



Neutral Citation Number: [2024] EWHC 1088 (TCC)

Case No: HT-2022-000180

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: 08/05/2024

Before :

MR JUSTICE FREEDMAN

Between :

LAING O'ROURKE DELIVERY LIMITED

Claimant

- and -

SWEETT (UK) LIMITED

Defendant

Ronan Hanna (instructed by **Pinsent Masons LLP**) for the **Claimant**
Lucy Garrett KC and Benjamin Fowler (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 21 and 22 March 2024
Date of handing down in draft: 1 May 2025

Approved Judgment

This judgment was handed down remotely at 12noon on Wednesday 8 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE FREEDMAN:

I Introduction

1. This litigation arises out of a PFI (Private Finance Initiative) contract relating to Roseberry Park Hospital in Middlesbrough (a mental health hospital). There was a Project Agreement dated 12 December 2007 ("Project Agreement") between the Tees Esk and Wear Valleys NHS Foundation Trust ("the Trust") that provides a range of mental health service and Three Valleys Healthcare Limited (here referred to as "Project Co", although referred to as "TVH" in the pleadings). The Project Agreement was for the development of a site at the hospital and certain related services.
2. On 12 December 2007, Project Co and the Claimant ("LOR") entered into a building contract in respect of the hospital ("the Building Contract") under which LOR acted as the design and build contractor. Days earlier, on 4 December 2007, LOR appointed an architect, Medical Architecture and Art Projects Ltd ("MAAP") as its lead consultant and architect under what is referred to as "the Services Agreement".
3. Also on 12 December 2007, the Trust, TVH, LOR and funders engaged Nisbet as "Independent Tester" for the project ("the Appointment"). Pursuant to a Collateral Warranty, Nisbet warranted to LOR its performance of its obligations under the Appointment. Subsequently, Nisbet was acquired by Sweett (UK) Limited ("Sweett") and, pursuant to a Deed of Novation, Sweett stepped into Nisbet's shoes in respect of the Appointment and Collateral Warranty. There is no dispute in relation to these novation arrangements.
4. The Hospital was handed over to the Trust in phases, from about March 2010 onwards. Project Co became insolvent and a consequence was that the Project Agreement has been terminated. The Trust brought proceedings against Project Co, claiming the sum due on termination ("the Upstream Litigation"). This included an amount claimed as due in relation to defects in the design and construction of the Hospital.
5. A number of years into its operation, the Trust appointed consultants to examine the fire safety of the Hospital, which then identified serious concerns and instigated several years of investigations.
6. In February 2020, the Trust issued a letter of claim against Project Co., claiming sums in excess of £125 million in respect of various defects, and they included fire safety defects. Project Co in turn sought to pass that claim down to LOR. On 22 July 2021, LOR settled that claim by way of the Settlement Agreement and agreed to pay Project Co in excess of £18 million.
7. LOR later served Particulars of Claim against its architect, MAAP (in June 2022) in action HT-2019-000432. MAAP issued a Part 20 Claim against LOR's roofing subcontractor Deeside Timberframe Limited ("Deeside") on 23 September 2022.
8. In this action brought in July 2022 between LOR and Sweett, LOR claims breach of contract against Sweett, it having acquired the liabilities of the Independent Tester by novation, seeking to pass on liability for the defects.

9. The proceedings between the Trust and Project Co were still live (HT-2019-000449) when this application was heard, but settled prior to the handing down of this Judgment. The expert reports in those proceedings were obtained by LOR and make allegations these defects were all non-compliant with the Project Agreement and were endemic throughout the Hospital. It is said by LOR that the experts in that action agree that this was the case.
10. LOR brought the present proceedings against Sweett (and also proceedings against MAAP) in order to recover the losses incurred in the Settlement Agreement in relation to fire safety defects (and smaller defects relating to vanity units and ensuite doors), as well as the costs of replacing the roofs. The Settlement Agreement also settled claims in respect of certain other defects. LOR does not seek to pass on Sweett / MAAP the sums paid in respect of those other defects. Both Sweett and MAAP have liability caps of £10m in their respective contracts with LOR.
11. LOR's claim against Sweett alleges, in broad summary, as follows:
 - (a) the fire protection designs (and, to a lesser extent, the vanity units and en suite designs) were deficient and not compliant with Schedule 8 of the Project Agreement;
 - (b) the workmanship was also, in certain respects, deficient and non-compliant with the Project Agreement;
 - (c) Sweett's review of the relevant designs was negligent, in that, contrary to its obligation to verify the designs for compliance with Schedule 8, it failed to identify (and notify) that the designs were non-compliant;
 - (d) Sweett negligently inspected the works and, as a result, failed to identify (and notify) that the works were non-compliant, contrary to its obligation to monitor compliance of the works with the Project Agreement during inspections;
 - (e) as a result of those breaches, LOR was liable to TVH for breaches of the Building Contract and that resulted in loss in the form of the Settlement Agreement and the roofing repair works;
 - (f) the sum claimed is £20.4m (which excludes interest and certain ancillary heads of claim yet to be ascertained).
12. The claim against Sweett has at its core two obligations that it owed pursuant to the Appointment - a design review obligation and a site inspection obligation, as follows:
 - (a) The design review obligation:
 - (i) *"The Independent Tester shall carry out an initial full review of the design of the Works and thereafter shall monitor the development of the design to verify that it complies with the design as described in Schedules 8 and 10 of the Project Agreement"*: see paragraph 3.1 of Appendix 1 of the Appointment. It is common ground that the

relevant Schedule for the purpose of this claim is Schedule 8 (and not Schedule 10);

- (ii) *“The Independent Tester shall not by virtue of its obligations under this paragraph 3 of this Part I of Appendix 1, be responsible for the carrying out of the design of the Works or any part of them and the liability for the design of the Works shall remain with Project Co or any other Project Co Party. The Independent Tester shall not be required to approve or consent to the suitability of the design of the Works”*: see paragraph 3.3 of Appendix 1.

