

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

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

Date: 11/09/2020

Before :

MRS JUSTICE JEFFORD

Between :

**THE LEICESTER BAKERY (HOLDINGS)
LIMITED**

Claimant

- and -

RIDGE AND PARTNERS LLP

Defendant

Stuart Benzie (instructed by **Gateley LLP**) for the **Claimant**
Christopher Reid (instructed by **Mayer Brown International LLP**) for the **Defendant**

Hearing dates: 24 August 2020

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para. 6.1 no official shorthand note shall be taken of this Judgment and copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 11th September 2020 at 10.30am

MRS JUSTICE JEFFORD:

Introduction

1. This matter involves two related applications. One is the application of the Defendant, Ridge and Partners LLP (“Ridge”), issued on 13 July 2020 for summary judgment in relation to particular paragraphs of the Particulars of Claim (and related paragraphs of the Reply), alternatively to strike out the said paragraphs. The second is the application by the Claimant, Leicester Bakery (Holdings) Ltd. (“Leicester Bakery”), for permission to amend the Particulars of Claim. That latter application was issued on 17 August 2020. There was also listed before me the CCMC, the conduct of which would obviously be affected by the outcome of the two applications. It became clear during the course of the hearing that, whatever the outcome, the CCMC could not proceed immediately after the hearing of the applications and without an opportunity for the parties to consider their positions on issues such as disclosure, evidence, and costs budgets.
2. The summary judgment application and the CCMC had previously come before HHJ Bird on 27 July 2020 and were adjourned to a date to be fixed as soon as possible after 17 August 2020 with a time estimate of 1 day. The adjournment came about because it appeared that the Claimant may not have had sufficient opportunity to serve evidence in opposition to the summary judgment application. The judge gave directions, including for the service of the Claimant’s evidence at least 7 days before the hearing of that application.

The approach to the applications

3. In his skeleton argument, Mr Reid submitted, on behalf of Ridge, that I should hear the summary judgment application first and with no regard to the proposed amendments. Mr Benzie, for Leicester Bakery, in his skeleton argument, submitted the complete opposite. In my view, neither of these rigid approaches would have been appropriate, not least because the summary judgment application was focused on identified paragraphs of the Particulars of Claim. If the amendments were permitted, it might be that some of those paragraphs would then play a different role but, equally, if the amendments were not permitted, it would not necessarily follow that the allegations pleaded in the particular paragraphs would fall away. In other words, these two applications needed to be considered together.
4. In the event, Mr Reid made his submissions on the application for permission to amend first. His position was firstly that the application was too late and fell at the threshold. Secondly, it was common ground between the parties that an amendment should only be allowed if the applying party has real prospects of success on the matter which is the subject of the amendment and that the test is the same as the test on summary judgment (see *SPR North Ltd. v Swiss Post International (UK) Ltd.* [2019] EWHC 2004 (Ch) at [5] and the notes to the White Book at paragraph 17.3.6.). Mr Reid’s submission was that the amended claim did not have real prospects of success and that the unamended damages claim was hopeless. Mr Benzie’s argued that the amended claim did have a real prospect of success and that, if permission to amend were allowed, the summary judgment application could not succeed.

The factual and procedural background

5. The Claimant is a holding company and is, itself or through companies within its group, engaged in the production of flat bread and flat bread products. In about 2016, Leicester Bakery's business was thriving and some land at Highview Close was acquired with a view to building a new bakery facility and a number of other retail units.
6. Ridge was engaged, at least on Leicester Bakery's case, by the Claimant as consultants on the project. Leicester Bakery's pleaded case is that there were two contracts between it and Ridge.
7. The first contract is referred to as the Services Agreement. Paragraph 4 of the Particulars of Claim pleads a contract made on 24 February 2016 by exchange of e-mails and letters pursuant to which Ridge was engaged by Leicester Bakery as its agent and quantity surveyor for the building works. It is said that this agreement was supplemented by an agreement contained in an e-mail dated 28 February 2016 whereby Ridge also agreed to perform M&E consultancy services. There is an issue between the parties as to whether the Claimant was the party that engaged Ridge or whether Ridge was engaged by another Leicester Bakery company or personally by one or more directors. That is not the basis for the application for summary judgment and does not fall to be considered.
8. I have not seen the letters and e-mails relied upon as forming the contract other than a fee proposal from Ridge dated 18 February 2016, and I note that, contrary to the pleaded case, the second statement of Mr Piet van Gelder, the Claimant's solicitor, states that the Services Agreement was entered into on 18 February 2016. That discrepancy is not material to the applications before me.
9. The fee proposal was one for carrying out an Initial Project Review, Value Engineering and Contract Sum Agreement; for acting as Employer's Agent and providing Site Monitoring and QS services; and for acting as Health and Safety Adviser. Ridge's Terms and Conditions of Business were attached and it is common ground that they formed part of the Services Agreement. These included clause 13 headed Intellectual Property:

"13.1 Unless otherwise set out in the Offer Letter, all intellectual property rights, including without prejudice to the generality of the foregoing, copyrights, patents, know how and any other intellectual property rights howsoever arising in all documents and drawings shall remain the property of Ridge.

13.2 Ridge grants a non-exclusive, royalty free licence to the Client to use or reproduce drawings, documents or data produced by Ridge in connection with the Services for all reasonable purposes in connection with the Project and/or Services.

....

13.5 Ridge shall provide copies of any drawings, documents or data required by the Client pursuant to clause 13.2 and shall be entitled to its reasonable copying and administrative costs of providing such copies."
10. The second agreement is the Confidentiality Agreement entered into between Leicester Bakery and Ridge and dated 1 February 2018. In the Confidentiality Agreement,

Leicester Bakery is referred to as the Bakery and Ridge as the Recipient. The agreement contains the following provisions:

