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Case No: HT-2019-000306 and HT-2020-000022

Neutral Citation Number: [2021] EWHC 2081 (TCC)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 27 July 2021

Before :
THE HONOURABLE MR JUSTICE FRASER

- -

Between :
STANDARD LIFE ASSURANCE LIMITED
Claimant

and –

(1) GLEEDS (UK) (a firm)
(2) BURO FOUR PROJECT SERVICES LIMITED
(3) SHEARER PROPERTY ASSOCIATES LIMITED
(4) BUILDING DESIGN PARTNERSHIP LIMITED
(5) CARTER JONAS LLP
(6) CUNDALL JOHNSTON & PARTNERS LIMITED
Defendants

Jonathan Selby QC and Callum Monro Morrison
(instructed by **Mayer Brown LLP**) for the Claimant
Vince Moran QC and Harriet di Francesco
(instructed by Vinson & Elkins LLP) for the Fourth Defendant
Michael Wheater (instructed by **BLM Law LLP**) for the Fifth Defendant
Piers Stansfield QC and Rachael O'Hagan
(instructed by **CMS Cameron McKenna Nabarro Olswang LLP**)
for the Sixth Defendant
The First Defendant (represented by Clyde & Co LLP), the Second Defendant
(represented by DAC Beachcroft LLP) and the Third Defendant
(represented by Kennedys Law LLP) attended the hearing
but did not make submissions
Hearing Date: 22 July 2021

Mr Justice Fraser:

1. In these proceedings the Claimant seeks permission to amend its Particulars of Claim. It is not an entirely straightforward application, in the sense that it follows an earlier attack on the Claimant's Particulars of Claim, in which some of the Defendants sought to strike out the claim (or more accurately, large parts of it). That attack was unsuccessful, but led both to a judgment and an order against the Claimant. As part of the consequential matters, a detailed order was made by Kerr J about what the Claimant had to do in terms of pleading its case, particularly so far as quantum is concerned. Some explanation is therefore needed in order to put this application into its proper context. I explained at the hearing itself what my decision was on the application, but said I would provide more detailed reasons in order to explain. These are those reasons.

2. The action is a factually complex one. The proceedings concern a mixed-use retail and residential development at Parkway, Newbury, West Berkshire, which was designed and constructed for the Claimant, which is a well known pension fund and investment company. Such developments often form part of the investment portfolio of such companies. The Defendants were each involved, in a variety of different roles, in the design and construction of that development.

3. The basis of the claim as a whole arises in the following way. The main contractor for the development was Costain Limited ("Costain" hereafter). The contract price was £77.4 million, though a very sizeable portion of that, £39.9 million, comprised provisional sums. The Claimant's case is that it paid £146.4 million to settle Costain's final account in June 2014. This is almost double the original contact price. The final account amount included £50.3 million which was made up as follows: £28.4 million in respect of variations to the building contract, of which £25.8 million arose from contract administrator instructions (CAIs) and £2.6 million from confirmations of verbal instructions (CVIs); and £21.9 million in respect of contractor's loss and expense arising from delay and disruption. There were substantial time and cost overruns on the project, which led to a very sizeable loss and expense claim by Costain against the Claimant. The Claimant settled that claim and has instituted proceedings against the current defendants.

4. The Claimant advances its claim in these proceedings in the following way. It makes a claim against the First, Second and Third Defendants in connection with the way that the building contract with Costain was procured. This claim is approximately £20 million. This part of the claim is usefully referred to by the parties as Part A. This application does not concern Part A or the Part A Defendants, which is why these parties attended to observe, but did not actively participate in, this application to amend.

5. The next part of the claim is called Part B, and concerns breaches of duty on the part of the Fourth, Fifth and Sixth Defendants (respectively, BDP, SGA (Sutton Griffin Architects, the relevant predecessor of the Fifth Defendant Carter Jonas LLP, who acquired its obligations) and Cundall). These three defendants comprised the Design Team for the project. The size of this claim is about £25.1 million, with an alternative claim of about £22.8 million. The first claim against the Part B Defendants is called

the Primary Claim, and the latter the Alternative Claim. The difference between the two is the Primary Claim relies upon extrapolation, and the Alternative Claim does not.

