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Case No: HT-2023-000010

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

The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Date: 8 August 2023

Before :

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

HALSION LIMITED
- and -
ST THOMAS STREET DEVELOPMENT
LIMITED

Claimant

Defendant

Lucy Garrett KC and Ben Sareen (instructed by **Fieldfisher LLP**) for the **Defendant**
David Streatfeild-James KC and Hugh Saunders (instructed by **Mills & Reeve LLP**) for the
Claimant

Hearing date: 18 July 2023

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30 am on Tuesday 8 August 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

HHJ CAWSON KC :

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INTRODUCTION

1. Under the terms of a Trade Contract dated 30 July 2018 and made between the Defendant, St Thomas Street Development Limited (“**STSD**”) (1), and the Claimant, Halsion Ltd (“**Halsion**”) (2) (“**the Trade Contract**”), Halsion was engaged by STSD as the M&E contractor in respect of the construction by STSD of a 27 story residential tower adjacent to the Shard known as “*Shard Place*”. Although initially envisaged as a design and build project with Mace as main contractor, STSD ultimately procured the project by construction management with Mace engaged as construction manager, and with Chapman BDSP (“**Chapman**”) engaged as M&E engineer for the project.

2. It is common ground that a life safety systems generator (“**the Generator**”) supplied under the Trade Contract was not adequately sized to meet the performance requirements in paragraph 1.10.1 of Volume 2B of the Specification within the Trade Contract, which provided that: “*The standby generator shall be sized to provide the power for all Life Safety Services when running at 80% full load but as a minimum to be rated at 500KVA at stand-by and designed to avoid failure during start-up for inrush currents.*”
3. The crux of the dispute between the parties is as to whether, under the terms of the Trade Contract:
 - i) Halsion was responsible for procuring and installing a life safety systems generator (“**Generator**”) that met requirements set out in a design and specification prepared by Chapman and was not therefore responsible for sizing the Generator (as contended by Halsion); or
 - ii) Alternatively, Halsion was obliged to provide a generator of sufficient capacity to meet the life safety power requirements of the building, whatever they might have been on the basis that the obligation to size the Generator rested with Halsion, with the result that Halsion was in breach of contract because the Generator was not correctly sized (as contended by STSD).
4. There have been two relevant adjudications relating to this dispute (“**Adjudication 4**” and “**Adjudication 5**”) in which, amongst other things, STSD sought damages for breach of contract of £2,617,159.49. Ultimately, the adjudicator in Adjudication 5 decided that Halsion was in breach of contract, the adjudicator rejecting arguments to the contrary advanced by Halsion based on the construction of the Trade Contract, alternatively to the effect that the Trade Contract ought to be rectified or that an estoppel by convention arose with regard to the terms of the Trade Contract. The adjudicator awarded STSD damages assessed at £1,934,732.11, which Halsion has paid.
5. It is trite that pursuant to s.108(1) of the Housing Grants Construction and Regeneration Act 1996 and/or paragraph 23 of Part I of the Scheme for Construction Contracts, SI 1998 No 649, the decision of an adjudicator is binding until the dispute is finally determined by legal proceedings, arbitration, or agreement. However, where it is determined by a court that an adjudicator’s decision involved the payment of more than was actually due in accordance with the parties’ substantive legal rights, then the adjudicator’s decision ceases, retrospectively, to bind – see *Aspect Contracts (Asbestos) Ltd v Higgins Construction Ltd* [2015] UKSC 38, [2015] 1 WLR 2961, per Lord Mance JSC at [24]. In these circumstances an overpayment is, retrospectively, established, and repayment is required either pursuant to an implied contractual obligation or by virtue of an independent restitutionary obligation – see *Aspect Contracts* (supra), per Lord Mance JSC at [23].
6. In the present proceedings, Halsion alleges that the adjudicator in Adjudication 5 got it wrong, and that on a proper construction of the relevant provisions of the Trade Contract, alternatively pursuant to the terms of the Trade Contract as rectified, alternatively in consequence of an estoppel by convention concerning the terms of the Trade Contract, Halsion had no obligation to size the Generator, and so it was not in breach of contract. Consequently, as a matter of substantive rights, Halsion had no

obligation to pay damages to STSD, and is therefore entitled to recover the £1,934,732.11 paid to STSD.

7. In seeking to recover this sum, Halsion further seeks declarations as to the proper construction of the Trade Contract, alternatively rectification of the Trade Contract, alternatively a declaration that STSD is estopped by convention with regard to the effect of the terms of the Trade Contract. In its original form, Halsion's Particulars of Claim further sought an order that the decisions in Adjudications 4 and 5 "*be set aside*". However, recently produced Amended Particulars of Claim now seek, instead, a declaration that the decisions of Adjudications 4 and 5 are "*of no effect*".
8. The application that I am presently concerned with is an application dated 8 February 2023 ("**the Application**") whereby STSD seeks:

"(1) Summary judgment pursuant to CPR r.24.2 on the claims for (i) declarations (ii) rectification and (iii) set aside of two adjudicators' decisions; (2) The remainder of the Claimant's Particulars of Claim dated 16 January 2023 to be struck out pursuant to CPR 3.4(2). Alternatively, the whole of the Particulars of Claim to be struck out."
9. Following the issue of proceedings on 16 January 2023, STSD's Solicitors, Fieldfisher, wrote to Halsion's Solicitors, Mills & Reeve, on 26 January 2023 setting out the respects in which it was contended that the Particulars of Claim did not comply with the Civil Procedure Rules ("**CPR**"), and were thus liable to be struck out. This letter invited Halsion to re-plead the Particulars of Claim. Halsion declined to do so, hence the issue of the Application, which Halsion resists.
10. As mentioned, draft Amended Particulars of Claim ("**the APOC**") have been produced proposing a number of comparatively minor amendments that do not, on STSD's case, resolve the difficulties that are said to exist with Halsion's pleaded case. It is common ground that the Application should be considered by reference to the APOC.
11. The Application is supported by the witness statements of STSD's Solicitor, Samantha Jayne Thompson of Fieldfisher, dated 8 February 2023 and 30 June 2023. In response, Halsion relies upon the witness statement of its Solicitor, Neil Davies of Mills & Reeve, dated 18 May 2023.
12. Lucy Garrett KC and Ben Sareen appeared on behalf of STSD, and David Streatfeild-James KC and Hugh Saunders appeared on behalf of Halsion. I am grateful to them all for their helpful written and oral submissions.

BASES FOR THE APPLICATION

Introduction

13. The Application is brought pursuant to CPR 3.4(2)(a), (b) and (c). It is thus STSD's case that the APOC disclose no reasonable grounds for bringing the claim, amount to an abuse of the court's process, and fail to comply with a rule, practice direction or court order.
14. The challenge to the APOC is advanced on two bases, namely that:

- i) The APOC fails to comply with CPR 16.4(1)(a), if not also paragraph 1.3 of CPR PD16, and with various provisions of the October 2022 TCC Guide (“**the TCC Guide**”), and does so to such a serious extent that the only appropriate course is for the Particulars of Claim to be struck out and for Halsion to be required to re-plead its case in so far as it is capable of being re-pleaded; and
 - ii) The way in which Halsion’s case as to each of the proper construction of the Trade Contract, rectification and estoppel by convention has been pleaded is such as to fail to advance reasonable grounds for pursuing the claim based thereupon, if not also such as to be abusive.
15. The Application thus requires a consideration of the way that the APOC as a whole has been pleaded, as well as a consideration of the way in which Halsion’s case as to each of the proper construction of the Trade Contract, rectification and estoppel by convention claims respectively have been pleaded.
16. In addition, STSD maintains its contention that it is entitled to summary judgment pursuant to CPR Part 24 in respect of Halsion’s claims for declaratory relief regarding the true construction of the Trade Contract and for declaratory relief with regard to the effect of Adjudications 4 and 5.

Failure to comply with a rule, practice direction or court order

17. CPR 16.4(1)(a) provides that a statement of case must include a “*concise statement of the facts on which the claimant relies*”.
18. Paragraph 1.3 of PD16 provides that if a statement of case “*exceptionally*” exceeds 25 pages, it must include an appropriate short summary at the start.
19. The TCC Guide acknowledges, at paragraph 2 of Appendix I thereto, that there is no general rule or maximum length for statements of case in the TCC, because some TCC cases by their nature require more detailed particulars than other cases. However, paragraph 2 goes on to provide that, where practicable, schedules and appendices should be used to ensure that: “*excessive detail does not detract from an understanding of the essential facts necessary for the purpose of formulating a complete cause of action set out in the body of the pleading.*”
20. Paragraph 1 of Appendix I to the TCC Guide identifies a number of “*principles*” that apply to all statements of case, including: “(a) *The document must be as concise as possible*”; “(c) *The document must deal with the case on a point by point basis to allow for a point by point response. In particular, each separate cause of action, or defence, should be pleaded separately wherever possible*”; “(d) *So far as possible each paragraph or sub-paragraph should contain no more than one allegation*”; “(e) *Special care should be taken to set out... only those factual allegations which are necessary to establish the cause of action... being advanced, to enable the other party to know what case it has to meet. Evidence should not be included, and a general factual narrative is neither required nor helpful (and is likely to contravene paragraphs (f), (h) and/or (k) below)*”; “(k) *Where it is necessary to give lengthy particulars of an allegation, this should be set out in schedules or appendices*”; “(m) *Where it is necessary for the proper understanding of the statement of case to include substantial parts of a lengthy*

document the passages in question should be set out in a schedule rather than in the body of the statement of case.”

