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Case No: CL-2023-000551

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01/11/2024

Before :

SEAN O'SULLIVAN KC (sitting as a Deputy High Court Judge)

- -

Between :

CAPGEMINI UK PLC **Claimant**

- and -

DASSAULT SYSTEMES UK LTD

Defendant

- -
- -

RAJESH PILLAI KC and **EMMA HUGHES** (instructed by **BRODIES LLP**) for the **CLAIMANT**
MATTHEW LAVY KC and **DANIEL KHOO** (instructed by **OSBORNE CLARKE LLP**) for the **DEFENDANT**

Hearing date: 14 October 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Friday 1 November 2024.

Sean O'Sullivan KC (sitting as a Deputy High Court Judge):

1. This is the Claimant ("C")'s application for summary judgment under CPR 24 and/or strike out under CPR 3.4, premised upon what are said to be two short points of contractual construction raised by the Defendant ("D")'s Amended Defence and Counterclaim. It is important to understand that C does not suggest that it can have summary judgment on its claim, or on D's counterclaim. Rather, its position is that the answer to these two individual issues is so obvious that the Court ought to "grasp the nettle" and resolve them now, on the basis that this would, or at least might, reduce the scope of the dispute before disclosure, witness evidence, etc.

2. C's underlying claim is for breach of a Settlement Agreement, entered into by the parties on 11 December 2017 ("the SA"). The purpose of the SA was to resolve disputes which had arisen under an earlier agreement (namely the Prime Contractor Agreement or "PCA"). The background to both agreements is a project for the creation and provision of logistics planning technology for the Royal Mail Group ("RMG").

3. C's claim is, in essence, that D failed to perform the work required of it and thereby repudiated the SA. D denies that there was any repudiation and counterclaims for further sums to which it says it is entitled for the work which it did perform. As part of both its defence to the claim, and the counterclaim, D relies upon the terms of the PCA, as well as on the SA. It also contends that its work was delayed and disrupted by errors in certain data which was provided by RMG.

4. It is in that context which the two issues which are the subject matter of C's present application arise. They have been labelled and described by C as follows:

    4.1. "The Entire Agreement Clause Issue". The issue here is whether an entire agreement clause in the SA has the effect of extinguishing the PCA, and hence precludes D from relying on any of the terms of the PCA in its defence to C's claims, or in order to support counterclaims.

4.2. "The Delay Construction Issue": This issue concerns D's argument that, as a matter of construction, or by virtue of an implied term, C was contractually responsible for errors in data provided by RMG.

Factual background

The parties and the project

5. Both partes are providers of software and technology services.

6. They were engaged in a project to provide what is called a "National Scheduling Tool" for RMG. This tool was to replace the systems previously used to carry out logistics planning for RMG's national delivery network. The logistics problem or 'puzzle' faced by RMG involves the transportation of mail throughout the United Kingdom by rail, road and sea.

7. I do not need to descend into the detail of what the tool – the software – is intended to do. In simple terms, it solves logistics puzzles by using a processing engine:

7.1. Customer-specific rules are defined to identify the parameters within which the logistics puzzle must be solved. Examples of customer rules for the RMG project include how long drivers are permitted to work before a break is required.

7.2. The software identifies an initial solution to the logistics puzzle. That initial solution is evaluated by reference to 'KPIs' (key performance indicators). These are concerned with outcomes which reflect the cost of the solution (such as the amount of fuel needed).

7.3. The optimiser software makes random changes to the initial solution. Changes that increase the quality of the solution (measured by reference to the KPIs) are retained; changes that do not are reverted. By this process of optimisation, the software should be able to arrive at a high-quality logistics solution within a given timeframe.

7.4. In order to assist the optimiser in reaching a high-quality solution more quickly, the optimiser is 'tuned'. The tuning process involves identifying the most fruitful types of changes to the initial solution and writing code

to ensure that, in the future, those types of changes are considered before other changes.

8. I am told that a key part of the evaluation of the performance of an optimiser is the concept of a "benchmark". That involves the customer (e.g. RMG) creating a manual solution for a given dataset. That dataset might contain, for example, details of all of the parcels to be delivered over a particular week, and the resources available to RMG, such as trucks, trains and drivers. The logistics solution provided by the software for that dataset can then be tested against that manual solution.

The PCA

9. The PCA was executed in September 2015, between C and a company named Quintiq. D subsequently acquired Quintiq and has taken on its rights and responsibilities. It was common ground between the parties that, for the purposes of this application, I could treat Quintiq and D as interchangeable. I will therefore continue to use "D" to mean D or Quintiq, as relevant.

10. The PCA is in familiar form for an agreement between a head contractor and a subcontractor in the context of an IT project. Picking out a few of the terms which are canvassed further below:

    10.1. clause 2 contains provisions in relation to the price and payment terms;

    10.2. clause 3.1 contains limitations of liability. Liability for breach is limited to 150% of the project value (clause 3.1(c)); loss of profit and consequential loss are excluded (clause 3.1(d)) and there is no liability for any claim made more than 2 years after termination of the PCA (clause 3.1(f));

    10.3. clause 3.2 provides some rights of termination;

    10.4. clause 3.4 addresses IP rights, making clear for example what rights each party has in relation to the use and ownership of software;

    10.5. clause 3.8 deals with confidentiality in relation to the data, documentation and information which was to be shared;

    10.6. clause 3.12 provides for a tiered escalation of disputes;

10.7. clause 3.13 sets out C's requirements for ethical business relationships and sustainable procurement;

10.8. clause 3.14 deals with the parties' anti-corruption and bribery obligation; and

10.9. clause 4 is a bundle of warranty provisions, providing the usual collection of obligations and protections for D in relation to non-conformances emerging after acceptance by C.

11. In addition, the PCA appended a long and detailed Statement of Work dated 19 October 2015 ("the SOW"). My attention was drawn in particular to section 6 of this document, which set out a long series of "General Assumptions". For example, one assumption was that "*Realistic and complete test data will be available on time in accordance with the project plan*". Under "*Who*", C was identified. I understand this to mean that (a) it was an assumption underlying the lump sum price and the agreed schedule for this work, that realistic and complete test data would be provided by certain identified dates and (b) that, as between C and D, C was the party taking contractual responsibility for the fulfilment of that assumption.

12. Section 7 of the SOW also confirmed that the work identified was to be executed for a fixed price of £925,911 (plus VAT). However, it was provided that "*Other activities (such as Change Requests etc.) will be invoiced as per the daily rate of 1100.00 GBP on a T&M basis*".

Deadlock

13. D's position was (and is) that its workscope under the PCA (see section 6.1.7 of the SOW) required it to test and tune the optimiser against 3 benchmarks provided by RMG and that it did so. It says that, in December 2016, RMG could not provide a large benchmark solution against which the optimiser could be tested. Instead, RMG provided smaller benchmarks (i.e. benchmarks that did not relate to the entirety of the logistics puzzle to be solved, but only part of the puzzle). Those were used for testing the software. D says that at least 3 smaller benchmarks were used in this way.

14. However, in July 2017, D's case continues, C requested that D test and tune the optimiser against a large benchmark. That led to a dispute between the parties as to whether that work was outside the defined scope. That disagreement formed part of a wider dispute about D's entitlement to additional payments, which resulted in an impasse between the parties.

