Case No: HT-2022-000152

Neutral Citation Number: [2023] EWHC 708 (TCC)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

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

Date: 28/03/2023

Before :

MR JUSTICE CONSTABLE

- -

Between :

RESOURCE RECOVERY SOLUTIONS (DERBYSHIRE) LIMITED (IN ADMINISTRATION)

Claimant

- and -

(1) DERBYSHIRE COUNTY COUNCIL
(2) DERBY CITY COUNCIL

Defendants

- -
- -

Stuart Catchpole KC and Paul Bury (instructed by **Ashurst LLP**) for the **Claimant**
Karim Ghaly KC, Jess Connors and Samar Abbas Kazmi (instructed by **Browne Jacobson LLP**) for the **Defendants**

Hearing dates: 15 and 16 March 2023

Remote hand-down: This judgment will be handed down remotely by circulation to the parties or their representatives by email and release to The National Archives. A copy of the judgment in final form as handed down should be available on The National Archives website shortly thereafter but can otherwise be obtained on request by email to the Judicial Office (press.enquiries@judiciary.uk). The deemed time and date of hand down is 10.30am on Tuesday 28th March 2023.

MR JUSTICE CONSTABLE:

Introduction

1. The Defendants ('the Councils') seek summary judgment in respect of two issues of contractual interpretation on grounds that the Claimant ('RRS') has no real prospect of succeeding in relation to these issues and because there is no other compelling reason why these issues should be disposed of at a trial. The Councils also seek an order striking out those aspects of the Particulars of Claim and Reply which advance RRS's contended for construction on the basis that those averments are an abuse of process. Essentially the summary judgment application and the related strike out application stand or fall together. There is a further application before the Court relating to the contents of RRS's Reply ('the Reply Strike Out'), which the Councils contend is (still) an abuse of process in that in various respects it contains a new case, and in places is tendentious, serves no purpose, and contains evidence and argument. The substance of the complaints were first made in front of Waksman J during a CMC on 2 December 2022, and some complaints remain after RRS amended its Reply on 15 February 2023.

2. The issues of contractual interpretation arise in relation to clause 58 of a contract made on 8th December 2009 ("the Project Agreement') for the procurement of waste management facilities and services. The Project Agreement was due to expire on 31st March 2042, if not extended or terminated. However the Project Agreement was terminated lawfully on account of Contractor Default, namely a failure to pass contractual Acceptance Tests in relation to the construction of the New Waste Treatment Facility ('NWTF') by the contractual long stop date. Clause 58 provides the mechanism for assessing what sums are owed either to the RRS or to the Councils following termination. In general terms, Clause 58.2 provides the mechanism where the Councils intend to re-tender. Clause 58.3 provides the mechanism where there is no re-tendering anticipated because there is no 'Liquid Market' as defined in the Project Agreement. There is no dispute that this is the position in the present case, and that the relevant entitlements fall to be determined by reference to Clause 58.3. It is in this context that the principal dispute between the parties is the value of the Adjusted Estimated Fair Value of the Project Agreement ('AEFV'), a defined term, and in particular the Estimated Fair Value ('EFV') which forms a part of the AEFV. In its Amended Particulars of Claim, RRS calculates the AEFV as £186,698,363, net of VAT, owing to RRS. In its Amended Defence, the Councils claim that the AEFV is no greater than £9,026,434 owing to the Councils, although given that RRS in is administration, no counterclaim for that sum has been brought. The value of the dispute is, therefore, extremely significant. The ultimate trial in this matter is set down for 28 hearing days (i.e. 7 four day weeks), excluding closing submissions, commencing 10 June 2024, following 4 reading days. As is plain from the time estimate, there are a wide range of contractual, factual, technical and quantification issues which the Court will be required to resolve.

3. The Councils seek summary judgment on the following two issues:

Issue 1: sub-clause 58.3.3.3 of the Project Agreement between the Defendants and the Claimant does not require an assessment of:

(a) how the Defendants actually intend to perform the Works and Services that the Claimant would have performed but for termination; and/or

(b) the rectification costs that the Defendants actually forecast that they will incur in performing those Works and Services (being the issue pleaded at paragraphs 153.2 of the Particulars of Claim; paragraphs 53, 60, 66 and 67 of the Defence; and paragraphs 13, 143, 146, 147 and 150 – 153 of the Reply);

Issue 2: the cost of providing and/or delivering the Project to the 'standard required' is the cost of procuring all the Contractor's obligations under the Deemed New Contract (as pleaded at paragraphs 68-70 of the Defence) and is not limited to the cost of Works and/or Services "that delivers the full Unitary Charge without Deductions and not any costs which may relate to any other requirement or obligation" (as pleaded at paragraphs 73, 123 and 124 of the Particulars of Claim and paragraphs 195-196 of the Reply).

4. I have considered the following evidence, relied upon by the parties: the Second, Third, Fourth and Fifth Witness Statements of Sarah Louise Evans for the Councils dated 23 November 2022 and 23 February 2023, and the Second and Third Witness Statements of Tom Duncan for RRS dated 25 January 2023. I have been considerably assisted by written and oral submissions of Counsel, Mr Catchpole KC and Mr Bury for the Claimants, and Mr Ghaly KC, Ms Connors and Mr Kazmi for the Defendants. I note that the page count of written submissions without appendices on the summary judgment application alone is 107 pages for the Claimants, and 30 pages for the Defendants. The oral submissions took place over two days, both counsel spending the majority of their time on the Summary Judgment application.

Overview of the Project and the Dispute

5. RRS was required pursuant to the Project Agreement to develop and implement an integrated waste management system to manage contract waste in accordance with the requirements, key performance indicators, and targets identified in the specification.

6. The targets included:

(1) NWTF Diversion Tonnage Target, essentially the amount of waste to be diverted from landfill by RRS;
(2) NWTF Re-Use, Recycling and Composting Target, essentially the amount of waste delivered to RRS which is to be re-used, recycled or composted;
(3) HWRC (Household Waste Recycling Centres) Re-Use, Recycling and Composting Target, essentially the amount of waste delivered to HWRCs which is to be re-used, recycled or composted;
(4) Contract Diversion Tonnage Target, consisting of the NWTF Diversion Tonnage Target and an enhanced HWRC Re-Use, Recycling and Composting Target.

7. It is common ground that central to the way in which RRS was to provide the services and seek to achieve these targets was through the design, construction and operation of the NWTF at Sinfin Lane in Derby. The NWTF was intended to receive and handle up to 190,731 tonnes per annum ("tpa") of household waste and remove 14,080 tpa of recyclates. The NWTF was to comprise two sections. The front end of the NWTF comprised a mechanical and biological treatment facility and the materials recovering facility. This was to remove recyclates from the waste stream and process the waste into a form of fuel that was suitable for use in the back end of the new NWTF. The back end of the NWTF comprised 3 advanced conversion technology ('ACT') lines. This was to gasify the fuel, to produce 'syngas', and then burn that gas. The heat produced by this process would be used to create steam to drive a steam turbine and produce electricity. The production of electricity through this process was assumed at a certain level within the base case. On account of the assumed electricity production, the Unitary Charge paid by the council for the Services was to be reduced from the planned completion date of the NWTF. Should the amount of electricity produced exceed that assumed within the base case, the additional income was to be shared between the councils and RRS according to a contractual formula. Moreover, should the syngas produced in the ACT meet the minimum quality requirements set by Ofgem, then a proportion of the electricity produced would qualify for Renewables Obligations Certificates ('ROCs') which the contractor could sell to third parties as a further income stream to the project. In addition to the NWTF, there were other facilities envisaged, including two waste transfer sites and nine HWRCs.

8. The extremely large difference in valuation of AEFV is driven by the parties' different inputs into a 'model'. The model was agreed between the parties as part of the Pre-Action process. Different assumed inputs are entered into the model and this then provides the compensation figure. The model runs to some 1,500 pages and contains hundreds of inputs. The inputs into the model are driven by a number of different technical assumptions. At a very high level, some of the key technical and economic differences between the parties are as follows:

    (1) whether it is possible to carry out remedial works/modifications to the ACT to ensure that the 'TOC' limit (or Total Organic Carbon) within the ACT bottom ash is met, and so that in turn the ACT is capable of meeting ROCs requirements while running at an hourly throughput of 6 tonnes per hour per ACT line. This affects the existence and extent of an income stream within the model;
    (2) the extent of rectification work required to the boilers. The Councils' position is that the boilers within the ACT need to be replaced. This is disputed by RRS;
    (3) the extent of electricity revenue to be assumed;
    (4) the contingencies and margins for rectification, operation and maintenance costs;
    (5) whether it is necessary to comply with the 'Energos Fuel Specification';
    (6) the costs of delivering the Service for the remainder of the life of the Project.

The Project Agreement

9. The Project Agreement is based on a standard Public-Private Partnership ("PPP") form known as "SOPC4" (applicable to a variety of different PPP projects, including hospitals, schools and roads), but contains specific amendments to address issues which may arise in relation to waste management services. As is common in PPP projects, the Project Agreement is, as submitted by Mr Catchpole, lengthy and complicated. It comprises 92 clauses over 247 pages, plus 23 schedules. Indeed, the definitions section of the Project Agreement itself runs to over 80 pages. The following were the key clauses referred to in argument by Counsel:

(1) Fair Value is defined as :

"the amount at which an asset or liability could be exchanged in an arms' length transaction between informed and willing parties, other than in a forced or liquidation sale."

(2) Estimated Fair Value of the Contract is defined as:

"the amount determined in accordance with clause 58.3 (No Retendering Procedure)) [sic] that a third party would pay to the Councils as the market value of the Deemed New Contract".