6. The third part of the claim concerns the Second Defendant only, and is regarding an agreement that was concluded with the well-known retailer Marks & Spencer plc in January 2008. It relates to land which was subject to a compulsory purchase order, and approximately £11.5 million is claimed. This part of the claim is called Part C, and does not concern the other defendants. Part C is not relevant on the Claimant's application to amend its Particulars of Claim.

7. The essence of the complaint against the Claimant, in the earlier attack to which I have already referred, was that much of the quantum of its £38.1 million claim for damages in the Part B claim, which are for alleged professional negligence, had been calculated by extrapolation from an analysis of a relatively small part of their work (what I will refer to as "the Initial Sample"). It was said by the Part B Defendants that extrapolation was impermissible. These defendants maintained in those applications that the Claimant had failed to plead a case against them supporting any award of damages, in respect of all but £12.9 million of the £38.1 million claimed. The use of the Initial Sample as a method was challenged.

8. The Part B Defendants argued that the claim for the balance of £25.2 million was an abuse of process, had no reasonable prospect of success and was unsupported by a pleading disclosing a reasonable cause of action. They therefore submitted that the relevant part of the Part B claim should be struck out or, alternatively, summary judgment should be given in favour of those defendants on their different defences.

9. There were therefore three applications made in respect of Part B which were each to strike out or dismiss parts of that claim. These applications were issued on 31 July 2020 by each of BDP, SGA and Cundall, all of the Part B Defendants. They were heard together by Kerr J on 11 and 12 November 2020. The Claimant contended that its plea of negligence against the Part B Defendants was good in law and fact; and that the extrapolation method used to calculate its losses was valid and permissible. It also submitted that it would be disproportionate and absurd to require it to plead and prove its case separately, in respect of each and every individual component of the claim. It maintained that the Part B Defendants knew the case they had to meet, and that it was permitted to quantify its claim for loss and expense by advancing what is called a global claim.

10. On 15 December 2020 Kerr J handed down a careful reserved judgment on the applications. This can be found at [2020] EWHC 3419 (TCC). Those applications had been fought, however, not in respect of the original Particulars of Claim, but against a proposed Amended Particulars of Claim, in which (one assumes) the Claimant had accepted or taken on board at least some of the criticisms made of its pleading, and proposed amendments to deal with those criticisms. That proposed Amended Particulars of Claim had been produced a little time before the hearing in November 2020. Kerr J found against the Part B Defendants and did not strike out part of the proposed Amended Particulars of Claim, or give summary judgment to the applicants. His detailed reasons are given in the comprehensive 150 paragraph judgment, and that should be consulted by anyone who wishes anything more than the cursory summary

that I provide here. There are two aspects of that judgment (or its consequences) that need to be identified here.

11. Firstly, he ordered a greater sampling exercise be done by the Claimant than that contained in the Initial Sample. Secondly, he appreciated that a fresh pleading would be required from the Claimant. He explained at [147] in outline terms how this should be done. He sensibly decided a fresh start was required, so ordered the pleading to be prepared afresh, and without the usual deletions and underlined additions adopted for amendments. Given the scale of changes required, such an approach was entirely understandable and any reader of the new Particulars of Claim can only be relieved that this was the approach he required. He also allowed the parties free rein to seek to agree a timetable, both for the pleading steps that were required, and also for the other defendants (those to Part A and Part C) to consider how these changes would impact upon their pleadings. He did, however, identify the way in which the new claim should deal with variations.

12. Thereafter, two orders were produced. One was by Kerr J of 17 January 2021, that left many of the dates to be agreed. The next was by Jefford J dated 19 February 2021, which had appended to it another version of the order by Kerr J at Appendix 1, but with dates included. The trial is set to take place in October 2023, with a trial estimate of 12 weeks. It is therefore a substantial case even by the standards of this specialist court. 12 weeks and seven parties demonstrates the complexity of the case, more in terms of scale and scope, rather than (at this early stage) any particular jurisprudential complexity.

13. Finally by way of overview, the Court of Appeal granted permission to appeal on the decision by Kerr J concerning extrapolation. That appeal is to be held at the beginning of next term, namely 12 and 13 October 2021.