The SA

15. The parties entered into the SA in December 2017 to get the project back on track. The SA addressed the two aspects of the parties' disputes separately: (a) it settled the dispute in relation to historic work (the SA defines this as the "Dispute"); and (b) it set out a way forward for the work outstanding under the PCA (the SA defines this work as the "Go Forward Work").

16. The distinction was explained in the recitals:

> *"(D) A dispute has arisen between the Parties relating to sums claimed by [D] under various disputed Change Requests and Invoices issued by [D] under Prime Contractor Agreement all as set out in Appendix 1 to this Agreement ("the Dispute").*
>
> *(E) The Parties are also in dispute in relation to the work to be delivered by [D] as set out in Appendix 2 to this Agreement (the "Go Forward Work") but have agreed that this work will continue under reservation of the Parties' respective claims in this regard and subject to the terms of this Agreement."*

17. Recital (A) refers to the PCA:

> *"(A) [D] and [C] are parties to a Prime Contractor Agreement related to the provision by [D] to [C] of services relating to National Scheduling Tool, Phase 1, for [RMG] dated 1 September 2015* ***("the Prime Contractor Agreement****")."*

18. Clause 1.1 defined the Go Forward Work as "*the work to be delivered by [D] as set out in Appendix 2 to this Agreement*" and the "Dependencies" as "*the dependencies identified in Appendix 2 to this Agreement*".

19. Clause 2.1 provided for a payment of £619,726.11 to be made by C to D and clause 4.1 contained a release in relation to the Dispute:

> *"4.1 Except for payment of the sums set out in Clause 2 of this Agreement, this Agreement is in full and final settlement of, and both parties hereby release and forever discharge, any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to the party or to the law, and whether in law or equity that it, its Related Parties of any of them have ever*

had, may have or hereafter can, shall or may have against each other or any of its Related Parties arising out of or connected with:

4.1.1 The Dispute; and

4.1.2 The underlying facts related to the Dispute,

*(collectively the **Released Claims**).”*

20. In relation to the way forward, clause 3 provided as follows:

*“**3 GO FORWARD WORK***

3.1 The Parties are also in dispute in relation to whether or not [D] is entitled to further payment for the Go Forward Work. [D] claims that it is entitled to further payment because the Go Forward Work is beyond the scope of the Prime Contractor Agreement. [C] claims that no further payment is due because the Go Forward Work is within the scope of the Prime Contractor Agreement (the “Go Forward Work Dispute”).

3.2 Notwithstanding the existence of the Go Forward Work Dispute, [D] shall complete the Go Forward Work subject to the Dependencies.

3.3 [C] shall make a without prejudice payment on account of £550 per person per day (pro rata in respect of any part day) to [D] in relation to any Go Forward Work performed after 1 September 2017 (the “Go Forward Work Payment”) subject to the terms of this clause 3.

3.4 Within 5 days of the Agreed Date [D] shall provide an effort profile showing the detailed breakdown of time and effort spent from 1 September to 1 December 2017 and a forecast of anticipated time and effort to be spent to complete the Go Forward Work. [C] and [D] shall use reasonable endeavours to agree this profile within 14 days. The agreed profile shall be the “Effort Profile”.

3.5 [D] shall provide a draft invoice on or before the 5th day of the month in relation to its claimed Go Forward Work Payment for the preceding month(s). This invoice shall be supported by vouching sufficient to enable [C] to satisfy itself that the claimed Go Forward Work Payment relates solely to time and effort spent by [D] in delivering the Go Forward Work and that it reasonably compares with the Effort Profile.

3.6 In the event that [C] disputes the claimed Go Forward Work Payment it shall (within 5 days of receipt of the draft invoice) notify [D] in writing to that effect identifying the amount in dispute and setting out its reasons for disputing that amount. [D] shall be entitled to issue an invoice for the undisputed element of the claimed Go Forward Work Payment. No payment shall be due in respect of any disputed amount pending resolution of that dispute. For purposes of this clause 3.6, “disputed” means that [C] disputes that the claimed Go Forward Work Payment relates solely to time and effort spent by [D] in delivering the Go Forward Work and/or that it reasonably compares with the Effort Profile.

3.7 All disputes in relation to the Go Forward Work Payment shall be resolved in accordance with Clause 3.12 of the Prime Contractor Agreement.

3.8 Performance of the Go Forward Work, and payment of the Go Forward Work Payment, shall be without prejudice to any of the Parties' respective claims in relation to the Go Forward Work Dispute. These claims are expressly reserved (including, for the avoidance of doubt, in the case of [D], its claim for further payment in relation to the Go Forward Work and, in the case of [C], its claim for repayment of the Go Forward Work Payment).

3.9 The Go Forward Work Dispute shall be resolved by mediation seated in London and conducted in English. The Parties shall exchange the names of 3 proposed mediators on or before 19 January 2018. If a mediator has not been agreed by 26 January 2018, any Party can request that a mediator is appointed by the Centre for Effective Dispute Resolution."

21. There was what seemed to me an important difference between the parties as to the way in which this scheme operated in relation to the Go Forward Work Payments. I will discuss this further below.

22. However, there was no dispute that D was obliged ("*shall*") to complete the work described in Appendix 2, subject to the dependencies found there. Appendix 2 makes clear that the Go Forward Work was split into 7 stages. The parties' agreed "*high level plan*" showed that work had started on Stages 1 to 4 before the SA was entered into on 11 December 2017. C emphasised that the new Go Live Date was set for early April 2018 (i.e. then just a few months away).

23. Taking stage 3 (data cleansing) as an example, Appendix 2 provides:

"RMG will calibrate data to the Process (to align to the NST business rules), and to remove all hard constraints. The output from following this process will be the large greenfield benchmark. The plan allows for six weeks for RMG to complete the data cleansing.

[D] with the support of [C] will ensure that the NST solution is available to support data cleansing.

[D] will support resolution of any issues or defects.

[D] will validate and accept the provided large greenfield benchmark before tuning process (Stage 5) can start.

<u>Stage 3 Dependencies:</u>

RMG is responsible for:

- *Data cleansing in accordance with the Project Plan;*

- *Providing the large greenfield benchmark (input data, plan and total KPI) which should be without any hard constraints."*

24. C pointed to the fact that D was to support the resolution of issues or defects and that it was specifically provided that D would "*validate and accept the provided large greenfield benchmark before tuning process (Stage 5) can start*". D pointed out that the express dependencies included that RMG was responsible for data cleansing and providing the large benchmark.

25. The SA also contained an entire agreement clause at clause 10.1:

> *"This Agreement constitutes the entire Agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter."*

Further disputes and the present claims

26. Continuing with the chronology, it is clear that there were delays to the Go Forward Work, which was not completed by the April 2018 "Go Live" date referred to in Appendix 2, or any time. D complained about alleged errors in the large benchmark provided by RMG. C asserts that the real problem was with D's software.

27. In due course, C took the position that the delay to the completion of the Go Forward Work amounted to a repudiatory breach by D of the SA. C alleges that it accepted that alleged repudiation by a letter dated 5 October 2020. C now claims reliance losses of in excess of £7 million, comprising a combination of costs paid to D, sums paid to RMG and C's own costs.

28. D denies liability and counterclaims for unpaid services. It says, in summary, that there was no fixed obligation to complete the work by April 2018, and that the reason for the delays was the errors in the data, which errors (D alleges) were C's contractual responsibility. D also relies upon the limitation of liability and the time limit in clause 3.1 of the PCA.