21. It is submitted on behalf of STSD that there is no inconsistency between CPR Part 16 and the TCC Guide, both requiring pleadings to be as concise, focussed and thus as short as practically possible. Whilst the TCC Guide is not a practice direction, it is submitted on behalf of STSD that it accurately reflects the comments in the authorities as to what is required under CPR 16.4, and by PD 16, and thus can be taken into account when considering the application of CPR 3.4(2).
22. As to comments in the authorities, STSD relies upon the following:
- i) Clarke LJ in *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609 (a 65 page pleading) at [76]: “... *Particulars of Claim must include a concise statement of the facts on which the claimant relies: CPR 16.4(1)(a). But they need not, and should not, contain the evidence by which they are to be proved or the opposing party’s pleadings or admissions...*” and [78]: “*Pleadings are intended to help the court and the parties. In recent years practitioners have, on occasion, lost sight of that aim. Documents are drafted of interminable length and diffuseness and conspicuous lack of precision...*”
 - ii) Leggatt J (as he then was) in *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) (a 94-page pleading):
 - “1. Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial.
 2. As commercial transactions have become more complex and more heavily documented (including electronically), adhering to the basic rules of pleading has become both increasingly difficult and all the more important...”
 - iii) Males J (as he then was) in *Grove Park Properties v Royal Bank of Scotland* [2018] EWHC 3521 (Comm) relied at [24] on paragraph [1] in *Tchenguiz* and added: “*It is wrong in principle to plead matters which do not support or relate to any of the remedies sought... To do so is likely to complicate or confuse the fair conduct of proceedings.*”
 - iv) Snowden LJ in *In the Matter of Kings Solutions Group Limited* [2021] EWCA Civ 1943 at [62] (a “*very lengthy document running to 69 pages*” at [35]), referred with approval to all the above authorities.
23. Having regard to the above considerations, STSD makes the following observations regarding the APOC:

- i) The first 28 pages including in particular paragraphs 12 to 71 are said to consist of a lengthy recitation of evidence and factual narrative;
 - ii) It is observed that the first mention of the terms of the Trade Contract is at paragraph 72 on page 29. Various terms are recited up to page 39, but no reference is made to them again in the remainder of the pleading.
 - iii) Paragraphs 91 to 92 on pages 40 and 41 describe Adjudications 4 and 5 in some detail when, so STSD submits, they are wholly irrelevant.
 - iv) The pleading of Halsion's actual claim as to the construction of the Trade Contract starts at paragraph 93 on page 41, under the heading "*The proper construction of the Trade Contract.*" It runs to paragraph 99 and when referring to relevant objective facts at paragraph 94, refers back to "*the matters set out in paragraphs 12 to 68 above.*"
 - v) Halsion's rectification case runs from paragraph 100 on page 44 to paragraph 108 on page 47. It is based on common mistake or in the alternative unilateral mistake and in both cases refers back to the matters pleaded in paragraphs 12 to 67 (see paragraphs 100(c) and 103 of the APOC).
 - vi) Halsion's estoppel by convention case runs from paragraph 109 on page 48 to paragraph 111 on page 50. This case relies on "*paragraphs 12 to 67 and/or paragraphs 68 to 71*" (see paragraph 109 of the APOC).
24. As to non-compliance, STSD submits that the APOC does not comply with any of the principles stated in the relevant provisions of CPR Part 16, the authorities or the TCC Guide, the particular concern being paragraphs 12 to 71 of the APOC. Ms Garrett and Mr Sareen have produced an Appendix 1 to their Skeleton Argument that sets out the specific grounds of complaint by reference to the numbered paragraphs of the APOC. Ms Garrett and Mr Sareen submit that "*particularly egregious*" examples include:
- i) What they maintain is unnecessary recitation of the wording of the RIBA Outline of Work and BSRIA Guide at paragraphs 14 to 16 (covering 3 pages).
 - ii) What they maintain is an enormously protracted factual narrative, including very extensive and wholly unnecessary pleading of evidence, dealing with "*The negotiations between the parties*" at paragraphs 22 to 68 (covering 14 pages). As to this section of the APOC:
 - a) They submit that this narrative also includes recitation of facts that are of no possible relevance to Halsion's causes of action, including in particular at paragraphs 22 – 23, 29 – 34, 35, 39, 41 and 44 dealing with matters such as a description of "*mid-bid*" meetings held and Tender Addenda issued (paragraph 35 covering an entire page and what are said to be irrelevant descriptions of the exchange of early versions of the Design Responsibility Matrix ("**DRM**") (see paragraph 41 of the APOC).
 - b) They submit that the same section of the APOC also mixes up the factual matters which are or may be relevant to Halsion's different causes of

action contrary to paragraph 1(c) of Appendix I to the TCC Guide. They submit that the entire section on pre-contract negotiations cannot be relevant to Halsion's case as to the proper construction of the Trade Contract for the reasons considered below, and they say that there are multiple paragraphs that cannot possibly be relevant to Halsion's rectification and estoppel cases for the reasons referred to below.

- c) STSD submits that this section also includes multiple paragraphs which consist solely of submissions/rhetoric as identified in their Appendix 1.
 - d) STSD points to the fact that the effect of the inclusion of this lengthy and protracted factual narrative is that one does not reach the first pleading of a contractual term until paragraph 72 on page 29. It is submitted that this is extraordinary for a claim in which the claimant's primary case is said to be based simply on the wording of the contract.
- iii) It is not in dispute that a key plank of Halsion's case relates to the DRM incorporated into the Trade Contract. Halsion's pleading of the history of the negotiation of and the ultimately agreed wording of the DRM which was incorporated into the Trade Contract at Rev 8 is at paragraphs 43 to 67 (covering 7 pages). STSD submits that this section of the pleading is also replete with the unnecessary pleading of evidence (multiple email exchanges and the contents of documents are set out at length) and submissions/rhetoric as to the import of the factual narrative set out (for example at paragraphs 47, 56 and 59).
25. STSD says that it is not necessary for Halsion to plead out the contents of documents in order to plead the facts on which it relies to establish its case and that, in any event, recitation thereof should be in schedules and not the main body of the pleading. Because it is not, so it is submitted, the APOC is confused and confusing for the reader.
26. STSD submits that the failures to comply with the relevant provisions of CPR Part 16 and the TCC Guide are not technical points. Ms Garrett and Mr Sareen submit that the purpose thereof is to ensure that there is a clear statement of a party's case which is capable of defining the issues (including defining the scope of disclosure, factual witness evidence and expert evidence) and which can function as an agenda for the trial. Thus, pleadings which do not comply are liable to increase costs for both parties, and consume a disproportionate amount of the Court's time, and in addition to engaging CPR 3.4(2)(c), amount to an abuse of process pursuant to CPR 3.4(2)(b).
27. As to the approach to be taken by the Court in a case such as the present, Ms Garrett and Mr Sareen refer to the recent decision of Constable J (sitting in the TCC) in *Resource Recovery Solutions v Derbyshire County Council* [2023] EWHC 708, a decision also relied upon by Halsion. In *Resource Recovery* (supra) at [75], Constable J, accepted that the facts of *Tchenguiz* (supra) were "extreme", but made clear that the general statements at paragraphs 1-5 in that case set out important principles which should be followed, and that the powers available to the Court were both clear and wide. At [76], he went on to say:
- "It is, however, also important to note that in applications such as this, the Court must ultimately take a proportionate and practical view. It is very likely that any pleading, particularly viewed through the eyes of the opposing

party, may contain what Akenhead J [in *Charter UK Ltd v Nationwide Building Society* [2009] EWHC 1002 (TCC)], describes as ‘infelicities’. A pleading may well stray at times onto the wrong side of the important Guidelines set out in the TCC Guide and other equivalent documents. That is not to be encouraged, but in reality it may happen in complex litigation. There will plainly be occasions where the ‘infelicities’ aggregate to a level which is clearly, and objectively, unacceptable. This will almost certainly be the case where the aggregate effect is to impair the ability of the pleading, or significant parts of it, to serve any useful purpose, or where essential elements (such as a cause of action) are missing. It will also be the case if the pleading is embarrassing or vexatious. Where essential elements are missing, or where the pleading is embarrassing or vexatious, the need for the matter to be cured is obvious and immediate. Where the complaint is that there is immaterial, irrelevant or unnecessary verbiage in a pleading, or that evidence has been pleaded rather than facts, the precise point at which it is necessary and proportionate for the Court to require offending elements to be struck out is more difficult to define. As Akenhead J said, mere infelicities in pleadings will not usually justify striking out. Whilst unnecessary and irrelevant material is in breach of the Guidelines and plainly unhelpful, it is also right that the general administration of justice is not advanced by parties combing the other sides’ pleadings for transgressions which do not in fact materially impact a parties’ ability to understand the case they have to meet or the Court’s ability to manage the case effectively.”

28. It is STSD’s case that the present case involves significantly more than mere “*infelicities*”, and that the whole construct of the APOC involves a wholesale failure to comply with the principles stated in the CPR, the TCC Guide and the authorities with the result that one has in the APOC a document that does not provide a clear statement of Halsion’s case to enable the issues to be properly defined, and presents Halsion’s case in a confused and confusing manner such that unless the defects are cured, insofar as capable of being cured, the APOC is liable to result in unnecessary and disproportionate costs for both parties, and frustrate the effective case management of the present claim. On this basis, so it is submitted, the Particulars of Claim as a whole should be struck out.
29. STSD points to the fact that the APOC is, in large part, a cut-and-paste from a Response submitted by Halsion in respect of Adjudication 5, a document prepared to perform a very different function than a statement of case in litigation in the TCC.