- (i) *“RECITALS*
 - A. *The Bakery has agreed to provide information to the Recipient concerning the project known as The Leicester Bakery New Premises, Highview Close (Land Adjacent), Leicester, in order for the Recipient to perform the project management, cost management, Employer’s Agent, and mechanical and electrical consultancy services (“the Purpose”).*
 - B. *The Bakery will disclose or make available Confidential Information (defined below) to the Recipient and the Bakery requires the Recipient to keep such information strictly confidential on the terms of this Agreement.”*
 - (ii) Clause 1 then defined “Confidential Information” of the Bakery. In summary, this was information as to the Bakery’s business and financial affairs and information relating to its operations including trade secrets and know how.
 - (iii) Clause 2.6:
“The Recipient shall upon the request of the Bakery at any time and within 10 working days of such request, return or destroy (at the Bakery’s option) all Confidential Information of the Bakery and all documents, notes, memoranda, papers, records, disks and any other material relating thereto or which bears or incorporated any of that Confidential Information or any information derived from it”
 - (iv) Clause 10:
“The provisions of this Agreement shall continue to apply notwithstanding that the Bakery may or may not engage the recipient for the Purpose and notwithstanding the completion of the services or the termination of the Recipient’s engagement at any time.”
11. Leicester Bakery entered into a contract for the works with GF Tomlinson & Sons Ltd. (“GFT” or “the Contractor”) dated 5 October 2017. The contract was made on the standard form JCT Design and Build Contract 2011. Whoever Ridge may have been engaged by, Ridge was named in the contract as the Employer’s Agent.
 12. It appears that the project was not a happy one and that there were substantial delays in the progress of the works. On 7 March 2019, Ridge terminated the Services Agreement. Clause 11 of Ridge’s standard terms and conditions deals with Suspension and Termination and may well have been relied upon.
 13. On 17 April 2019, Leicester Bakery commenced these proceedings in the Queen’s Bench Division.
 14. Prior to the commencement of proceedings, there were exchanges of correspondence between Ridge and both Leicester Bakery and Gateley plc, on Leicester Bakery’s behalf.
 15. On 15 March 2019, Ashma Sabat, a director of Leicester Bakery Ltd., e-mailed Mr Sandell of Ridge, referring to an earlier e-mail about a handover meeting and the provision of project documentation to the new Employer’s Agent. She asked for the documents as soon as possible because “GFT commenced an adjudication for an extension of time this afternoon” and she said she needed access to the documents for her records and to serve a Reply. She said that she had been in contact with Mr van

Gelder of Gateley about this and that he had pointed out that clause 13.2 gave her a right of access. Mr Sandell responded on 19 March 2019. He said that Ridge was in the process of preparing a full claim for additional fees but had submitted an early settlement proposal in the sum of £40,360 (excluding VAT). This e-mail continued:

“With regards to your generic request for Project Documentation, Leicester Bakery have been issued all documentation produced by Ridge in the course of the project delivery so will be able to provide this information directly to the new Employer’s Agent. We would also confirm that the termination of our agreement includes the termination of all Clients rights under the agreement.”

16. By a letter dated 20 March 2019 and headed “Urgent – Injunctive Proceedings Intimated”, Gateley then wrote to Ridge saying that they were instructed by Leicester Bakery Ltd. (not the Claimant and referred to in the letter as LB). They set out their client’s case as to the contract between that company and Ridge. They said that Ridge had been overpaid and that their client was entitled to a refund of fees paid. The letter then continued:

“LB has a more pressing issue in requiring access to documentation. Mr Sandell alleged in an email of 19 March that all information had been handed over, patently that is not the case.”

The letter then referred to clause 13.2 of Ridge’s standard terms which was described as a wide ranging clause. The letter continued

“This is important as an Adjudicator’s decision issued on 29 December 2018 found as a fact that Ridge had entered into agreements with the contractor, G F Tomlinson & Sons Limited, to accept alterations to main staircase to the Bakery. That Decision has been provided to Mr Sandell and comments requested both during the adjudication and subsequently; Mr Sandell refused to assist or provide any comments.

Nonetheless, this is clear evidence that agreements have been made without LB’s knowledge or consent that both it and any subsequent Employer’s Agent needs to be aware of.

In order to effectively manage the project and provide an orderly hand-over to the replacement Employer’s Agent, access needs to be given to these documents immediately. LB has written to you requesting access but has been told that the above licence has been revoked upon termination which is patently not the case and additional of over £200,000 will be charged. It is quite clear that Mr Sandell is trying to be as obstructive as possible.

As LB is also the subject matter of a live adjudication on time issues immediate access is required and indeed the balance of convenience is clearly in favour of providing full access

In the circumstances where the documents are required as a matter of urgency we would invite you to make proposals for the immediate of all documentation to which LB’s licence under clause 13.2 applies. If we do not receive these proposals within 24 hours we are instructed to apply to Court for an ex parte injunction compelling you to release those documents by order of the Court.”

17. The request for documentation was, therefore, at this point, made under clause 13. As I read Gateley's letter, the emphasis was on the importance of the documentation for the future management of the project. The December adjudication, which I shall refer to as the staircase adjudication, reflecting its subject matter, was referred to as evidencing the fact that Ridge had reached agreements with GFT that LB did not know about and that LB did not have all documents. There was also reference to a live adjudication on extension of time issues and to the urgency attached to that. Ridge's response to date had not been to link the provision of documentation to the payment of additional fees but was rather that its client already had all the relevant documentation.
18. There is evidence before me that the live adjudication had been commenced on 15 March 2019 and concerned delay and extensions of time to Sectional Completion Dates. As I will come to, although both the adjudication and the outcome of the adjudication are now sought to be relied upon by the Claimant in the draft Amended Particulars of Claim, there is virtually no evidence before me about the conduct of this adjudication or the outcome of the adjudication. The only document I have seen is a short chain of e-mails exhibited to the second statement of Mr van Gelder. By an e-mail dated 25 April 2019, Mr Waterhouse, the adjudicator, proposed revised directions to be agreed between the parties (the Claimant and GFT) providing for Leicester Bakery's Further Response by 10 May, GFT's Reply by 24 May, LB's rejoinder by 3 June, and his decision by 5 July. This suggests that the adjudication, even if commenced in mid-March, was one in which the parties agreed a more protracted timetable than that provided for by statute. I was told that this was the timetable that was followed and that the adjudicator's decision was given on 5 July 2019. The draft Amended Particulars of Claim alleges that the adjudicator gave an extension of time for completion of the Main Unit from 29 June 2018 to 8 April 2019 and an extension of time on the Retail Units from 20 April 2018 to 1 March 2019.
19. Returning to the correspondence between Gateley and Ridge, Mr Francis of Ridge replied on 21 March 2019. On the matter of the documentation, he said this:
"Your assertion that Leicester Bakery do not have all documentation on the project is incorrect. The documentation referred to in the adjudication notice are emails sent to Leicester Bakery and minutes of meetings at which Leicester Bakery attended. In addition, as directly instructed by Leicester Bakery, their Client Representative was acting on their behalf and was party to the correspondence and documentation referred to in the Adjudication."
20. It is not at all clear whether this passage was referring to the staircase adjudication or to the live adjudication ("the March adjudication") referred to in Gateley's letter, although it seems more likely to be the latter. One of the reasons I say that is that, on these applications, Mr Morris, Ridge's solicitor, has served a third statement in which he points to evidence that, from October 2018 if not before, Ridge was not involved in the assessment of extensions of time. On 4 October 2018, in response to an e-mail from Mrs Sabat, Mr Sandell noted that Spearing Waite (solicitors) had corresponded with GFT explaining why they did not consider that GFT had complied with their contractual obligations in respect of an application for an extension of time. He said that, although Ridge had previously provided an opinion on GFT's application, Spearing Waite had become Leicester Bakery's de facto adviser and Ridge would cease providing input. The minutes of a meeting on 5 December 2018 recorded that Mrs Sabat acknowledged receipt of Mr Sandell's e-mail relating to extension of time

assessments and “that Ridge would not be providing further input on these as LB and their solicitor were responding on behalf of the Employer.” That is consistent with Ridge’s reference to the Client Representative acting on Leicester Bakery’s behalf.