(3) Adjusted Estimated Fair Value of the Contract (or AEFV) is defined as:

"the Estimated Fair Value of the Contract, less an amount equal to the aggregate of:
(a) where relevant any Post Termination Service Amounts paid to the Contractor (if a positive number);
(b) the Tender Costs; and

(c) amounts that the Councils are entitled to set off or deduct under clause 71 (Set Off)
plus an amount equal to the aggregate of:

(d) all credit balances on any bank accounts held by or on behalf of the Contractor in connection with this Contract on the date that the Estimated Fair Value of the Contract is calculated;

(e) any insurance proceeds and other amounts owing to the Contractor (and which the Contractor in connection with this Contract is entitled to retain), to the extent not included in (d); and

(f) the Post Termination Service Amounts (if a negative number) to the extent that:

- *(i) (d), (e) and (f) have not been directly taken into account in calculating the Estimated Fair Value of the Contract; and*
- *(ii) the Councils have received such amounts under (d) and (e) in accordance with the Contract or such amounts are standing to the credit of the Joint Insurance Account".*

(4) Deemed New Contract [C/1/35] is defined as:

"an agreement on the same terms and conditions as this Contract, as at the Termination Date, but with the following amendments:

(a) if this Contract is terminated prior to the NWTF Planned Completion Date then the NWTF Planned Completion Date shall be extended by a period to allow a new contractor to achieve NWTF Services Commencement;

(b) any accrued Performance/ Deductions and/or Unavailability Deductions, warning notices and/or default notices shall for the purposes of termination only, and without prejudice to the rights of the Councils to make financial deductions, be cancelled;

(c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date or the Extended Expiry date (as the case may be);

(d) in the event that any New Contractor Rectification Works are required (in relation to a Facility that has, at the Termination Date, had a Completion Certificate issued) to enable the New Contractor to provide the Services to the full specification and standards required by this Contract, then provided that the New Contractor complies with the New Contractor Rectification Plan the Councils shall not exercise their rights to terminate the Contract under clause 57 (Termination on Contractor Default) by reason of any failure to achieve some or all of the Specification and/or standards required by this Contract during the New Contractor Rectification Period solely as a consequence of the New Contractor Rectification Works being required. Such provision shall for the avoidance of doubt not affect the Councils' entitlement to make adjustments and/or Deductions in accordance with Schedule 3 (Payment Mechanism) as a result of failure to achieve the Specification and/or standards required by this Contract during the New Contractor Rectification Period;

(e) (only if it is practically impossible to achieve 100% following the implementation of the Upgrade Plan) vary the level of default applicable for the purposes of paragraph (r) of the definition of Contractor Default to an amount 10% above the average at which the Contractor was performing in the two years prior to the Termination (or where Termination occurs within two years from the NWTF Completion Date, the average at which the Contractor was performing since the NWTF Completion Date)".

(5) New Contractor Rectification Works are defined as:

"such works (including new and rectification works) and implementation of such new systems as shall be required to enable the New Contractor to achieve the standards and targets set out in Schedule 1 (Specification)."

(6) Tender Costs are defined as:

"the reasonable and proper costs of the Councils incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Contract".

(7) Unitary Charge is defined as:

"the fee notionally payable by the Councils as consideration for the delivery of the Services calculated in accordance with paragraph 1 of Schedule 3 (Payment Mechanism) on the basis of complete performance of the Services in accordance with the Specification and without allowing for over performance".

(8) Deduction is defined as:

"any deduction from or reduction in the Unitary Charge made pursuant to Schedule 3 (Payment Mechanism) resulting from the Contractor's failure to deliver the Service in accordance with the requirements of Schedule 1 (Specification)".

(9) Clause 30.2.1.2
"*30.2.1 Subject to:*

30.2.1.1 any other express right of the Councils pursuant to this Contract; and

30.2.1.2 the Councils' right to claim, on or after termination of this Contract, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Contract by the Contractor (provided that where the breach is one in respect of which the Councils are able to make a Deduction, the making of such Deduction shall be the sole remedy of the Councils in relation to such breach), save to the extent that the same has already been recovered by the Councils pursuant to this Contract or has been taken into account to calculate any compensation payable by the Councils pursuant to clauses 60 (Compensation on Termination for Force Majeure), 58 (Compensation on Termination on Contractor Default), 56 (Compensation on Council Default) 64 (Compensation on Voluntary Termination) or 62 (Compensation on Termination on Corrupt Gifts, Fraud) and 66 (Compensation on Termination for Breach of the Refinancing Provisions);

the sole remedy of the Councils in respect of a failure to provide the Services in accordance with this Contract shall be the operation of Schedule 3 (Payment Mechanism) and Schedule 14 (Performance Mechanism)."

(10) Clause 58 :

"*58.1* ***Retendering Election***
58.1.1 Subject to clause 58.1.2, the Councils shall be entitled either to:

58.1.1.1 retender the provision of the Project in accordance with clause 58.2 (Retendering Procedure); or

58.1.1.2 require an expert determination in accordance with clause 58.3 (No Retendering Procedure).

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*58.3 **No Retendering Procedure***

If the Councils are not entitled to re-tender the provision of the Project under clause 58.1 or the Councils elect to require an expert determination in accordance with this clause 58.3 or clause 58.2.19 applies, then the following procedure shall apply:

58.3.1 Subject to clause 58.3.2, the Contractor shall not be entitled to receive any Post Termination Service Amount.
58.3.2 If the Councils elect to require an expert determination in accordance with this clause 58.3 after they have elected to follow the procedure under clause 58.2, then the Councils shall continue to pay to the Contractor each Post Termination Service Amount until the Compensation Date, in accordance with clause 58.2.
58.3.3 In agreeing or determining the Estimated Fair Value of this Contract, the Parties shall be obliged to follow the principles set out below:
58.3.3.1 all forecast amounts shall be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Contract;
58.3.3.2 the total of all future payments of the full Unitary Charge (without Deductions) forecast to be made and Third Party Income forecast to be earned shall be calculated and discounted to the Termination Date at the Termination Date Discount Rate;
58.3.3.3 the total of all costs forecast to be incurred by the Councils as a result of termination shall be calculated and discounted at the Termination Date Discount Rate and deducted from the payment calculated pursuant to clause 58.3.3.2 such costs to include (without double counting):
(a) any loss of Third Party Income to which the Councils would otherwise have been entitled under paragraph 5.5 of Schedule 3 (Payment Mechanism) assumed at Base Case levels;
(b) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant Base Case;
(c) the costs of the Service (including any assessment of costs of generating any Third Party Income) forecast to be incurred by the Councils in providing the Project to the standard required; and
(d) any rectification costs required to deliver the Project to the standard required (including any costs forecast to be incurred by the Councils to complete construction or development work and additional operating costs required to restore operating services standards),

in each case such costs to be forecast at a level that will deliver the full Unitary Charge referred to in clause 58.3.3.2.

> *58.3.3.4 where any element of the Capital Contribution has not been paid as at the Termination Date (the "Unpaid Contribution"), then:*
> *(a) where the Termination Date is earlier than the NWTF Planned Completion Date, the Unpaid Contribution shall be discounted at the Termination Date Discount Rate, except that references in the definition of Termination Date Discount Rate to the "average life ,'of the outstanding Senior Debt" shall be read as referring to the period of time between the Termination Date and the NWTF Planned Completion Date, and the outcome of this calculation shall be taken into account in calculating the Estimated Fair Value of the Contract;*
> *(b) where the Termination Date is either the NWTF Planned Completion Date or a date falling thereafter, the full amount of the Unpaid Contribution shall be taken into account in calculating the Estimated Fair Value of the Contract.*
> *58.3.4 If the Parties cannot agree on the Adjusted Estimated Fair Value of this Contract on or before the date falling 30 days after the date on which the Councils elected to require an expert determination in accordance with this clause 58.3, then the Adjusted Estimated Fair Value of this Contract shall be determined in accordance with the Dispute Resolution Procedure.*
> *58.3.5 The Councils shall pay to the Contractor an amount equal to the Adjusted Estimated Fair Value of this Contract on the date falling 60 days after the date on which the Adjusted Estimated Fair Value of this Contract has been agreed or determined in accordance with this clause 58.3.*
> *58.3.6 The discharge by the Councils of their obligation in clause 58.3.5 is in full and final settlement of all the Contractor's claims and rights against the Councils for breaches and/or termination of this Contract or other Project Document whether in contract, tort, restitution or otherwise, save for any liability which arose prior to the Termination Date (but not from the termination itself) that has not been taken into account in determining the Adjusted Estimated Fair Value of this Contract.*
> *58.3.7 To the extent that the Adjusted Estimated Fair Value of this Contract is less than zero, then an amount equal to the Adjusted Estimated Fair Value of this Contract shall be due and payable by the Contractor to the Councils on the Compensation Date."*

10. Both sides rely upon SOPC4, which was bound into the four corners of the contract, as an aid to construction, with both sides contending that it supports their construction. To the extent necessary, I make reference to parts of that document further below, when considering the parties' competing positions.

The Parties' competing constructions by reference to the pleadings

11. The parties have both engaged in some detail on the proper construction of clause 58 in their pleadings. This will be considered in more detail in the context of the Reply Strike Out. For the purposes of the summary judgment application it is sufficient to identify the basic positions of the parties.

12. In relation to Issue 1, paragraphs 118 to 120 of the Amended Particulars of Claim set out RRS's position:

"118. Therefore, the formula in clause 58.3 is the product of:

118.1 Income: "the total of all future payments of the full Unitary Charge (without Deductions) forecast to be made and Third Party Income forecast to be earned…discounted…at the Termination Date Discount Rate" (clause 58.3.3.2).

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118.2 Costs: "the total of all costs forecast to be incurred by the Councils as a result of termination…discounted…at the Termination Date Discount Rate … forecast at a level that will deliver the full Unitary Charge"
(clause 58.3.3.3).

plus

118.3 where, as in the present case, the Termination Date falls after the NWTF Planned Completion Date, the full Unpaid Contribution under the Project Agreement (which is £50,000,000) (clause 58.3.3.4(b)).

Income

119. In relation to income, clause 58.3.3.2:

119.1 assumes full payment of the Unitary Charge without any Deductions;

and

119.2 requires there to be a forecast of the Third Party Income to be earned, which is not fixed by a particular standard or by the level assumed in the Base Case.