14. The Claimant realised that it required permission to amend in respect of the fresh document, which I shall refer to as the new Particulars of Claim. It is the third Particulars of Claim that the Claimant has advanced. Only some of the proposed amendments are opposed by the Part B Defendants. By way of yet further background, it must be appreciated that the new Particulars of Claim (as with the two earlier versions) is a very substantial document, and has a vast number of schedules. However, both the approach to the new pleading, and certainly the parties' approach to interlocutory strife, is almost a relic of an earlier, pre-CPR age. So is the approach of some of the Part B Defendants to attempting to understand the case. Mr Selby QC for the Claimant submits, essentially, that these defendants are being as difficult as they can, and looking for matters about which to complain. There is some force in that, in my judgment. The days of complex litigation being a war of attrition, and campaigns being undertaken where parties seek to impose unreasonable costs burdens on their opponents are over, and have been for some considerable time. That message does not seem to have reached all the parties to this application. Parties generally must realise that the court will not lightly be persuaded that defendants "do not know" or "do not understand" the case they have to meet. This difficulty is not improved where it appears that groups of defendants are acting in concert.

15. It is, of course, a requirement of any pleading that it sets out a concise statement of the facts so that any defendant knows the case it has to meet. This is most helpfully and clearly set out by Coulson J (as he then was) in ***Pantelli Associates Ltd v***

Corporate City Developments No. 2 Ltd [2010] EWHC 3189 (TCC) at [11]. Both that paragraph and the subsequent one in that case merit reproduction here, because that case also involved a claim in professional negligence.

"[11] CPR 16.4(1)(a) requires that a particulars of claim must include "a concise statement of the facts on which the claimant relies". Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated. Those are 'the facts' relied on in support of the allegation, and are required in order that proper witness statements (and if necessary an expert's report) can be obtained by both sides which address the specific allegations made.

[12] It is plain that, on any view, the amendments contained in paragraph 16 of the Amended Defence and Counterclaim do not begin to meet the test in r.16.4(1)(a). It is impossible for anyone to work out from those generalised and generic allegations what particular matters were being alleged against Pantelli. It would be impossible for a solicitor to take a witness statement from those involved in providing the services in question that could hope to meet these points, because no details have been provided for a prospective witness to accept or dispute. Accordingly, paragraph 16 is not a proper pleading of a case of professional negligence."

16. However, knowing the case one has to meet does require the defendant properly to accept the wording of, or at least try and understand, a pleading. Sometimes defendants will obstinately refuse to understand, or will claim a lack of comprehension that does not have any real justification. Here, that is, to my mind, an observation that can be laid at the door of BDP, the Fourth Defendant, who does not appear much minded even to attempt to understand the case against it.

17. The list of objections lodged by the Part B Defendants to the proposed amendments do, regrettably, have some of that flavour to them. To describe this as sabre rattling by the Part B Defendants over-states any glamour involved. Nor has the Claimant exactly helped itself in this respect; for example, it had been ordered to serve a proposed amended pleading by 2 July 2021, but did not fully do so, and served the actual pleading on 9 July 2021. Only some of the schedules were served on 2 July, with the remaining schedules and the pleading itself one week later. When a date has already been set for the hearing of the application, that approach is not entirely helpful. However, and fortunately, by the time of the hearing of the application itself, the Part B Defendants had narrowed down their objections to those that were reasonably arguable. I shall deal with each in turn.

18. It should not be concluded, from those opening remarks above, that I am of the view that none of the points raised by the defendants have any merit. As will be seen, I do accept them, but only in one specific area. However, I do not accept them because they demonstrate that the amendments have no real prospect of success, or that the claim is not realistic, or is fanciful. Those terms are used in the cases such as ***Swain v Hillman*** [2001] 1 All ER 91, ***ED&F Man Liquid Products v Patel*** [2003] EWCA Civ 472, and ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch). These different passages, and the approach to amendments required under the rules, have

been recently usefully collated in a number of cases, such as ***SPI North Ltd v Swiss Port International (UK) Ltd*** [2019] EWHC 2004 (Ch) at [5] per Mr Hochhauser QC sitting as a Deputy Judge of the High Court.