21. Gateley replied on 22 March 2019. The first substantial part of the letter was addressed to the issue of the fees paid to Ridge. The letter then gave examples of documents that Leicester Bakery did not have including e-mails during the tender period, valuations and assessments relating to changes, and interim quality audits. One paragraph said this:

“It is apparent from the adjudication that took place in December 2018 relating to the staircase that drawings were not sent on to LB and that discussions were entered into and agreements made to which LB was not privy. Accordingly, drawings, reports, site visits and surveys need to be disclosed to ensure LB has everything because LB is constantly being surprised in adjudication proceedings and needs full disclosure to cover the gaps that are clearly present.”

Gateley then set out a list of categories of “disclosure” which, in summary, covered all the documentation that might be expected to be generated in the course of a project such as this. Gateley repeated that the documentation was required as a matter of urgency and said that if they did not receive proposals from Ridge to provide the documents by 10.00am on Monday 25 March 2020, they would apply ex parte for an injunction.

22. Although the urgency was repeated, and there was a reference to being surprised in adjudication, no link - let alone a clear link - was drawn between this wide ranging request for documents and the March adjudication nor were any documents specifically identified that might be material to and required for that adjudication.
23. Ridge (Mr Francis) responded on 25 March 2019. In relation to the request for documentation, Ridge offered to accept, in full and final settlement, approximately £40k (plus VAT), as it had previously offered, subject to licence terms and an undertaking to pay fair and reasonable costs, on a time charge basis, for compiling the documents.
24. Gateley replied the same day accusing Ridge of attempting to extort money and saying that, failing hearing from Ridge by return, they would proceed as previously advised.
25. Ridge also replied the same day addressing the extortion allegation, which was described as potentially defamatory, and, in effect, repeating the offer made.
26. Gateley wrote further on 4 April 2019. This time they enclosed a copy of the Confidentiality Agreement. They referred to clause 2.6 and said this:

“This clause is drafted very widely and covers all documents, drawings and other media associated with the Works. ...

This is a collateral contractual obligation to provide disclosure of all documentation and as it has not been provided will be presented to the Court as further evidence of your unreasonable behaviour in breach of two separate contracts.”

27. Ridge replied on 5 April 2019. Ridge explained that the Confidentiality Agreement was, as the Confidentiality Agreement says and as I have set out above, concerned with

confidential information provided to Ridge and did not encompass “all documents, drawings and other media associated with the Works.” Ridge said that its offer remained open for acceptance.

28. Gateley replied by e-mail dated 5 April 2019. The e-mail simply said: “*Thank you for confirming that you intend to breach the disclosure obligations of both agreements without proper cause.*”
29. Then on 12 April 2019, Gateley wrote again. They said:

“We again reiterate our request that you provide us with all the documents we required. We confirm that we will pay the reasonable costs of you providing those documents.”
30. This, it would appear, was the first time Gateley had undertaken to pay the costs of providing the documents. They said that if the documents were not provided within 72 hours, that is by 3.30pm on Monday 15 April 2019, they would commence “the attached proceedings for an injunction”.
31. It was submitted by Mr Benzie that up to this point the basis on which Leicester Bakery said the documents should be provided was clear and included reliance on Ridge’s fiduciary obligations as agent. Although there was some reference in the correspondence to the role of Employer’s Agent, there was, as I read the correspondence, no reliance on fiduciary obligations and no explanation as to what documents they applied to and the first mention of fiduciary obligations came in the proceedings then commenced.
32. The Claim Form was issued on 17 April 2019; the Particulars of Claim bears the same date; and an application for a mandatory injunction was made at the same time.

The Particulars of Claim

33. The Particulars of Claim sought delivery up of “the Documents”; damages for breach of contract; damages and/or equitable compensation for breach of fiduciary duty; and damages for “breach of bailment” or conversion.
34. It is convenient to start with paragraph 13 of the Particulars of Claim which listed the documents (the defined Documents) said to have been requested and refused by Ridge. These were valuation applications and payment certificates; changes to Employer’s Requirements (variations/instructions); cost reports; meeting minutes; all pre and post contract e-mails; quality reports; tender documents; contractor documents; extension of time (sic); drawing issues; RFI schedules; contractor issued information ie contractor reports, programmes, extension of time requests etc; M&E appointment documentation ie drawings, specifications etc.
35. This is the list which I have already referred to as every document one might expect to be created in the course of the project. They are documents that would or might be created by the person acting as consultant, Quantity Surveyor, Employer’s Agent, and so forth. They are not on the face of it documents provided by the claimant to Ridge falling within the Confidentiality Agreement.

36. Nonetheless, the Particulars of Claim at paragraph 9 asserted that the Claimant had demanded and was entitled to the documents under clause 2.6 of the Confidentiality Agreement adding that the documents were held by Ridge as the agent of Leicester Bakery. Paragraphs 11 and 12 listed the requests and Ridge's refusal to deliver up the documents.

37. Paragraph 10 said this:

“Following the making of the Demand [20 March 2019], the Defendant did deliver-up certain documents and stated to the Claimant that it had delivered up all such documents. However, the Claimant has subsequently discovered in the course of a dispute with a sub-contractor that certain documents had not been delivered up but had, wrongfully and in breach of contract and/or breach of fiduciary duty been provided to the sub-contractor to assist the sub-contractor in its claim against the Claimant.”

38. There is no application to make any amendments to these paragraphs despite the fact that they are replete with problems and inaccuracies. Firstly, only some of the demands for documents, and certainly not the one made on 20 March 2019, had relied on the Confidentiality Agreement, the relevance of which is doubtful at best. Secondly, if documents created by Ridge were held by it as agent for the Claimant, that is unlikely to have extended to every document listed.

39. Most notable, however, is paragraph 10. That paragraph made and makes a serious allegation that the Defendant had wrongfully, in breach of contract and in breach of fiduciary duty, provided documents to a sub-contractor to assist the sub-contractor in a claim against the Claimant. That allegation remains wholly unparticularised. As framed, the allegation related to something that the Claimant had discovered in a dispute that post-dated the demand on 20 March 2019. There is no evidence of a dispute with a sub-contractor after this date. This may have been intended to be a reference to the extension of time dispute with GFT, the main contractor, but, aside from that possibility, the Particulars of Claim made no reference at all to the March adjudication. I return to this below.

