope and extent of the existing duty and breaches pleaded, the starting point is the summary at paragraph [2]. In my view, the Deputy Master is right to say that although the existing pleading sets out as a matter of fact that the Respondents "*advised the Claimants in relation to the Arrangements and took responsibility for aspects of implementation of the Arrangements"* the pleaded breach focuses on "*errors in relation to the implementation of the Arrangements"*. Similarly, although existing paragraphs

[17], [18], [20] and [21] refer in each case to the duty to exercise skill and care reasonably to be expected of specialist accountants and tax advisers, the duty to advise as to the risks and steps which should be taken to minimise risks is new.

45. Although I do not share the Deputy Master's view that the term "independent consideration" is unclear and so inherently objectionable on that ground, it seems to me that he is correct that the pleas in paragraphs [100] to [105], [109] to [111] amount to a new claim that the Arrangements should have been designed in such a way as to include a requirement that the Appellants and the Trustee give independent consideration at the various steps of the scheme. A comparison of the new and old parts of the Particulars of Negligence in [113] leads me to the same conclusion: in its existing form the allegations all concerned the manner of implementing the Arrangements – see for example at [113a] on the insertion of wrong prices; [113b] on the timely exercise of the options; [113c] on the payment of the price and/or evidence and [113h and i] on dating of assignments. Insofar as the same paragraph pleads particulars of failure to advise, they are the mirrors of the implementation failures. I do not accept Mr Goodfellow's criticism of the Deputy Master as having downplayed implementation here to mean something merely "mechanical" or "administrative". The distinction he was drawing (correctly in my view) was that the existing claims were concerned with the manner in which the scheme was implemented rather than its design.

46. I am also not persuaded that Mr Goodfellow QC is right to say that it was obviously implicit in the Combined Advice Document that "independent consideration" would be given to the steps or elements of the Arrangements such that they were vulnerable to "collapse" or that the RFI Answer can be said to have been concerned with advice only in the broader sense of risk of challenge and failure. In my view, the RFI was plainly seeking to draw out whether, and if so in what respects, any failure to advise by PwC was being relied upon.

47. For all these reasons, I reject that the Deputy Master erred in concluding that the first category of Disputed Amendments constituted a new claim within the meaning of CPR 17.4.

Appeal Ground 2

48. The second ground of appeal is whether the Deputy Master erred in concluding that, if the effect of the Category One Disputed Amendments was to introduce a new claim, it was not one which arose out of the same or substantially the same facts as those in respect of which the Appellants had already claimed a remedy in the proceedings. In particular, it is said he was wrong to conclude that there was a material difference between the facts relating to (i) the original allegations concerning the Respondents' failure to implement the Arrangements with reasonable skill and care and (ii) the new allegations concerning the Respondents' failure to advise of the need for independent consideration. It is also said he was wrong to conclude that this would require the Respondents to undertake new factual allegations.

49. The Deputy Master sets out his conclusion on this point in paragraph [57] of the Judgment. His view was that the disputed amendments did not arise out of the same or substantially the same facts because there was a factual difference between the allegation of failure to implement the Arrangements with reasonable skill and care and the Disputed Amendments, in particular the allegation of failure to advise of the need for independent consideration and that the inevitable consequence of the new allegations of breach meant that the Respondents would have to undertake new factual inquiries as to duty, breach and causation.

50. Although his conclusions are brief, it seems to me that they are to be read together with his earlier conclusions on the first limb. Although I do not agree with the Deputy Master that the new allegations of duty are likely to give rise to any significant new factual inquiries (because as Mr Goodfellow QC stressed the source of the obligations remains the engagement letters and much of the factual ground on implementation of the Arrangements is already there), I agree with Mr Chapman QC that the newly pleaded breaches (especially the new particulars of negligence in [113]) and the new case on causation in [122B to D] go well beyond the ambit of the facts which the Respondents can reasonably be assumed to have investigated when preparing their defence to the original claims. It seems to me that, in particular, investigation would have now to be

undertaken, if the amendments were allowed, of what advice was given and when; what if any record was kept of the advice and, on causation, as to the counter-factual of what the Appellants or the Trustee would have done if they had been advised of the need for independent consideration.

51. Mr Ellis dealt with the perceived scope of further inquiry which it would be necessary for the Respondents to undertake in his witness statement at [22], to [25]. The relevant passages are set out in the Judgment. In my view, the Deputy Master was correct at [55] to approach that evidence with some caution especially in circumstances where a lot of the factual material (for example as to events in September 2004) had already been pleaded.