19. Another most useful and persuasive first-instance case is ***Pearce v East and North Hertfordshire NHS Trust*** [2020] EWHC 1504 (QB) when Lambert J set out the approach to the exercise of discretion, and the act that the overriding objective is of central importance to the consideration under CPR Part 17.3.

20. In my judgment there is an important distinction to be made between proposed amendments in cases such as ***Pantelli***, where there are generalised and generic allegations and the defendant could neither understand nor properly meet them; and some of the disputed proposed amendments in this case, where further detail may be required in due course, whether by way of Further Information or otherwise. The latter, in my judgment, is a matter of case management. The former are points of real importance that justify refusal of the amendments. Just because, say, a paragraph refers to Delay Notices generally, but does not specify which specific ones, does not mean that the Claimant cannot or should not obtain permission for that amendment. All it means is that the Defendant needs to ask (if it really does not know,) or the Claimant needs to specify, which particular Delay Notices are included. Here, Mr Selby QC was left in the uncomfortable position that he had to explain to the court what was really meant in some respects in certain paragraphs or sentences in the new Particulars of Claim. That is hardly ideal. However, it does not of itself mean that a defendant is justified in opposing permission to amend as a matter of principle.

21. Equally, where the court has already ordered what must be done, it is difficult for a party (here, the Claimant) who does not comply with the Order in terms, to persuade the court either that it has so complied (when it clearly has not) or that it does not need to.

22. Against that introductory landscape, I will now consider the objections by each of the Part B Defendants in turn.

Objections by the Fourth Defendant

23. The Fourth Defendant, BDP, was the lead architect, and also the designer for two parts of the development, namely Block F and the Basement. It also became the designer of the other blocks (Blocks A to E, and G) from July 2010.

24. Its objections fall into the following categories.
    1. Quantum
    2. Extrapolation
    3. Inadequate Record-Keeping
    4. Loss of a Chance

Quantum

25. So far as quantum is concerned, this concerns proposed amendments to each of Schedules 1 to 9. Kerr J ordered the Claimant to amend its claim to plead the additional cost of each alleged variation. Originally, the Claimant had sought the full cost of each variation. What is required is clearly set out in paragraph 11.2.5 of the Order which says that, "if a claim is pursued", then the Claimant must in respect of

"each variation individually identified" set out "the amount of additional cost to the Claimant claimed". This paragraph only applied to some of the schedules.

26. However, notwithstanding this clear order, which in my judgment could not be more clear on this point, namely that for each individual variation the amount of additional cost which is claimed must be specified, all that the Claimant has done is to state the following in the relevant column, namely Column G of the different voluminous schedules: "subject of expert evidence in due course."

27. This goes further than an argument about whether a proposed amendment is sufficiently particularised or not. It goes to a failure to comply with an existing order of the court. It is not an acceptable way for the Claimant to proceed, or to purport to comply with a court order.

28. I am not persuaded that the Claimant is entitled to do anything at all in this respect so far as these proposed amendments are concerned, other than to comply with the Order already made which so clearly states what is required. In my judgment, it is simply impermissible to ignore the detailed paragraphs and state that quantum will be provided in the expert evidence in due course. That does not comply with the Order. I therefore accept the submissions of BDP (who is joined in this respect by the other two respondents to the application) on this.

29. Mr Selby sought to justify this approach on a very wide variety of grounds. He submitted that the Order applied only to some, but not all, of the schedules. He submitted that the Claimant *had* complied with the Order. He submitted that the Primary Claim sought the full cost of each CVI or CAI (which it does) and that the additional cost really meant the full cost. If so, that is not what the different columns of the schedules themselves suggest in terms of how they are currently pleaded, which use the terms "additional cost" and other similar terms. He submitted that the Claimant had done the best it could, that no further facts were available to it, and that documents were required from the defendants (including Gleeds) and these had not been provided. On that latter point, no disclosure applications have been made. He even went so far as to say it was impossible to do more.