Costs

120. In relation to costs:

120.1 clause 58.3.3.3 refers to four heads of cost, namely (emphasis added):

(a) "any loss of Third Party Income to which the Councils would otherwise have been entitled under paragraph 5.5 of Schedule 3 (Payment Mechanism) assumed at Base Case levels" (clause 58.3.3.3(a));

(b) "a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant Base Case" (clause 58.3.3.3(b));

(c) "the costs of the Service (including any assessment of costs of generating any Third Party Income) forecast to be incurred by the Councils in providing the Project to the standard required" (clause 58.3.3.3(c)); and

> *(d) "any rectification costs required to deliver the Project to the standard required (including any costs forecast to be incurred by the Councils to complete construction or development work and additional operating costs required to restore operating services standards)" (clause 58.3.3.3(d)).*
>
> *120.2 the costs in clause 58.3.3.3 are the costs that the Defendants are forecast to incur; and*
>
> *120.3 these costs are not the very lowest or highest costs that could be incurred; first, the likely costs are forecast and then a reasonable risk assessment of any cost overruns is applied as set out in clause 58.3.3.3(b).”*

13. A further explanation of the mechanism at 58.3.3.3(c) and (d) was provided at paragraph 153.2 of the Amended Particulars of Claim (without redline):

> *“153.2 The starting point for any assessment of the costs under clause 58.3.3.3(c) and (d) is:*
>
> *(a) an assumption that the Defendants would actually perform (or procure the performance of) the Service to meet the output/performance targets in the Specification and a forecast of the costs that the Defendants would incur if they did so;*
>
> *(b) a forecast of the rectification costs the Defendants actually would incur in doing so; and*
>
> *(c) in each case, assuming the Defendants act reasonably and consistently with their overall obligation to achieve Best Value by planning and implementing a reasonable methodology which delivers the full Unitary Charge in the most economic manner*
> *reasonably attainable.”*

14. The Councils joined issue with this in their Amended Defence at paragraph 60, pleading that the words ‘*to be incurred by the Councils’* do not require an investigation of ‘*how the Defendants actually intend to perform the Service’* or ‘*the rectification costs the Defendants actually forecast they will incur’*. At paragraphs 60.1 and 60.2 they state:

> *’60.1 [Clause 58.3] requires an objective assessment of the amount that a hypothetical third party would pay to the Councils as the market value of a hypothetical contract on the same terms as the Project Agreement, with a term of 2 August 2019 to 31 March 2042 – ‘the Deemed New Contract’ as defined in the Project Agreement.*
>
> *60.2 The Clause 58.3 exercise thus entails determining, objectively, matters such as: the condition and capabilities of the NWTF and other Project Assets at Termination; the rectification works required to put them into the condition required by the Deemed New Contract their likely*

performance and capacity to generate Third Party Income, and the costs of maintaining and operating them to deliver the Services required by the Deemed New Contract and of otherwise complying with the terms of that contract.'

15. In its Reply, RRS responded:

'147. As the language of clause 58.3 expressly requires… the starting point in any assessment under that clause will always be to:

147.1 Identify the work / services that the Defendants intend to undertake to achieve the targets in the output / performance specification which will deliver the full income stream credited to the Claimant in clause 58.3.3.2 (or, in the event that they do not intend to undertake such works /services, the work / services that they would intend to undertake if they were to achieve the targets in the output / performance specification);

147.2 Identify the costs forecast to be incurred in providing those works /services;

147.3 Assess the proposed works/services/costs on evidence against the standard of whether they are:

(a) Required to deliver the Project to the level that will deliver the full Unitary Charge; and

(b) Meet the Fair Market Value test.'

16. Characterising the debate at its essence, RRS contends that the starting point for the exercise is the forecast costs of what the Councils actually forecast to be incurred, and the Councils contend that the exercise is a wholly hypothetical/notional exercise without reference to the actual intentions of the Councils. Whilst contractually the Councils contend that the actual intention of the Councils is entirely irrelevant to the exercise, as will become apparent, Mr Ghaly accepted in oral argument that post termination events (including what the Councils do or do not in fact do) may be relevant to the overall assessment insofar as they casts light on the notional exercise as at the date of termination required to be carried out by the experts.

17. In relation to Issue 2, RRS contends that the 'standard required' in Clause 58.3.3.3(c) and (d) *'is that required to deliver the full Unitary Charge'* (paragraph 123 of the Amended Particulars of Claim). As explained at paragraph 124, by this it is meant that any obligation within the Project Agreement which does not, if not met, result in a Deduction is ignored for the purposes of the exercise (unless it is something which ordinarily would form part of providing what it contends is that 'service required', such as insurances). By contrast, the Councils' position is that (as set out at paragraph 70 of the Amended Defence), '*Delivering the Project to 'the standard*

required' therefore entails performing exactly the same obligations as the obligations of the Contractor under the Project Agreement, for the period 2 August 2019 to 31 March 2042.'

The Proper Approach to Summary Judgment applications

18. The parties do not agree that I should determine the questions of construction by way of summary judgment. The Councils contend that I should do so, on the basis that the points are straight forward questions of contractual interpretation. It is said that if the matters were before the Court on a Part 8 application, it would determine them. All the necessary evidence is before the Court to enable determination of the issues. They say that not only are there no compelling reason why the issues should be disposed of at trial, there are compelling case management reasons to 'grasp the nettle' and resolve these issues now; they say there would be a fundamental difference to the shape and cost of the litigation. RRS contend that I should not do so on the basis, in summary, that (1) it is necessary to fully understand the factual matrix and the Project Agreement; (2) material can be expected to be available at trial on the issues; (3) summary judgment is inappropriate where the Court is being asked to consider one parties' case in relation to one part of a wider clause; and (4) there are no compelling case management benefits, all of which are against a background where RRS's construction clearly meets the test of whether it has a real prospect of succeeding. In oral argument, Mr Catchpole also indicated clear concern about the time that was available for oral submissions (2 days), in part by way of explanation as to the extremely lengthy written submissions provided.

The Law

19. The Councils rely upon *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725, Moore-Bick LJ, at [11]-[14], as applied by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

20. In *ICI,* the issue was a short point of construction which was determinative of the claim. It was, as Moore-Bick LJ noted at paragraph 11, an issue which the judge had invited the parties to agree that he should decide as a preliminary issue, but the parties were unwilling to agree to take that course of action. It was in this context that the Court of Appeal indicated that:

> '*the judge should have followed his original instinct. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reasons is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applications' case is bad in law, the sooner that is determined, the better.*'

21. In *Easyair,* determination of the summary judgment application in relation to a point of contractual construction led to the dismissal of the claimants' claims for breach of contract and breach of fiduciary duty. Although the Court decided that the third claim, for an account and inquiry, had a real prospect of success, the context was plainly that the summary judgment was, if successful, dispositive of the proceedings as a whole. At paragraph [15], Lewison J set out the correct approach. This stated:

> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91 ;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
>
> *vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court,*

such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

22. It can be seen that at [vii], Lewison J largely adopted the wording of Moore-Bick LJ from *ICI.* In subsequent authorities relating to CPR Part 24 applications, the passage in *Easyair* is generally regarded as a convenient summary of the principles to be applied, and I shall do likewise. However, it is necessary in the present case to identify some other observations which have been made in the context of summary judgment applications.

23. In *BBC Worldwide Limited v Bee Load Limited (trading as Archangel Limited)* [2007] EWHC 134 (Comm), the claimant sought summary declarations on a number of points of dispute which arose in relation to three agreements. The agreements were governed by English law. Alongside the English proceedings, the parties were involved in litigation in Maine, USA. During interlocutory skirmishes in the American litigation, the US Court had remarked that '*a parallel proceeding in the High Court that yields an interpretation of the Masterrights Agreement could aid this court in resolving the parties' dispute'*. In this context, Toulson LJ observed as follows in considering whether to exercise its jurisdiction to grant a summary declaration:

> *'23. In considering whether to exercise its jurisdiction to grant a summary declaration, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons for granting or refusing the declaration: Financial Services Authority v Rourke 19 October 2001, unreported (Neuberger J). In this case the existence of the proceedings in Maine, in which judicial indications have been given that the view of this court on questions of English law regarding the three agreements would be welcomed, provides a cogent reason for exercising the jurisdiction provided that the necessary requirements are met.*
>
> *24. CPR 24.2 provides that the court may give summary judgment against a claimant or a defendant on the whole of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue or, conversely, that the defendant has no real prospect of successfully defending the claim or issue. Part of Bee Load's argument is that on all the issues of construction its argument is tenable, and accordingly the requirements of CPR 24 are not satisfied. This raises the question how the court should proceed where the issue raised is a pure point of construction which can be as well determined on a summary application as on a full trial (or a trial of preliminary issues), because it will not be affected by evidence. It seems to me that if at the end of the argument the court comes to a clear view as to the correct construction, the court has jurisdiction to grant summary*

> *judgment under CPR 24.2 on the basis that a trial would have no realistic prospect of causing it to reach a different judgment.*
>
> *25. I believe that this approach accords with the underlying objective of Part 24, which superseded RSC O14, O14A and O18 r 19. RSC O14A provided for summary disposal of a case on a point of law. If I were wrong in this approach, an alternative approach in order to minimise the use of court time and the cost to the parties would be to direct the hearing of preliminary issues, reserve the matter to myself (having already heard detailed arguments on the issues) and then give judgment, but I do not believe that this is necessary. I agree with Cooke J's observation that if summary judgment is given on points of construction, it is because they appear to the judge to be clear as a matter of English law.*'

24. In *AC Ward v Catlin (Five)* [2010] Lloyds LR 301, the Court of Appeal upheld the refusal of the judge at first instance to issue summary judgment in relation to the proper construction of the terms of an insurance policy, which if successful would have been determinative of the claim. Etherton LJ agreed that the claimant's construction had a real prospect of success. He continued:

> *'35. I agree with the Defendants that neither the Claimant nor the Judge has articulated clearly any evidence relevant to interpretation which is likely to exist and, although not available on the hearing of the Application, can be expected to be available at trial. Had this been the only ground for dismissing the Application, it would not, in my judgment, have been sufficient: ICI Chemicals & Polymers v TTE Training: [2007] EWCA Civ 725 at paragraph [14] (Moore-Bick LJ). Mr Stuart-Smith accepted, however, as I have said that it is apparent from paragraph [46] of the Judgment that the Judge's decision included the arguability of the Claimant's submissions on interpretation. Furthermore, I bear in mind that the Warranties are standard terms of the Defendants' Multiline Commercial Combined Policy, which may affect many other policyholders, and that provisions in the Warranties such as "be in full and effective operation at all times" and "put into full and effective operation at all times" are said to have even wider currency in the insurance market. In those particular circumstances, combined with the arguability of the Claimant's points on interpretation, I can understand why the Judge considered it would also be appropriate to give the Claimant the opportunity to seek and adduce any relevant and admissible factual material available by the date of the trial'.*

25. In *TFL Management Services v Lloyds TSB Bank (CA)* [2014] 1 WLR 2006, the defendant's summary judgment application dismissing the claimant's claim for unjust enrichment had been successful. Allowing the appeal, Floyd LJ set out Lewison J's summary, noting that neither side challenged the principles, and continued:

> '*I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in Partco v*

> *Wragg [2002] EWCA Civ 594; [2002] 2 Lloyds Rep 343 at 27(3) and cases there cited. Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; see Partco at 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example Hudson and others and HM Treasury and another [2003] EWCA Civ 1612*.'