(b) The site inspection obligation:

“Visit the Site and monitor and inspect the Works on a regular basis in accordance with the Project Agreement to monitor compliance of the Works with the Project Agreement”: see paragraph 5.4 of appendix 1 of the Appointment.

13. Schedule 8 of the Project Agreement contained the Trust's Construction Requirements (in Part 3) and the Project Co's Proposals (in Part 4). Parts 3 and 4 are in excess of 900 pages comprising a detailed specification and/or concept design for the Hospital. Schedule 8 required that the Hospital complied with *inter alia* HTM 05 (Firecode for hospitals); Good Industry Practice (a defined term); the Building Regulations; relevant British Standards and codes of practice; Health Building Notes (HBNs) and Health Technical Memoranda (HTMs).
14. Sweett's skeleton (para. 42) refers to common ground that:
- (i) Sweett's obligation was to exercise reasonable skill and care: see LOR's Reply para. 11.2.
- (ii) Sweett's obligation was to review the design produced by LOR with the *“design as described in”* (specifically) Schedules 8 and 10 of the Project Agreement, in order to *“verify compliance”* with the Schedule 8 and 10 design: see Sweett's Defence para.28(a) and LOR's Reply para.12.1. In fact, the pleading of LOR's Reply is not the same in that a part of it reads as follows, namely *“Paragraph 3.1 required Sweett to (i) carry out an initial, full review of the design and (ii) thereafter, to monitor the design as it developed, so as to “verify that it complies with” Schedules 8 and 10 of the Project Agreement. LOR will rely on the terms of paragraph 3.1 for their full meaning and effect.”* The nature of the difference between the parties is discussed below in this judgment.
- (iii) Sweett was not required to express approval of or consent that the design was suitable or fit for purpose, as opposed to verifying that the design was compliant with Schedules 8 and 10 of the Project Agreement, which it was required to do: see LOR's Reply para. 12.2(c).

15. Project Co issued a claim form against Sweett on 24 November 2023. However in the period between hearing the applications and the handing down of this judgment, that claim was discontinued.

II The Applications

16. The Court has before it two applications, namely:
- (i) Sweett's application dated 4 December 2023 to strike out various parts of the Particulars of Claim pursuant to CPR 3.4(2) ("the Strike Out Application").
 - (ii) LOR's application to amend dated 10 November 2023 ("the Amendment Application"). That application was in relation to the third version draft of LOR's amended pleadings. LOR served a fourth version of its draft Amended Particulars of Claim and a fourth version of its draft Amended Response to the Request for Further Information with its evidence in response to the Strike Out Application on 1 March 2024. It is assumed that LOR seeks permission to amend in the terms of the latest drafts.
17. Sweett's position is that various paragraphs of the Particulars of Claim, dealing with the alleged design deficiencies in relation to the Fire Safety Defects, the Vanity Units and En Suite Doors and the Roofs, together with related allegations of breach of contract, should be struck out pursuant to CPR 3.4(2) under each of the grounds: (a) no reasonable grounds for bringing the claim; (b) the statement of case is an abuse of the Court's process and/or (c) there has been a failure to comply with a rule, practice direction or court order, namely CPR 16.4(1)(a) and PD16.
18. Sweett also objects to LOR's Amendment Application (both in relation to the Particulars and the latest draft Amended Response to the Request for Further Information ("RFI")) on the following bases, namely that the amendments:
- (i) have no reasonable prospects of success.
 - (ii) should not be allowed where the contractual obligation is unpleaded and/or irrelevant to the allegation of non-compliance.
 - (iii) are vague and/or repetitive and/or add nothing.
 - (iv) plead LOR's case by cross-reference to the draft Amended Response to the Part 18 Request, which should not be allowed.
19. Sweett has acknowledged that some of the amendments have progressed matters, but that they have not rendered the application to strike out redundant. The reason for this is that sometimes the entirety of the cause of action is not before the Court, and until that it is the case, it should not stand. In other instances, they complain that the pleading is inconsistent and confusing, and such that if it is allowed to stand, it is liable to cause insuperable problems at a trial. In many respects, they are not seeking

that the strike out should occur in this application, but submit that LOR should be given a further opportunity to put forward a coherent case which pleads properly the alleged causes of action. As regards vanity units, Sweett submits that the case is bound to fail and should be struck out at this stage.

20. There had been a suggestion or expectation on the part of LOR that the amendments would be considered first, and then the strike out application would be considered. In line with a submission of Sweett, the Court considered at the outset that the submissions should be heard as a whole, and then the Court should rule on both applications. The arguments about the adequacy or otherwise of the pleadings and the amendments are entirely inter-connected. The decision to consider the two applications has been vindicated and is reflected by the fact that the discussion on the strike out application straddled most of the controversies in respect of the amendment application. This has rendered the amendment application section of this judgment short because it has been interwoven into the discussion on the various facets of the strike out application. This is the ruling on both applications.