30. I am not remotely persuaded by any of those submissions. In the absence of a witness statement saying so, I doubt the task is an impossible one. The Claimant itself accepts its experts will do this, because it pleads already that these details will be provided, only not yet. That is not good enough. Paragraph 35.10.1 of the White Book states the following:

"An expert's report does not serve the same purpose as a statement of case. Its function 'is to provide opinion evidence, agreeing or disagreeing with allegations which are contained in the claimant's case', and not to advance a party's case….."

That is undoubtedly correct, but in very complicated quantum scenarios sometimes expert input is required to calculate exact quantum. But whether it is or not, in a case such as this one the quantum associated with the different variations has to be identified. It cannot be left hanging in the wind, waiting for exchange of evidence many months, if not longer, later.

31. In any event, these details, or particulars, have been ordered to be provided already, by Kerr J. I accept that this applied only to some of the schedules, and not to schedules 1, 2, 3 and 4. However, the Claimant needs to focus on each of the sub-paragraphs of 11.2.5 of the Order. None of it is conceptually challenging. If an expert is needed to provide input on quantum, then that input needs to be obtained. In so far as the Order does not relate to all the schedules dealing with variations, CVIs and CAIs, then the same details are required (in other words, from now on, the same particulars are required for schedules 1 to 4 too). What was ordered are conventional elements of any pleading. They are the particulars of causation and quantum. They need not be voluminous, and indeed, ought not to be. What is required is a concise statement of the facts upon which the Claimant relies. The Claimant may consider it is justified in attempting to avoid pleading these details now (which as I have explained, has already been ordered by Kerr J for some of the schedules in any event) but I disagree. Until it is done, the amendments dealing with the variations which are opposed do not have permission from the court.

32. I would finally add just this. One variation was concentrated upon as an example in the hearing. It was CAI 3586. It looks to me as though, if Mr Selby were right and the whole of the amount is claimed, the heading in Column D cannot be right. It also looks as though the text in columns E and G has been drafted by someone without proper consideration of what is required in a pleading. Repeating narrative from a document is not pleading the necessary concise facts. The drafting of this part of the schedule has been done entirely ignoring the requirements of paragraph 11.2.5 of the existing Order by Kerr J. Further, how can the costs of historical movement and structural instability (the subject of this CAI) be claimed as they currently are, and how can these costs be said to have been caused by a breach? I would add that this example was one chosen by Mr Selby, it is not an outlier in terms of being unusually sparse in terms of pleading detail on causation and quantum. It needs to be done in the way already ordered by the court, and it needs to be pleaded correctly. This is not to impose a counsel of perfection upon the Claimant, But certain basic details in terms of pleading are entirely missing.

Extrapolation

33. Extrapolation is the subject of the forthcoming appeal which is being heard in October. As such, it is neither necessary nor desirable to deal with those proposed amendments at this stage and all the parties are agreed that it ought not to be dealt with now. I refer to it for completeness only.

Inadequate record keeping

34. Inadequate record keeping is dealt with in the new Particulars of Claim between paragraphs 124 to 127. Each of these paragraphs explains what it is said that BDP did not do, which it ought to have done. So for example, in paragraph 124 it is pleaded that basic information which would be expected on an instruction or amended drawing prepared by a competent Contract Administrator was not included by BDP, and the paragraph then adds "such as (a) whether an instruction was for expenditure against a provisional sum item, (b) the nature of and reason for the instruction, (c) whether an instruction was issued to rectify defects in the contractor's work (and, if so, what defects) or to authorise a change for the contractor's convenience or to address the contractor's poor progress, or (d) whether any instruction constituted an addition and/or omission or merely clarification….."

35. The following paragraphs include similar allegations relating to failure to keep schedules of CAIs and CVIs; failure by BDP to keep overarching or summary records of the same; and a failure to keep a schedule referencing CAIs and/or CVIs to provisional sums. Other failures on the part of BDP are also alleged in respect of Gleeds, such as failures to liaise with Gleeds; failures to have specific discussions from time to time with Gleeds; and failures to take necessary steps to manage the budget and the available provisional sums are also alleged. Failures properly to analyse, explain and record assessments of the Delay Notices issued by Costain are also alleged, as are failures to provide sufficient information to Gleeds (that latter element being part of an alternative case in paragraph 127).