General approach

The law on strike out and summary judgment

29. There was nothing between the parties as to the correct approach to an application of this kind.

30. CPR 3.4(2)(a) provides:

> *"The court may strike out a statement of case if it appears to the court (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim…".*

31. CPR 24.3 provides:

> *"The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if –*
>
> *(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and*
> *(b) there is no other compelling reason why the case should be disposed of at trial"*

32. The principles applicable to summary judgment are helpfully summarised by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]. Those principles are well known and do not need to be set out in full here.

33. C submitted, and I accept that:

33.1. the Court must consider whether the claimant has a "*realistic*" as opposed to a "*fanciful*" prospect of success, a "*realistic*" claim being one which is "*more than merely arguable*"; but

33.2. in reaching its conclusion the Court must not conduct a "*mini-trial*";

34. C observed, correctly, that it is not uncommon for an application under CPR Part 24 to give rise to a short point of law or construction and, if the Court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, the Court can (and sometimes should) grasp the nettle and decide it. An example of a case in which it was decided that the judge not merely could, but should, have "grasped the nettle" is ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

35. However, the fact that there will be cases in which it is right to grasp the nettle does not mean that it is always appropriate for judges on summary judgment applications to don their gardening gloves and set to pulling up the nettles. In ICI Chemicals, determining the point enabled the Court to conclude that the whole claim was bound to fail. There is an obvious difference between deciding a point of law which results in disposal of case as a whole, or a clearly identifiable part of it, and deciding a point of law which only represents one strand of a defence which is otherwise going to trial.

36. To put this another way: in my judgment, Part 24 is not intended to operate as an informal way of raising preliminary issues. That must be especially true when the issues on which the Court is being asked to grant summary judgment are closely tied into other issues in the case, such that they would never be considered suitable to be heard as preliminary issues. To be fair, Mr Pillai KC for C made very clear that he was not submitting that the Court should decide the points of law identified in C's application in his favour and, on the basis that it had done so, grant summary judgment on those issues in his favour. Rather, he was contending that the position was so clear that there was really nothing to decide; that D's case on these issues was unarguable as a matter of English law.

37. Even put that high, it seems to me that caution is required because of the risk that (to continue the gardening analogy) what seems to a judge hearing a short summary judgment application to be a weed, is later identified by the trial judge as a precious flower. I note that overlap with other issues can be a compelling reason why a claim which is not thought to have real prospects of success should be allowed to proceed to trial: see Iliffe v Feltham Construction Ltd [2015] EWCA Civ 715, at [71]-[73].

38. Although ultimately it may not matter to the outcome of the present application, I take the view that great care is required before deciding points of law in cases where it is **not** being suggested that success on the summary judgment application will result in a final disposal of the claim or counterclaim.

The law on construction and implied terms

39. There was nothing between the parties in this regard. C provided the following summary, which I found useful:

39.1. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement: Wood v Capita Insurance Services Ltd [2017] AC 1173 at [10] and National Commercial Bank Jamaica Ltd v NCB Staff Association [2024] UKPC 2 at [32].

39.2. Statements of the parties' subjective intent are, for this purpose, irrelevant: Arnold v Britton [2015] UKSC 36 at [15]. It is the meaning which the document would convey to a reasonable person that is determinative, not what the parties subjectively understood the contract to mean.

39.3. When seeking to interpret the contract, a court is entitled to take into account the background knowledge which would reasonably have been available to both parties in the situation in which they were at the time of entry into the contract (the so-called "matrix of fact"); National Commercial Bank Jamaica Ltd v NCB Staff Association at [32].

39.4. Although the "matrix of fact" is broad, it does not encompass:

39.4.1. pre-contractual negotiations (Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1001); or

39.4.2. conduct subsequent to the making of the contract (Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235).

39.5. The meaning of the contract is assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract or document, (iii) the overall purpose of the clause and the contract or document, (iv) the facts and circumstances known or assumed by the parties at the time that the contract or document was executed, and (v) commercial common sense: Arnold v Britton at [15]. The court must therefore interpret the clause in dispute in the context of the contract as a whole rather than examining the disputed clause in isolation from the contract of which it is a part.

39.6. The starting point in construing a contract is that words are to be given their 'ordinary and natural meaning' especially where the parties have access to legal advice and can be expected to choose their words carefully: Arnold v Britton at [17] – [18]. *Prima facie*, words mean what they say: Fomento de Construcciones Y Contratas SA v Black Diamond Offshore Ltd [2016] EWCA Civ 1141, [12]. Thus, in a case where the contract has been drawn up with the benefit of professional assistance, the terms of the contract are to be interpreted '*principally by textual analysis*': Wood v Capita Insurance Services Ltd at [13].

39.7. In the case where the language used by the parties is unambiguous, it is the duty of the court to apply that meaning, even in a case where the result is thought to be improbable: Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 at [23].

40. In relation to implied terms, C reminded me that:

40.1. it is usually necessary for the party contending for an implied term to show that the reasonable reader of the contracts would consider what is being proposed to be so obvious as to go without saying or as being necessary to give business efficacy to the contract (see Marks and Spencer plc v BNP Paribas Securities Trust Company (Jersey) Ltd [2015] UKSC 72 at [23]-[24]);

40.2. no term can be implied if it would contradict an express term (see Marks and Spencer at [28]);

40.3. a term must be capable of clear expression: Tesco Stores Ltd v USDAW [2024] UKSC 28 at [35]; and

40.4. the process of implying a term into the contract must not involve rewriting of the contract in a way which the Court believes to be reasonable, or which the Court prefers to the agreement which the parties have negotiated; it is not the function of the Court to relieve a party from the consequences of poor advice or bad judgment: Tesco Stores Ltd at [35], [47].

41. I did not understand any of this to be controversial and it represents the general approach which I take for the purposes of this application.

Entire Agreement issue

42. Although there is some overlap between them, it is convenient to take the two issues in turn, starting with the entire agreement clause.

43. For convenience, I repeat that clause 10.1 of the SA provides as follows:

> *"This Agreement constitutes the entire Agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter."*

44. C says, in summary, that the PCA was a previous agreement and hence has been superseded and extinguished by the SA. On that basis, C contends, it is not open to D to rely upon any clauses of the PCA, save only the specific clauses which have been expressly preserved.

The law on entire agreement clauses

45. The parties cited to me a number of cases concerned with entire agreement clauses and their effect.

46. The best known is probably Inntrepreneur Pub Co v East Crown Ltd [2000] 2 Lloyd Rep 611 in which Lightman J explained for example that:

> *"The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth…".*

47. In MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2018] UKSC 24, Lord Sumption (at [14]) approved Lightman J's analysis of the purpose for entire agreement clauses, saying that they are:

> *"…intended to achieve contractual certainty about the terms agreed…by nullifying prior collateral agreements relating to the same subject matter".*

48. Neither party suggested that there are any special rules for the interpretation of an entire agreement clause. D pointed to the comment of Andrew Burrows QC in Federal Republic of Nigeria v JP Morgan [2019] EWHC 347 (Comm) (at [37]) to the effect that "*one should recognise that a party is unlikely to have agreed to give up a*

valuable right that it would otherwise have had without clear words". But that case was concerned with whether a "Quincecare" duty might arise as a matter of an implied term or by operation of law, not a right which was to be found in a previous agreement.