No reasonable grounds for bringing the claim/abuse of process

30. It is necessary to consider in turn STSD’s criticisms of the way that Halsion pleads its case with regard to the proper construction of the Trade Contract, rectification and estoppel by convention respectively.

Proper construction of the Trade Contract

31. Halsion’s case as to the proper construction of the Trade Contract is pleaded in paragraphs 93 to 99 of the APOC.

32. Paragraph 93 pleads as follows:

“93. As pleaded above, the proper construction of the Trade Contract requires consideration of:

- (a) the wording contained in the documents of which it is comprised (or evidenced by), as set out above;
- (b) the objective facts known to both parties which, in STSD’s case, it either knew itself or is taken to have known on the basis that such facts were known by its agent, Mace (a major international contractor and contract manager, highly-experienced in the construction of significant buildings and MEP design and installation for such projects);
- (c) the circumstances which led to the execution of the Trade Contract, to identify the purpose of the Trade Contract so as to construe the language used (both in the Contract’s components and as a whole) in the light of that purpose; and
- (d) the parties’ common intention as at the date of entry into the Trade Contract.”

33. STSD makes the following criticisms of Halsion’s pleaded case as to the proper construction of the Trade Contract:

- i) Firstly, whilst paragraph 98 sets out how the Trade Contract ought to be construed by reference to a number of negative propositions, including that Halsion was not responsible for the sizing of the Generator, no case is advanced so as to identify the particular words actually used in Trade Contract, including the incorporated DRM, whose meaning is said to support the negative propositions contended for. In short, it is said that one is forced to go back to the extensive recitation of the terms of the Trade Contract in paragraphs 74 to 84 (covering some eight pages) and make an informed guess.
- ii) Secondly, it is submitted that Halsion, by paragraph 93(c), as further developed in paragraph 95, impermissibly relies upon the negotiations between the parties leading to the conclusion of the Trade Contract in support of Halsion’s case as to the proper construction of the Trade Contract, and in particular in support of the proposition that Halsion was not responsible for the sizing of any plant, including the Generator. Indeed, STSD submits that, as pleaded, Halsion’s case as to the true construction of the Trade Contract is dependent on its case as to the pre-contract negotiations, thus providing, in itself, a basis for striking out Halsion’s case as to the proper construction of the Trade Contract as a whole.
- iii) Thirdly, whilst Halsion permissibly seeks to rely upon the relevant objective facts known to both parties including the three specific matters identified in paragraph 94, it does so “*by reason of the matters set out in paragraphs 12 to 68 above*”, without identifying what specific matters in paragraphs 12 to 68 are relied upon.
- iv) Fourthly, in paragraph 93(d), as further expanded upon in paragraph 97, Halsion relies on “*the parties’ common intention as at the date of entry into the Trade*

Contract”, when it is trite that the subjective intentions of the parties can form no part of the exercise of construing a contractual document, if that is what Halsion is here seeking to rely upon.

34. On the basis of the above, STSD submits that even apart from the general complaints with regard to the failure to comply with the relevant provisions of CPR Part 16 and the TCC Guide, Halsion’s case as to the construction of the Trade Contract requires to be struck out in any event.
35. As to reliance on pre-contract communications and negotiations, there is an issue between the parties as to whether the reliance thereupon by Halsion in Sub-paragraph 93(c) and paragraph 95 of the APOC is permissible as an aid to construction. As to this, Halsion says that the language of sub-paragraph 93(3) follows the language used by Cardozo J in *Utica City National Bank v Gunn*, 222 NY 204 (1918), referred to with apparent approval by the Court of Appeal in *Merthyr (South Wales) Limited v. Merthyr Tydfil County BC* [2019] EWCA Civ 526 at [53], per Leggatt LJ, namely: “*by considering the circumstances which led to the execution of the contract, to identify the purpose of the transaction and to construe the language used in the light of that purpose.*”
36. STSD, however, refers to the fact that Leggatt LJ goes on in *Merthyr* (supra) at [54] to say that:

“What is not permissible, as the decision of the House of Lords in [*Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101] confirms, is to seek to rely on evidence of what was said during the course of precontractual negotiations for the purpose of drawing inferences about what the contract should be understood to mean. It is also clear from the *Chartbrook* case that it is not only statements reflecting one party’s intentions or aspirations which are excluded for this purpose but also communications which are capable of showing that the parties reached a consensus on a particular point or used words in an agreed sense.”
37. In *Chartbook* at [41], Lord Hoffmann had said that:

“The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it.”
38. STSD submits that the applicable principle is that documents/statements forming part of pre-contract negotiations may be looked at to ascertain objectively the “*genesis and aim*” of the contract as a whole but not:
 - i) For the purpose of interpreting specific provisions – see *Merthyr* (supra) at [50] to [55]; *Elmfield Road Ltd v Trillium* [2016] EWHC 3122 (Ch) at [48] to [53]; *NHS Commissioning Board v Vasant* [2019] EWCA Civ 1245 at [28] and *Schofield v Smith* [2022] EWCA Civ 824 at [22-28] and [38]);

- ii) In relation to the parties' subjective intentions or objectives: *Schofield* (supra) at [22] and [26].
39. In addition, STSD also refers to *Falconera Shipping Co v Arcadia Energy Pte* [2012] EWHC 3678 (Comm), where Eder J, at [29], "*strongly deprecated*" attempts to introduce evidence of what parties say or do in the course of negotiations for the purpose of drawing inferences about what the contract means.
40. STSD submits that, impermissibly, Halsion's pleaded case is that the pre-contract negotiations set out in paragraphs 22 to 67 of the APOC should be used to draw inferences about (a) what the Trade Contract means, and (b) what a particular part of the Trade Contract (namely the DRM) means. Reference is made in paragraph 36 of STSD's Skeleton Argument to the fact that paragraph 95 of the APOC referred to: "*the circumstances which led to the execution of the Trade Contract and the purpose of the Trade Contract and its constituent documents (in particular the DRM) in light of the above included*". STSD suggests that "*in light of the above*" must be a reference to paragraphs 12 to 68 of the APOC, including the pre-contract negotiations, some aspects of which are then summarised in sub-paragraphs 95(a) to (e) of the APOC.
41. So far as the "*common intention of the parties*" sought to be used by Halsion as an aid to construction is concerned, paragraph 97 of the APOC pleads as follows:
- "97. It was the common intention of the parties, as at the date that the Conditions were signed, that in respect of the Works where the DRM categorised Chapman's design responsibility as "P" and Halsion's as "E1", and the "*RIBS Workstage Delivery*" as "4" (or including "4"), and specifically in respect of the Generator:
- (a) The design of the Works (save in relation to the CDP elements) was completed to RIBA Work Stage/BSRIA Stage 4.
 - (b) Halsion would only be responsible for carrying out the RIBA Work Stage/BSRIA Stage 5 design (unless Halsion changed elements of the Work Stage 4 design that had been provided to it).
 - (c) Halsion was not responsible for:
 - (i) The Work Stage 4 design produced by Chapman (unless Halsion changed elements of that design); or
 - (ii) The sizing of any plant (including the Generator), where Halsion was to be (or had been) provided with a Work Stage 4 design.
 - (iii) Validating or otherwise checking the Work Stage 4 design provided to it (save where it had specifically agreed to: Halsion had offered to spot-check 10% of Chapman's cable calculations in return for an additional fee of £15,000).

(d) In the event that the Work Stage 4 design produced by Chapman proved to be inadequate or deficient, Halsion would be entitled to a written instruction varying the Trade Contract in respect of any additional work that was required.”

42. In so far as Halsion seeks, by paragraph 97, to place reliance on the subjective (common) intentions of the parties, then it is STSD’s case that while such matters may be admissible for the purposes of a claim in rectification, they cannot assist in construing the terms of the Trade Contract – see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913. On this basis the common intention pleaded in paragraph 97 could only be relevant to the extent that it reflects the meaning of the Trade Contract properly construed with the benefit of admissible materials.

Rectification of the Trade Contract

43. Halsion seeks rectification on the grounds of both common and unilateral mistake. STSD’s essential case is that the facts pleaded are insufficient to make out a cause of action.

44. So far as common mistake is concerned, there had initially been an objection by STSD to sub-paragraph 101(c) of the APOC which had sought rectification by: “*amending the Trade Contract in such terms as the Court may decide common intention at the date when they entered into the Trade Contract.*” However, it has been confirmed on behalf of Halsion that this wording is simply to cover the situation that the Court concludes that a different form of wording is appropriate to that suggested by sub-paragraphs 101(a) and (b). On this basis, the specific objection to sub-paragraph 101(c) is no longer pursued.

45. So far as rectification is sought regarding the definition of category “EI” of the DRM by sub-paragraph 101(b) of the APOC, STSD takes the point that there is, it says, an inconsistency between relying upon the agreement reached as to the terms of the DRM in support of the claim for rectification on the one hand, and, on the other hand seeking rectification of the wording of the DRM on the basis that, as drafted, it does not reflect the parties’ common intention.

46. It is to be noted that the principal rectification sought by paragraph 101(a) of the APOC is in respect of paragraph 1.10.1 of the specification within the Trade Contract at Volume 2B - Electrical Services. This currently reads as referred to in paragraph 2 above. Rectification is sought so that it reads as follows:

“In the event that Halsion changes the Stage 4 design prepared by Chapman, the standby generator shall be sized [by Halsion] to provide the power for all Life Safety Services when running at 80% full load but as a minimum be rated at 500KVA at stand-by and designed to avoid failure during start-up for excessive inrush currents.”