36. The complaints by BDP in respect of these paragraphs in the pleading are reminiscent of what I would describe as old fashioned pre-CPR obstinacy or nit-picking. These tactics historically would be deployed when a party mounted a wide-ranging attack on a pleading, usually using requests for further and better particulars. Two examples will suffice. BDP states that the Claimant fails to particularise "what BDP should have done with respect to Gleeds and when". Thus it is said that not only does the Claimant have to allege that BDP failed to have sufficient specific discussions with Gleeds on certain topics (which it plainly has pleaded in the new Particulars of Claim), but the Claimant ought to identify *when* those discussions ought to have taken place. One need only state this objection to realise how misplaced it is. It is also said that the Claimant has failed to state "the counterfactual, ie what [the Claimant] says would have happened had BDP performed the duties alleged to have been breached".

37. Given the terms of the appointment dealing with cost control are said, in the pleading, to have clearly not been complied with such that BDP was in breach of them, and also that the loss claimed by the Claimant is said to have been caused by those breaches, the complaint that "the counterfactual" is not pleaded is rather difficult to follow, in my judgment.

38. BDP has no sensible basis for opposing the proposed amendments to paragraphs 124 to 127. The only point which has any merit (and only limited merit at that) was that raised by Mr Moran QC for BDP in relation to Delay Notices. Paragraph 126 relates to an allegation that BDP failed properly to analyse, explain and record the basis upon which it assessed Costain's Delay Notices. There are 280 Delay Notices, but the Claimant only relies upon 15 which are all set out in Schedule 10. However, that specification of which Delay Notices is or are intended to be referred to in paragraph 126, though clear from the pleading if one reads a multiplicity of paragraphs, is not clear from paragraph 126 itself. It could be read as referring to them all. That can be readily corrected by the insertion of a few words within paragraph 126 making it clear that it is the 15 Delay Notices within Schedule 10 that are referred to by the Claimant in this respect. This is not difficult, can be accomplished readily, and will aid clarity. Provided that one small change is done, permission to amend is granted for all those paragraphs opposed by BDP under the category of "inadequate record keeping".

Loss of a chance

39. The basis of the Claimant's claim in this respect is as follows. It is set out in paragraph 129 of the proposed amendment in the new Particulars of Claim. It is said, firstly (in paragraph 128) that breaches in relation to BDP's poor record keeping have

hindered the Claimant in certain respects. Paragraph 129 goes on to aver that if absence of records have had any adverse effect on the Claimant's claims, in the sense they are lost or diminished, then this – in the alternative – will have been caused "as a result of BDP's breaches of duty in relation to poor record-keeping and [the Claimant] will seek damages from BDP in respect of such lost or otherwise diminished opportunities, such damages to be assessed at trial by reference to the value of the claims lost or otherwise diminished….". In other words, loss of a chance is relied upon as an alternative case.

40. BDP maintains that this is a loss of a chance claim of a type that is not well founded either in law or in fact. My attention is drawn to a number of cases on loss of a chance, such as ***Allied Maples v Simmons & Simmons*** [1995] 1 WLR 1602; ***Perry v Raleys Solicitors*** [2020] AC 352; ***Chaplin v Hicks*** [1911] 2 KB 786; ***Kitchen v Royal Air Force Association*** [1958] 1 WLR 563; and ***Harrison v Bloom Camillin*** [2001] PNLR 7. Mr Moran advanced a number of points which he relied upon to demonstrate that the loss of a chance claim was misplaced in law, and also in fact, and to justify his assertion that the necessary threshold of likely success to permit the amendment had not been reached by the Claimant.

41. Having carefully considered Mr Moran's legal submissions, and the written submissions of Mr Selby to consider both sides of this jurisprudential divide (I did not require oral submissions from him), I am satisfied that the legal and factual basis of the proposed amendments in paragraphs 128 and 129 are sufficiently arguable that they have the necessary prospects of success and these amendments ought to be allowed. That is not to say that they will definitely succeed. The Claimant is in the foothills of the expedition to the summit where damages would be recovered so far as loss of a chance is concerned. However, to adopt the phrase used by Mr Selby for the Claimant, this part of the claim is "sufficiently viable" at this stage to permit the amendment. I do not, by using that phrase, change the test for allowing an amendment as it is set out in the rules and the cases. In my judgment, it meets the test of being more than merely arguable and it has a realistic prospect of success.