III The position of Sweett

21. Sweett's position is that LOR's pleadings do not disclose a legally recognisable cause of action, because they do not plead a complete cause of action against Sweett. The case of Sweett is that if the pleadings were allowed to stand in their current form, this would (i) increase the costs and time associated with every step in the proceedings; (ii) make it (at best) difficult and expensive to ascertain the precise scope and nature of the issues arising for disclosure and for the necessary witness evidence and expert evidence; (iii) increase materially the time the court itself needs to spend in understanding the claim and determining it. It is therefore submitted on behalf of Sweett that the pleading as it stands is not consistent with the overriding objective (or with the parties' CPR 1.3 duty to help the court to further the overriding objective).
22. Sweett submits that there is no recognisable cause of action. They make complaint under four headings:
- (i) a failure to plead a cause of action in relation to the allegations of failure properly to carry out the initial review and/or monitor the design in relation to the allegations of design defects.
 - (ii) failure to plead a cause of action specifically in relation to the allegation of failure to monitor the development of the design at paragraphs 112.2(b), 119.2(b) and 166.2(b).
 - (iii) allegations as to the Vanity Units at paragraphs 117.1(a) to (e), which are hopeless on the face of LOR's pleading and/or where no cause of action has been pleaded in relation to paragraphs (b) to (e). The associated draft amendment at paragraph 117.1A should be rejected on the same grounds, but in any event it (and the related amendment at paragraph 120.2(b)) is incomprehensible and is also resisted.
 - (iv) the remaining reference to "good practice" at paragraph 105.8(c) (Fire protection at the top of compartment walls) of the Particulars of Claim is objectionable.

IV The history of the pleadings and the strike out application

23. The strike out application has been mooted since June 2023. This judgment could contain a lengthy account of correspondence between the parties about complaints and responses in respect of LOR's pleadings, as well as complaints about Sweett's pleadings. There is material in the skeleton arguments on both sides comprising a stage-by-stage account of four versions of the Amended Particulars of Claim and four versions of the Further Information provided by LOR in answer to the RFI. Sweett has prepared a composite document which shows the changes made between the various versions of the Amended Particulars of Claim in different colours. The key shows the date of those amendments. Sweett makes allegations of shortcomings in the pleadings at each stage and LOR has provided its responses.
24. It is evident that there has been an unhappy history in this process. Sweett submits that the pleadings have been dogged by a lack of clarity and specificity as well as by confusion or error on the part of LOR in the case that it is pursuing. Sweett's case is that this is evidenced and magnified by the different versions and inconsistencies of the case in the various documents. LOR submits that, at best, the complaints about the pleadings have been unnecessary and, at worst, there has been a course of conduct unreasonably to prevent LOR from advancing its case. LOR submits that its various versions reflect attempts on its part to avoid controversy and to make progress with the case. It denies that they evidence any shortcomings in its case.
25. The examination of the genesis of pleadings to date is a distraction from examining the current pleading. It is necessary to consider the application not as it would have been months ago, but as it now stands. The written arguments in part obscure an examination of the pleadings in their current form by harking back to previous versions of the pleadings. Any benefit in examining the history of the pleadings in order to test if it evidences shortcomings of either party's case is outweighed by the distraction which it entails. The Court must concentrate on the issue which it has to decide, namely (i) whether the pleadings as they stand are adequate (ii) insofar as they are not, whether further attention and a further opportunity should be afforded (iii) if not, whether parts of the pleadings should be struck out, and (iv) whether and to what extent the proposed amendments are to be allowed.
26. The Court has been informed that several hundreds of thousands of pounds have been incurred in costs in dealing with the pleadings. It is difficult to escape the impression that one reason for dwelling on the history of the drafts was so as to set the scene for submissions which may be made as to costs irrespective of the result, particularly if the various versions have generated large costs. If that were a reason for the repeated references in the skeletons to the history, it is not helpful at the adjudication stage in respect of the adequacy or deficiencies of the pleadings. The Court will not test whether there is anything in this impression because it will judge matters for the purpose of determining the applications as they now stand and without having in mind any costs consequences.
27. The parties agreed for the purpose of hearing on the applications to confine their observation to the current status quo. Whilst tempted occasionally to refer to the past history, both parties exercised commendable restraint in refraining from so doing.

V The law

(a) The law relating to summary judgment/strike out

28. The relevant rules in the CPR are as follows:

Power to strike out a statement of case

“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.”

Grounds for summary judgment

“24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if–

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

(Rule 3.4 makes provision for the court to strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)”

29. In *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), Lewison J said the following about summary judgment applications, but the same applies also to strike out applications:

“The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: Swain v Hillman [2001] 2 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

(b) Strike Out Application – the law

CPR 3.4(2)(a) provides “that the statement of case discloses no reasonable grounds for bringing or defending the claim”.

30. The principles applicable to an application for strike out pursuant to CPR 3.4(2)(a) are conveniently summarised in section 3.4.2 of the White Book (2024 Edition). That makes reference to paragraph 1.4 of PD3A (Striking Out a Statement of Case), which gives examples of the types of claim suitable for strike out. This includes claims “*which are incoherent and make no sense*” and “*those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.*”
31. In *Liberty Homes (Kent) Limited v Kanangaratnam Rajakanthan* [2022] EWHC 2201 (TCC), Jefford J struck out a pleading which did not set out the facts necessary for a completed cause of action. She referred at [52] to the purpose of the rule as summarised by Teare J in *Towler v Wills* [2010] EWHC 1209 (Comm) at [18]:

“The purpose of the pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case

and in a matter which saves unnecessary expense...” [emphasis added]