26. In *Kryvenko v Renault Sport Racing Ltd* [2016] EWHC 2284 (Comm), the Court refused summary judgment, which would have been, if successful, determinative of the claim, having concluded that there were factual matters to be determined at trial. The Court effectively considered sub-paragraph (vi) of *Easyair* to be particularly applicable: that the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

27. In *Hall v Saunders Law Ltd [2020] EWHC 404 (Comm)*, the issue on which summary judgment had been sought was the extent of the duties (if any) owed by solicitors who conduct funded litigation to those who provide the litigation funding. The outcome of the application was determinative of the claim, and Richard Salter QC, sitting as a Deputy Judge of the High Court, concluded that the issue of the correct interpretations to be given to the relevant clauses of the particular agreement was, at heart, a short point (or series of points) of law, and he was satisfied that he had all of the facts relevant to the interpretation of those clauses (paragraph 35). In considering the approach when the parties disagree on 'grasping the nettle', he said:

> *17 […] In cases where the relevant law is in a state of incremental development or of uncertainty, a court will for sound practical reasons usually be reluctant to come to any final conclusion on the basis of assumed rather than actual facts. As Mummery LJ observed in Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Co 100 Ltd 3 (a case cited by Lewison J):*
>
> > *..there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment .. than in trying the case in its entirety .. The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials.*
> >
> > *The outcome of a summary judgment application is more unpredictable than a trial. The result of the application can be influenced more than that of the trial by the degree of professional skill with which it is presented to the court and by the instinctive reaction of the tribunal to the pressured circumstances in which such applications are often made ..*

> *18. However, where a point of law or construction which is not fact-sensitive (or where the court can be confident that it is seized of all the relevant facts) is both short and likely to be determinative of the whole (or at least of a substantial part) of the case, the overriding objective under CPR 1.1(1) of dealing with cases justly and at proportionate cost will usually favour summary determination.*

28. In *Commerz Real Investmentgesellschaft MBH v TFS Stores Ltd [2021] EWHC 863 (Ch)*, Chief Master Marsh considered the proper construction of a lease in the context of a claim for rents payable under it. Ultimately, the application was successful in determining the claim, in the Claimant's favour, and thus obviating the need for a trial. In considering the approach he should take to whether to 'grasp the nettle', the Chief Master said:

> *'It is open to the court to deal with a point of law or construction on the hearing of an application for summary judgment. In Easyair and in Mellor v Partridge [2013] EWCA Civ 477 at [3 (vii)] Lewison J said it was open to the court to determine "a short point of law or construction". This description usually prompts the applicant to submit the point is short, and is therefore capable of being dealt with on an application for summary judgment, and the respondent to submit it is anything but short. Quite where the boundary lies between a point with which it is acceptable for the court to deal on a summary basis, and one that is unsuitable, is not easy to draw. As it appears to me, the notion of shortness does not relate to the length of the document to be construed or the length of the material passage in that document; but it may relate to the length of the hearing that will be required and the complexity of the matrix of fact the court will have to consider. In my experience the court regularly deals with points of law and of construction of real difficulty on the hearing of an application for summary judgment. I would only add that there may be some overlap between the idea of a point of construction not being 'short' and the second limb of CPR rule 24.2. There may be some points that the court is capable of grappling with (or grasping the nettle as it is sometimes put) that, nevertheless due to the context in which they arise or other factors are best left to be dealt with at a trial.'*

29. Of the other authorities to which I was directed by the parties which I have not referred to explicitly above, I note that :

(1) In *Natixis v Famfa Oil Ltd* [2020] 2 WLUK 330, HHJ Pelling gave summary judgment in relation to the contractual defence to claims brought (whilst leaving other defences, such as misrepresentation, to trial). He did so in circumstances where he regarded the proper construction of the document 'close to obvious', and the defendant's contention as to the proper meaning was 'unreal'.

(2) In *TKC London Limited v Allianz Insurance* [2020], the summary judgment application was successful, and determinative of the entire claim on the basis of a short point of construction. Richard Salter QC, sitting as a Deputy Judge of the High Court, considered he was confident that he had available to him all the

evidence necessary for the proper determination of the issues of interpretation. He also considered that there was a public interest in having a determination of the meaning of the relevant policy determined sooner rather than later (relating as the issues did to its responsiveness to matters related to the COVID-19 pandemic).

(3) In *Orchard Plaza Management Co Ltd v Balfour Beatty* [2022] EWHC 1490 (TCC), Morris J rejected the claimant's application for summary judgment in respect of one aspect of the defendant's case, namely that losses claimed were too remote. He considered that the Defendant had not shown by evidence that the material not currently before the court was likely to exist and could be expected to be available at trial would put the current evidence in another light.

(4) In *Avantage (Cheshire) Ltd v GB Building Solutions Ltd (in administration)* [2022] EWHC 171 (TCC), the application for summary judgment (which would have been determinative if successful) in relation to a negligence claim was rejected as an attempt as a mini-trial. It was accepted it was not a 'short point of construction' case.

30. The following can be distilled from these authorities:

(1) Just because a point of construction is difficult or complex does not mean of itself it cannot be considered as a 'short' one for the purposes of a summary judgment application (see *Commerz Real Investmentgesellschaft MBH*).

(2) no difficulty generally arises where the Court is persuaded that the construction a party contends for has no reasonable prospect of success. Where the point of construction is 'clear', summary judgment will generally follow (see *BBC Worldwide*);

(3) a more difficult assessment of the appropriate course to take arises where both parties' contentions would – without more – be described as having real prospects of success. In these circumstances, a broader view of the appropriateness of finally determining the issue summarily will usually be relevant;

(4) in these circumstances, the Court should bear in mind whether the declaration would serve a useful purpose (see *BBC Worldwide*). In particular:

(a) will deciding the issue(s) to be determinative of the whole or a substantial part of the dispute? (see *Hall v Saunders Law*) If it will, this will militate towards grasping the nettle. If not, the Court may be more circumspect about doing so. This is because parties should not generally be encouraged to add potentially costly steps into the route to trial which (even if right) add to, rather than reduce, the costs of conducting litigation for little practical benefit;

(b) by analogy, is the issue the sort of matter the Court would encourage parties to hear by way of a preliminary issue because, even if not determinative of the whole or a substantial part of the dispute, its resolution will provide considerable case management benefits? If it is, summary determination will

be more appropriate; if, however, the Court would not have considered it appropriate to have dealt with the matter by way of preliminary issue because of a lack of practical case management benefit, the Court may again be slow to allow summary judgment on a point of construction unless the answer is clear;

(c) it follows from this, an important, although not determinative, question will often be whether there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action (see *TFL*);

(5) whilst the question whether there is evidence relevant to interpretation which is both likely to exist and can be expected to be available at trial is an important one, it is not determinative where the answer to the point of construction is not clear: even if the court may consider that it is capable of grasping the nettle, there may nevertheless be good reasons to conclude that it are best left to trial (see *Commerz Real Investmentgesellschaft MBH*).

31. Against this background, I shall now consider the two issues the Councils seek summary determination in respect of.

Summary Judgment: Issue 1

32. There is no dispute as to the approach to be taken in general terms to questions of contractual construction. In summary, the court is required to seek to ascertain the intention of the parties by reference of the language used when seen in context. I adopt the principles summarised by Popplewell J (as he then was) in *The Ocean Neptune* [2018] EWHC 163 (Comm) at paragraph 8.

33. The Councils' principal contention is that Clause 58.3.3 is concerned with establishing the sum that a hypothetical third party bidder would pay to take on the remaining term of the Deemed New Contract. Mr Ghaly emphasises, at the outset, that the 'Estimated Fair Value of the Contract' is defined as the amount '*a third party would pay to the Councils as the market value of the Deemed New Contract*'. However, as Mr Catchpole points out, the full definition states that the EFV is '*the amount determined in accordance with clause 58.3 that a third party would pay to the Councils as the market value of the Deemed New Contract …'*. Thus, reading the full definition of EVF into Clause 58.3 merely creates a circularity when one is asks what 'in accordance with clause 58.3' means.

34. The second main element of the textual analysis advanced by Mr Ghaly rests on the fact that Clause 58.3.3.2 refers the '*the total of all future payments of the full Unitary Charge (without Deductions) forecast to be made*'. It is said, with some justification, that this is a reference to hypothetical, not actual, payments 'to be made', in circumstances where the Project Agreement has been terminated and no actual payments are in reality forecast to be made to RRS. This part of the overall equation represents the 'income' side of the calculation against which 'cost' (dealt with in 58.3.3.3) will be set. If the words '*forecast to be made*' in 58.3.3.2 do not mean *actually* forecast to be made, the same is true, Mr Ghaly argues, with the words upon

which RRS rely heavily in 58.3.3.3, namely '*forecast to be incurred*'. This is certainly a factor which ought be taken account in the unitary exercise of construction, but it is far from determinative. Placed in context, the 'income' line is by definition a hypothetical amount (and not one likely to give rise to much if any dispute). However, Clause 58.3.3.3, the cost line, is not necessarily hypothetical: in most cases, the Councils will *in fact* incur sums in providing the Services which RRS is not now going to provide by reason of the termination. There is no necessary reason, in this factual context, that one would construe '*the total of all costs forecast to be incurred by the Councils as a result of the termination*' in 58.3.3.3 as meaning the same as a reference to notional forecast payments in the preceding sub-paragraph.

35. The principal difficulty faced by the Councils, and why I do not consider that the proper construction of the mechanism is in any way 'clear', is that there is no real justification for any of the verbiage in clauses 58.3.3.1 to 58.3.3.3 if the mechanism is never any more than a notional one requiring an expert to value the Deemed New Contract. If the parties' intention was that 58.3.3.3 merely required a expert's assessment of what a third party might notionally bid for a scope of work defined by the Deemed New Contract (whatever that scope may be), this is all the clause needed to say.