49. D also relied upon a series of cases which were said to show that the English Court has "*consistently*" held that entire agreement clauses do not preclude reliance upon earlier contractual agreements. It seemed to me that was putting the submission too high. In Cheverney Consulting Ltd v Whitehead Mann Ltd [2007] EWHC 3130 (Ch), for example, the entire agreement clause in a consultancy agreement did not preclude the enforcement of a side letter. But that was because Sir Donald Rattee confirmed that the side letter was to be read as part of a composite transaction or package of agreements (at [103] to [104]), because it was only the mechanics of signing which had resulted in the consultancy agreement being entered into after, rather than at the same time as, or before, the side letter. Several of the other cases cited by D involved a similar conclusion in relation to a single package of contractual documents.

50. Probably the best example, from D's perspective, of an entire agreement clause being held not to bite on a prior contract is Satyam Computer Services Ltd v Upaid Systems Ltd [2008] EWCA Civ 487. The clause referred to all agreements "*concerning this subject matter herein*" being superseded. Collins LJ agreed (at [56]) with the first instance judge (Flaux J) that:

> *"…Satyam's reliance on the Entire Agreement clause is circular since it applies to supersede prior agreements 'concerning this subject matter herein and the terms and conditions applicable hereto,' and 'all other documents' inconsistent with 'the documents constituting the Entire Agreement' (namely the Services Agreement and its Annexures). The question still remains whether the subject matter of the Assignment Agreement is included within the Services Agreement or whether it is inconsistent with the Services Agreement in any material respect"*

51. For its part, C directed my attention to Ravenni v. New Century Shipbuilding [2006] EWHC 733 (Comm), in which Gloster J held that a shipbuilding contract containing an entire agreement clause, did have the effect of replacing, or denuding of legal effect, provisions in an option agreement about offering earlier delivery dates. That was said (at [33]) to be on the basis that:

> *"… the entire agreement clause, when read together with the express provisions relating to delivery and payment dates in the shipbuilding contracts, does have the effect of replacing the provisions of the option agreement or ''denuding them . . . of legal effect''. I accept Mr Turner's submissions on this point. I agree with him that the yard's delivery obligations in relation to dates, which were the subject of clause 4(ii) and other provisions of the option agreement, are clearly also the subject matter of the shipbuilding contracts."*

52. It might be noted that the shipbuilding contracts contained express provisions about delivery dates and hence the yard's delivery obligations, as previously set out in the option agreement, were described as "*also the subject matter of the shipbuilding contracts*".

C's case

53. As I have said, C's position is that, put simply, the PCA has ceased to exist or to have any legal effect, or – to use the word in the entire agreement clause – has been "extinguished" by the SA, such that it is not open to D to rely upon it for any purpose. C says that the contrary is not arguable.

54. At the risk of doing an injustice to the elegant way in which the submission was developed by Mr Pillai, I understood the argument to include the following points.

55. First, the new framework agreed under the SA was inconsistent with the PCA in important respects. For example, the SA sets out the Go Forward Work and how it is to be completed ahead of a new Go Live date of April 2018 (superseding the PCA's Go Live date of June 2016). This was said to mean that the two contracts could not operate in parallel. This was an interesting starting point because it is undoubtedly correct to say that some parts of the PCA are inconsistent with, and hence must be superseded by, the SA. But the real question is whether the parts of the PCA which are **not** in any way inconsistent with the SA are also deprived of legal effect.

56. Second, Mr Pillai argued that, where the parties wanted specific terms of the PCA to continue to apply, they expressly identified those terms and incorporated them by reference. They concerned definitions, and the procedure for resolving disputes, rather than any substantive obligations involving the performance of the Go Forward Work.

57. Third, he submitted that the meaning of the entire agreement clause is clear beyond argument: the SA supersedes and extinguishes **all** previous agreements and the PCA is a previous agreement. Mr Pillai recognised that built into this submission is an assumption that the PCA, and indeed the PCA as a whole, is a prior agreement relating to the subject matter of the SA. His position was that the subject matter of the SA was described in its recitals. I found that point slightly elusive. Certainly the recitals which describe what the SA is doing – what has been agreed – might be said to be describing the subject matter of that agreement (see especially recitals (E) and (F)). But it is harder to read recitals (A) to (C) as describing the subject matter of the SA. They are describing the background to the SA, which is not quite the same thing.

58. In his oral submissions, Mr Pillai took a more ambitious line, suggesting that the subject matter of the SA was the whole project for RMG and delivery of "Go Live" for the National Scheduling Tool. That (if it is right) enabled him to say that it is obvious that the PCA is related to that subject matter.

59. As such, Mr Pillai submitted that D could not rely upon the limitation of liability clause at clause 3.1 of the PCA or the time limit at clause 3.1(f) of the PCA. I did not understand him to say that there was any direct inconsistency between these provisions and the terms of the SA. His position, at least for the purpose of this application, was much more binary: if the SA superseded and extinguished the PCA, then D cannot rely on **anything** contained in the PCA, save as expressly preserved by the SA.

60. Mr Pillai also argued that D's counterclaims in respect of the "Iterative Development Milestone" and the "Implementation Milestone", both of which relied upon clause 2.1 of the PCA, could not survive the entire agreement clause. If the SA superseded and extinguished the PCA, the argument went, then D cannot rely on any terms of the PCA to found counterclaims. I found that submission interesting because Mr Pillai accepted that those counterclaims were **not** caught by the definition of the "Dispute" in the SA. So the suggestion was that the parties had carefully identified which (present and future) claims were being settled, but not included these milestones, despite the claims (on the face of it) having accrued

by the time of the SA. Yet supposedly the parties had effectively agreed to dispose of them by a side wind as a result of agreeing that the PCA be extinguished.

61. Mr Pillai was dismissive of D's textual point to the effect that recital (A) of the SA refers to the PCA in the present tense (i.e. "*[D] and [C] are parties to…*". He said that the operative terms take precedence over recitals.

62. He also submitted that his case was assisted, not harmed, by the specific references to terms of the PCA in the SA's operative terms, because this demonstrated that the parties had decided which selected terms from the PCA were to survive.

63. Finally, he argued vigorously that there is nothing in the wording of the SA to suggest that the parties intended to preserve all of the PCA.

D's case

64. Mr Lavy KC (for D)'s basic position was that clause 10.1 of the SA is a typically worded entire agreement clause that relates only to its subject matter, namely (a) the compromised Dispute; and (b) the interim arrangements for the Go Forward Work.

65. He suggested that the SA contains none of the typical terms that might be expected to regulate the delivery of a large-scale IT project. There is, he observed, no change request procedure. There are no warranties. Nor is there any of the detailed explanation contained in the SOW as to what is involved in 'UAT' (User Acceptance Testing') or "go live activities".

66. D argued that the SA contains no express wording to the effect that the PCA will not continue in force. If anything, Mr Lavy said, all of the references to the PCA suggest that it remains in effect:

    66.1. as noted above, recital (A) uses the present tense when describing it, which, he suggested, was inconsistent with the PCA being extinguished;

    66.2. C is defined in the SA as the "Prime Contractor" and is referred to as the Prime Contractor throughout the SA;

    66.3. clause 1.1 of the SA states that the terms defined in the PCA shall bear the same meaning when used in the SA; and

66.4. clause 3.1 of the SA records the parties' dispute in relation to the Go Forward Work and clause 3.7 of the SA refers to clause 3.12 of the PCA. He suggested that the parties only extended clause 3.12 to the Go Forward Work Payment because, insofar as it concerned the Go Forward Work, the SA only purported to regulate the payment position on a "pro tem" basis. All substantive disputes, he said, were to be resolved under the PCA in any event.