32. Three purposes of pleadings are identified, namely:
- (i) to enable the other side to know the case it has to meet;
 - (ii) to ensure that the parties can properly prepare for trial and unnecessary costs are not expended and court time required “*chasing points which are not in issue or which lead nowhere*”;
 - (iii) *to operate as a critical audit for the claimant and its legal team that it has a complete cause of action or defence: see King v Stiefel [2021] EWHC 1045 (Comm) and Chandler v Wright and Rowley (The BHS Group Litigation) [2022] EWHC 2205 (Ch) at [87] to [90].* CPR 3.4(2)(a) is that there are no reasonable grounds for bringing the claim.
33. It is important not to take this too far. For example, the case of *Towler v Wills* was a shareholder dispute where a litigant in person appeared without a skeleton argument to defend a pleading which was unreasonably vague and incoherent, and after a long run up putting him on notice about the basis of the strike out application. The next paragraph of the judgment after the one quoted above gives something of what would have happened if the strike out had not occurred, namely at [19]:

“19. It is not fair and just that the Defendant cannot be sure of the case he has to meet. It may well be that, with appropriate legal advice, the Claimant could have pleaded a concise, clear and particularised case against the Defendant but that has not been done. If the Amended Particulars of Claim are not struck out there is a very real risk that unnecessary expense will be incurred by the Defendant in preparing to defend allegations which are not pursued, that he will be impeded in his defence of allegations which are pursued and that the Court will not be sure of the case which it must decide.”

CPR 3.4(2)(b): Abuse of the Court’s process or otherwise likely to obstruct the just disposal of the proceedings

34. Paragraph 1.3 of Practice Direction 3A states that a claim may fall within CPR 3.4(2) (b) where it is “*vexatious, scurrilous or obviously ill-founded*”. The White Book 2024 at para. 3.4.1 referring to 3.4(2)(a) and (b) states: “*Grounds (a) and (b) cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence.*”

35. The ambit of the rule was considered by Whipple J in *Cleeves v The Chancellor, Masters and Scholars of the University of Oxford* [2017] EWHC 702 (QB) at [35] as follows:
- "(i) *A pleading which is unreasonably vague or incoherent is abusive and likely to obstruct the just disposal of the case...*
 - (ii) *One factor for the Court to consider is whether there is a real risk that unnecessary expense will be incurred by the Defendant in preparing to defend allegations which are not pursued, or will be impeded in its defence of allegations which are pursued, or that the Court will not be sure of the case which it must decide ...*
 - (iii) *Another factor for the Court to consider is whether the Defendant will be able to recover its costs, if successful at the end of the day; and if not, whether it may well feel constrained to make some sort of payment into Court, not because the case merits it, but simply as the lesser of two evils and for the avoidance of costs.*
 - (iv) *A claim can still be struck out even if it discloses a reasonable prospect of success."*
36. A related form of abuse is a party who "blows hot and cold" where a party pursues a case in the same or other proceedings and then does a volte face and pursues an inconsistent case. Even without that, if there is a case which lacks coherence and is "endlessly mutable" with fundamental contradictions for example between witness statements and pleadings which could not stand together, and if the case were not ready to move forward, the need to strike out might arise: see *Nekoti v Univilla Ltd* [2016] EWHC 556 (Ch) (Chief Master Marsh) especially at [72 - 76]. It might be different if the party was "genuinely mistaken about a version of events, particular facts or how best to put forward its case". Whilst the Court has to control its own process and be prepared to strike out a claim, the Court will be cautious before so doing in respect of a case which has a real prospect of success. The Court will not exercise the power to strike out for abuse of process without a scrupulous examination of the circumstances and a consideration as to whether this is appropriate and proportionate.
37. In *Summers v Fairclough Homes Limited* [2012] 1 WLR 2004, Lord Clarke drew attention to the right to a fair and public hearing, and then said this at [48]: "*It is in the public interest that there should be a power to strike out a statement of case for abuse of process, both under the inherent jurisdiction of the court and under the CPR, but the Court accepts the submission that in deciding whether or not to exercise the power the court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly*".

CPR 3.4(2)(c): Failure to comply with a rule, practice direction or court order

38. CPR 16.4(1)(a) requires that a statement of case must include a "concise statement of the facts" relied on. In *Pantelli Associates Limited v Corporate City Developments Number Two Limited* [2011] EWHC 3189 (TCC), the pleader had "simply taken each

relevant contractual term and then added the words “failing to” or “failing adequately at all to” as a prefix to each obligation, thus turning the obligation into a breach of professional negligence” (at [10]). Coulson J (as he then was) said this was non-compliant with the Rules:

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

39. Jefford J also referred to Coulson J’s comments in *Liberty Homes*. She concluded at [60]:

“It is incumbent on the claimant to comply with the rules and it cannot be right in principle that the burden should pass to the defendant to tease out the claimant’s case. As ever there is a question of fact and degree. There may be cases in which a simple request for clarification could have been made but was not and the court will not exercise its discretion to strike out where that course has not been taken...”