36. When pressed for a reason why clause 58.3.3.3 was structured in the way it was, and worded by reference to '*costs forecast to be incurred by the Councils'*, the only practical reason identified by Mr Ghaly was the need to indicate that the Councils would incur a 'cost' by reference to the margin that would be added to the cost of carrying out the services by the notional bidder of the Deemed New Contract. However, this is very limited justification in my view for Clause 58.3.3.3 to be drafted using the language of '*costs forecast to be incurred by the Councils*' in three separate places within the clause. Indeed, one might have thought it obvious that the inclusion of a margin would by definition be included in what a third party might notionally bid for a scope of work defined by the Deemed New Contract, and would not need to be spelt out (and certainly not in such an indirect and – as Mr Ghaly frankly conceded – 'odd' way). Indeed, it is difficult to conclude that, at least in some circumstances, the wording of 58.3.3.3 is intended to signify the inclusion of some costs outside that which a third party might notionally bid for a scope of work defined by the Deemed New Contract. This is at its clearest in 58.3.3.3(d) in which reference is made to '*any rectification costs required to deliver the Project to the standard required (including any costs forecast to be incurred by the Councils to complete construction or development work and additional operating costs required to restore operating services standards).'* This seems to suggest that there may be two types of rectification costs – arguably those which the notional third party bidder might include to deliver the Project to the standard required *and* forecast costs to be incurred by the Councils to '*restore*' operating services standards. This is language that does not sit obviously with an intention that all that is required is an assessment of what a third party might notionally bid for a scope of work defined by the Deemed New Contract (whatever that scope may be), and in respect of which costs in fact forecast to be incurred by the Councils as a result of the termination, in the respect identified, play no part in the analysis.

37. Indeed, if one were to read Clause 58.3.3.3 in isolation from the definition of EFV, it would appear on its face to seek to replicate what might be regarded as a traditional

'termination for default' calculation, where the innocent employer is made good by recovering its costs caused by the termination, net of the sums it otherwise would have been required to pay the defaulting contractor had the contract continued, subject to the obvious difference that the contractual mechanism produces a sum owing to the contractor. A consequence of the Councils' construction is that where, upon termination, and in circumstances where a Council actually knew at the date of termination that it was going to be necessary in reality to procure the continuation of the provision of Services in a manner quite different, and more costly, to that which the outgoing contractor had been pursuing, then recovering costs by reference to a hypothetical 'Deemed New Contract' rather than by reference to what the Council actually forecast its incurred costs would be would leave the Council with a loss. Whilst this may be the proper construction of the Project Agreement, it is not an outcome one would readily assume reflected the parties' intentions without clear words.

38. On the other hand, it seems to me that RRS's construction is not without its difficulties. The principal problem as a matter of construction is the obverse to that faced by the Councils: if clause 58.3.3.3 is intended to require the 'cost' side of the equation to be simply the costs that the Councils forecast they will actually incur, why it is necessary to retain the concept of a Deemed New Contract, and to define EFV by reference to it? Put another way, if the benchmark of determining the forecast costs to be included within the assessment is the actual forecast costs to be incurred by the Councils (however they in fact choose to do it), the reference to the Deemed New Contract seems otiose. Whilst Mr Catchpole's answer to this is that it is necessary in order to provide for the position where the Councils do not intend to carry out the work at all, it might be considered that the mechanism as a whole does not appear, expressly at least, to deal with what happens in this position. Another, related, difficulty is that whilst RRS's construction leads, as Mr Ghaly characterises it fairly, to a 'multi-stage' assessment process, this is not evident from the language used. Whilst it may be possible to imply some sort of objective 'brake' on what the Councils might incur by reference to reasonableness or market value, precisely how this functions is not clear from either the clause as drafted itself, or from Mr Catchpole's admirable attempt to explain it.

39. There appears, therefore, to be a tension on the face of the Contract (which has manifested itself in the dispute before me on this application) between an assessment which centres upon a notional Deemed New Contract, and an assessment which centres upon what the Councils actually forecast to incur (or some potentially objective version of the same). The clause uses language consistent with both; however, where consistent with one, it is inconsistent with the other.

40. Both sides prayed in aid SOPC4. However, for the purposes of this judgment, it is sufficient to conclude that this is far from determinative in resolving this tension. This is because there are parts of SOPC4 which support both constructions. For the Councils, support can be drawn from paragraph 21.2.9.2, which states:

> *'Estimated Fair Value computations are conducted by forecasting the full Unitary Charge from the date of termination to the expiry of the Contract (ignoring any deductions for performance or availability), from which the estimated costs of delivering the service to the required standard in the output*

> *specification (this includes the running costs, lifecycle costs and any rectification costs) are deducted to arrive at the estimated operating cash-flow stream which, had a liquid market existed and the project been re-tendered, a hypothetical bidder would have valued to determine the amount to bid for the project.'*

41. This, Mr Ghaly rightly submits, provides some support for a mechanism focussed on a notional exercise. However, set against this, there are a number of references within the voluminous SOPC4 which identify that the purpose of the contractual structure is, amongst other things, to ensure that the Authority is no worse off as a result of the termination (and likewise does not get a windfall). See for example paragraph 21.2.6 under 'Market Value':

> *'21.2.6.1 The required approach follows the principle set out in Section 21.2.5.4. It facilitates the Senior Lenders' rights to step–in, manage and rescue or sell the Project if the Contractor defaults, but, if they fail to do so, offers compensation on termination based on the market value of the unexpired term of the Contract.*
>
> *21.2.6.2 The approach:*
>
> ...
>
> - *ensures that the Authority is no worse off as a result of the termination where Senior Lenders elect not to step–in;*
> - *does not give the Authority a windfall gain on termination; ...'*

42. As Mr Catchpole submits, an approach which ensures that the Authority is to be no worse off, but is not to receive a windfall, is consistent with an approach that takes into account by what the Authority actually intends to do rather than a purely notional assessment if that is does not reflect post-termination reality.

43. It follows from the foregoing that there is most clearly, in my view, at least a reasonable prospect that RRS will establish that sub-clause 58.3.3.3 of the Project Agreement does require, to some extent and in some ways, an assessment of (a) how the Councils actually intend to perform the Works and Services that RRS would have performed but for termination; and/or (b) the rectification costs that Councils actually forecast that they will incur in performing those Works and Services.

44. In light of this, I consider whether – this ultimately being a question of law – I should nevertheless determine the issue summarily, by reference to the principles I have identified above.

45. It is to be noted, first, that Issue 1 is not requiring the Court to determine the claim or any substantial part of it. Issue 1 is effectively a declaration in relation to one element of an issue of construction which exists on the face of the pleadings. Moreover, the way in which the Issue is framed, the Court is being invited only to determine what (a part of) Clause 58.3 *does not* mean. Mr Ghaly confirmed in terms that the Court was *not* being invited to determine what the proper construction of the clause (or part of it) actually is. That means that even if this Court were to determine the issue as invited, the Court would have to return to the question of the proper

construction of the clause in the forthcoming trial. All that would happen is that, in considering the proper construction at that time (along with lots of other contractual questions), one possible answer would, if the declaration was granted, have been removed from the table.

46. It can readily be seen that this is an unattractive proposition for the Court. In none of the authorities to which I have been taken has the Court ever been invited to 'grasp the nettle' in respect of such a small and non-determinative element of the overall dispute. Had the Councils applied to have this issue tried by way of preliminary issue, there is no doubt that the Court would have been extremely sceptical about agreeing to permit the use of Court time and potential disruption to the timetable to trial for the purposes of considering a negative declaration in relation to one part of one clause of the Contract: indeed, this may be why the Councils have tried to bring the question before the Court by way of summary judgment rather than having applied for a preliminary issue. On any view, the Court would have to have been persuaded that there would be overwhelming case management advantages before embarking upon such an exercise. Mr Ghaly, at one point, submitted that had the issue been placed before the Court by way of Part 8 proceedings, the Court 'would have' determined it. That is not necessarily so: granting declaratory relief is always within the discretion of the Court. If a Court considers that one party is trying for strategic purposes to bring a small part of a much wider dispute before the Court by way of Part 8 in isolation from the wider dispute within which it sits, and considers that no proper purpose is served by carving out that isolated issue, then it is under no obligation to grant declaratory relief.

47. In terms of the case management advantages of providing this limited, negative declaration, I am not persuaded that doing so will, as Mr Ghaly sought to persuade me, change the shape of the litigation to any significant degree. It was not suggested, for example, that determination of the issue would (if the Councils were successful) bring forward the 7 week trial date, which was set down by Waksman J in December 2022 in the face of the Councils' submissions that the trial would not be ready until much later. Nor was it suggested with any particularity that the 7 weeks' estimate for the trial length would change, or change materially.

48. In relation to disclosure, the Councils' submission was that RRS's plea leads to the requirement for extensive document production on the subjective intentions of the Councils. Ms Evans, in her witness statements, points to the Disclosure Review Document, and identifies a question, '*What are the Councils' intentions concerning the future use of the NWTF*?'. This is described as wide-ranging, and she says that it could include all documents and correspondence produced or received by the Councils which could fall within the opaque and ill-defined rubric of '*future use of the NWTF*'. The disclosure request is described as requiring a trawl for any documentation evidencing any consideration of the NWTF during the 3.5 year period of a 'real-world exercise'.

49. In the face of this, RRS contended, both through the evidence of Mr Duncan in response to Ms Evans, but also in the oral submissions of Mr Catchpole, that even if the Councils succeeded in their application and the clause 58.3 exercise is purely hypothetical, documents which evidenced the actual intentions of the Councils and/or what they in fact did remained relevant. Although this position was described as

'wrong' by Ms Evans and 'meaningless' by Mr Ghaly in his written submissions, in oral submissions Mr Ghaly conceded, quite properly in my judgment, that what the Councils in fact did could be relevant to any hypothetical or notional exercise being undertaken by the experts. That is plainly the case: an experts' view that a certain technical or economic assumption is necessary on their notional assessment may well be undermined by factual evidence that that assumption was not being adopted in the 'real world'. It is not possible to pre-judge the probative value of that real-world evidence: this would be a matter for the trial judge. However, it would not be irrelevant, and would, within the bounds of reasonableness and proportionality, be disclosable. This being the case, it is far from clear what – if any - the real difference in scope of disclosure would be whether or not the application for summary judgment succeeded.