67. That last point interlocked with Mr Lavy's reading of clause 3 of the SA. He said that the parties' substantive rights in relation to payment for the Go Forward Work continued to be governed by the terms of the PCA, with the Go Forward Work Payment being a "pro tem" arrangement. Specifically, the SA envisaged D claiming a right to further payment pursuant to an alleged change request under the PCA, and C seeking repayment of the Go Forward Work Payments on the basis that the PCA required that work to be done as part of the original lump sum price. In the absence of an agreement via mediation, the only basis on which that substantive dispute could be resolved would be by reference to the terms of the PCA, and especially the SOW.

68. Mr Lavy's argument in this regard was important because, if he was right, it necessarily followed that the parties were envisaging the terms of the PCA (not being terms which had been expressly referred to in the SA) surviving and determining their respective ultimate entitlements.

69. I should record that Mr Pillai implicitly acknowledged that this reading of clause 3 of the SA was problematic for his arguments on the effect of the entire agreement clause. He disagreed with Mr Lavy as to whether the Go Forward Work Payments envisaged by clause 3 of the SA amounted to a "pro tem" arrangement. He said that the claims reserved under clause 3.8 of the SA did not extend to the Go Forward Work Payments, which were being "earned" under clause 3.5 of the SA.

Analysis

70. It seems to me that C's basic assertion, that clause 10.1 of the SA must mean that the PCA is extinguished and of no legal effect, is premised upon the proposition

that the PCA as a whole is an agreement relating to the subject matter of the SA. I do not consider the truth of that proposition to be self-evident.

71. Ultimately this is a matter of construing the words "*relating to its subject matter*" in clause 10.1 in accordance with all of the well-known principles to which I have been referred. The authorities dealing directly with other entire agreement clauses are only of tangential assistance, because each clause falls to be construed by reference to the words used and the factual context. However:

71.1. I would suggest, as a very general proposition, that entire agreement clauses are primarily aimed at ensuring that parties do not seek to rely upon informal discussions and communications as supposedly tempering the meaning of the formal agreement; in other words, to prevent the parties thrashing (or threshing) around in the undergrowth of negotiations. As such, they are usually concerned with a different mischief, not with the existence of multiple **formal** contracts between the parties; and

71.2. in both Satyam and Ravenni, the Court appears to me to have equated the "subject matter" of the contract which contains the entire agreement clause with the **content** of that contract. This is why the focus in each case was on whether there was an inconsistency between the terms of the previous agreement and the terms of that contract. None was found in Satyam and hence the entire agreement clause did not bite. There was an inconsistency between the different terms about delivery in Ravenni, and hence the delivery terms in the option agreements were superseded.

72. In the same way, it seems to me more likely that the "*subject matter*" of the SA, when that phrase is used in clause 10.1, is the settlement and the way forward which is agreed in the SA, not the project generally, or the various matters which happen to be mentioned in the recitals. As well as being (in my judgment) the more natural reading of the words of clause 10.1, there seem to me two sets of reasons why it is unlikely that the parties were intending to dispense with the PCA in the way suggested by C.

73. The first and most important is that (while it is not for me to make any final decision on the point), in my judgment, Mr Lavy has a strong argument that any

substantive issues about payment for the Go Forward Work are ultimately to be decided by reference to the payment terms of the PCA. By way of summary:

73.1. clause 3.3 provides that the Go Forward Work Payment is a "*a without prejudice payment on account of £550 per person per day*" (i.e. 50% of the daily rate of £1,100 for variation work identified in the SOW). The description of this payment as "*a without prejudice payment on account*" strongly suggests that there will be some further stage at which it will be determined how much (if anything) is **actually** due;

73.2. this fits with clause 3.8, which makes clear that payment of the Go Forward Work Payment is without prejudice to the parties' claims, which are expressly said to include "*in the case of [D], its claim for further payment in relation to the Go Forward Work and, in the case of [C], its claim for repayment of the Go Forward Work Payment*". That would suggest that, for example, C could seek to claim back the whole of that £550 per day paid on account, on the basis that, in fact, all of the Go Forward Work was covered by the original lump sum price;

73.3. clause 3.9 envisages this Go Forward Work Dispute being resolved by mediation, but it is obvious that there must be some objective criteria against which the parties' competing positions can be judged. Putting the point at its lowest, the parties must be taken to have contemplated the possibility that the mediation would be unsuccessful, and litigation would be required. I cannot presently see what other process there could be for resolving that dispute, other than going back to the contractual baseline and seeing what entitlement to payment (if any) D has under the PCA;

73.4. for the avoidance of doubt, this seems to me to be a different process from the resolution of disputes in relation to the Go Forward Work Payment, which is envisaged by clause 3.7. That is concerned only with a dispute of the much more limited kind defined by clause 3.6; namely a dispute about whether the claimed sum "*relates solely to time and effort spent by [D] in delivering the Go Forward Work and/or that it reasonably compares with the Effort Profile*". It may be that it was necessary because an issue about

payments on account under the SA would not otherwise be within the dispute escalation clause of the PCA. The hope was no doubt that using that process would enable swift resolution (after all the mechanism was itself intended as a swift fix).

74. If Mr Lavy is right about this, it necessarily follows that the PCA cannot be denuded of any legal effect, else this scheme would simply not work. His reading would mean that the parties envisaged the PCA continuing to operate, albeit in the background, as the baseline for the parties' substantive rights in relation to payment for the Go Forward Work.

75. My second set of reasons is that, in my judgment, it would be counterintuitive for the SA to cause the PCA to cease to have any legal effect, or at least that, if that was what the parties had wanted, one might have expected them to do it in a different way.

76. Mr Lavy submitted that this was obvious from a comparison of the SOW with Appendix 2 to the SA. He said that the parties needed the detail which was found in the SOW for a project of this kind. I found that point difficult to assess in the context of a summary judgment application, which might itself be said to be a reason why summary judgment was not appropriate.

77. However, there are examples which are striking even without getting into the detail of this project. As I have pointed out above, the PCA contains familiar terms about IP rights, about confidentiality, about bribery and corruption, and about corporate initiatives such as sustainable procurement. The SA does not repeat these, having only a more limited provision about confidentiality. Mr Pillai had no choice, when I put the point to him, but to confirm that it was his case that all of these useful provisions in the PCA were deprived of any contractual effect by the SA. No doubt it was open to the parties to dispense with all of these protections when entering into the SA. But why would they want to do so?

78. Mr Pillai made much of the fact that the SA does not say anywhere that the PCA will continue to bind the parties. I agree with him that the textual points made by Mr Lavy do not take matters very far, although it might just about be said that the use of the present tense when referring to the PCA in recital (A) of the SA is more

consistent with its survival than its extinction. But the absence of any express wording only actively assists C if one assumes that the default position is that the PCA will be extinguished. Given its role, if that whole agreement was being disposed of in its entirety, I would expect the parties to say something more specific. It would be a little surprising, in my judgment, if they were to leave that job to an entire agreement clause.