47. The proposed additional wording, which I have shown underlined above, seeks to make clear that Halsion only had an obligation regarding the sizing of the Generator if it changed the Stage 4 design for which Chapman was responsible, which it did not do.

48. Paragraph 100 of the APOC pleads that if the Trade Contract is not to be construed as contended by Halsion, then Halsion is entitled to relief because:
- “(a) By mistake the wording does not reflect the parties’ common intention (as pleaded at paragraph 97 above) as to their respective obligations for the responsibility for Work Stage 4 design and the sizing of plant.
 - (b) There was an outward expression of accord as to that common intention.
 - (c) The accord was continuing as of the date on which Halsion signed of the Trade Contract Conditions (for the reasons set out in paragraphs 12 to 67 above).”
49. It is, as I understand it, common ground between the parties that the requirements for a successful claim in rectification are: (a) a mistake that does not reflect the parties’ common intention; (b) some outward expression of accord in relation to that common intention; and (c) the continuation of the common intention up to the time that the relevant contract is entered into – see *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2020] Ch 365.
50. STSD’s complaint is that sub-paragraph 100(b) of the APOC pleads no factual case as to the accord regarding the common intention that is alleged to have been given outward expression. Further, whilst sub-paragraph 100(c) pleads that the accord was continuing on the date when Halsion entered into the Trade Contract, it merely pleads that this was for “*the reasons set out in paragraphs 12 to 67 above*”. Whilst it may be possible to extract from paragraphs 12 to 67 of the APOC facts that demonstrate an accord, its outward expression, and the continuation of the common intention, STSD submits that those facts are not identified, and that paragraphs 12 to 67 deal with many other matters that do not go to this issue.
51. STSD accepts that this is something that could be cured by amendment, but STSD submits that apart from being in breach of CPR Part 16 and the TCC Guide, as it stands, and in the absence of a re-pleaded case, the claim to rectification on the grounds of common mistake ought to be struck out.
52. A similar complaint is made in respect of the claim to rectification on the grounds of unilateral mistake, which is founded on the premise that whilst Halsion was mistaken as to the meaning of the words used, and with regard to the allocation of responsibility between the parties for the design and sizing of the Generator under the Trade Contract on its proper construction, STSD was not, and that STSD knew both of Halsion’s true intention and that Halsion was operating under a mistake – see paragraph 102 of the APOC.
53. Paragraph 103 pleads that such STSD’s knowledge was either actual knowledge, or consisted in STSD “*either wilfully shutting its eyes to the obvious, or wilfully and recklessly failing to make such enquiries as an honest (or reasonable) and reasonable counterparty in STSD’s position would make.*” Paragraph 103 then goes on to plead that this is “*to be inferred from the matters pleaded in paragraphs 12 to 67 above*”. Whilst three “*particular*” matters are then set out in sub-paragraphs 103(a) to (c), only

sub-paragraph 103(c) refers to specific paragraphs within paragraphs 12 to 67, and otherwise the factual basis for the allegation is not, so it is submitted, identified.

54. Further, there is, it is submitted, the same inconsistency point as between the reliance on the wording of the DRM on the one hand, and the attempt to rectify it on the other hand.
55. Thus, again, apart from the alleged failures to comply with CPR Part 16 and the TCC Guide, it is STSD's case that the APOC fails to disclose the factual basis of a properly maintainable case for rectification on the grounds of unilateral mistake.

Estoppel by convention

56. Similar problems are said to arise in respect of the case of estoppel by convention.
57. Paragraph 109 of the APOC begins by pleading that:

“In the further alternative, by reason of the matters set out in paragraphs 12 to 67 and/or paragraphs 68 to 71 above, an estoppel by convention arose, there being a common assumption or understanding between the parties as to their respective obligations for the Work Stage 4 design and sizing of plant in the terms pleaded at paragraph 97 above. This assumption or understanding was made and shared by both parties, alternatively made by Halsion and known about and acquiesced in by STSD, as evidenced by, *inter alia*.”
58. Paragraph 109 goes on to then plead six matters relied upon, but in general terms, without reference to the specific factual matters that had been pleaded in paragraphs 12 to 71 of the APOC, e.g. sub-paragraph 109 (b) refers to: “*the exchanges between Halston and Mace after the ITT, in which Halsion's intention in this regard was clearly and repeatedly communicated to Mace*”. However, the specific exchanges are not identified. STSD complains that:
 - i) Many of the matters pleaded in paragraphs 12 to 71 can have no possible relevance to or bearing on an alleged convention.
 - ii) Halsion's reliance on 28 pages of factual narrative as constituting the convention does not enable it to understand the case that it has to meet.
 - iii) It also fails “*wholesale*” to comply with the TCC Guide requirement that only the facts relevant to a cause of action should be pleaded, and it is not, on any view, a concise statement of facts.
59. By reference to sub-paragraph 109(d) and (e) of the APOC, STSD further complains that there is a similar inconsistency as in relation to the rectification case.
60. Thus, again, apart from the alleged failures to comply with CPR Part 16 and the TCC Guide, it is STSD's case that the APOC fails to disclose the factual basis of a properly maintainable case of estoppel by convention.

Declarations

61. STSD further objects to Halsion’s claims for a declaration as to the true construction of the Trade Contract as sought by paragraph 99 of the APOC, read together with paragraph 98 thereof, and a declaration that the decisions in Adjudications 4 and 5 are of no effect as sought by paragraph (4) of the prayer to the APOC (Halsion having originally sought an order that the decisions be set aside).
62. STSD’s essential point is that the Court ought only to make declarations where they serve some useful purpose. It is argued that Halsion’s claim is, in reality, to recover the monies that it was required to pay pursuant to the decision in Adjudication 5. If the Trade Contract is to be construed as Halsion contends, alternatively if it takes effect as rectified as contended for by Halsion, or alternatively if STSD is bound by the estoppel by convention contended for by Halsion, then, as a matter of substantive law, Halsion will be entitled to recover its money, and, so it is argued, there is no useful purpose in granting any declaration as to the meaning of the Trade Contract, or to declare that Adjudications 4 and 5 are of no effect because the decision of the adjudicator on the Adjudications does not affect the Court’s ability to give effect to Halsion’s substantive rights by ordering the repayment of the money.
63. STSD goes further and submits that it is inappropriate of Halsion to plead the detail of the Adjudications, and that all that needed to have been pleaded was the effect of the decision in Adjudication 5, and that for the Court have to consider the detail of the Adjudications, and consider the grant of declaratory relief as the effect thereof, would be in an irrelevant waste of time.
64. On this basis, STSD seek summary judgment on the claims for declaratory relief, alternatively an order that the claims be struck out.
65. In support of the contention that the Court ought only to grant declaratory relief where it would serve a useful purpose to do so, STSD relies upon:
 - i) The summary of the relevant principles in *Rolls Royce plc v. Unite the Union* [2009] EWCA Civ 387 at [120], per Aikens LJ:

“ ... (1) the power of the court to grant declaratory relief is discretionary.

(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.

(3) Each party must, in general, be affected by the court’s determination of the issues concerning the legal right in question.

...

(7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue.”

- ii) The reference to the requirement that any declaration should serve a useful purpose in *Messier Dowty v Sabena* [2000] 1 W.L.R. 2040 at 2050H, per Lord Woolf MR. In this case the Court of Appeal accepted that there is a discretion to grant a negative declaration and that the Courts should not be reluctant to grant negative declarations where this would help to ensure that the aims of justice were achieved. However, Lord Woolf observed that the use of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose to grant them.
- iii) The principle that the court does not have jurisdiction to declare the law generally or to give advisory opinions, being confined to declaring contested legal rights where the issue can be clearly defined – *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 at [92]-[93], per Lord Scott.
- iv) The fact that the granting of a negative declaration on liability does not in itself give rise to an entitlement to consequential relief – see *Higgins v Aspect* [2015] UKSC 38 at [20], per Lord Mance JSC.

Particulars of knowledge

- 66. STSD raises a further complaint concerning the APOC, namely that Halsion has not, it submits, contrary to paragraph 8.2(5) of CPR PD16, pleaded the matters it relies on as to knowledge of a fact.
- 67. STSD identifies Halsion’s assertion in paragraph 28 of the APOC that both STSD and Mace had knowledge of various facts, including the matters alleged at paragraphs 22 to 28 of the APOC, which describe pre-contract negotiations conducted between Mace and Halsion at a time when it is common ground that Mace was acting as proposed design and build contractor, with Halsion proposed to act as a domestic subcontractor, not as the construction manager with Halsion in direct trade contract with STSD.
- 68. It is submitted that no case has been pleaded as to the basis on which it is asserted that STSD is fixed with Mace’s knowledge during a period when Mace was not acting as STSD’s agent and was acting on its own behalf in a completely different procurement context. STSD maintains that such facts are, in any event, not admissible in relation to Halsion’s case as to the construction of the Trade Contract, but in so far as relied upon to support Halsion’s rectification and/or estoppel cases, it is submitted that they are only capable of being relevant if these facts were known to STSD.
- 69. On this basis STSD maintains that, as pleaded, Halsion’s case in paragraphs 22 to 28 does not disclose a legally comprehensible cause of action and ought to be struck out.

Conclusion

- 70. STSD thus submits that in consequence of what are submitted to Halsion’s serious failures to comply with CPR Part 16 and the TCC guide, the specific identified failings in Halsion’s pleaded case as to the construction of the Trade Contract, rectification and estoppel by convention, the inclusion of misconceived claims for declarations as to the proper construction of the Trade Contract and as to the effect of Adjudication 5, and a failure to provide particulars of knowledge, the Court should to strike out Halsion’s Particulars of Claim as a whole and/or to dismiss Halsion’s claims for declarations.