(c) Amendments

40. The White Book 2024 states as follows at 17.3.6:

*“A proposed amendment must be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation: see *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18].*

However, for the amendment to be allowed it must be shown to have “a real prospect of success”, as draws upon the test for summary judgment. Distinction is sometimes drawn between whether the amendment: (i) introduces a new claim or alternatively (ii) provides further particulars, based on factual material, in support of an existing pleaded point. It is clear that the former will not be permitted if the new allegation carries

no reasonable prospect of success. There is support for the proposition that the latter should not invite an assessment whether the particulars have a real prospect of success, these being matters for trial. See Phones 4U Ltd (In Administration) v EE Ltd [2021] EWHC 2816 (Ch) at [11], as followed HH Judge Eyre QC (as he then was), sitting as a judge of the High Court, in Scott v Singh [2020] EWHC 1714 (Comm) at [19] (the summarised principles in which were approved by the Court of Appeal in CNM Estates (Tolworth Tower) Ltd v Simon Peter Carvill-Biggs Freddy Khalastchi [2023] EWCA Civ 480) and JFC Plastics Ltd v Motan Colortronic Ltd [2019] EWHC 3959 (Comm) at [14] and [34]. However, in Gerko v Seal [2023] EWHC 63 (KB) the court expressed “slight scepticism” (at [190]) as to the existence of a “rule” that additional particulars do not have to meet a real prospect of success, giving reasons why such rule, if it exists, must have very limited scope. Even if an amendment does not present a new cause of action or defence, it should still properly be subject to considerations of the overriding objective and case management powers and so irrespective of any “rule” displacing a test of prospect of success.

Real prospect must focus must be on the pleaded case rather than supporting evidence and conclusions that might be drawn based on that evidence.”

41. LOR's claim against MAAP is very closely related to the claim against Sweett. Whereas LOR says that Sweett failed to spot non-compliances in the designs, the claim against MAAP is advanced on the basis that MAAP *produced* the non-compliant designs. LOR submitted that this is a “poacher-gamekeeper” situation. LOR has claims against both the poacher (MAAP) and the gamekeeper (Sweett). The details of the design non-compliances themselves are, necessarily, the same against both defendants.
42. Sweett is critical of the pleadings of LOR because it says that what has happened is that LOR has simply repeated the claim against MAAP against LOR, LOR's characterisation is of MAAP having produced defective designs being liable as poacher and LOR having failed to observe the defective designs being liable as gamekeeper. This is an odd characterisation because there is no suggestion that there was an intentional wrong on the part of MAAP, and so the analogy of poacher and gamekeeper is not particularly apposite. Of more moment to consider is the criticism of Sweett that in assuming that there are two sides of the same coin, LOR has neglected to analyse that the liabilities may be connected but they are not co-extensive. It is necessary to consider in this judgment the suggestion that the specific obligations of Sweett have to be analysed separately from those of MAAP, and that to the extent that a pleading does not do this, it is deficient.
43. As originally pleaded, and perhaps in subsequent iterations, there may not have been sufficient attention given to separating the two claims and to identifying the

obligations specific to Sweett. The question for the Court is not whether that is how it started: rather it is how it has ended up on the basis of the latest iteration of the draft Particulars of Claim and the RFI replies.

VI The *Pantelli* argument

44. This heading has been used as a short-hand for an argument deployed by Sweett to the effect that the argument in respect of design deficiencies was the same case as deployed by LOR against MAAP, but that was to confuse the different obligations of Sweett and MAAP respectively. The respective arguments of Sweett and LOR in response need to be considered.

(a) Submission of Sweett

45. As noted above, Sweett submits that LOR has failed in the pleadings to recognise and reflect that the obligations of MAAP and Sweett were not the same. Sweett submits that its obligation was to review the design produced by LOR to verify its compliance with the design described in Schedules 8 and 10. As is common ground, Sweett was not required to express approval of or consent that the design was suitable or fit for purpose (as opposed to verifying that the design was compliant with Schedules 8 and 10 of the Project Agreement, which it was required to do).
46. The submission of Sweett is that it was not acting as a backup designer. It was simply comparing two sets of designs to see if it complied with the design in Schedule 8. If the design was not suitable or fit for purpose, provided it was the same design as described in Schedule 8, Sweett would not be in breach of contract. It therefore did not suffice to repeat or tweak the pleading against MAAP because a non-compliance could be a breach of the MAAP contract without being a breach of the Sweett contract. Sweett submits that this has been repeatedly overlooked by LOR.

(b) Submission of LOR

47. LOR submits that the Sweett contract required Sweett to ensure that the design of the works complied with the requirements of Schedule 8. That did not involve simply making a comparison between two sets of designs, namely MAAP's designs and the designs described in Schedules 8 and 10. The proper interpretation of the duty in Clause 3.1 is to consider whether the design complies with the relevant codes that are referenced and incorporated into Schedule 8. For example, in respect of a fire drawing, one of the requirements is to see whether it complies with HTM 05-02. The Particulars of Claim specify the respects in which there has been non-compliance with the requirements in HTM 05-02. It is recognised by LOR that in addition to proving the non-compliance, it must also prove that it was negligent of Sweett to fail to spot the non-compliance when it was reviewing the design.