40. Paragraph 17 of the Particulars of Claim then said this:

“The Claimant is currently unable to plead as to what (if any) losses have been suffered as a consequence of the Defendant's breach of contract and/or breach of fiduciary duty and/or breach of bailment and/or conversion but reserves the right to plead further as to such losses following delivery-up of the Documents and/or disclosure in this action.”

The injunction

41. The application for the injunction sought delivery up of the documents in schedule A of the draft Order. With some modifications or further details of description, these were the Documents listed in the Particulars of Claim.

42. The application was supported by the first witness statement of Mr van Gelder. The witness statement adopted something of a scattergun approach. He said both that documents had been demanded which had been received by Ridge in the course of acting as his client's agent and that documents had been demanded throughout on the basis of the Confidentiality Agreement, neither of which statement was entirely accurate. He also referred to breach of the Services Agreement and an obligation to deliver up under that agreement (which was not relied on the Particulars of Claim). He referred to "previous adjudications taking place from December 2018 onwards" when there is no evidence that there had been anything other than the staircase adjudication which concluded with a decision dated 29 December 2018. He said that in the course of an ongoing adjudication, the contractor had produced documents, particularly e-mails, which had not been provided to the Claimant. There were no further details of what these were and they were, by definition, in the Claimant's possession by this date. The statement then said this:

"28. The prejudice of the Defendant's refusal to comply with its obligation to deliver up documents and information as required by the Services Agreement and the Agreement has already been suffered by the Claimant in the first adjudication with the Contractor by virtue of the Claimant being bound by agreement with the Contractor which had been agreed by the Defendant. The Claimant conducted the adjudication without the relevant documents and in consequence sought to defend claims in circumstances where it would have compromised those claims if it had been aware of the existence of the documents that were provided by the Defendant to the Claimant.

29. As a consequence, the Claimant has incurred: (1) its own costs; and (2) costs that it will pay to its contractor that were caused by the Defendant's breach of contract and/or fiduciary duty. Further, the Claimant lost the chance to settle the dispute on more favourable terms by being deprived of the documents that would have allowed it to take proper advice as to its legal position."

43. The application was listed for hearing on 24 April 2019. The parties agreed to adjourn the application to 1 May 2019. On that date, without any admission, Ridge consented to an order for delivery up of the documents listed in Schedule A to the Order. There is a dispute between the parties about this but it is the Defendant's position that it provided the documents in Schedule A on 2 May 2019.
44. By that time the revised timetable for the ongoing adjudication had been proposed by the adjudicator.

Further pleadings

45. On 31 May 2019, Ridge served its Defence. In respect of paragraph 10 of the Particulars of Claim and the allegation about the dispute with a sub-contractor, the Defence (at paragraphs 10.2.1 and 10.2.2) said that the allegation was not understood and that the pleading was embarrassingly vague and did not give sufficient particulars of the dispute or the documents referred to. At paragraph 10.2.3, however, Ridge identified that what might be being referred to was the staircase adjudication and set out Ridge's case on that basis. That formed paragraph 10.2 of the Defence.
46. The Claimant served a Reply on 22 July 2019. In reply to paragraph 10.2 of the Defence, the Claimant said this:

“30. Paragraph 10.2 is noted. The dispute with GFT is irrelevant to the Claimant’s claim herein save that: (1) in the course of the said dispute it became apparent that the Defendant had not disclosed all of the “project documentation produced by Ridge” as stated by Mr Sandell; and (2) that the Claimant’s ability to conduct its case in that dispute was prejudiced by the Defendant’s failure to provide the Documents and/or certain individual documents that were relied on by GFT and of which the Claimant had no prior knowledge.”

47. The Reply went on to say that, although the Defendant said it did not understand what dispute was being referred to, the Defendant was in fact well aware of what the Claimant was referring to and had set out details in paragraph 10.2.3 of the Defence. In other words the Reply confirmed that the dispute referred to in paragraph 10 was the staircase adjudication.
48. It bears repeating that, although the exchanges in March 2019 and the first statement of Mr van Gelder had made some reference to the extension of time dispute and the March adjudication, no other disputes or adjudications were referred to in the Particulars of Claim. I made the point that paragraph 10 might have been intended to refer to the March adjudication because it appeared to refer to a dispute that had arisen or continued after the demand for documents in March 2019 but the Reply made clear that it did not. Mr Benzie accepted that the currently pleaded case relied on the staircase adjudication and not on the March adjudication, although he argued that the Claimant made essentially the same case in respect of both.
49. The pleaded case, therefore, as it stands without amendment, makes no reference to and places no reliance on the March adjudication. That is so despite the fact that the adjudicator’s decision was given over 3 weeks before the Reply was served, which itself is over a year ago.
50. I have set this background out in some detail because, as I will come to, the proposed amendment now relies on the conduct of and outcome of the March adjudication. The Claimant’s evidence in support of that application and Mr Benzie’s skeleton argument both argue that the Claimant’s claim for damages on that basis cannot come as a surprise to Ridge. I disagree. There may have been some reference to this adjudication in March 2019 but it was patently and, Ridge would be entitled to infer, deliberately not relied upon in the pleaded case. Those matters seem to me relevant both to the timing of the application to amend and to the efficient conduct of these proceedings.

The progress of the proceedings

51. In his second statement, Mr Morris sets out what happened throughout 2019 and 2020 in terms of the progress of the proceedings.
52. On 4 July 2019, he wrote to Gateley suggesting that, given the subject matter of the dispute, the proceedings should be transferred to the TCC.
53. On 17 July 2019, Gateley replied with proposed directions but not addressing the request to transfer.