50. Similarly, in terms of factual evidence, it is unrealistic in my judgment to consider it likely that significant involvement from witnesses would be required. To the extent it is required, it would necessarily be directed to those parts of the dispute which relate to the issues upon which money turns. Where the notional case advanced by the Councils corresponds to what they are actually doing or plan to do, there is little if anything to explain. If disclosure shows that what the Council is in fact doing is far removed from that which it seeks to persuade the Court is the correct assumption for the purposes of an input into the model, it may be that a short factual explanation would be provided as to why this is the case (or why it depends on factual matters which could not have been forecast as at the date of termination). Once, however, it is accepted (as Mr Ghaly does) that what happens in the real world may be considered in the context of determining the credibility of the right hypothetical assumptions (on his own case as to what the Contract means), this enquiry becomes potentially relevant, and may give rise to the need for factual evidence irrespective of the determination of Issue 1. It goes without saying that that factual evidence would not extend to opinion, argument or submission, these being areas for the experts and/or lawyers.

51. In terms of expert evidence, Mr Ghaly contends that RRS's construction requires, if correct, a duplicative and unnecessary exercise in that once the actual intention is ascertained, this is checked by the experts against an objective standard in any event. This being the case, why, it is asked rhetorically, undertake the first step? Again, it seems to me likely on the material in front of me that this potentially over-states the process and/or its complexity. There is nothing necessarily unusual (for example in damages claims) about costs which are claimed on the basis of what is actually forecast to happen being adjusted to account for an objectively reasonable outcome, nor the existence of an interplay between evidence of what a party says it intends to do in the face of (for example) a particular breach, and those consequences being measured against an objective standard.

52. Mr Ghaly also submitted that, if the Councils were right with their construction and if that was not determined in their favour at this early stage, the Councils will be subjected wrongly to a highly disruptive investigation and examination of their real-world re-tendering exercise in relation to the NWTF, an exercise the Councils intend to carry out over the next 18 months. However, again, in my view the supposed disruption is significantly overstated. Once it is accepted, as it has been, that documentation relating to what happens in the real world is relevant to disputes which

arise even in relation to testing the credibility of a contractually hypothetical calculation, relevant documents will be provided in the usual way. It is far from unusual in this Court for remedial works to be ongoing during the preparation for a trial in relation to liability for and quantum of those remedial works. These are matters the parties and the Court can and do take in their stride as a matter of case management.

53. Finally, I address the question of whether, by evidence or otherwise, the Court will be in a better position to determine the proper construction of Clause 58.3.3 at trial. I am not persuaded that there will be significant factual matrix evidence likely to influence the outcome of this particular factual debate. However, I have no doubt at all that a full understanding of the technical and economic implications of the parties' competing constructions are matters that it is appropriate for the Court to take into account when determining what the correct interpretation of Clause 58.3.3 is.

54. For all these reasons, I refuse summary judgment and/or strike out in respect of Issue 1.

Summary Judgment: Issue 2

55. Issue 2 relates to the meaning of 'standard required'. This issue, as phrased, essentially sets against each other the two, high level, pleaded positions: does 'standard required' mean the cost of procuring all the Contractor's obligations under the Deemed New Contract or does it refer to the more limited cost of Works and/or Services "that delivers the full Unitary Charge without Deductions and not any costs which may relate to any other requirement or obligation".

56. Issue 2 has therefore been drafted to provide an enticing and simplistic choice between two alternatively pleaded constructions. At a high level, the Councils' case is that *every* obligation that RRS was under as at the date of termination is an obligation that has to be priced into what the hypothetical bidder would bid in order to take on the Deemed New Contract. On the other hand, RSS contends that the reference to 'standard required' is a reference to what are, in effect, the core obligations within Schedule 1 of the Project Agreement, and which if not fulfilled would give rise to a Deduction. As a matter of language, both are properly arguable positions, in that the constructions are not fanciful, and both, without more, have real prospects of success.

57. However, it became readily apparent during oral argument that Issue 2 was in fact a proxy for what in reality will require a detailed exercise of determining which of the obligations principally relating to technical matters within the Project Agreement are carried forward into the 'Deemed New Contract' (to the extent that that, in itself, is required, which may depend upon Issue 1). It is clear that, for example, an important debate upon which money will turn is the extent to which, if at all, RRS's method statement provided by RRS pursuant to its obligations under the Project Agreement is to be taken as the basis for determining some or all of the notional scope of work to be priced for the purposes of model inputs, or whether (because of the Councils' actual intentions or otherwise), other methods of achieving the Services should be assumed for the purposes of model inputs.

58. In these circumstances, it is abundantly clear to me that what 'standard required' means within Clause 58.3.3.3 can and should only be construed in the context of the real underlying factual and technical debate which exists between the parties, rather than in a vacuum from that debate. Indeed, there is a real prospect that the ultimate answer may be that neither of the high level, seemingly extreme positions adopted by the parties on the face of the pleadings is wholly right. Instead, there may be particular obligations which are, in context, appropriate for costing within the model, and others which are not. For example, if the Court were to determine ultimately that what is to be costed within 58.3.3.3 constitutes or includes scenarios reflecting the Councils' actual forecast incurred costs, and that these differ from how RRS intended to fulfil the remainder of the Project Agreement as set out in its method statement extant at the time of termination, this would also mean that the Councils' contended for construction under Issue 2 is not (at least wholly) right. It may, of course, be said in due course by the Councils that this is itself a reason why its construction is correct, but it demonstrates how the contract should be construed as a whole and, importantly, with a proper understanding of the factual and technical consequences of the alternative constructions.

59. For all these reasons, I refuse summary judgment.

Strike Out: The Reply

The Council's position: Overview

60. This application concerns the Amended Reply served by RRS. As originally served, the Reply ran to 137 pages. When the Reply was originally served, it was met by an application by the Councils seeking to strike out large parts of it because it contained new cases (said to be new technical or legal cases not advanced in the Particulars of Claim or inconsistent with the Particulars of Claim); tendentious text (said to be tendentious or inaccurate summaries of the Councils' case and then polemic 'responses' to those tendentious or inaccurate summaries), text that served no purpose (said to be repetitive of the Particulars or Claim or pleaded background matters which did not advance the narrowing of the issues); argument; and evidence.

61. The complaints were originally set out in the second witness statement of Ms Evans dated 23 November 2022.

62. The matter was first considered in the context of case management by Waksman J at the first CMC. Having read the transcript of that CMC, it is clear that the principal concern of Waksman J was, understandably, timetabling of the trial expeditiously. The Councils were seeking a much longer period to trial, in part because of the consequences on case management of the effects of their applications and their concerns about the state of the pleadings. Waksman J stated at the outset that he had 'looked at' the Reply. It was made clear in argument by Mr Bury for RRS that insofar as the Reply set out a different, refine or updated case, it was the case in the Reply that had to be met. There was no investigation or determination as to why the Reply included technical cases which were different to that pleaded in the Particulars of Claim. There was no substantive discussion of the contents of the Reply, or any detailed arguments about the merits of the points made by Ms Evans in her second

witness statement. In the course of the discussion between counsel and Waksman J, the learned judge made the following observations:

> *MR JUSTICE WAKSMAN: Right, OK. Now let me just stop there because the strike out application is causing a procedural obstacle at the moment and I have nothing to do with Listing, I am afraid, but I am concerned that the strike out application (as opposed to the summary judgment application) will only be determined in March. I am concerned about that because it is an application which is of limited compass really.*
> *And I am going to jump the gun a bit here but I want to go back to Mr Bury. I know you have got points about the reply being tendentious and argumentative, which is a sort of secondary point, though I have to say, Mr Bury, having looked at it, there is a lot of argument in here and then saying that their benchmark is "fictitious" and then defining it as "the defendant's fictitious benchmark" is precisely the kind of pejorative stuff we do not have in pleadings. It is the sort of stuff that solicitors do sometimes and when they do it I am equally critical.*
> *If I was dealing with this application now there would there certainly have to be some trimming. Put that to one side.*
> *...*
> *I have not had time to read the reply so I cannot say whether it is a definitive thing or not, but you can cut through all of this, Mr Bury - leave aside the question of tendentiousness in the reply; that is not an unimportant issue but it is not the critical one for the timetable - the critical one for the timetable is whether you are prepared to amend your particulars of claim so as to set out now definitively what your proposed model is and that will allow the defendant to plead to it. If there is a consequential reply to that that is really just consequential on the defence I am not going to suggest you have to re-amend, but the advantage of you being in a position to agree to that today is that, since on your case it is largely a matter of cut and pasting, you could have your amended particulars of claim done within a week and the other side would be in a position to put their amended defence in, which would be the equivalent instead of a rejoinder by the beginning of next year, in which case none of this is going to affect the timetable.*

...

> *Now let us just see where we are on timing for today because I have another application to deal with. I said one and a half hours. However, what we have at least usefully done is essentially we have got rid of the strike out application element of your two-day hearing.*
> *Apart from the question of, as it were, "tendentiousness" - if I can put it in that way - of the reply, but the position it seems to me logically is this. There is no point doing anything with the reply at the moment because there is going to be another reply after the amended defence so that has become a bit irrelevant. As it stands at the moment we have got the reply coming on - let me just see when - ---*
> *MR BURY: 17 February was the direction, my Lord.*
> *MR JUSTICE WAKSMAN: --- 17 February, right. Now let me just have a word with both of you. My view, Mr Bury, is you do need to revisit the language of the reply. I have already given you some indications about that. A lot of it is argument. I can understand that you may say, "Well, it is very*

> *useful argument and it is just as well we put it here than anywhere else", but it is not the purpose of the pleading. By the same token, I do not want the defendant spending a lot of time on arguing these points when, at the end of the day, all that will happen is that it will not help the claimants. Judges disregard arguments. That is what we do: we disregard arguments in pleadings; we disregard arguments in witness statements. What I think you should do, Mr Bury, is bear those points in mind when you come to file your reply.*
> *MR BURY: Yes.*
> *MR JUSTICE WAKSMAN: If in your reply there is lot of tendentious stuff, like "tendentious" definitions and argument, there will be costs consequences for your side somewhere down the line and that will have to be borne by the lawyers, so I hope you take those points on board. With a little bit of common sense that ought the defuse that secondary part of the strike out application which is technically still live because it should have been all done in a proper way by 17 February. If the defendants are still not happy and still think that there is some point that is worth taking time and costs over in relation to the nature of the reply they can raise it on the 15 and 16 March hearing and if those points are valid there will be an immediate costs order against claimant's legal team, all right?*

63. No order was made in relation to the contents of the Reply, merely the date upon which the Amended Reply would be served.