(c) Discussion

48. As noted above, the Court did not find appealing the analogy of poacher and gamekeeper. The real objection is not that the analogy is imperfect, but it is the objection of Sweett that the obligations are not co-extensive. In my judgment, the pleadings in their current form are responsive to this point.
49. The criticism of Sweett is that the pleadings are defective due to the *Pantelli* Argument. That argument is set out in the first witness statement of Ms Robbins to the effect that the particulars of Sweett's contractual obligation are simply a repetition of the design defects for which MAAP was responsible. Sweett submits that it is not explained with which part or parts of Schedules 8 or 10 of the Project Agreement the design deficiencies do not comply. It is also said that the Particulars of Claim do not explain what it is that Sweett did, or failed to do, which meant that its review of the design was inadequate. The criticism of Sweett is that LOR's approach is the same as that which was rejected by the Court in *Pantelli*.
50. In *Pantelli*, there were professional negligence allegations prepared without any input from an independent expert. The particulars of negligence were no more than statements of contractual obligations, prefaced with the words "failed to": see para. 9 of the judgment in *Pantelli*. Further, beyond those bare and generalised allegations, there were no further particulars nor were there any supporting factual matrix for the allegations. It is correct that para. 113.1 of the draft Amended Particulars of Claim contains particulars of negligence comprising the contractual obligations and the words "failed to". However, this has to be read in the context of the many pages of the pleading which preceded, namely paras. 92-113. They include the following:
- (i) key provisions of the Project Agreement and the relevant codes: see paras. 92-104;
 - (ii) the deficiencies in the designs of the works which gave rise to the fire safety defects. Particulars have been added in the draft Amended Particulars of Claim to explain why the design errors amounted to breaches of Schedule 8. Further particulars of the design defects including the drawings and their dates are set out in the draft amended response to the RFI e.g. see paras. 9-12;
 - (iii) the works were constructed in accordance with the designs and therefore LOR was in breach of the Project Agreement and the hospital was unsafe: see paras. 106-108;
 - (iv) Sweett's breaches of contract are set out in paras. 112-113, and obligations in paras. 3.1 and 5.4 of Appendix 1 to the Appointment are set out as is the duty to exercise reasonable care and skill.
51. The submission of LOR at para 68 of its skeleton argument dated 18 March 2024 is as follows:

“When the totality of this part of the pleading is read, from paragraph 92 to paragraph 113, what is contained therein is (i) a proper statement of the design requirements applicable under the Project Agreement; (ii) details of what the design errors were; (iii) details of why they were non-compliant with Schedule 8; (iv) a statement that the works were built in accordance with those drawings and (v) then, finally, at paragraphs 112 and 113,1 the allegation that Sweett was negligent in failing to identify (and notify) the non-compliances in the designs”.

52. In my judgment, this case is radically different from the inadequacies of the pleadings in the *Pantelli* case. The Court accept the submissions that the pleading has to be seen as a whole. It is not the function of the Court to examine whether, at an earlier stage, the pleading was inadequate for the purpose of the current decision of the strike out. In particular, the case is pleaded properly about the non-compliance with specific parts of Appendix 8 and the allegations of negligence. As the case stands, the breach of contract specific to Sweett is pleaded in a comprehensible manner.

VII Fire safety defects

53. Fire safety defects have been pleaded in the draft Amended Particulars of Claim at paras. 105, 112 and 113 in relation to the following defects, namely:
- i. Services Crawlway;
 - ii. the Linings in the Services Crawlway;
 - iii. fire separation between the ground floor and the Services Crawlway;
 - iv. horizontal offsets in the Services Crawlway;
 - v. ground floor services cupboards; and
 - vi. fire separation of day and night areas.
54. In the skeleton argument of Sweett, there is a detailed critique of the Particulars of Claim as originally drafted at paras. 45 - 49, 50 - 53 and 58 - 61. The gravamen of the criticism is that the claim of LOR against MAAP was in effect repeated against Sweett without analysing that the scope of the duties of MAAP was different from the duties of Sweett. This judgment shall return to this, but for the moment, it suffices to say that the concentration must be on the latest iteration of the pleadings, that which is called version 4 of the draft Amended Particulars of Claim together with the latest iteration of the RFI Response.
55. Sweett summarised the draft Amended Particulars of Claim at para. 105.2A (at para. 62 of its skeleton argument). It is desirable to set out the relevant part of the draft pleading in full:

“Failure to properly classify the Services Crawlway

- 105.1 *MAAP failed to produce a fire engineering and/or risk assessment for the Services Crawlway that assesses whether it should be designated as a fire hazard room / zone and/or enclosed in 30-minute fire-rated construction.*
- 105.2 *MAAP ought to have, but failed to, designate the Services Crawlway as a fire hazard room (or series of fire hazard rooms). It ought to have done so because inter alia the Services Crawlway contained sources of ignition of a fire, such as electrical distribution boards, as well as combustible materials. The consequences of MAAP's failure to designate the Services Crawlway as a fire hazard room(s) are that MAAP's detailed design of the fire protection for the Services Crawlway was inadequate, as set out further below.*
- 105.2A *This element of the design of the Timber Framed Blocks was not compliant with Schedule 8 of the Project Agreement because:*
- (a) HTM 05-02 paragraph 6.29 requires the designer to assess the fire risk associated with all rooms to determine whether it is necessary to enclose the room in fire resisting construction;*
 - (b) There was nothing in the design documentation to indicate that a fire risk assessment had been carried out for the Services Crawlway pursuant to paragraph 6.29 of HTM 05-02;*
 - (c) A proper and competent fire risk assessment for the Services Crawlway, if carried out in accordance with paragraphs 6.28 and 6.29 of HTM 05-02 (as it ought to have been), would have concluded that it was a fire hazard room that needed to be enclosed in fire resisting construction (for the reasons given in paragraph 105.2 above);*
 - (d) Contrary to the aforementioned requirements of HTM 05-02, the designs for the works failed to designate the Services Crawlway as a fire hazard room that needed to be enclosed in fire resisting construction, pursuant to paragraph 6.30 of HTM 05-02.*

56. There should also be read with this the additional paragraph 112.1 and 112.2 and 113.1 of the Amended Particulars of Claim which reads as follows:

112. *“In respect of the Fire Safety Defects set out at paragraphs 105 and 109 above (“**the Fire Safety Defects**”), Sweett breached the following terms of the Appointment (and consequently was in breach of clause 1.1. of the Collateral Warranty):*

112.1 *Clause 2.1, in that it failed to perform its Services in Appendix 1 with reasonable care and skill;*

112.2 *Paragraph 3.1 of Appendix 1, in that, in relation to the matters at paragraph 105 above and contrary to its obligation to exercise reasonable care and skill, it:*

(a) failed to properly carry out an initial review of the design of the Works; and

(b) failed to properly monitor the development of the design, in both cases so as to verify compliance with the Project Agreement.