54. On 18 July 2019, Mr Morris wrote again with draft directions including transfer to the TCC.
55. On 22 July 2019, Gateley replied agreeing the draft directions save for the transfer to the TCC. Gateley agreed, however, to the application of PD 51U (the disclosure pilot). The Reply was also served together with a costs budget which assumed no amendments to the statements of case and a two day trial.
56. Mayer Brown then made an application to transfer to the TCC. Mr Morris made his first statement in support of that application. In relation to the claim for damages, Mr Morris said that it was wholly inadequately pleaded and, at paragraph 15, that the Claimant appeared to allege that it had suffered loss as a result of not having certain documents before or during the staircase adjudication.
57. In support of the application to transfer to the TCC, Mr Morris made two points. Firstly, the claim was, he said, of a type referred to in PD 60, being a claim against surveyors or other specialised advisers relating to the services they provide; secondly, there was a wide discretion to transfer and it was argued that the discretion ought to be exercised to transfer the case because it raised a number of issues of law of importance to the construction industry. These were the extent to which an Employer's Agent would be a fiduciary and in respect of which functions; the extent to which the employer has a proprietary interest in the documents produced or received by the Employer's Agent; and *"the principles to be applied to what appears to be a "loss of a chance" claim in connection with an adjudication, in that Leicester Holdings appears to allege that, had it been in possession of certain documents, it may have achieved a different result, such that it is entitled to claim that loss from Ridge."*
58. Mr Morris' statement, therefore, made it very clear, if it was not already, that, so far as the claim for damages was concerned, the Defendant understood it to be related to and arise out of the staircase adjudication and the loss of the chance of a better result for the Claimant in that adjudication.
59. For reasons probably explained by the proximity of this application to the so-called long vacation, by 13 September 2019, a decision on transfer had not been made. That was the date in the draft directions for Initial Disclosure. On that date, Mayer Brown wrote to Gateley saying that, given the disclosure already made as a result of the 1 May Order, the Defendant had already given Initial Disclosure but, for the sake of good order, enclosed a Defendant's Initial Disclosure list. The letter continued:
"The defendant looks forward to receiving the claimant's Initial Disclosure List of Documents and copies of the documents listed therein by the close of business today, including but not limited to any submissions and decision the adjudications between the claimant and its Contractor, GF Tomlinson & Sons."
In his second statement, Mr Morris says that he received no reply to that letter and no documents. That is not disputed.
60. Mayer Brown then received notice of the listing of a hearing of the application to transfer.
61. On 26 September 2019 and in advance of that hearing, Gateley wrote to Mayer Brown saying that they remained of the opinion that a transfer to the TCC was unnecessary but

consenting to the transfer to avoid further costs and delay on the basis that the parties' bore their own costs of the application. The letter enclosed a draft statement of Mr van Gelder in support of the Claimant's position and the Claimant reserved the right to file that statement if agreement could not be reached. In response to Mr Morris' point about the type of claim, Mr van Gelder said that the proceedings related "purely to matters of agency" and did not require specialist construction knowledge. In relation to Mr Morris' arguments as to the points of law raised, Mr van Gelder said, and repeated, that the Claimant's application related to delivery up of documents arising of the contractual terms and "relates only to the law of agency".

62. Thus, in response to Mr Morris setting out very clearly the Defendant's understanding of the issues and the nature of the claim for damages, the Claimant said nothing to suggest that that understanding was wrong other than to assert that it was a simple contractual matter and/or one that related only to the law of agency.
63. The matter was eventually transferred to the TCC in December 2019 and a CMC was fixed for 12 June 2020. That CMC was subsequently adjourned. It is unnecessary for me to go into any detail or attribute any blame but that appears to have been the product of a misunderstanding in which, having been contacted by the Claimant only, it was thought by the listing office that the parties both wanted an adjournment in the light of the Covid-19 crisis.
64. In any event, that led to further correspondence between the parties. On 14 April 2020, Gateley wrote explaining what they thought had happened. In that context, Gateley (Mr van Gelder) said this:

"At no time was the Listing Office informed that the parties had agreed to vacate the CMC.

We had contacted the Court to express our view that a final hearing for the injunction would be a more appropriate listing than a CMC in this matter. This was to be investigated and it was agreed with the Court that if any changes to the listing occurred, we would inform you.

We heard nothing further from the Court in this respect so it was assumed the CMC would be going ahead prior to the Court listing a final hearing.

....

We remain of the view that a final hearing is the appropriate listing to deal with this matter effectively. A CMC is not necessary and has only arisen because the proceedings have been transferred, at your request.

In any event, the CMC has now been vacated. It would be both beneficial and cost effective for the parties to co-operate in obtaining a listing from the Court for a final hearing to bring this matter to a close."

65. I do not know what Mr van Gelder thought was going to be investigated or by whom and why the court, on the basis of no more than a conversation with the listing office, would change a hearing listed as a CMC into a "final hearing". That said, what was abundantly clear from this letter was that, so far as the Claimant's solicitors were

concerned, the only matter outstanding was the making of a final injunction. If there had been any damages claim to be addressed, the suggestion that there need be no CMC and no further directions would have been bizarre.

66. Mayer Brown (Mr Morris) responded on 22 April 2020. The response was lengthy but it placed exactly that interpretation on what Gateley had said, inferring that the Claimant no longer intended to pursue the allegations leading to a claim for damages and only wanted a “final hearing” for a final order for delivery up of documents. Mayer Brown asked for confirmation of that position and said that if that was not forthcoming an application to strike out the damages claim would be made.
67. On 4 May 2020, the listing office e-mailed Mayer Brown saying that the TCC was happy to relist the CMC – which appeared to have been vacated without consent – and offering dates on a Monday to Thursday in June and July. The relevance of that is that the court would normally only hear CMCs on a Friday and that offer was, therefore, being made with a view to re-listing the CMC as soon as possible because it had mistakenly been taken out of the list. That e-mail was forwarded to Gateley with a request that counsel’s clerks liaise. Mr van Gelder’s e-mailed response to Mayer Brown on 5 May 2020, was short and to the point: *“Thanks but this should be listed for a Final Hearing”*.
68. Mr Morris replied the same day, by e-mail timed at 19:24, referring to the letter of 22 April and saying that he did not understand what was meant by a Final Hearing, and asking for a response to the letter. He suggested that it might be more efficient to discuss matters by telephone and invited Mr van Gelder to call his mobile number. Mr van Gelder did not take up that invitation but replied by email timed at 19:27. The entire content of that e-mail was as follows:

“This was an application for an injunction to be made final at a subsequent hearing after the interim injunction was granted in our client’s favour and in respect of which your client has partially complied. The question is whether the injunction is made final or not; that’s it.”
69. Following the making of the Order of 1 May 2019, there had been an exchange between Gateley and Mayer Brown about Ridge’s compliance with Order. By letter dated 9 May 2019, Gateley had said that it was not credible that there would be only a handful of internal e-mails over a nearly three year period and that the only saving provision was for privilege. Mayer Brown had replied on 13 May 2019 at some length contending that Gateley had misunderstood the terms of the Order and that it was only e-mails “... between 18 February 2016 and 7 March 2019 sent or received by the Defendant in its capacity as agent of the Claimant” which had been ordered to be disclosed, and setting out Ridge’s case as to the status of internal e-mails. Apart from this exchange, Mr van Gelder’s e-mail of 5 May 2020 was the first time any further suggestion had been made in nearly a year that the Defendant had only partially complied with the Order of 1 May 2019.
70. Leaving that to one side, the e-mail made entirely clear that the Claimant had no intention of pursuing the claim for damages. What the timings also make clear is that that was not something Mr van Gelder felt the need to reflect on or discuss with his

client. That is not a criticism – it simply makes it the more clear what the Claimant’s position was.