71. STSD has no objection to the Court giving Halsion the opportunity to replead, but not so as to place reliance on pre-contract negotiations as an aid to construction or to seek declarations as to the proper construction of the Trade Contract or as to the effect of Adjudication 5.

HALSION'S CASE

Introduction

72. Halsion contends that the APOC complies with CPR Part 16 and the TCC Guide, or that if it does not, STSD's case is grossly overstated. Further, Halsion does not accept that the way that its case as the construction of the Trade Contract, rectification and estoppel by convention is pleaded is subject to the difficulties identified by STSD, or that it is not entitled to the declaratory relief that it seeks. It is therefore submitted that no case is made out for striking out the Particulars of claim in whole or in part pursuant to CPR 3.4(2)(a), (b) or (c), or for granting reverse summary judgment, in respect of any aspect of the claim.
73. Mr Streatfeild-James KC emphasised in submissions the importance of the DRM as a component of the Trade Contract, as informed, at least in part, by an understanding of RIBA Work Stages and the BSRIA Guide. Mr Streatfeild-James took me with some care to the provisions of the DRM said to be relevant not only to the design of the Generator, but its sizing.
74. The DRM sets out how responsibility for the design of the Works was intended to be allocated under the Trade Contract between the various parties involved in the project. As to its relevant terms:
- i) It included the following relevant "*categorisations*":
 - a) "*E1*", defined as "*Responsible for producing DETAILED DESIGN that is BASED ON the performance specification or details produced by others (P/A). Only if any elements of the stage 4 design are amended by TP6000 after stage 4. Stage 5 by TP6000.*" [NB TP6000 is Halsion].
 - b) "*P*", defined as "*Responsible for producing PERFORMANCE SPECIFICATION and/or DESIGN INTENT DRAWINGS which are then to be developed by a CONSULTANT, SUB CONTRACTOR/TRADE CONTRACTOR, MANUFACTURER OR SUPPLIER.*"
 - ii) For each item of work in the package scope, there is then set out under the "*responsible designer*" heading the applicable "*categorisation*", the RIBA Work Stage that the design that has been prepared by the relevant designer will have reached (if applicable), and further explanatory comments.
 - iii) Halsion identifies the following items of work in the DRM as of relevance so far as the Generator is concerned:
 - a) "*15.01 Mechanical, Electrical & Public Health Design – Performance & Detailed Design Services*";
 - b) "*15.03 MEP Plant and equipment selection and schedules*";

- c) “17.05 Secondary supplies to emergency equipment (e.g. fire fighting lifts)”.
- iv) Halsion makes the point that in respect of each of these items of work, Chapman’s responsibility was categorised as “P” (with its design completed to RIBA Work Stage 4), and Halsion’s responsibility was categorised as “E1”.
75. Controversially, at least so far as the construction issue as opposed to the rectification and estoppel by convention issues are concerned, Halsion places reliance upon the final sentence of the definition of category “E1”, i.e., the words “Only if any elements of the stage 4 design are amended by TP6000 after stage 4. Stage 5 by TP6000”, as having been added by agreement between the parties on 23 February 2018 as part of the pre-contract negotiations.
76. In short, as explained by Mr Streatfeild-James KC in submissions, it is Halsion’s case that paragraph 1.10.1 of the specification within the Trade Contract at Volume2B – Electrical Services, the terms of which are set out in paragraph 2 above, requires to be construed consistently with the relevant provisions of the DRM, and if it is, then, on Halsion’s case, it must bear the construction contended for by Halsion. To the extent that it does not fall to be so construed, then it is Halsion case that it requires to be rectified so as to achieve consistency with the DRM in the way referred to in paragraph 46 above, further or alternatively that an estoppel by convention arises requiring the provision to take effect in the way contended for.

CPR 3.4(2)

77. So far as the relevant principles are concerned, Halsion relies upon the summary in relation to the application of CPR 3.4(2) provided by Pepperell J in *Tejani v Fitzroy Place Residential Ltd* [2020] EWHC 1856 (TCC) at [21], and, in particular, at [21.3]:
- “While there are other categories of abuse that are not relevant to this application, the court may strike out Particulars of Claim under r.3.4(2)(b) where they are so badly drafted that they fail to identify the case that the defendant has to meet. In such cases, strike out is, however, very much a remedy of last resort and the court should usually first allow the claimant an opportunity to file a coherent and intelligible claim.”
78. So far as the correct approach to CPR 3.4(2)(c) is concerned, Mr Streatfeild-James KC relied upon the recent decision of Constable J in *Resource Recovery Solutions (Derbyshire) Limited v Derbyshire CC* (supra) at [67]-[76], and in particular at [76], which is set out in paragraph 27 above, where Constable J drew a distinction between “*infelicities*” and more serious non-compliance that have a real effect on the conduct of the litigation, and discouraged the taking of unmeritorious pleading points.
79. On the basis of these authorities, Mr Streatfeild-James KC accepted that a court may in the exercise of its discretion strike out a statement of case where the principles of the CPR have been flouted or where there has been an egregious and widespread failure to comply with the CPR, and/or where its effect is likely to obstruct the just disposal of the proceedings. However, he submitted that the present is not such a case, and that there are, at the most, procedural *infelicities*” that fall well short of requiring that the Particulars of Claim be struck out.

80. Halsion's takes the "short point" that: "CPR 3.4(2) is not the appropriate route for debating pleading points which do not materially affect the understanding of the claim (or defence)". It is submitted that this is what STSD is, in reality, seeking to do by the Application.
81. Mr Streatfeild-James KC took me with some care through the APOC, explaining the relevance of the various sections identified in the contents to the APOC, explaining, for example, the importance of the sections therein dealing at some length with "RIBA Work Stages", "the BSRIA Guide" and knowledge of the process of designing MEP systems in providing important factual background against which the relevant terms of the Trade Contract required to be construed.
82. Further, Mr Streatfeild-James KC sought to justify the extensive factual narrative concerning the negotiations between the parties, which included some matters of evidence, on the basis that presenting the background in this was a helpful approach as the matters dealt with thereby are, on Halsion's case, relevant to each of the proper construction of the Trade Contract, and Halsion's claims in respect of rectification and estoppel by convention.

Pleading of the proper construction issue

83. As to STSD's criticisms of the way that Halsion's case on the construction issue has been pleaded, Halsion submits that its case is sufficiently pleaded by pleading out what are said to be the relevant terms of the Trade Contract in paragraph 72 et seq of the APOC, and then setting out what is contended to be the proper effect of the provisions in paragraph 98 in the light of the matters referred to.
84. So far as reliance on pre-contract negotiations is concerned, as referred to in paragraph 35 above, paragraph 93(c) of the APOC is said by Halsion to follow the wording of Cardozo J, apparently approved by Leggatt LJ in *Merthyr* (supra) at [53].
85. In paragraph 20(1) of Mr Streatfeild-James KC's and Mr Saunders' Skeleton Argument, the case is articulated that various matters are sought to be relied as being properly admissible as to construction of the Trade Contract, including not only the factual matrix, but also: "*the circumstances which led to the execution of the Trade Contract so as to establish the parties' objectives in the transaction (per Elmfield Road Ltd v Trillium (Prime) Property Group Ltd [2016] EWHC 3122 (Ch) at [52] and Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council [2019] EWCA Civ 526 at [50].*"
86. In *Elmfield Road* (supra) at [52], David Halpern QC, sitting as a Deputy Judge of the High Court, having considered the general principle that prior negotiations may be admissible for the purposes of identifying the genesis and objective (i.e. aim) of a transaction, commented that: "*The genesis and aim of a particular provision may be sufficiently important to qualify as part of the genesis and aim of the whole transaction. If so, it will be admissible pursuant to Prenn v Simmonds; if not, it is contrary to Prenn v Simmonds to allow it to be admitted.*"
87. In *Merthyr*, at [50], Leggatt LJ referred to *Elmfield Road* at [52] and the view expressed by David Halpern QC therein, and observed: "*Sir Kim Lewison considers this approach*

to be correct (see The Interpretation of Contracts, 2017 supplement, at 3.09), and so do I.”

88. It was submitted on behalf of Halsion that, on the construction issue, it is appropriate for the Court to have regard to the fact that the purpose of the DRM was to resolve a dispute between the parties as identified in the communications between them relied upon. As understood, the above authorities cited by Halsion are relied upon for the proposition that the genesis and aim of the DRM was, in fact, sufficiently important to qualify as part of the genesis and aim of the Trade Contract, and so the relevant pre-contract communications said to explain the purpose of the DRM are admissible because they go to establishing the parties’ *“objectives in the transaction”*.
89. It is thus submitted on behalf of Halsion that:
- i) A dispute as to whether Halsion is correct as to the proper construction of the Trade Contract, or indeed as to whether the matters relied upon by Halsion are admissible on that issue, is not something that falls within the scope of CPR 3.4(2)(a) or (b); and
 - ii) It cannot sensibly be said that Halsion has no reasonable grounds for bringing its claim based on the construction of the Trade Contract, or that it is acting abusively in seeking to bring this claim in the way that it does.