79. An illustration of this is C's case that certain counterclaims, albeit not included by the parties in Appendix 1 to the SA, as part of the definition of the Dispute which was being compromised, are nevertheless precluded by virtue of the entire agreement clause. To my mind, that would be a peculiar way for the parties to go about "settling" those counterclaims. If what the parties had intended to do was to capture any other possible arguments about entitlement to payment under the PCA, and settle all of them, I would expect them to define the "Dispute" sufficiently widely to ensure they were all caught by the release.

80. Having regard to this combination of the words used, the scheme of the SA more generally, and the inherent probabilities, I am satisfied that there is, at the very least, a respectable argument that the effect of the entire agreement clause is that, to the extent something has been agreed in the SA, that agreement supersedes and replaces anything in the PCA with which it is inconsistent. So, to give an example, to the extent that the description of the Go Forward Work in Appendix 2 to the SA is inconsistent with what is said in the SOW, the description in Appendix 2 now governs.

81. That possibility seems to me perfectly sensible and workable. Where the parties have agreed something in the SA, the entire agreement clause stops them from contending that the meaning or effect of their agreement in the SA is tempered or modified by some oral term or prior agreement. But if they have previously agreed something which is **not** covered by the SA, there is no inconsistency and it is not meaningful to refer to that separate agreement being "superseded" by the SA. Nor is there any reason for the prior agreement to be extinguished by it.

82. Underlying many of Mr Pillai's submissions about problematic inconsistencies seemed to me to be an assumption that there are only two possible options for the

PCA: either the whole of it survives untouched, or the whole of it is extinguished. But surely there is scope for a more nuanced result. The PCA can probably be seen as a bundle of previous agreements, promises, assurances, warranties etc., some of which are undoubtedly superseded and extinguished by the SA, but some of which are unaffected, because they are not agreements etc. relating to the subject matter of the SA. Deciding which is which, of course, is not a matter for me, but for the trial judge.

83. Indeed, I have consistently sought to express my views about these points of construction in a way which respects the fact that this is an application for summary judgment, not the hearing of a preliminary issue, and recognises that it will be open to the trial judge in due course to disagree with everything I have said. I have made clear that I do not accept C's submission on this application that it is clear beyond any argument that the PCA has been extinguished. My conclusion to that effect suffices to dispose of this limb of the application. But, for completeness, I will add that, even if I took the view that C had very much the better of the legal argument in this regard, I would hesitate before grasping the nettle and making a final decision on the meaning and effect of clause 10.1 of the SA. It seems to me that Mr Lavy is right to say that that issue of construction is tied too closely together with lots of other issues about the meaning and effect of the SA. If one of the parties had proposed a preliminary issue in this regard, it seems to me that the response would have been that the issue was thoroughly unsuitable for being singled out for early determination in that way. If anything, it was even less suitable for summary judgment.

"Delay" construction issue

84. I turn then to what the parties call the "delay" issue of construction.

85. Put very simply, C contended on this limb of the application that it is not open to D to rely upon delays allegedly caused to the Go Forward Work by unrealistic, incomplete or incorrect data or information provided by RMG, whether to defend C's allegation of repudiatory breach, or to found claims for additional sums. I use the past tense "contended" here, because it was my understanding that, by the time of his oral reply, Mr Pillai accepted that Mr Lavy had identified a properly

arguable basis for his reliance upon those alleged errors in the context of both the claims and the counterclaims. Mr Pillai's complaint, by that stage, was only that the arguments outlined by Mr Lavy did not feature in D's pleaded case.

86. That concession was, if I might say so, a sensible one and it enables me to take the substantive points (which I would usually expect to be the focus of a summary judgment application) more briskly. I will come back to the pleading point at the end.

C's case

87. Although it follows from what I have just said that Mr Pillai's position softened during the course of the hearing, it is sensible for me to outline where he started, Mr Lavy's answer to this part of the application, and my conclusion on the substantive points, if only by way of introduction to C's complaint about D's pleaded case.

88. C's initial position was that D's attempt to make C responsible for errors etc. in the data could be summarily rejected for a number of reasons.

89. First, under the SA, it was argued that C had very limited obligations:

89.1. clause 3.2 provided that: "*…[D] shall complete the Go Forward Work subject to the Dependencies*";

89.2. D's entitlement to be paid was governed by clauses 3.5 and 3.6 and hence to be determined by reference to whether the work "*reasonably compar[ed] with the Effort Profile*";

89.3. Appendix 2 identified the "*Dependencies*", for all of which RMG (not C) was said to be responsible. There is one reference to C, at stage 3 of Appendix 2, but C was only to "*support*" D to "*ensure that the NST solution is available to support data cleansing*".

89.4. otherwise, C's obligations under the SA with respect to the Go Forward Work only concerned payment. Responsibility for the Go Forward Work was shared between D and RMG.

90. I was puzzled by C's insistence that the fact that the Dependencies referred to steps for which RMG, rather than C, was responsible, meant that D could not rely upon their non-fulfilment. In the context of a contract between C and D, if it is agreed that the performance of work by D is dependent upon provision of something for which a third party is responsible, it would seem to me that D is entitled to rely upon the fact that that thing has not been provided when defending a complaint by C that the work has not yet been performed. For C to respond that the third party, not C, is identified as being responsible, is to miss the point. It is the fact that it is a dependency, not that the third party has been identified as responsible for it, which is important.

91. Perhaps recognising the force of this, in the course of his oral submissions, Mr Pillai developed a clever argument to the effect that, because D had started performing the optimiser tuning work which formed part of stage 5, it was no longer open to D to allege that any of the dependencies for earlier stages (such as in relation to the provision of the benchmark by RMG and data cleansing) had not been fulfilled. That was said to be the contractual effect of a dependency which made performance of the stage 5 work dependent on completion of stages 1-4.

92. In relation to D's reliance on some "factual matrix" evidence, C's position, in outline, was that the points made by D were all iterations on the same theme: namely, the fact that RMG had provided the data. C said that it did not follow from this that **C** would take responsibility for any delays caused by errors in RMG's data. I understood it to be accepted by C that (for the purposes of this application) I should take what is alleged by D about the factual matrix to be true, but averred that those facts made no difference to the construction of the agreements.

93. In relation to implied terms, C's submission was that:

    93.1. the proposed implied term came nowhere near satisfying the test of necessity. There could be a number of reasons why C would not be responsible for any issues with the data, including because D was collaborating directly with RMG, and because D was itself required to support data cleansing and the resolution of any issues and defects;

93.2. the SA (and the PCA insofar as relevant) both work without any implied term. D was protected under the SA because the completion of its obligations was subject to the Dependencies. In particular, D could have refused to validate and accept the large greenfield benchmark provided by RMG at Stage 3, before starting the tuning process at Stage 5;

93.3. the suggested term was opaque and incapable of clear expression, because it is not clear how the descriptions "unrealistic, incomplete or incorrect" are said to differ, or whether D considers them to overlap; and

93.4. the contracts are long, detailed and comprehensive agreements made between two parties with equal bargaining power and equivalent experience of the industry. If the contracts do not contain express protections or risk-allocations which D now wishes had been included, the position cannot be improved by relying on an implied term: the Court's function does not extend to rewriting the bargain.