64. It is the Councils' case that whilst RRS amended the Particulars of Claim so as to plead almost all of the new case, and has deleted some of the argument and tendentious summary in the Reply, it has refused to delete large elements of the tendentious summary and argument in respect of which the Councils complained. It has, Mr Ghaly argued, effectively made matters worse by introducing additional tendentious summaries and argument to the pleading in order to justify the retention of what (it is submitted by Mr Ghaly) Waksman J directed should be removed. This, it is said, leaves a pleading that is apt to mislead the reader as to what is actually in dispute. In Ms Evans' fifth statement, she set out by way of Annex those items where they accept that 'the default' has been cured, and where they maintained an objection.

RRS's position: Overview

65. RRS points out, firstly, that the original approach of the Councils was 'scattergun', as demonstrated by the fact that around 30% of the complaints originally made, in respect of which no amendments have been made, are not now pursued. In relation to those the Councils now say were 'cured by amendment' were in fact situations where, by the insertion of express cross reference, the Councils now accept that the Reply was responsive to the Defence. This was, it is said, always obvious and the manner in which the Reply responded to the Defence was a function of what is said to be the Defence's own unhelpful approach to setting out the Councils' case. Following the observations of Waksman J, RRS says that it made amendments to the style of certain aspects of the Reply (e.g. removing references to the term 'Fictitious Benchmark'). In the same breath, Mr Catchpole pointed out what were equally tendentious

nomenclature in the Defence (such as the description of a trio of obligations as 'the Trifecta' - which can be a term used in betting in which the person betting forecasts the first three finishers in a race in the correct order), but about which RRS had not considered it worth the parties' and Court's time in making complaint. Mr Catchpole similarly made the point that where it had removed argument, it did so notwithstanding the fact that the Councils' pleading similarly contained passages of argument about which no complaint was made.

66. Mr Catchpole explained to the Court that in making the amendments to the Reply (which he did), the criticisms that had been made by the Councils and the comments of Waksman J were taken very seriously. A considerable amount of time and cost was spent on dealing with the points made, moderating style and language and removing parts. Whilst accepting that the final document may not be 'flawless', he submitted that it was appropriate in the context of the complexities of the case, and that it properly assists the experts and the Court in understanding where the respective parties are coming from. Whilst pointing out that other pleaders may draw a line on one paragraph or another in slightly different places, the key point was that the exercise was carried out diligently and with care. Mr Catchpole submitted forcefully that the description of the present pleading as an abuse of process, an extremely serious one, was wholly without merit and the renewed strike out application in relation to the Amended Reply should not have been brought.

The Applicable Principles

67. CPR 3.4(2) states:

> "*3.4—(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.*
> *(2) The court may strike out a statement of case if it appears to the court—*
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*
> *(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or*
> *(c) that there has been a failure to comply with a rule, practice direction or court order.*
> *(3) When the court strikes out a statement of case it may make any consequential order it considers appropriate."*

68. In terms of inconsistencies between the Reply and the Particulars of Claim, the Councils rely upon PD16 §9.2, which provides: *"A subsequent statement of case must not contradict or be inconsistent with an earlier one; for example a reply to a defence must not bring in a new claim. Where new matters have come to light a party may seek the court's permission to amend their statement of case."* It also relied upon the remarks of Pepperall J in *Martlet Homes Limited v Mulalley & Co Ltd* [2021] EWHC 296 (TCC), in which the rationale for this practice direction was explained at paragraph 21:

> *'Not only is the proposition that one can advance a new claim in a Reply contrary to the clear terms of the Practice Direction, but it is also inherently undesirable and contrary to the overriding objective of dealing with cases*

> *justly and at proportionate cost. If such practice were to be condoned, claimants would not need to be precise in their formulation of the Particulars of Claim since they could always have a second bite of the cherry when pleading the Reply. Defendants would have to seek permission from the court in order to answer by way of Rejoinder any new claims pleaded in the Reply, which might in turn call for a Surrejoinder from the claimant.'*

69. Unsurprisingly, this was not disputed as a matter of principle by Mr Catchpole, although its application to the parts of the pleading which the Councils contend contain a new case is in issue.

70. In terms of general pleading protocol, the Councils refer to Appendix I of the TCC Guide. This states sets out a number of principles which apply to all statements of case. The pleading should:

(1) be as concise as possible (paragraph 1a);
(2) be limited to only those factual allegations which are necessary to establish the point of reply being advanced (paragraph 1e);
(3) not include evidence (paragraph 1e); and
(4) avoid contentious paraphrasing (paragraph 1n).

71. Whilst that there appeared to be a debate between Counsel as to whether the new TCC Guide was in force as at the date of the Reply (and it certainly was in any event by the date of the Amended Reply), this debate is somewhat sterile: none of the factors identified are matters which would come as a surprise to the experienced pleader. That said, it is not clear on what basis the Councils advanced the contention that 'Guidance' (expressly so called) within the TCC Guide itself amounted to a rule, practice direction or court order for the purposes of CPR 3.4(2)(c). That does not mean that an egregious and/or widespread failure to comply with the Guidance in Appendix I may not cause a Court to conclude that the pleading is an abuse of process or likely to obstruct the just disposal of the proceedings for the purposes of CPR 3.4((2)(b), or indeed pursuant to its inherent jurisdiction, and as such render the pleading or parts of it susceptible to being struck out.

72. Of some additional relevance is the guidance in *Charter UK Ltd v Nationwide Building Society* [2009] EWHC 1002 (TCC), in which Akenhead J summarised some general principles applicable to applications to strike out parts of pleadings at [16]:

> "*1. Claim forms and particulars of claim must identify the nature of the claim and the remedies sought.*
> *2. Particulars of claim must contain the basic facts on which the claimant relies to support its claim or claims.*
> *3. The remedies sought must relate to the claim or claims made and the basic facts pleaded by the claimant.*
> *4. Generally at least there should be no half measures taken in the claim or in particulars of claim in terms of pleading matter which is immaterial to the relief or remedies sought.*
> *5. It would be wrong, at least generally, in principle, to plead a matter which does not support or relate to any of the remedies sought.*

6. It would be wrong in principle to plead a matter which is immaterial to the claim or claims made or relief sought for the purpose of securing disclosure of documentation relating to such immaterial matter.
7. Whilst infelicities in pleadings will not usually justify striking out, where no cause of action is pleaded then the court must give serious consideration to striking out that part of the pleading, particularly where its presence complicates and confuses the fair conduct of the proceedings.
8. Either through the CPR or through its inherent jurisdiction the court has wide powers to strike out parts of a pleading if it contains immaterial matter, particularly in circumstances when its continued presence will confuse the resolution of the underlying and properly pleaded claims.
9. A party absent agreement has no automatic right to amend its Particulars of Claim."

73. The Councils rely upon the well known case of *Tchenguiz & Ors vs Grant Thornton UK LLP & Ors* [2015] EWHC 405 (Comm). The claim was in the Commercial Court where the Commercial Court Guide limits pleadings to 25 pages. This guidance had been ignored by the claimant at the time of serving the pleading. The defendants objected to the pleading and the claimant therefore had to make a retrospective application for permission to serve its Particulars of Claim. Leggatt J (as he then was) struck out the Particulars of Claim with permission to issue fresh particulars of 45 pages length. He said :

"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. It is increasingly difficult because it is harder for pleaders to distil what is essential from the material with which they are provided and because they can feel pressure to show their mettle and enthusiasm for their client's case by treating the pleadings as an opening salvo of submissions in the litigation. It is all the more important because prolixity adds substantial unnecessary costs to litigation at a time when it is harder than ever to keep such costs under control.

[Paragraph 3 dealt with the history of the introduction of the 25 page word limit within the Commercial Court and paragraph 4 set out parts of the Commercial Court Guide]

5. The particulars of claim which have been served in the present case flout all these principles. They are 94 pages in length. They include background facts, evidence and polemic in a way which makes it hard to identify the material facts and complicates, instead of simplifying, the issues. The phrasing is often

> *not just contentious but tendentious. For example, the defined term used to refer to three of the defendants is "the Conspirators". Nor can headings such as "the plot" and "the plot evolves" be supposed to be "in a form that will enable them to be adopted without issue by the other party".*"

74. The approach in *Tchenguiz* has been approved in subsequent authorities, including by Stuart-Smith J (as he then was) in *Portland Stone Firms Ltd & Ors v Barclays Bank PLC & Ors* [2018] EWHC 2341 (QB), saying (emphasis in original) – under the heading "*The proper function of pleadings*":

> *"30. It should not need repeating that Particulars of Claim* ***must*** *include a* ***concise*** *statement of the facts on which the Claimant relies: CPR 16.4(1)(a). The "facts on which the Claimant relies" should be no less and no more than the facts which the Claimant must prove in order to succeed in her or his claim. .... The Queen's Bench Guide provides guidelines which should be followed: they reflect good and proper practice that has been universally known by competent practitioners for decades. They include that "a statement of case must be as brief and concise as possible and confined to setting out the bald facts and not the evidence of them": see 6.7.4(1). A statement of case exceeding 25 pages is regarded as exceptional: experience shows that most cases can be accommodated in well under 25 pages even where the most serious allegations are made. Experience also shows that prolix pleadings normally tend to obfuscate rather than to serve their proper purpose of identifying the material facts and issues that the parties have to address and the Court has to decide.*
>
> *31. Where statements of case do not comply with these basic principles, the Court may require the Claimant to achieve compliance by striking out the offending document and requiring service of a compliant one: see Tchenquiz v Grant Thornton [2015] EWHC 405(Comm) and Brown v AB [2018] EWHC 623 (QB). It has always been within the power of the Court to strike out either all or part of a pleading on the basis that it is vague, irrelevant, embarrassing or vexatious."*

75. It is right, as Mr Catchpole points out, that the facts in *Tchenguiz* were extreme, (see e.g. *Berkeley Square Holdings Ltd v Lancer Property Assets Management* Ltd [2021] EWHC 818 (Ch) in which they were so described). However, the general statements at paragraphs 1-5 from *Tchenguiz* set out important principles which should be followed; and the powers available to the Court to require compliance are both clear and wide.

76. 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 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.