Rectification

90. So far so as any complaint that there is no pleading of a common intention sufficient to support the claim to rectify is concerned, Halsion points to paragraph 97(c)(ii) of the APOC as setting out the parties’ common intention that Halsion was not responsible for the sizing of any plant, including the Generator.
91. So far as STSD’s inconsistency point is concerned in relation to the claim to rectify the definition of *“EI”* in the DRM whilst at the same time relying upon that definition to support the common intention, Halsion’s answer is that the suggested wording in sub-paragraph 101(b) merely seeks to clarify the definition in the light of any ambiguity, and that support for the common intention relied upon is provided by the correspondence relating to the agreement reached as to the wording of the definition, and in particular the final sentence of the definition.
92. So far as concerns the complaint that no factual basis is pleaded in support of the averment in sub-paragraph 100(b) of the APOC that there was an outward expression accord regarding the alleged common intention, Halsion says that sub-paragraph 100(b) requires to be read together with sub-paragraph 100(c), where the averment that the outward expression of accord was continuing as at the date that the Trade Contract was entered into is said to be *“for the reasons set out in paragraphs 12 to 67 above.”* It is therefore submitted that it was entirely appropriate to refer in general terms to those paragraphs where one finds the factual basis for the assertion that there was outward expression of accord as to the common intention.
93. In respect of the unilateral rectification, Halsion makes the same point regarding the assertion in paragraph 103 of the APOC that STSD’s state of knowledge is to be inferred from the matters pleaded in paragraphs 12 to 67. It is said to be sufficient to

refer to paragraphs 12 to 67 of the APOC in general terms, and that the matters therein referred to demonstrate STSD's state of knowledge.

Estoppel by convention

94. In answer to STSD's inconsistency point akin to that taken in respect of rectification, and in answer to STSD's complaint that the factual basis for the claim is based upon a reference to paragraphs 12 to 71 of the APOC, without identifying specific relevant facts, Halsion essentially provides the same answers as in the case of the rectification claim.

Declarations

95. I do not understand there be any significant difference between the parties as to the legal principles to be applied, save that I understand Halsion's position to be that the Court has rather more of a discretion on the matter than STSD suggests, and that the granting of the declarations sought would serve a useful purpose, given the potential for other issues between the parties in relation thereto to arise.
96. As put by Halsion in paragraph 36(3) of its Skeleton Argument in respect of the declaration as sought concerning Adjudication 5: "*Given the historic dispute between the parties as to what was and was not decided by the Adjudicator in his decisions in Adjudications 4 and 5, there is real utility in such a declaration being granted Halsion's favour*". The point is made on behalf of Halsion that the Court has the power to make a declaration if sought under CPR 40.20 and s. 19 of the Senior Courts Act, and it is submitted that the question as to whether the court should make the relevant declarations is a matter for argument and submission at trial on the basis that the trial judge would be best placed to decide whether the declarations are appropriate.

Particulars of knowledge

97. As to the alleged breach of paragraph 8.2(5) of PD 16, Halsion contends that the latter simply requires a claimant to set out knowledge where it is to be relied upon, and it is submitted that this is what Halsion has done in paragraph 28 of the APOC, so there can be no breach.
98. Halsion accepts that there may, subject to STSD's defence, be a legal issue between the parties as to whether Mace's knowledge acquired before it was STSD's agent is to be imputed to STSD. Halsion relies upon *Bowstead & Reynolds on Agency* (22nd Ed) at Article 95, rules (1) and (2) which, it is said, makes plain that knowledge acquired pre-agency may be imputed to a principal.
99. On this basis, it is submitted that there is nothing objectionable with regard to Halsion's case in paragraphs 22 to 28 of the APOC.

Conclusion

100. It is therefore Halsion's case that there is no proper basis pursuant to CPR 2.4(a), (b) or (c) to strike out the Particulars of Claim or any part thereof, and that there is no proper basis for granting reverse summary judgment in respect of any part of Halsion's claim.

DETERMINATION OF THE APPLICATION

Introduction

101. I consider that the appropriate course is to first consider STSD's specific objections to the way that Halsion's case as to the proper construction of the Trade Contract, rectification and estoppel by convention respectively are pleaded in the APOC, including the objections to the reliance on pre-contract negotiations or communications as an aid to construction and to Halsion's claim for declarations, before then considering the complaint that the APOC fails to comply with the relevant provisions of CPR Part 16 and the TCC Guide in a serious and significant way. In the light of my findings in respect thereof, and if STSD's complaints and objections are made out it would then be necessary to consider what the appropriate response thereto is, and whether the Particulars of Claim should be struck out as a whole as contended for by STSD.
102. I remind myself that the Application is brought under CPR 3.4(2), under which a statement of case (such as the Particulars of Claim) may be struck out (in whole or in part) if:
- i) It discloses no reasonable grounds for bringing or defending the claim;
 - ii) It is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
 - iii) There has been a failure to comply with a rule, practice direction or court order.
103. I do not understand it to be in dispute but that CPR 3.4(2)(a) and (b) cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded, as well as other cases in which the statement of case does not disclose a legally recognisable claim or defence, whereas CPR 3.4(2)(c) covers cases where the complaint lies in the way that the claim or defence (as the case may be) has been conducted, and where there has been a failure to comply with a rule, practice direction or court order whether directly concerning the statement of case or otherwise. CPR 3.4(2)(c) does not, in terms, include breach of a Court Guide such as the TCC Guide, but I shall consider below how a failure to comply with a Court Guide might tie in with CPR 3.4(2)(c).
104. In so far as STSD seeks reverse summary judgment, the question is whether Halsion can show that it has a "*real prospect*" of succeeding on the relevant claim or issue within the meaning of CPR 24.2. What this means was helpfully explained by Lewison J (as he then was) in his oft approved and applied passage in *Easyair Ltd (ta Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], referred to in Civil Procedure 2023 at 24.2.3.

STSD's specific objections

Proper construction of the Trade Contract

105. I consider that STSD's objections to the way that Halsion has pleaded its case as to the proper construction of the Trade Contract are largely made out.

106. Firstly, when a Court is being asked to rule as to the proper construction of a contract or other document, I consider that it must be incumbent upon the party seeking the ruling to clearly identify the wording of the document that requires to be construed.
107. As Lord Neuberger identified in *Arnold v Britton* [2015] AC 1619 at [15]:
- “When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context.”
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. As to the facts concerning any documentary, factual or commercial context that the party seeks to rely upon, they should also, I consider, be pleaded in accordance with CPR 16.4(1)(a), i.e., as part of the “*concise statement of facts*” on which the party relies.
109. I appreciate that in the case of the types of construction contract that often fall to be construed by the TCC, the Court is frequently concerned with contracts spread over a number of documents, often put together in a somewhat unwieldy fashion. However, as I see it, all the more reason in such a situation to clearly identify what particular provisions (and the wording thereof) is in issue, bearing in mind that it may be more effective, and is likely to be more appropriate, to set out any particular contractual provisions sought to be construed, or otherwise relied upon for the purposes of the exercise of construction, in a schedule to the statement of case.
110. Secondly, insofar as Halsion does seek to rely upon the subjective intentions of the parties as reflected by a subjective common intention as to the meaning of particular words used in the Trade Contract, such must be impermissible and inadmissible given that the Court is not entitled, in construing a contractual document, to have regard to the subjective intentions of the parties – see, e.g., *Investors Compensation Scheme Ltd v West Bromwich Building Society* (supra) 912-913, per Lord Hoffmann.
111. As I read paragraph 97 of the APOC, this is what APOC is seeking to do. The position would be otherwise, as I see it, if paragraph 97 pleaded that the matters set out in subparagraphs (a) to (d) reflected the intention of the parties as ascertained by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the relevant language in the Trade Contract to mean, and if the documentary, factual and commercial context relied up to support that conclusion had been properly pleaded.

112. Thirdly, I do not consider that it is open to Halsion to rely upon pre-contract communications and negotiations in the way that it seeks to do by sub-paragraph 93(c) and paragraph 95 of the APOC.
113. As I read the authorities, it is, generally speaking, only open to a party to rely upon pre-contract negotiations or communications to establish that a fact was known to both parties and to elucidate the genesis, or to identify the general aim or object of the contract, albeit that the genesis or aim of a particular provision may be sufficiently important to qualify as part of the genesis and aim of the whole contract in which case pre-contract negotiations or communications going thereto may be admissible – see *Elmfield Road v Trilliam* (supra) at [52].
114. However, *Chartbrook* (supra) at [14] and *Merthyr* (supra) at [54] make clear that there is excluded from the exercise of construction evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant, and that it is not only statements reflecting one party’s intentions or aspirations which are excluded for this purpose but also communications which are capable of showing that the parties reached a consensus on a particular point or use words in an agreed sense.
115. Further, the more recent authorities of *NHS Commissioning Board v Vasant* (supra) at [28] and *Schofield v Smith* (supra) at [22-28] and [38] do, to my mind, make clear that whilst documents or statements forming part of the pre-contract negotiations may be looked at to ascertain objectively the genesis and aim of the contract as a whole, it is impermissible to have regard thereto:
- i) For the purpose of interpreting specific provisions; or
 - ii) In relation to the parties’ subjective intentions or objectives.
116. The problem with paragraph 95 of the APOC is that it is, as I see it, seeking to rely upon “*the circumstances which led to the execution of the Trade Contract*” going beyond the objective facts permissibly relied upon in paragraph 94 of the APOC for the purpose of interpreting specific (albeit unidentified) provisions of the Trade Contract, and relying upon the matters referred to in paragraph 95 of the APOC for the purpose of drawing inferences as to what the relevant provisions of the Trade Contract mean. It is possible that sub-paragraph 95(a) of the APOC could be rephrased in more objective terms, but this does not appear possible in respect of other sub-paragraphs which are concerned with the parties’ subjective approaches to the negotiations.
117. Fourthly, I consider that there is a legitimate concern that whilst paragraph 94 identifies, in sub-paragraphs (a) to (c) thereof, a number of objective facts which are properly admissible as an aid to construction, there are other unidentified and unparticularised matters within paragraphs 12 to 68 that also seem to be relied upon as an aid to construction. If other objective facts are relied upon as providing context against which the meaning of the words used is to be considered, then those facts should, in my judgment, be particularised, if necessary by reference to a schedule.
118. In conclusion therefore, I consider that there are a number of factors that render paragraphs 93 to 99 of the Particulars of Claim liable to be struck out pursuant to CPR 3.4(a) and (b). However, I consider that the defects in question are capable at least of

being cured by amendment, subject to the point that I do not consider that it would be permissible for any proposed amendment to rely upon any pre-contract negotiations or communications for the purpose of drawing inferences about what the relevant provisions of the Trade Contract should be understood to mean, or for the purpose of interpreting specific provisions, as opposed to ascertaining objectively the genesis and aim of the Trade Contract as a whole. Further, I do not consider that it would be permissible for any proposed amendment to rely upon a plea as to the common intention of the parties, insofar as what is sought to be relied upon is the subjective intentions of the parties.