D's case

94. D's primary answer to this was that C's approach was premised on a misunderstanding. D argued that it is clear from the SA that the parties agreed (a) that work would ultimately be charged on a 'time and materials' basis and further (b) that D was not under any absolute obligation to deliver within a specific timeframe.

95. Mr Lavy recognised that the shape of the legal analysis in this regard depended on whether the alleged errors in the data were being relied upon by way of defence, or to found a counterclaim for additional payment.

96. In relation to the former, in his oral submissions, Mr Lavy argued that D was only obliged to complete the Go Forward Work within a reasonable time. While it was right to say that a "Go Live" date was given in Appendix 2, this was expressed only as being part of a "*high level plan*", the detail of which, it was recognised, would be "*reviewed by the Parties on a weekly basis*". If he was right that this was only an obligation to complete within a reasonable time, it necessarily followed that it would be necessary for the Court to consider what time period was reasonable for D, which Mr Lavy described as a multi-factorial investigation. In

that context, he said, it would be open to D to prove that delays were caused by errors etc. in the data provided by RMG: i.e. to contend that the time taken was reasonable, given those circumstances.

97. Alternatively, he relied upon the dependencies, which he said were not fulfilled, because of the errors etc. in the data provided by RMG. He disagreed with Mr Pillai's suggestion that D's conduct (seeking to keep things moving forward) in commencing tuning of the optimiser (i.e. stage 5) had the effect of preventing D thereafter from relying upon the non-fulfilment of the dependencies contained in stages 1-4 of Appendix 2. He submitted that this was not what Appendix 2 provided, and that everything would depend on the facts: i.e. what D actually said and did.

98. If he needed to, he made clear that he also relied upon the assumptions contained in section 6 of the SOW to the PCA, which (as discussed above), he submitted had not been extinguished by the entire agreement clause in the SA. For example, he pointed out that the SOW says that "*realistic and complete data will be available on time*" (with the table allocating responsibility to C) and made clear that "*Failure to account for these assumptions during the project will result in an extension of the timeline, increased budget requirement, or could impact the availability of resources. This could lead to additional Change Request(s)*". He acknowledged that there might be questions to answer as to whether any or all of those assumptions were inconsistent with Appendix 2 to the SA, but he said that (if he was right on the first limb of the application) those were questions for another day.

99. Turning to D's entitlement to claim additional sums in respect of performance of the Go Forward Work because of errors in the data, Mr Lavy repeated that D's primary position as to the operation of clause 3 of the SA (as discussed in the previous section) was that this scheme preserved all arguments as to the parties' substantive entitlement to payment under the PCA. It followed that, if D was right, it was entitled to invoice for the Go Forward Work as "*Other activities*" (see section 7 of the SOW), which meant that D was to be paid on a T&M basis using a daily rate of £1,100. In that context, D could seek to prove that it had been required to expend additional time dealing with errors in the data for which it was

not responsible and/or it could rely upon the assumptions in section 6 of the SOW with the same result.

100. Even if C was right to say that D's only entitlement in relation to the Go Forward Work was the on account payment of £550 per day provided for in the SA, Mr Lavy pointed out that D was still entitled to be paid for the time that it actually spent on the Go Forward Work, provided that the time spent reasonably compared to the agreed effort profile. As to that last constraint, his position was that, if work ended up taking longer because of problems with data supplied by RMG, the time spent might still "*reasonably*" compare with the effort profile. After all, he argued, this effort profile was only ever a "*forecast of anticipated time and effort*" (see clause 3.4 of the SA). The errors would make the discrepancy reasonable.

101. In support of all of these submissions, D relied upon the factual matrix to explain why, it said, it is entirely understandable that C would bear the contractual risk of problems with this data. The data was held by RMG. D's workscope was dependent on RMG providing realistic data. It was C (and not D) that had a contractual relationship with RMG. D's case on the factual matrix was that the parties understood at the time of entering into the SA that RMG would be responsible for the content of its data, and that any errors in the data would likely cause delay to D's work.

102. With that in mind, D also relied upon the 'prevention principle'. That rule of construction is described as follows in *The Interpretation of Contracts* (8th Ed.) at paragraph 6.129: "*The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing*". D argued that it could not complete the Go Forward Work without realistic and complete data. Its case was that problems with the data meant that D's work was delayed. If that is right, D said, it followed that the SA could not be construed to mean that D was obliged to have completed its work in accordance with the estimated date in Appendix 2.

<u>My conclusion on the substantive issues</u>

103. It is probably sufficient for me to say that I am satisfied that the analysis put forward by Mr Lavy, as to the potential relevance of errors in the data to the claim

and to the counterclaim, was properly arguable. Indeed, as I have said, by the end of the hearing, Mr Pillai was not seriously contending to the contrary.

104. In relation to the defence to the allegation of repudiatory breach, for example, I struggled to follow C's argument that the Dependencies identified in Appendix 2 could not, in the context of a complaint by C about the time taken to perform the Go Forward Work, be relied upon by D, just because they were described as being RMG's responsibility. Mr Pillai's argument about the supposed contractual effect of D carrying out work on tuning of the optimiser, before data cleansing of the benchmark by RMG is complete, seems ambitious to say the least. It amounts to converting what must be intended as a protection for D (namely providing that D's obligation to perform stage 5 is dependent upon completion of stages 1-4) into a trip hazard for D. It is not easy to see what useful purpose that would serve, or why that part of Appendix 2 would fall to be read in that way. I agree with Mr Lavy that the issue as to whether the benchmark was accepted by D is more likely to be a question of fact.

105. In relation to D's counterclaims, I have already made clear that I consider it to be properly arguable that the terms about the Go Forward Work Payments in the SA are intended to put in place a "pro tem" arrangement, with the ultimate or substantive position depending on D's entitlement (or not) to these sums **pursuant to the PCA**. If that is right, it is obvious that errors in the data from RMG would (or at least might) be relevant.

106. I am doubtful whether any of this requires invocation of the so-called "prevention principle". D's arguments seem to me to have more to do with the inherent probabilities in relation to risk allocation than a case that C was "preventing" D from completing the work. But some might say the "prevention principle" is now really just to be understood as a convenient label for a type of scenario in which those inherent probabilities are clearly apparent. If it adds anything, it does seem to me that D's arguments as to the correct approach to risk allocation are here supported by the (assumed) factual matrix that: (a) there is a contractual relationship between C and RMG, but not D and RMG; and (b) it was apparent to

the parties at the time that the data to be provided by RMG was essential to the performance of D's work, such that errors could impact on D's time and effort.

107. Again, I am not asked to, and do not, make any final findings about any of this. It suffices for me to say that D's substantive arguments on this second limb of the application have a real prospect of success.