71. In his reply dated 13 May 2020, Mr Morris made the point that it appeared that the Claimant did not intend to pursue the claim for damages and he set out in some detail all the steps that the Defendant had had to take because the Claimant had persisted with these proceedings despite the fact that they had no intention of pursuing the damages claim. Those steps will be apparent from what I have already said.
72. The CMC was then listed for hearing on 27 July 2020. On 30 June 2020, Mayer Brown wrote to Gateley making an open offer, on a commercial basis, to consent to the injunction being made final in return for the Claimant formally abandoning the damages claim and leaving only the issue of costs of the damages claim for determination by the Court. There was no response to that offer. However, it was common ground between the parties that on 7 July 2020, in without prejudice correspondence, the Claimant indicated its intention to apply to amend the Particulars of Claim. Because that correspondence was without prejudice I was told no more than that.

The summary judgment application

73. On 13 July 2020, and in advance of the CMC, the Defendant then issued this application for summary judgment on certain paragraphs of the Particulars of Claim and the Reply, alternatively to strike out those paragraphs. In effect, summary judgment was sought on the damages claim. The application was supported by the second statement of Mr Morris to which I have already referred at length for the procedural background.
74. As Mr Morris said in his statement and Mr Reid submitted, the only articulated claim for damages in the unamended Particulars of Claim is for damages which are said to arise from the failure by the Defendant to produce documents which were relied on in the staircase adjudication. But the decision in that adjudication was made on 29 December 2018. Before that date there had been no demand for documents under the Confidentiality Agreement or pursuant to any fiduciary duty and there is no pleaded breach that could be relied upon. Any contention that the Defendant should have provided to its client every document and piece of correspondence with the contractor without any contractual requirement to do so or any request to do so, and was in breach in failing to do so, stands no prospect of success at all.
75. Further, the Claimant has not, faced with this application, identified even in general terms what loss it has suffered as a consequence of not having had documents that were relied on by the Contractor in the staircase adjudication. The only suggestion remains the loss of a chance to settle the claim referred to in no more detail in Mr van Gelder’s first statement.

The application for permission to amend

76. It is worth noting that on 6 July 2020, in preparation for the CMC, the Claimant served an updated costs budget. That costs budget still identified as assumptions that there

would be no amendments to the statements of case and that that trial would have a 2 day estimate.

77. As I have said, the matter came before HHJ Bird on 27 July 2020 but was adjourned and re-listed on 24 August 2020. That meant that the Claimant's evidence in response to the summary judgment application was due no later than 17 August 2020. On that date, the Claimant issued the application for permission to amend and served the second statement of Mr van Gelder both in opposition to the summary judgment application and in support of the application to amend.
78. For ease, I will refer to the draft Amended Particulars of Claim as the Amended Particulars of Claim although permission has not yet been granted to amend.
79. As I have mentioned, the Amended Particulars of Claim leaves untouched paragraph 10 relating to the staircase adjudication. In fact there are no amendments proposed at all until new and slightly mis-numbered paragraphs 15A to 15G and 16H to 16X (which should obviously be numbered consecutively 15H to 15X) are inserted.
80. All these paragraphs address causation and loss and damage and what is, in my view, a wholly new case:
 - (i) Paragraphs 15A to 15C set out that there were delays in the course of the works and that the Contractor sought extensions of time to the dates for Sectional Completion. In support of its application, the Contractor submitted, on or about 11 December 2018, "a critical path report" prepared by Mr Iain Stackhouse. It is said that it was obvious to Mr Stackhouse that any extension of time would deprive the Claimant of the right to claim liquidated damages and would expose the claimant to the risk of having to make payments in respect of extended preliminaries.
 - (ii) Paragraph 15D pleads that on 15 March 2019, the Contractor commenced an adjudication dealing with delay and extensions of time to the Sectional Completion dates. Paragraph 15E then says that, as a result of the notification of that adjudication, the Claimant wrote to the Defendant "pointing out that the contractor had commenced an adjudication and demanding disclosure of the Documents. The Claimant stated expressly that the Documents were required to deal with the adjudication"
 - (iii) The following paragraphs (15F to 16L) set out the correspondence that followed and the commencement of these proceedings.
 - (iv) Paragraph 16M alleges that disclosure was given, pursuant to the consent order, on or about 7 May and that that disclosure was "extensive and incomplete".
 - (v) Paragraph 16N is then in these terms:

"As a consequence of the failure to disclose documents properly or at all and in a timely fashion in response to the demands made by the Defendant, the Claimant was unable to prepare its evidence to respond to the claims made by the contractor in the March 2019 Adjudication."
 - (vi) Paragraph 16O then pleads that as a consequence of the absence of such evidence, the adjudicator gave the extensions of time that he did.
 - (vii) From paragraph 16Q, the Claimant pleads its case as to loss and damage. The content of paragraphs 16O and 16Q is repeated. It is then said that as a consequence of the extensions of time, the Claimant lost the right to claim

liquidated damages of £387,000 in relation to the Main Unit and £292,600 in relation to the Retail Units – a total of £679,600. Further, it is said that the Contractor has submitted a further claim for £500,000 in relation to extended preliminaries “that would not have been necessary but for the Defendant’s unlawful acts”.

- (viii) At paragraph 16V, the Claimant claims damages or equitable compensation in a sum of not less than £1,170,600 (which is the total of the sums above).
- (ix) At paragraph 16W, the Claimant pleads further or in the alternative, a claim for damages or equitable compensation “for the loss of the chance to succeed in the March 2019 adjudication” (my emphasis).
- (x) Paragraph 16X the provides:
“The Claimant is currently engaged in an arbitration with the contractor in an attempt to reduce its losses as more particularly set out above. The Claimant will plead further when the result of the arbitration is known.”

The merits of the amended claim

- 81. As I have indicated above, it was common ground that the application for permission could succeed only if the amended claim had real prospects of success in the sense that it was more than fanciful. Whilst not rejecting Mr Reid’s threshold argument on lateness, I take this issue first.
- 82. Mr Benzie fairly accepted that the amended claim was a difficult claim for the Claimant to advance but he submitted that a coherent factual and legal basis for the claim was set out and that anything further was a matter for evidence in due course. He suggested that the Claimant could not yet know exactly what evidence might need to be adduced, as it did not yet know the outcome of the arbitration, but that was not a reason to refuse permission to advance a claim which, on its face, had a real prospect of success.
- 83. Mr Reid, on the other hand, submitted that there was so little particularisation of the claim and so little evidence before the court, that the court could not possibly be satisfied that the claim had a real prospect of success and, since the burden of establishing that it had such a prospect of success lay on the Claimant, the application ought to be refused on that basis alone. I prefer Mr Reid’s submission on this issue for the reasons that follow.
- 84. Firstly, the causal link now pleaded is that because of Ridge’s failure to disclose or provide documents properly “or at all”, and in a timely fashion in response to the demands made, the Claimant was unable to prepare its evidence to respond to the claims made by the Contractor in the March adjudication, and that, as a consequence of the absence of such evidence, the adjudicator gave an extension of time on the Main Unit to 8 April 2019 and on the Retail Units to March 2019. It is then also alleged that that led to the Contractor making a claim for prolongation costs, although no further detail of that claim or what has happened in respect of it is set out. Indeed, the causal connection between the alleged failure to provide documents and the Contractor’s claim for prolongation costs is even more obscure since the claim pleaded is that the extended preliminaries would not have been necessary but for the Defendant’s unlawful acts.
- 85. On any view, the causal connection between breach and loss is barely pleaded and, in this context, it is remarkable that there has been so little evidence about the adjudication