119. I consider that the fate of paragraphs 93 to 99 of the Particulars of Claim must necessarily turn upon the fate of the Particulars of Claim as a whole in the light of the further objections thereto.

Rectification case

120. So far as the claim for rectification on the grounds of common mistake is concerned, I am not convinced that there necessarily is an inconsistency between the reliance upon the agreement as to the terms of the DRM on the one hand, and the claim to rectify the definition of “EI” in the DRM on the other hand. It seems to me that the wording proposed merely serves to clarify the original wording, rather than introduce a new meaning. It is perhaps questionable whether rectification is appropriate in those circumstances, but that is a different point.
121. Further, I am satisfied that the scope of the common intention is sufficiently pleaded by reference to paragraph 97 of the APOC. However, I consider that paragraph 100 of the APOC is defective to the extent that it fails to plead the factual basis for the existence of the common intention, the accord alleged in relation thereto, and how that accord was given outward expression. Sub-paragraph 100(b) is entirely silent in relation thereto, making the bald assertion that: “*There was an outward expression of accord as to that common intention.*” I do not consider that this defect is overcome by the fact that sub-paragraph 100(c) then refers to the accord continuing up to Halsion entering into the relevant contract “*for the reasons set out in paragraphs 12 to 67 above*”. Firstly, this sub-paragraph is concerned with the continuation of the common intention/accord up to the time of contract, rather than its initiation. Further, it does not, in any event, identify any specific facts relied upon, but rather makes a general reference to some 55 paragraphs of the APOC leaving it to the reader to try and work out what, exactly, might be being referred to therein.
122. The effect of this is, as I see it, that paragraphs 100 and 101 of the APOC fail to disclose reasonable grounds for bringing a claim, and are liable to be struck out pursuant to CPR 3.4(2)(a). Again, I consider that the relevant claim is capable of being cured by amendment, and that how such paragraphs are dealt with for present purposes requires to be considered in the light of the further objections to the Particulars of Claim.
123. So far as the claim for rectification on the grounds of unilateral mistake is concerned, I consider that there is a difficulty regarding Halsion’s plea as to STSD’s knowledge in paragraph 103 of the APOC, essentially for the reasons advanced by STSD. The allegation that STSD had actual knowledge, alternatively “*shut-eye*” knowledge, is based upon an alleged inference “*from the matters pleaded at paragraphs 12 to 67 above*”. Whilst three matters are then referred to “*in particular*” in sub-paragraphs

103(a) to (c), this leaves open that Halsion is relying, in support of this inference, upon other matters hidden away within the relevant 55 paragraphs. I consider this to be unsatisfactory and inappropriate.

124. In the circumstances, I consider that STSD would be entitled to require Halsion to amend at least paragraph 103 of the APOC to either delete the reference to the matters pleaded in paragraphs 12 to 67 of the APOC, or properly plead all the matters hidden away therein that are, in fact, relied upon. However, again, the fate of the pleaded case as to rectification requires to be considered together with the other objections that are taken to the Particulars of Claim.

Estoppel by convention

125. I consider that the similar criticism made with regard to how the estoppel by convention claim is pleaded is also made out. It is true that certain specific matters are set out in sub-paragraphs 109(a) to (f) of the APOC, but this is done by reference to a general plea that the estoppel by convention arose: “*by reason of the matters set out in paragraphs 12 to 67 and/or paragraphs 68 to 71 above*”. Thus, for example, sub-paragraph 109(b) refers to certain exchanges between Halsion and Mace, but without identifying the same in such a way as to enable STSD to know what, exactly, is being relied upon. I consider that STSD is justified in saying that Halsion’s reliance on some 28 pages of factual narrative as constituting the convention does not enable STSD to understand the case it has to meet, irrespective of any failure to comply with the requirements of the TCC Guide.
126. Again, I consider that STSD would be entitled to require Halsion to amend at least paragraph 109 of the APOC in order for it to properly plead its case as to estoppel by convention. However, again, the fate of the pleaded case as to estoppel by convention requires to be considered together with the other objections that are taken to the Particulars of Claim.

Declarations

127. The guiding principle that I extract from *Messier Dowty v Sabena* (supra) per Lord Woolf MR at 2050H is that whilst the Court might have a discretion to grant a negative declaration and should not be reluctant to grant negative declarations where this would help to ensure that the aims of justice were achieved, the use of such declarations should be scrutinised and their use rejected where it would serve no useful purpose to grant them.
128. So far as the claim for declarations as to the effect of Adjudications 4 and 5 is concerned, Halsion seeks a declaration that the decisions in both Adjudications are of no effect. I am satisfied that the claim for this relief should be struck out on the basis of there being no reasonable grounds for bringing the claim, and/or that summary judgment ought to be granted in respect thereof on the basis that the claim has no real prospect of success.
129. The circumstances of the Adjudications are pleaded out in some detail in paragraphs 91 and 92 of the APOC, but I consider that STSD is correct that there is no need for the Court to be concerned with this detail, and that all that the Court needs to know is that there has been an adjudication the result of which was that Halsion was required to pay

the relevant sum to STSD for breach of the terms of the Trade Contract relating to the obligation to size the Generator. Given that this Court is required to give effect to Halsion's substantive legal rights irrespective of the Adjudications, it would, I consider, be an unnecessary and irrelevant waste of time (and therefore money) to have to go into the detail of what occurred in the course of the Adjudications, and what determinations were made in respect thereof apart from the determination that Halsion is liable to pay the sum in question to STSD for breach of contract.

130. More fundamentally, the Adjudications are what they are, and under the relevant legislation are not subject to review as such. In the circumstances, I consider it both inappropriate and unnecessary for this Court to make any declaration as to the effect as such of the Adjudications. All that is required is for the Court to determine Halsion's substantive rights, and if it considers that the effect of the Adjudications was to require Halsion to pay a sum of money that it ought not to have paid, to order that the money in question be repaid applying the legal principles considered in paragraph 5 above.
131. So far as the question of declarations concerning the proper construction of the Trade Contract is concerned, I am not presently satisfied that there is any good reason for the Court to grant declaratory relief if Halsion's case in respect thereof is otherwise properly pleaded. The purpose of the present proceedings is, clearly, to recover the sum paid to STSD in consequence of Adjudication 5 that Halsion alleges ought to be repaid based upon its construction of the relevant provisions of the Trade Contract. That result can be achieved, if Halsion is right, without the need to grant declaratory relief as to the meaning of the relevant provisions of the Trade Contract.
132. It was suggested on behalf of Halsion that there may be other issues concerning either the Adjudications or the proper construction of the Trade Contract that would benefit from declarations in the terms sought. However, I do not consider that this can provide a reason for granting declaratory relief that would not otherwise be granted. Indeed, the fact that there may be other issues between the parties not revealed by the APOC is, to my mind, a good reason for not granting declaratory relief unless and until those other issues are identified in the parties' pleaded case.
133. Consequently, so far as the claim for declaratory relief as to the proper construction of the Trade Contract is concerned, I would again strike out, or grant summary judgment against Halsion in respect thereof. However, I would not entirely rule out the inclusion of appropriate limited declaratory relief in any further amendment of the Particulars of Claim that might be proposed in consequence of my present determination of the Application, if it could be shown that such declaratory relief had a purpose that is not immediately apparent.

Particulars of knowledge

134. This concerns STSD's complaint that whilst paragraph 28 of the APOC pleads that both STSD and Mace had knowledge of various facts, no case is pleaded as the basis upon which it is asserted that STSD is fixed with Mace's knowledge gained during a period when Mace was not acting as STSD's agent, but on its own behalf in a different procurement context. This is said to be contrary to paragraph 8.2 of CPR PD 16 which requires that a claimant must specifically set out in the particulars of claim, where they wish to rely upon them in support of the claim, a number of matters, including at sub-paragraph (5): "*notice or knowledge of the fact*".

135. As identified above, Halsion’s short answer is that all that is required to be pleaded is a plea of knowledge, without pleading the factual basis for the plea as such. However, I do not consider that this provides an answer. I consider that paragraph 8.2 of CPR PD requires to be read together with CPR 16.4(1)(a) requiring a claimant to include in their particulars of claim “*a concise statement of the facts on which the claimant relies*”. Further, I consider it necessary to bear in mind that one of the purposes of a statement of case is to enable each party to understand the case of the other, and to identify the issues. In the circumstances, if a party is asserting that the other, or some third-party, has notice or knowledge of a particular fact, then it must be incumbent upon them to go beyond stating the bare fact of notice or knowledge, and to plead the factual basis for the allegation that the relevant party had notice or knowledge of the fact in question.
136. I therefore consider that paragraphs 22 to 28 of the APOC are open to objection on the grounds contended by STSD.