113.1 *In respect of the deficiencies and/or defects in the designs, as set out at paragraph 105 above, Sweett:*

(a) Failed to properly review the designs, with the result that it failed to identify the defects and/or deficiencies aforesaid (which were non-compliant with Schedule 8, for the reasons set out above); and/or

(b) Failed to notify and/or alert the Trust and/or TVH and/or LOR of the existence of the design defects and/or deficiencies aforesaid.”

57. Sweett is critical about this pleading because it says that the obligation at HTM 05-02 at para. 6.29 was not on Sweett. There was nothing in the design documentation to indicate that a risk assessment has been carried out and therefore there was nothing against which to verify compliance. Since there was no risk assessment carried out, there was nothing for Sweett to do. Sweett points to a response in evidence to the effect that there was a breach of contract by failing to advise that no fire risk assessment had been produced: see the extracts from Mr Kippax's witness statement quoted in Sweett's skeleton argument at paras. 65-66. Sweett submits that this is not pleaded and goes beyond verifying compliance with that which had been produced. Sweett submits that para. 105.2A is a different case from the remainder of the pleading and is inconsistent with it.

58. The answer of LOR is that it was a breach of contract for Sweett not to report about the absence of a fire risk assessment. Just as defective aspects of the fire risk assessment would have to be reported on to comply with Appendix 8, so too the absence of a fire risk assessment had to be reported, in both instances to the extent that it would involve a failure to exercise reasonable skill and care on the part of Sweett not to report about it. If compliance has to be verified, that is broad enough to include both a defective design (to the extent that it ought to have been observed and without having to assess suitability of fitness for purpose) and also the failure to have a design at all.
59. The allegation has at lowest a real prospect of success. Whether it will succeed at trial is a matter for trial. The Judge will have the benefit of expert evidence and will consider the alleged breach in the light of the evidence as a whole. It is wrong to have a mini-trial to assess the prospects of success in the circumstances.
60. LOR relies on its pleading as regards the Services Crawlway matter at para. 105.2A, including sub-paragraph (b) quoted at para. 55 above that there was nothing in the design documentation to indicate that a fire assessment had been carried out which was not compliant with Schedule 8. That is not an incoherent plea as alleged. Nor must it fail on the ground of inconsistency with other allegations. It is a further way of putting this part of the case. This was a defect or deficiency in the designs which is relied upon as a breach of contract against Sweett at para.113 in the respects set out therein.
61. Insofar as the absence of a risk assessment is capable of amounting to a breach of contract as regards the Services Crawlway matter, so too it is capable of giving rise to a breach of contract as regards the other fire safety defects. That the same issues arise in respect of alleged shortcomings of the pleadings is a part of Sweett's case as set out in its skeleton argument in paras. 73-74 of its skeleton argument. The failure to have a risk assessment was a common theme, and likewise the criticisms of Sweett and the responses of LOR.
62. It does not follow from the foregoing that the already lengthy pleadings need to be extended to plead expansively why an obligation to report about a compliant risk assessment involves also an obligation to report that there has been no risk assessment at all. It is also not the case that a pleading has to be perfect or incapable of improvement in order not to be struck out. There is usually scope for improvement. The question is whether it does enough to comply with basic rules including about providing a concise statement of fact and to put matters in way that can be readily understood by the other side and the Court. In my judgment, this has been achieved sufficiently. The pleading does not require to be struck out, and the case requires the matter to be progressed towards trial without further delay in a battle of the pleadings which ought to be drawing towards to a conclusion.
63. The submissions made on behalf of Sweett are relevant to whether the obligations alleged by LOR can be sustained at trial. It may be that the missing risk assessment is not a matter which can render Sweett or Nisbet as Independent Tester liable for a variety of reasons. These may include that the role was limited to checking what was in, and not what was not in the drawings produced. It may be that there was nothing to show that in the Services Crawlway allegation, that it should be designated as a fire hazard room, or that an Independent Tester ought to have picked up this point.

Similar points may be made in respect of the other fire safety allegations at paragraph 105. Points may arise in respect of whether these alleged breaches of contract caused loss, but none of these points are decisive in favour of Sweett at this stage. They are not answers to the instant applications. In these applications, the focus is on whether there is a real prospect of success of the pleaded allegations and whether the pleadings in the current form should be struck out under any of the grounds alleged, or should not be permitted to be maintained in their current form. The fact that Sweett's defence to these allegations may prevail at trial, or even that it may have good prospects of success, is not relevant for now. These are points for trial, but they do not provide a reason why LOR should not be able to proceed on the basis of the existing pleadings with the amendments sought. It therefore follows that the strike out application must fail and the amendments allowed in respect of the Services Crawlway allegation and each of the other alleged fire safety defects.