or subsequent claim. Put shortly, the Amended Particulars of Claim seems to proceed on the basis that, if the Defendant was in breach in failing to provide all the documents requested in March 2019, it follows, without more than the mere assertion that the Claimant was “unable to respond” in the adjudication, that the Defendant must be liable for the financial consequences to the Claimant of the adjudicator’s decision. That simply does not make sense.

86. On its face, the allegation relies on the failure to provide every document requested and on every document as being material to the Claimant’s defensive position in the adjudication. There is not even the most rudimentary attempt to identify what documents the Claimant did not have that inhibited its ability to defend itself in the adjudication. It is inherently improbable that the Claimant had no documents at all or that it needed every document requested in order to defend itself or that it was hamstrung by the absence of every document requested. That position becomes all the more improbable when it seen against the background of the evidence that the Claimant and its solicitors were dealing with the extension of time claim and that the updated Stackhouse report (dated 1 March 2019) relied on in the adjudication appears to have appended all the documents relied on.
87. If there is any merit in the claim, there is no reason the Claimant could not have given some basic indication of what documents it did not have that inhibited its ability to respond in the adjudication. The adjudication took place and was concluded over a year ago but the Claimant has not even placed before the court a copy of the adjudicator’s decision from which some indication might be derived of what was before him on behalf of the Claimant or what matters he relied on in reaching his decision, which in turn might have given some indication of how the Claimant may have been prejudiced.
88. Although this is not how the matter is pleaded, Mr van Gelder puts the prejudice to the Claimant broadly on the basis that, once the documents were provided in May 2019, there was insufficient time to undertake a full critical path analysis.
89. As set out above, the report of Mr Stackhouse was submitted in December 2018 and an updated version relied on in the adjudication. The Claimant’s position appears to be that it was unable to respond to that report in kind. The Claimant had since then been involved in an arbitration to rectify what it sees as the wrongs of the adjudication. I inferred from that, and Mr Benzie confirmed, that it was the Claimant that commenced the arbitration. It is, I think, a reasonable inference that the Claimant did so once it considered itself to be in a position properly to present its case and, it might be inferred from Mr van Gelder’s evidence, once it had obtained what it regarded as a satisfactory critical path analysis. It ought, therefore, to have been possible, if only in the most general terms, to identify what the Claimant did not have in March 2019 but needed to prepare that critical path analysis now relied on in the arbitration. There is not even a hint.
90. In this context, I note also that, in his second statement, Mr van Gelder gives some evidence about the history of the extension of time claims made.
91. He explains that in about June 2018, GFT changed its commercial management team and that a new Commercial Director, Mr Sims, adopted a very aggressive approach to

asserting the contractor's claims. For reasons it is not necessary for me to recite, Mr van Gelder describes the approach to Mr Sandell of Ridge to Mr Sims's correspondence as confused. He makes a general point that because the Defendant was the gatekeeper for all information on progress, it was not possible for an external consultant to determine the causes of delay or validity of any application for an extension of time.

92. Mr van Gelder then says that in December 2018, with the works even further delayed, the contractor submitted the "critical path report" prepared by Mr Stackhouse to which I have already referred. Mr van Gelder then expresses the opinion that it should have been absolutely clear to the Defendant and Mr Sandell that "a far reaching analysis of what activities were actually causing delay was needed" and that the Defendant should have compiled detailed information to establish the critical path and, even if the Defendant could not do so, should have provided the information to the Claimant. This seems to me to go well beyond the proposed amended case.
93. In any case, in contradiction to the alleged complexity of the delay analysis, Mr van Gelder then says that the Stackhouse report was "a very clever put up job". He explains that Mr Stackhouse starts by relying on the retaining wall as a cause of delay (which was a matter Mr Sandell had already identified as being one of contractor's design) but he contends that Mr Stackhouse then realises that that would only generate 5 or 6 weeks extension of time. So, he says, Mr Stackhouse glosses over this by relying on the services installation as the critical delaying event so that a myriad other delaying events are ignored. Whatever the merits of Mr van Gelder's analysis, it is apparent from that that the Claimant understood the basis of the Contractor's application and the answer to it as a matter of fact. That calls into question even more why the Claimant has failed to give any indication of what material it did not have that inhibited its ability to respond in the adjudication.
94. Lastly, it is impossible to ignore the fact that the amended claim is sought to be introduced over a year after proceedings were commenced; over a year after the Defendant made plain, and the Claimant agreed, that the claim for damages was founded on an entirely different matter (namely the staircase adjudication); and against the background of the Claimant's solicitors' repeated indications that there was nothing left in this action other than making final the interim injunction. In other words, there has been no indication at all that there might be a claim waiting in the wings arising out of the extension of time adjudication and subsequent arbitration, the latter never having being mentioned at all until this application was made.
95. All these matters must call into question the merits of the Claimant's case and make it incumbent on the Claimant to provide more than the barest of pleadings. This is not to try the amended claim prematurely or to require evidence to be pleaded. Rather, it emphasises why it cannot be said that there is a coherent legal or factual basis for the claim in the Amended Particulars of Claim and why there is, in fact, just a bare assertion that because the Claimant did not have every document it had requested, it was prejudiced in the adjudication. Mr Benzie emphasised in his submissions that the claim was one framed as one for breach of fiduciary duty but that does not obviate the need for a causal link between the breach and any loss and damage.
96. A further aspect of this paucity of pleading relates to the claim for loss and damage. On the basis that the Claimant has now been able to fully set out its case in the

arbitration, the outcome will be that the Contractor is awarded the extensions of time to which it is properly entitled. The amounts that the Claimant cannot then deduct by way of liquidated damages will be the amounts that it is not entitled to deduct. That will have nothing to do with what documents the Defendant may have been obliged to provide or did provide to the Claimant. The same is true in relation to the Contractor's claim for prolongation costs, assuming that also to be the subject of the arbitration. It would be hopeless to suggest that the alleged failure to comply fully with the Consent Order is causative where that issue has not been raised for over a year and nothing further has been asked for for the purposes of conducting the arbitration. The Amended Particulars of Claim wholly fails to recognise the problems with causation of loss and damage.