Pleading complaint

108. That leaves C's pleading point.

109. In essence, Mr Pillai complained that the way in which Mr Lavy now explained the contractual role of errors in the data provided by RMG was not the way in which the case had been pleaded. The particular focus of that complaint was paragraphs 34 and 35 of the Amended Defence and Counterclaim, which provided as follows:

> *"34. On a true interpretation of the Prime Contractor Agreement and the Settlement Agreement:*
>
> *34.1 if and insofar as 3DS was required to carry out additional work as a result of unrealistic, incomplete or incorrect data or information provided by RMG and/or Capgemini, that was work for which Capgemini was responsible and in relation to which Capgemini had to pay 3DS;*
>
> *34.2 if and insofar as delay was caused to the Project as a result of unrealistic, incomplete or incorrect data or information provided by RMG and/or Capgemini, that was delay for which Capgemini was responsible.*
>
> *35. Further and/or alternatively, the matters pleaded at paragraph 34 above were implied terms of the Prime Contractor Agreement and the Settlement Agreement, such terms being necessary for the business efficacy of those agreements and/or so obvious as to go without saying."*

110. For completeness, I should perhaps also pick out:

110.1. paragraph 52.1 in answer to C's allegation of breach:

> *"52.1 It is unclear what Capgemini alleges 3DS has failed to do. It is further unclear whether Capgemini alleges that 3DS was in breach by failing to comply by a specific date and, if so, what it is that Capgemini alleges should have been done and by what date."*

110.2. paragraphs 55.2B(3) and (4) (added by amendment):

> *"55.2B(3) Both the Prime Contractor Agreement and the Settlement Agreement provided for Capgemini to pay 3DS for work done on a 'time and materials' basis. If work took longer for any reason, including because of errors or inadequacies in the data or benchmarks provided by RMG, that was Capgemini's risk under the contracts.*

55.2[B] (4) There was no obligation to complete the Go Forward Work by any fixed date. Clause 3.4 of the Settlement Agreement provided that 3DS would provide a "forecast" of the "anticipated time and effort to be spent". The date of April 2018 (which was the estimated date for completion of the entire Project, not the Stage 5 work) was an estimate only. If work took longer for any reason, including because of errors or inadequacies in the data or benchmarks provided by RMG, then (as the parties understood and agreed) that estimated date would move."

111. Further, in its counterclaim, D has claimed for all of the time spent under clause 2.2 of the PCA (using the daily rate from section 7 of the SOW of £1,100), and also pursuant to the SA (using the daily rate of £550).

112. C makes a series of complaints about paragraphs 34 and 35 of the Amended Defence and Counterclaim. It points out that the phrase "*On a true interpretation of the Prime Contractor Agreement and the Settlement Agreement*" does not identify any particular words used in either agreement. Moreover, it says that the assertion that "*if and insofar as [D] was required to carry out additional work as a result of unrealistic, incomplete or incorrect data or information provided by RMG and/or [C], that was work for which [C] was responsible…*" bears little resemblance to the arguments outlined by Mr Lavy in his submissions on the second limb of this application.

113. Mr Pillai relied upon the recent decision of HHJ Cawson KC (sitting in the TCC) in Halsion v. St Thomas Street Development [2023] EWHC 2045 (TCC). Among a litany of complaints about the Amended Particulars of Claim (the APOC), it was said that the claimant had not properly explained its case as to the proper construction of the contract. The learned Judge commented (at [108]):

"It cannot, as I see it, be sufficient in a statement of case to plead all the various provisions of the document that might bear upon the question of construction, and to then simply set out a meaning sought to be extracted therefrom as paragraph 98 of the APOC seeks to do without identifying the specific wording that is sought to be construed. I consider that it must be incumbent upon the pleading party to identify the particular wording that is an issue so that the Court can then focus on the meaning thereof in its documentary, factual and commercial context…"

114. In that case, the whole of the APOC was struck out pursuant to CPR 3.4, albeit on the assumption that the claimant would make an application to amend and provide

a redrafted version, rather than on the basis that judgment would be entered disposing of the claim.

115. Mr Khoo, who dealt with this part of the argument on behalf of D, in accordance with the encouragement of the Commercial Court to find advocacy opportunities for juniors, submitted that Halsion was on any view an extreme case, with the complaint referred to above being just one of a long list of problems with the APOC. I accept that submission.

116. He submitted more generally that there was nothing wrong with the formulation "*On a true interpretation of the Prime Contractor Agreement and the Settlement Agreement*", nor with the absence of any detailed analysis in the Amended Defence and Counterclaim as to why errors in the data are relevant to the claim or the counterclaim, on the basis that the CPR requires only a concise statement of the facts relied upon, not submissions on the law.

117. That seems to me to misunderstand that rule. I respectfully concur with the view expressed by HHJ Cawson KC as set out above. It does seem to me that an averment that there is a term in a contract which has a particular meaning and effect will usually require identification of the specific words relied upon. It is no answer to say that it is only necessary to plead facts, and not law, because an averment about the "true interpretation" of a contract **is** pleading law. The problem with paragraph 34 of the Amended Defence and Counterclaim is not that it is pleading law; the problem is that it is not doing so in a helpful way.

118. More generally, there seems to me to be some force in C's complaint that Mr Lavy's analysis of the role of delay caused by problems with the data, as presented to the Court in answer to the second limb of the application, is not yet fully described in the Amended Defence and Counterclaim. However, I would not want to overstate this. Paragraphs 55.2B(3) and (4) might be said to outline D's primary position both on complaints about delay and on claiming additional sums on a T&M basis. Even paragraph 34 might be said to capture the essence of D's position about the contractual allocation of risk under both the PCA and the SA, even if it does so in such a condensed form as to be unhelpful.

119. I certainly do not consider that it would be appropriate to give summary judgment on any part of the claim or counterclaim, by reference to these complaints about the pleading, as Mr Pillai seemed at one point to be inviting me to do. That could only cause confusion, given that I have found that D's substantive position as to the contractual allocation of risk under the two agreements is properly arguable.

120. Nor am I minded to strike anything out at this stage. These minor problems with the Amended Defence and Counterclaim bear no resemblance to the many respects in which the claimant had chosen to test the patience of the Court in Halsion. Given what both Mr Lavy and Mr Khoo have said at the hearing about the willingness of D to address any concerns which the Court has about the Amended Defence and Counterclaim, I cannot see that there is any risk that my patience will be tested in the same way.

Disposal

121. At one stage, I was minded simply to dismiss the application, without prejudice to C's right to seek Further Information in respect of the Amended Defence and Counterclaim, if so advised. After all, seeking Further Information would have been the proper first step if C's concerns had really been about understanding the shape of D's case. But, on further reflection, I have decided that might just store up trouble for another day. Given my conclusions at paragraphs 117 and 118 above, I take the view that D ought to re-amend the Amended Defence and Counterclaim to make clear **why** it says that C is contractually responsible for errors in the data provided by RMG (including by identifying the specific contractual language relied upon). Having formed that view, it is more satisfactory for me to ensure that re-amendment is properly implemented, rather than hope that the parties can sort it out for themselves.

122. I may assist if I observe that it seems to me that, if D is relying upon specific Dependencies in the SA, or assumptions in the SOW, which D says were not fulfilled/ met, by way of defence to the allegation of repudiatory breach, D should identify the Dependencies and/or assumptions and explain the nature of the non-fulfilment. The same would apply if assumptions (or indeed Dependencies) are relied upon for the purpose of counterclaiming additional payment.

123. In an ideal world, my draft judgment having been shared with its legal team in the usual way, D would prepare a draft re-amendment and the parties would on that basis be able to agree consequential directions in time for when this judgment is formally handed down. If that is not possible, Counsel may want to give some thought to how the tidying up which I am proposing can best be achieved. If necessary, I will hear submissions about this, and any other consequential matter on which agreement cannot be reached.

124. For the avoidance of doubt, however, I should make clear that, subject only to that small point about tidying up the Amended Defence and Counterclaim, I will dismiss C's application for strike out and summary judgment, which I consider, for the reasons I have given, to have been wholly misconceived.