The Councils' Remaining Complaints

New Case

77. In his written submissions, Mr Ghaly indicated that the only remaining 'new case' complaints related to paragraphs 41, 43.3 and 303.3. In oral submissions, complaints relating to 43.3 and 303.3 were dropped. In Ms Evan's schedule, paragraph 52 was identified as 'objection maintained' on the basis of 'New Case', however Mr Ghaly confirmed in oral submissions that whilst the Councils regarded the paragraph as tendentious, it was accepted that (following the incorporation of the 89% availability scheme into the Amended Particulars of Claim) there was no 'new case' complaint. The only 'new case' complaint remaining, therefore, relates to paragraph 41.

78. Paragraph 41 states:

> '*One of the issues that caused problems with the set-up, commissioning and optimisation of Energos gasification plants in the United Kingdom (namely, Derby, Milton Keynes and Glasgow) from mid-2016 onwards was that Energos became insolvent. This meant that, certainly in the case of the ACT at Derby,*
> *experienced personnel from Energos who should have been involved in the process of setting up, commissioning and optimising the gasification plants were not available and the work had to be undertaken by personnel without particular experience or expertise with the Energos plant and designs. That inevitably resulted in a protracted period in which, in effect, there was a learning curve for many of the personnel involved. In the case of Derby, that period extended beyond the NWTF Long Stop Date and the subsequent termination of the Project Agreement by the Defendants. What is required properly to set up, commission and optimise all parts of the ACT has become much better understood both by the time of termination and, because the Milton Keynes and Glasgow plants have continued to operate. If the Works*

and Services were undertaken, it would involve consultation with operators of these other Energos plants and drawing on their "lessons learned".'

79. This plea relates to whether the boilers within the ACT need to be replaced. Paragraph 39 of the Reply pleads the erstwhile 'new' case (now in the Amended Particulars of Claim) that the ACT can, with the existing boilers, operate with a required throughput of at least 140,400 tpa of RDF. There is very limited explanation in paragraph 68 of Ms Evans witness statement as to why paragraph 41 contains a 'new case'. Mr Ghaly, in submissions, submitted simply that if Energos' insolvency was relevant in some way, it was a new case and should be in the Amended Particulars of Claim, and if it was not relevant it should not feature in the pleading at all. RRS's written submissions (by way of a tabulated response to each remaining complaint), state that the paragraph provides an explanation as to why, post termination, the performance and speed of commissioning may be quicker than in the initial period at Derby.

80. It is clear from the pleading that paragraph 41 goes hand-in-hand with paragraph 40, in which by way of Reply RRS plead that Energos' experience elsewhere is a fact that is going to be relied upon to support the plea at paragraph 39 as to the viability of the existing boilers. No doubt the detail of that experience will be a matter for evidence, and that detail has (rightly) not been pleaded. It is correct of course, as stated above, that paragraph 39 reflects a case initially advanced by way of (original) Reply which related to a scheme that was different to the scheme originally relied upon in the Particulars of Claim. The new scheme has now, properly, been introduced into the Amended Particulars of Claim. In response, the Defence (and Amended Defence) pleads that RRS's scheme is not viable and that the boilers need replacing. Whether the boilers need replacing is a financially significant element of the dispute. In my judgment, the contents of paragraph 41 are a reply to the (Amended) Defence. That content did not need to be pleaded positively within the (Amended) Particulars of Claim, prior to any allegation within the (Amended) Defence that the boilers required replacing. It is not necessary for a Particulars of Claim to pre-empt the contents of a Defence, notwithstanding the fact that matters have been canvassed pre-action. The paragraph does not contain a 'new case', and is not otherwise offensive. The paragraph should not be struck out.

Tendentious summary, argument, repetition of the Particulars of Claim and recitation of background facts

81. The Councils argue that its original application was 'effectively determined' at the CMC as a matter of case management by Waksman J. Mr Ghaly argued that while RRS had deleted significant parts of the Reply, it has attempted to maintain large parts of its argument and tendentious summary but adding further tendentious summary of the Amended Defence and claiming that the passages of argument in the Amended Reply are a response to the Amended Defence. The specific remaining objections are set out in the Annex B to the fifth statement of Ms Evans.

82. Contrary to the submissions of Mr Ghaly, Waksman J did not determine the Reply Strike Out application. He sensibly cut through the application for case management purposes by making some well founded comments based upon what was clearly a

relatively high level review of the Reply. The original Reply was, in his view and in mine, unnecessarily prolix in places, comprised argument/submission and included some elements of tendentiousness.

83. That said, it is clear to me that the deletions, amendments and revisions carried out by RRS's legal team to produce the Amended Reply were carried out with care, and with appropriate regard to the high level observations made by Waksman J. There remain areas where one might debate the necessity of the content, but looked at in the round, the Reply comes nowhere close to the type of egregious pleading that was so obviously being dealt with in the case of *Tchenquiz*.

84. Tendentiousness is the more serious of the complaints. Remaining objections on the grounds of tendentiousness within Ms Evans' Annex B are limited to:

(1) the third sentence of paragraph 13.2 which states:

> '*As the Claimant understands the Defendants' pleaded case, the Defendants' Notional TPP is a single, risk averse contractor which the Defendants assert is free to operate without any competition.*'

(2) the phrase '*hypothetical uncommercial entity*', which is plainly a reference back to paragraph 13.2.

85. As became clear from Ms Evans' fifth witness statement, it is not the Councils' case that the notional third party is assumed to be operating without competition. The Councils accept and aver that the notional third party must be assumed to be a reasonable contractor in a Liquid Market using realistic assumptions. Ms Evans says that the Councils had never suggested otherwise. That said, I accept that RRS genuinely believed what it set out as its understanding, on the basis of what it contends are the unreasonably high margins added to the notional third party costs, which it considered were compatible only with the assumption that the notional third party was not bidding in competition. Whilst it may have been preferable for RRS's pleading to identify the basis of its understanding of the Councils' case (i.e. it was an inference from the margins adopted), it is not uncommon that one party may genuinely misunderstand another party's case, as I accept to be the position here, and respond to a case that is not being put. The remedy in such circumstances is not a strike out application, but communication between the parties and, if needed, a short Rejoinder. I do not therefore consider that the allegation of tendentiousness in the Reply as amended is well founded.

86. In oral submissions, Mr Ghaly similarly criticised paragraph 52 (which had previously been the subject of a 'new case' complaint) as being tendentious. However, I do not accept either that it is wrong in principle within a pleading for a party to attempt to summarise its understanding of the case it has to meet (indeed, sometimes this is necessary and even if not strictly necessary, can be useful; the Councils' pleading does similarly), or that, in this case, RRS deliberately sought to misrepresent what it genuinely understood the case to be in order to set up a straw man. No 'tendentious' complaint was originally levelled at paragraph 52 by Ms Evans, and I reject Mr Ghaly's complaint in this regard advanced in oral argument.

87. Whilst 'tit for tat' arguments are rarely edifying, I also consider that there is force in Mr Catchpole's submission that, when subject to scrutiny, the Councils' own pleading contains potentially irrelevant material, argument, and is in places tendentious. For example:

(1) applying the shorthand of '*Trifecta*' to three specified parameters could fairly be perceived as falling into precisely the same unhappy category as the '*Fictional Benchmark*' about which the Councils complained, and which Waksman J rightly described as tendentious. Whilst I accept that the term 'Trifecta' is not necessarily a term with betting connotations, and Counsel for the Councils' statement that they were not aware of this, care should obviously be taken when providing nomenclature within a pleading.

(2) Annex B to the Amended Defence is called 'Matrix Material' and is 20 pages in length. Whilst referred to fleetingly at paragraph 78 of the Amended Defence, it is in no way clear how the particular facts purportedly relied upon support any particular contention as to the proper meaning of the Project Agreement. Just because the content is demoted to an 'Annex' does not mean it does not form part of the pleading. Indeed, relegation of relevant material to an Annex is apt to cause confusion: does it need to be responded to? Is evidence required in respect of it? What disclosure issues does it give rise to?

(3) Paragraph 94 (amongst others) is pure argument/submission: so much is obvious from the initial sentence: '*To illustrate how the risk assessment is driven by the Court's assessment of the basis, amount and likelihood of the Clause 58.3.3.3(c) and (d) costs, and the risk of adverse outcomes of those costs, it is helpful to consider the example of steady state ACT availability, as follows….'*

88. Where, as here, a key issue rightly dealt with on the face of the pleadings is the proper meaning of a contract, the line between stating a case and argument/submission is a fine one. In my view both the Amended Defence and the Amended Reply err too much on the side of submission. Whilst both documents can therefore be described as containing 'infelicities' when judged against the TCC Guidance, neither can sensibly be described as an abuse of process. I come to this conclusion having considered each of the remaining complaints advanced by the Councils both individually and (to the extent well founded in, for example, identifying argument or submission) in the aggregate. It serves no useful purpose, in my judgment, in requiring RRS to expend further cost in curing these infelicities, and it would be unjust to do so in circumstances when similar complaints can be been made about aspects of the Councils' own pleading.

89. In the circumstances, the Strike Out application in relation to the Amended Reply is dismissed.

Costs

90. I had the benefit of oral submissions in relation to costs arising in relation to the Amended Reply and the Amended Particulars of Claim. RRS accepts that the usual

order applies in relation to the Amended Particulars of Claim. The Councils contend, in addition, that:

(1) the costs of preparing the entirety of the (original) Reply should be disallowed;
(2) the Councils should have their costs of responding to the (original) Reply;

91. The first order is sought on the basis that large parts of the Reply have been excised in response to the observations of Waksman J (and on the pre-emptive assumption that further parts would be struck out, which is not the case). The Councils point to the fact that in *Tchenguiz,* approximately 50% of the document was judged to be improper but the whole of the costs of preparing the statement of case were disallowed. The second order is sought on the basis that, had the 'new case' been made properly by way of Amended Particulars of Claim in the first place, the costs of responding to it would have been part of the usual order.

92. RRS contends that neither order is appropriate.

93. I have a wide discretion in relation to costs. In my judgment, it is appropriate that 40% of the costs of preparing the (original) Reply are disallowed. It is also appropriate that the costs of dealing with the matters introduced into the Amended Particulars of Claim following their introduction in the (original) Reply are to be recovered as if they had been introduced by way of Amended Particulars of Claim as at the date of the service of the (original) Reply.