97. Mr Reid pointed out that the Claimant had made a claim for not less than £1,176,600. Mr Reid submitted further that the Claimant had, therefore, pinned its colours to the mast of a claim for not less than that amount so that no lesser claim was open to it. He relies on the fact that the "not less than" wording is repeated twice in the prayer. Although that may be strictly what is claimed, the submission seems to me to give no effect to the draft paragraph 16W, which advances, in the alternative, a claim for loss of a chance, and paragraph 16X, which advertises a revised claim when the outcome of the arbitration is known. But, having said that, neither of these paragraphs gives any indication of what that claim might be. There is no indication of what would have been "success" in the adjudication and, as Mr Reid submitted, in the adjudication, the loss of a chance was the chance to do better which might have reduced the amount payable at that time and avoided some costs of the subsequent arbitration but would not be the amount of the contractor's contractual entitlement. As I have already said, the outcome of the arbitration should be the actual entitlement of the contractor to time, and perhaps money, and the Claimant's corresponding entitlement and/or liability.
98. Mr Benzie submits that there may be some different claim. It may be that there could be some other, as yet unarticulated, claim for interest on monies paid or wasted costs in defending the adjudication or conducting the arbitration - a position referred to briefly in Mr van Gelder's statement. But that is not sought to be pleaded by amendment and, if it were to be the subject of a future amendment, the particulars of breach and causation would require substantial further amendment to advance such a claim.
99. In conclusion, in my judgment, the Amended Particulars of Claim does not come close to setting out a case with real prospects of success unless the claim is further elaborated upon very significantly at a later date. That in itself would be a reason to refuse permission to make the amendment but, even if I am wrong about that, I would not allow the amendment for the reasons I address below.

Other factors

100. In *CIP Properties (AIPT) Limited v Galliford Try Infrastructure Ltd.* [2015] EWHC 1345 (TCC), at [19], Coulson J. drew together the factors to be taken into account in the exercise of the court's discretion to allow or refuse an amendment.
101. The first factor was the lateness of the amendment which Coulson J described as "a relative concept":

“(a) ... An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statement and expert’s reports) which had been completed at the time of the amendment.

...

(c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise. ... In essence there must be a good reason for the delay.”

102. Mr Reid submits that the amendment is late either because it could have been advanced earlier or because the application is made after close of pleadings. In *CIP* at [21], Coulson J characterised the application as late because it was made after close of pleadings and disclosure.
103. It does not seem to me that there is, or should be, some hard and fast rule that an application for permission to amend is “late” at some particular stage of the proceedings. Lateness is, as Coulson J, said a relative concept:
- (i) In this case, the proceedings have not advanced very far but it is still the case that steps have been taken by Ridge in respect of case management, costs budgeting and disclosure which will have to be revisited.
 - (ii) If the stage of the proceedings was the only factor going to lateness and was to be looked at in isolation, I would not have regarded this application as late. But that would, in my judgment, be an unrealistic approach.
 - (iii) The lateness of this amendment comes from the fact, as I have already said, that it is made over a year after the start of proceedings and over a year after the adjudicator’s decision. At no time until early July was any indication given that there was any intention to make this amendment and the Claimant’s position had been the complete opposite.
 - (iv) The argument that the Claimant has been awaiting the outcome of the arbitration does not explain or excuse the Claimant’s position. If that were truly the Claimant’s position, it would have been the easiest thing to say in correspondence. Instead, there has been, in the pleadings and correspondence since the 1 May Order was made, confirmation that the damages claim related to the staircase adjudication; utter silence about any other adjudication or arbitration; the repeated assertion that the matter should proceed directly to a “final hearing” to make the injunction final; and the filing of a costs budget and draft directions that are completely inconsistent with a case of the complexity that a damages claim of this nature would entail.
104. It is against this background that the timing of the application and the extent to which the Defendant will be required to revisit steps already taken has to be seen. In the context of this case, this is, in my judgment, a late amendment and one in respect of which no satisfactory explanation for lateness has been proffered.
105. A further factor (at paragraph 19(d) in *CIP*) is the particularity or clarity of the proposed amendment because “different considerations may apply to amendments that are not tightly-drawn or focussed”. The Claimant’s proposed amendments are not tightly drawn and focussed and face numerous difficulties for all the reasons I have already given.

106. Consideration of the clarity of the amendment to my mind reflects the application of the overriding objective which includes ensuring that a case is dealt with expeditiously and fairly. The position here is that, having made its application late and contrary to all the indications previously given, the Claimant now seeks to use the existing proceedings to advance a wholly new claim. The proposed amended claim is pregnant with a request for further information and pregnant with a further application for permission to amend - and not merely for the reasons set out in paragraph 16X.
107. The application is one to make an amendment which, if it is to have any prospect of success, will inevitably require further particularisation or amendment to establish any plausible causal link and articulate any sustainable claim for damages. If the amendment were allowed, the Defendant would simply not know the case it had to meet and would be put to the time and effort of trying to find out. Further, it would be extremely difficult, if not impossible, to case manage the action – there is insufficient detail in the proposed amendments to permit an informed approach to disclosure, the relevant witnesses may well be difficult to identify, and the scope and nature of expert evidence equally difficult to define. Costs budgeting would then be all but impossible. The upshot would be that all these matters would inevitably have to be revisited in the future.
108. There is nothing expeditious or fair about that, and to allow such an amendment would not be in accordance with the overriding objective.
109. There is, of course, also the potential prejudice to the Claimant to be weighed in the balance if the amendments were not allowed but, as Coulson J also said in *CIP* (at paragraph 19(f)), if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise. Any prejudice to the Claimant in this case is very much the product of its own actions.
110. What follows is that, even if I were more persuaded that the amended claim had a real prospect of success, I would still in the exercise of my discretion have refused to allow the amendment.

The summary judgment application revisited

111. Returning to Ridge's application for summary judgment, the position, therefore, remains that that application falls to be considered without reference to the amendment and, since the claim for damages based on the staircase adjudication, makes no sense, I grant summary judgment on and/or strike out the paragraphs that plead that claim for damages.
112. It was not the subject matter of any argument before me but it seems to me that it is appropriate only to give judgment on or strike out, (i) paragraph 10 (except for the first sentence), paragraphs 16.4 to 16.7, and paragraphs 17, 18, 20, 22 and 23 of the Particulars of Claim and (ii) paragraphs 29 to 33 of the Reply. The other paragraphs to which the application refers plead the factual background, the demands for documents and the allegations of breach. Since the application for a final mandatory injunction remains live, it does not seem to me that these paragraphs should also be struck out. However, since I heard no argument on this particular issue, I will invite the parties to

make further submissions in writing if they wish to argue differently. Otherwise, I invite them to agree the terms of the order to be made.