42. However, loss of a chance is a complex area of the law. Cases on, say, solicitors' negligence, do not readily translate across to the nature of a claim such as this one. If a professional adviser on a major project such as this is required to keep certain records, fails to do so, and is in breach of his or her obligations thereby, undoubtedly some factual consequences would follow. The effect of that failure may have an impact on the chances of the employer being able to deal with subsequent financial matters in a particular way – whether by reason of the contractor's final account, or in litigation – and in my judgment it is reasonably arguable that damages will be recoverable under loss of a chance, and that argument has a sufficiently realistic prospect of success for the purposes of allowing the proposed amendments. In this case there are some complications not present in the other loss of a chance cases, which are on entirely different facts. Many loss of a chance cases concern solicitors' negligence. Lord Briggs in the most recent such case, ***Perry v Raleys Solicitors*** [2020] UKSC 5, at [15] explains that "the assessment of causation and loss in cases of professional negligence has given rise to difficult conceptual and practical issues which have troubled the courts on many occasions". In my judgment, and exercising the discretion that I have to exercise when considering an opposed application to amend, the just and proportionate course is to allow this amendment.

Objections by the Fifth Defendant

43. The Fifth Defendant acquired the obligations of SGA, who was initially the designer for a number of the blocks on the development. It had a direct appointment with the Claimant but appears to have been treated as a sub-consultant to the lead architect, BDP. It had its appointment terminated in factual circumstances that are hotly contested.

44. It objects to the amendments to the schedules in terms of quantum, on the same basis and for the reasons that I have explained above in respect of BDP. For the same reasons that I have set out in the section of the judgment dealing with this, namely [25] to [47] above, I accept those criticisms of the way that the Claimant intends to put its quantum case. It is not good enough to ignore the detailed paragraph of the existing Order. Kerr J was very clear in that order. Additional expense must be pleaded per variation. This task is going to have to be completed at some stage in any event. Putting it off to "in due course" is not acceptable, given the terms of the Order.

45. I would also add this. It will be of obvious benefit to all parties for this to be done in the pleading. This is a sizeable case, but in terms of money claimed, it is in about the lower part of the mid-range of cases with which the specialist lists in the Business and Property Courts deal. Judicial resources are finite, and legal and expert costs very sizeable. What follows is hypothetical, but if a particular CVI or CAI is only worth in a claim against the Part B Defendants of (say) only £5,000, it justifies, and is likely to attract, far less attention in the case than if it is worth £500,000 or £5 million. In order to comply with the Order already made, the Claimant needs to provide that information, and in any case, ought to want to know that same information now, in any event. It will enable the correct focus to be applied on all sides. It has already been ordered to be done by the court, and unless it is done, the Clamant will not be given permission to amend those parts of its claim. I have explained this already.

46. Given the length of time that the Claimant has been given to organise its case in this respect, the detail in the Order, and the failure to comply with it, arguably this could be a suitable case for an unless order. However, for the moment, I consider the correct course is to allow the Claimant to attempt to remedy its case in this respect without imposing an unless order. Further, it is not clear to me that an unless order would be necessary conceptually. I invited Mr Selby to be realistic in terms of how long the Claimant would need to accomplish what is required. He asked until 8 October 2021 which was not opposed by the Part B Defendants, and is the period of time he will be granted in the order on this application.

47. For the avoidance of doubt, I do not require the Claimant to particularise the amounts to the nth degree. Approximate figures are justified, and the use of the word "approximate" is deliberate. It means that the Claimant will be able to advance a more detailed case in due course in its expert evidence that may provide a more precise figure than the one required to comply with paragraph 11.2.5 of the Order of Kerr J. By "approximate", and in the circumstances of this case, the figures need to be provided to the nearest £5,000. This is reasonable and proportionate. If the parties disagree with this, they can use the liberty to apply provisions. But I consider figures to the nearest £5,000 is the correct approach at this stage.

Objections by the Sixth Defendant

48. The Sixth Defendant, Cundall, is a multi-disciplinary engineering consultancy, which was engaged to provide certain civil and structural engineering services, and also mechanical and electrical services, for the development.