52. However, this does not detract from my view that the Deputy Master was not wrong to conclude that the first category of Disputed Amendments did not arise out of the same or substantially the same facts as the existing claims and would involve investigation of facts and gathering of evidence well beyond the ambit of those previous undertaken. I reject Ground 2 of the Appeal Notice.

Appeal Ground 3

53. The third ground of appeal is whether the Deputy Master applied the wrong principles and so erred in refusing to exercise his discretion (assuming that either the requirements of CPR Rule 17.4(2) did not need to be satisfied, or that they were satisfied) to allow the Appellants to make the Disputed Amendments. In particular, he is said to have erred in conclusions that the allegations concerned with "independent consideration" (i) failed to identify what that meant; (ii) failed to identify what the Appellants would have done differently; (iii) failed to identify why that would have resulted in HMRC offering better settlement terms; (iv) sought to advance claims on behalf of Basing View Limited, which is not a party to the proceedings and (v) set out a case which is implausible. It is also said that the Deputy Master erred in concluding that the

second category of Disputed Amendments failed to identify the Appellant's case on causation and loss.

54. In circumstances where I have concluded that the Deputy Master did not err in relation to his conclusions that the first category of Disputed Amendments raised a new claim which did not arise out of the same or substantially the same facts as the existing pleaded claims, it is not necessary for me to go on to deal with this Ground. It seems to me that the criticisms made of the Deputy Master on the exercise of his discretion do not take it outside the "*generous ambit within which reasonable disagreement is possible"*. The fact that I might have reached a different view, as I have indicated I have in relation to the comprehensibility of the phrase "independent consideration", does not alter this position.

55. However, it is necessary me to consider whether the Deputy Master erred in the exercise of his discretion in refusing to permit the second category of Disputed Amendments concerning the position of KM, BM and BK. The relevant parts of the Deputy Master's decision are set out in paragraphs [64] to [76] of the Judgment.

56. First, as to the discrete position of BK, in my view the Deputy Master was correct to say that in contra-distinction to the position of KM and BM, where the factual underpinning of their agreement to "make good" to NSL and/or Primecrown and/or HMRC in respect of the income tax was at least pleaded in new paragraph 127(b), no such plea was made for BK. He was also right to say that it was (and is) not obvious on what basis BK, who was not a director of either company would be required to "make good". Despite the fact that it was he who made a witness statement on 1 June 2020 in support of the second category of Disputed Amendments, the basis on which he is likely to suffer losses is not clear.

57. More generally, although Mr Goodfellow QC took me to paragraph [5] of the NSL Settlement Agreement and to a letter dated 1 February 2019 from RR Sanghvi & Co to HMRC, this is a letter written on behalf of NSL not the individuals. The apparent confirmation of this arrangement in a more recent letter sent by BM and KM to NSL dated 28 May 2020 was not pleaded.

58. Mr Goodfellow QC submitted that all of the criticisms made by the Deputy Master were misplaced because the basis on which HMRC might be able to take action against KM, BM or BK were all matters of law which would all become clear on proper scrutiny of the principal relevant taxing statute (the Income Tax (Earnings and Pensions) Act 2003) and regulations (the Income Tax (Pay As You Earn) Regulations 2003/2682 (and especially regulation 81) and did not need to be pleaded. I disagree. The primary and secondary legislation provides the legal framework for the alleged position of KM, BM and BK as set out in [127A] and [127B] and [129B] but the allegations that: (a) NSL/Primecrown have paid sums to HMRC in respect of employment income paid to KM and BM; (b) that KM and BM have suffered loss and (c) the basis on which HMRC might seek to make them liable are essentially matters of fact which could and should have been properly pleaded out.

59. In my judgment, the Deputy Master was correct to say that the pleading was defective because it does not properly set out the basis on which the alleged loss and damage has been or is likely to be suffered.

Ground 4

60. Ground 4 of the Grounds of Appeal does contain any independent route to saying that the Deputy Master erred and I therefore dismiss it.

61. For all of these reasons, I dismiss the appeal.

62. I invite the parties to attempt to agree the terms of an order and any consequential matters. My provisional view is that if it is not possible to agree them, it would be appropriate for those matters to be dealt with by written submissions, but I invite the parties to indicate their position on that at the same time as supplying typographical errors in accordance with the preamble.