General objections to the Particulars of Claim

Discussion

137. The authorities referred to in paragraph 22 above make clear the need for statements of case to be concise, and not prolix, and to plead only material facts, i.e., only those facts necessary for the purposes of formulating a cause of action or defence, and thus not, generally speaking, background facts, evidence, argument, reasoning or rhetoric. The authorities referred to in paragraph 22 above further highlight the tendency of statements of case, in recent years, to be of exorbitant and unnecessary length.
138. That statements of case should be concise and limited to material facts is important, particularly in complex cases, for a number of reasons, including:
- i) To better enable the other party to discern and understand the case that it has to meet and to respond to it in concise terms;
 - ii) To assist in identifying the issues between the parties, including:
 - a) Identifying issues for disclosure under CPR PD 57 AD;
 - b) Identifying the matters that each party will need to prove at trial for the purpose of preparing trial witness statements in accordance with CPR PD 57AC and obtaining expert evidence; and
 - c) Identifying the issues for trial;
 - iii) Helping to ensure the efficient and effective case management of the claim.
139. An important consideration so far as a claimant’s particulars of claim are concerned is that the particulars of claim are very likely to set the pace as to the form and contents of subsequent statements of case. Therefore, prolix and unclear particulars of claim are liable to lead to prolix and unclear defences and subsequent statements of case.
140. CPR 16.4(1)(a) sets out the basic requirement that particulars of claim should comprise “*a concise statement of the facts on which the claimant relies*”. Further, CPR PD 16, paragraph 1.3, provides that statement of case should only “*exceptionally*” exceed 25

pages, including an appropriate short summary at the start. The TCC Guide is not a Practice Direction, and so breach thereof does not, per se, engage CPR 3.4(2)(c). However, I consider that the relevant provisions of the TCC Guide must be treated as serving to inform how CPR 16.4(1)(a) and paragraph 1.3 of CPR PD 16 should be applied in the context of a case in the TCC such as the present. A statement of case that significantly fails to comply with the TCC Guide so far the requirement to be “*concise*” is concerned, is therefore, as I see it, liable to fall foul of these rules.

141. As Constable J recognised in *Resource Recovery Solutions v Derbyshire County Council* (supra) at [75], it is necessary, so far as the application of Court Guides such as the TCC Guide are concerned, for the Court to take a proportionate and practical view of “*infelicities*”, not least given the scope for an opposing party to take immaterial procedural points for tactical reasons. However, as Constable J further identified, there will be occasions where “*infelicities*” aggregate to a level which is clearly, and objectively, unacceptable, e.g., where the aggregate effect is to impair the ability of the statement of case, or significant parts of it, to serve any useful purpose, or where essential elements are missing.
142. The issue between the parties on the present Application is as to whether STSD is, as Halsion contends, seeking to use CPR 3.4(2) as a route for debating pleading points which do not materially affect the understanding of the claim, or whether, as STSD contends, the Particulars of Claim are so fundamentally flawed and/or in breach of the relevant provisions of CPR Part 16 and the TCC Guide, that they not only materially affect a proper understanding of the claim, but are liable to lead to other serious and significant difficulties in responding to the Particulars of Claim, identifying the issues for determination, and more generally case managing the present claim.

Breach of CPR Part 16 and the TCC Guide

143. I am satisfied that there have been serious and significant breaches of the relevant provisions of CPR Part 16 and the TCC Guide with regard to the Particulars of Claim in the present case.
144. I consider that the fundamental point is that the APOC cannot, on any proper view, be described as containing a “*concise*” statement of the facts on which Halsion relies as required by CPR 16.4(1)(a), particularly considered in the context of the application of the TCC Guide to the present proceedings and, in particular, the requirement thereof that the Particulars of Claim should be “*as concise as possible*” as required by paragraph 1(a), and further the requirements of sub-paragraphs 1(c), (d), (e), (f), (k) and (m) of Appendix I to the TCC Guide referred to in paragraph 20 above.
145. The principal concerns that I have with the Particulars of Claim as presently drafted in the form of the APOC are the following:
- i) They are, I consider, unduly prolix, one of the consequences being that no reference is made to the contractual provisions, the proper effect of which forms the basis of the dispute between the parties, until paragraph 74 of the APOC, at page 30 thereof.
 - ii) The use of a lengthy factual narrative which, as identified in paragraph 1(d) of Appendix I to the TCC Guide is neither required nor helpful. The position is, as

I see it, compounded by the fact that Halsion's case is put on three alternative basis, namely the proper construction of the Trade Contract, rectification and estoppel by convention which each turn on discrete facts and considerations. However, as reflected initially in paragraph 12 of the APOC, and as the factual narrative is the developed, the various factual matters relied upon in support of the respective bases upon which the case is put are elided, and when the alternative ways in which the case is put are pleaded out, extensive use is made of the factual narrative without clearly identifying the particular parts relied upon. This does, as I see it, make it difficult to properly identify and understand how Halsion puts its case, and makes STSD's task of seeking to respond thereto by its Defence difficult, if not practically impossible.

- iii) It is, as I see it, necessary and important in pleading Halsion's case in any particulars of claim for the factual matters said to support the respective ways (construction, rectification and estoppel) in which Halsion's case is put to be separately and distinctly identified and pleaded out, if necessary by the use of appropriate schedules tied to the particular heads of claim. Unfortunately, because the factual narrative is not so linked to the respective ways in which Halsion's case is put, apart from resulting in the case as to the respective heads being elided and therefore becoming confused, the factual narrative contains what I consider to be irrelevant matters, and deals with certain relevant matters in excessive and unnecessary detail, e.g.:
 - a) Paragraphs 22-23, 29-34, 35, 39, 41 and 44 dealing with "mid-bid" meetings held, Tender Addenda issued, and descriptions of the exchange of early versions of the DRM;
 - b) The detailed references to the RIBA Work Stages and BSRIA Guide in 15-15 of the APOC. Whilst these may well be relevant to the factual matrix on the construction issue, and relevant to the common intention on the rectification issue, they should more appropriately be referred to in brief and more pertinent terms when dealing with those particular heads of the claim.
 - c) The more general pleading out of the contents of documents in order to plead the facts upon which Halsion seeks to rely, being facts which, in any event, ought more appropriately to be included in schedules rather than the main body of the APOC.
 - d) The lengthy references to Adjudications 4 and 5 in paragraphs 91 and 92.
 - iv) The inclusion of submissions and rhetoric at various parts of the APOC.
146. The above considerations have, as I see it, led to Halsion seeking to rely upon a statement of case (the APOC) which presents Halsion's case in a prolix and confusing way, and therefore in a way in which:
- i) Makes it difficult to follow Halsion's case;

- ii) Makes it difficult if not impossible for STSD to respond to Halsion's case in a concise, compliant and effective way; and
 - iii) Seriously hinders the ability of the Court to effectively case manage the claim and to identify the issues that arise for determination.
147. Unfortunately, it is evident that the problems have arisen because Halsion, rather than drafting particulars of claim from scratch in a compliant way, has sought to utilise its response submissions prepared for Adjudication 5. However, submissions to an adjudicator are intended to perform a very different function than statements of case prepared for litigation in the TCC, or indeed any court.
148. I certainly consider that the circumstances of the present case fall well on the wrong side of the line between mere "*infelicities*" on the one hand, and serious and significant non-compliance with the relevant provisions of CPR Part 16 and the TCC Guide on the other hand, such that it can properly be said that there have been serious and significant breaches of a rule and practice direction sufficient to justify invoking the power to strike out of the Particulars of Claim as a whole pursuant to CPR 3.4(2)(c), if the Court can be satisfied that that would be a proportionate and practical response to the breaches established.

Proportionate and practical response

149. I consider that the proportionate and practical response that the Court ought to adopt in light of the above is one that must have regard not merely to the serious and significant breaches of the rule and practice direction that have been established, but to my findings in respect of STSD's complaints in respect of the ways, respectively, that the case as to proper construction of the Trade Contract, rectification and estoppel by convention has been pleaded.

OVERALL CONCLUSION

150. Having regard to the pleading deficiencies that I have identified with regard to each of the proper construction, rectification and estoppel by convention elements of the claim, and my finding that the Particulars of Claim more generally breach CPR 16.4(2)(a) and paragraph 1.3 of CPR PD 16, as given expression through the relevant provisions of the TCC Guide, I am satisfied that the deficiencies are so marked, and the consequences thereof so serious, that the only proportionate and practical response is for the Particulars of Claim as a whole to be struck out pursuant to CPR 3.4(a), (b) and (c).
151. However, STSD concedes, and I accept that the pleading deficiencies are likely to be capable of being cured, but in my judgment that can only effectively be achieved by a wholesale redrafting of the Particulars of Claim in a compliant way that does comply with the relevant provisions of CPR Part 16 and the TCC Guide, does not seek to rely upon a pre-contract negotiations or communications for the purpose of drawing inferences about what the Trade Contract should be understood to mean, or for the purpose of interpreting specific provisions, and does not seek to claim declaratory relief in respect of the effect of Adjudications 4 or 5, or as to the proper construction of the Trade Contract.

152. On the assumption that Halsion would wish to make an application to amend, and for the Court to consider a redrafted version of its Particulars of Claim, I would, subject to further submissions, propose that I consider the precise form of order to be made on the Application at a consequential hearing to be listed within a reasonable period of time, when redrafted Particulars of Claim are available.
153. No attendance is required on the hand down of this judgment. I adjourn the determination of consequential matters, including any application for permission to appeal, to the consequential hearing.