49. It has three areas of objection, or to put it more accurately, two areas of objection and one consequential upon the first.

50. Firstly, it raises the same points in respect of quantum as those raised by both BDP and for SGA. My conclusion on that point is the same, as one would expect. The additional costs per each CVI and CAI must be provided, as ordered by Kerr J.

51. There is one refinement sought by Mr Stansfield QC for Cundall, and that is that if, or where, the Claimant advances a figure for a CVI or CAI that is the whole cost advanced against the Part B Defendants, this means that the Claimant's case must be that the entirety of the work the subject of the CVI or CAI in question must be caused by a breach of duty on the part of the Part B Defendants. As a matter of logic, that is correct. In any event, the amendment must clearly identify where the entirety of the value of the CVI or CAI is the amount claimed; currently, that is simply not done at all. This is obvious from the terms of the Order of Kerr J but has not been done in the proposed amendments currently before the court.

52. It is in any event already covered in sub-paragraphs (b) and (c) of paragraph 11.2.5 of the Order. It has therefore been ordered already, but it could be said to fall into a different category because Mr Stansfield's refinement of it makes it clear what is required if the "additional cost" is the whole of the value of that CVI or CAI.

53. Secondly, Cundall has the same position in relation to the extrapolation claim as BDP and SGA, namely this should be left until after the Court of Appeal has decided the appeal against the judgment of Kerr J. This is due to be heard in October as I have explained. All parties are agreed on this and that is the course I have already indicated I shall adopt.

54. The third and consequential matter is this. Cundall wished to have copies of all the documents referred to in the proposed amended pleading. Two points arise on this. The Claimant said it will provide these; indeed, it can have no sensible basis for any other position, given the clear terms of the CPR and Part 31.14(1)(a). However, the Claimant's skeleton states that these "will be provided on 16 July 2021, as [the Claimant] said they would be". They were not provided by that date, nor by the date that Cundall's skeleton argument was lodged either. This approach to compliance with dates needs to be vastly improved. The documents had been provided by the time of the hearing, but there is no need to leave such matters to the eleventh hour in this way. They should have been provided on 16 July 2021, which was the date originally agreed by the Claimant. Given they have been provided, no order is necessary. But arguments about providing documents and complying with dates demonstrates a lack of co-operation.

55. There are two final matters that need to be dealt with. The first is costs. These were dealt with at the hearing itself, after the result was known. The eventual orders were uncontroversial – both SGA and Cundall received their costs, with payments on

account of detailed assessment, and the Claimant and BDP bore their own costs. I am of the view that the Claimant had been partially successful against BDP; BDP had been partially successful against the Claimant; and both SGA and Cundall were wholly successful. However, even after the substantive elements of the application were dealt with, some of the parties sought to continue their excessively adversarial approach by arguing about very modest amount of costs. This is entirely counter-productive.

56. The second matter might just be a wider view on the same point. Co-operation by parties is expressly required by the CPR. There is nothing to be gained by endless interlocutory strife, and the only consequence is vast expense and difficulty. In a case of this type and scale, it is possible for different parties to attempt to engage in litigation warfare. This is particularly so if groups of defendants decide to act in concert with one another. With pleadings of this nature, there is often the temptation to attempt to inflict "death by schedule" upon the others involved. All these temptations must be resisted. One year has passed since the Part B Defendants issued their strike out applications. The parties have had two substantial hearings and this is the second reserved judgment, yet the Claimant has not even finalised its Particulars of Claim. Goodness knows how many millions have been expended in costs during that year. The summary cost schedules just for the Part B Defendants just for this application alone were over £130,000. This is not how modern specialist litigation should be conducted.

57. The judges of the TCC in particular, but all specialist lists share similar expertise, have considerable experience in case management, especially of legally and factually complex cases. However, such experience can only take matters so far. The parties to this case must engage constructively. Such co-operation seems, to date, to have been lacking. Failure to comply with existing orders of the court must end. Deadlines must be kept. Unless this is done, legal costs will dramatically escalate on all sides, and parties also run the risk that their own costs, associated with large areas of the case, may simply be disallowed.