VIII Roofs

64. As regards the roofs, Sweett says that the criticisms are of the specifications which formed part of Schedule 8. They were internally contradictory, referring to a warm roof, but actually providing details for a cold roof. There are other related criticisms: in each case, Sweett submits that Sweett could not be held liable for design defects within Schedule 8. These may have been faults in Schedule 8, but there was no duty of Sweett to challenge the design specifications of Schedule 8. If it is the case that there is a response to this answer, then Sweett says that it should be pleaded in the Amended Particulars of Claim and not in a Reply.
65. In oral submissions at Day 1/134/3 to Day 1/139/2, Mr Hanna on behalf of LOR provided a detailed answer to the criticism of Ms Garrett KC for Sweett. In short, it amounts to saying that there was a non-compliance with Schedule 8. In particular, there was a specification J42 within Schedule 8, most of which pointed to a warm deck roof (albeit that there was some tension in the document between a warm and a cold deck).
66. MAAP produced drawings which were for a cold deck roof. The argument of LOR is that that was inappropriate in that its drawings did not provide for ventilation with consequent interstitial condensation. LOR's case at para. 163.1 of the Amended Particulars of Claim is that MAAP was wrong to select a cold deck roof in that this was contrary to Good Industry Practice and relevant BS standards there specified, and reasons are given. In this regard, it did not comply with Schedule 8 and was therefore a breach of contract on the part of not only MAAP (see para. 163.1 and also see paras. 149-152), but also of Sweett.
67. It was also a breach of contract on the part of Sweett in that the drawings of MAAP issued in May 2008 did not comply with Schedule 8: see the RFI Response at para. 89 in Response to Request 89. The case of LOR is that "*Sweett ought to have identified the non-compliances set out at paragraph 163.1 of the Amended Particulars of Claim. That is so regardless of whether Sweett's review of those drawings formed part of its initial full design review or ongoing design development monitoring within the meaning of paragraph 3.1 of Appendix 1 of the Independent Tester Appointment.*" It is also said that the design drawings of MAAP for the roofs did not provide adequate

air space above the insulation and there was a lack of adequate cross-ventilation contrary to Good Industry Practice and various codes. This was another instance of non-compliance which rendered Sweett in breach of contract in failing to ensure compliance with Schedule 8.

68. The case will depend on expert evidence about the breaches of Good Industry Practice and the various codes such as to give rise to non-compliance and whether Sweett acted without reasonable care in failing to observe the non-compliance. It is complicated by the tension in the J42 specification between hot air and cold air, and the consequences which that might have. All of this is for trial, and there is no strike out point here. In short, there is a case with a real prospect of success about non-compliance which ought to have been observed by Sweett. That is not to say that it will succeed, but that the threshold of raising a case at this stage has been satisfied.

IX En Suite Doors

69. In the case of the En Suite Doors, the case of Sweett is that the complaint is in effect that the design in Schedule 8 was defective in not providing for the end grain of the doors to be sealed/protected from water ingress. In that event, there was compliance with Schedule 8 in that Sweett was not obliged to change the design. Sweett says that the reference to two paragraphs of HTM 58 are not pleaded and do not contain this obligation.
70. The case of LOR at para. 117.2A of the Amended Particulars of Claim is as follows:

“The designs in respect of the ensuite doors (in particular the abovementioned drawings detailing the ensuites) were not compliant with Schedule 8 of the Project Agreement because, for the reasons set out above, they were contrary to HTM 58 clauses 2.47 and/or 2.48 and/or Schedule 8 Part 3 Subpart C paragraph 3.2 and/or Good Industry Practice. In order to comply with Schedule 8, the design ought to have provided for the end grain of the doors to be sealed / protected from water ingress.”

71. This is further pleaded in the particulars of breach of contract against Sweett at para. 120.2 of the Particulars of Claim as follows:

“Further or alternatively and in breach of paragraph 5.4 of Appendix 1, Sweett failed to properly monitor and/or inspect the Works for compliance with the Project Agreement, with the results that:

- (a) Sweet failed to identify that the en suite doors had not received a water based lacquer and/or end grain sealant so as to protect them from water ingress /*

damage and failed to notify and/or failed to alert the Trust and/or TVH and/or LOR of this non-compliance with the Project Agreement. It was non-compliant because (as is set out in paragraph 117.2(a) above) it was contrary to HTM 58 and/or Good Industry Practice, both of which formed part of the requirements in Schedule 8 of the Project Agreement. A reasonably competent independent tester, conducting monitoring and/or inspection of the Works with reasonable care and skill, would have identified that the en suite doors were liable to be exposed to water and ought to be (but were not) sealed against water ingress and would have notified this non-compliance”.

72. Here too, the same comments as in respect of the roofs will apply about how the issues between the parties will be for trial as regards the scope of the obligations of Sweett and whether they were in breach of contract. These are not matters to be decided on a strike out application. Sweett's answer may prevail at trial, but that is for a dispute at trial rather than a basis for strike out or for the pleadings to require revision before being allowed to go forward. It is possible that if the pleadings were being started again that the matter could be expressed in a clearer way. The question is whether the pleading ought to be improved before it is allowed and/or whether the pleading ought to be struck out if that is not done. In this regard too, the Amended Particulars of Claim is adequate: it ought not to be struck out. As is made clear in the discussion in the law, pleadings are not marked out of ten with a basic pass-mark, failing which they are struck out. The striking out for abuse of process depends on an analysis of serious deficiencies which usually affect the ability of the Court to try the matter or the other parties to prepare for trial. In my judgment, whatever criticisms are made, they fall short of requiring this or any part of the claim to be struck out, or for amendments to have to be made to save the pleading.

X Vanity units

73. Sweett submits that the case in respect of the vanity units should be struck out and no amendment should be allowed: see Amended Particulars of Claim paras. 117.1(a) - (e) and draft amendment para. 117.1A. It submits that it is hopeless because:
- (i) LOR has said that they were not constructed on site but built by a subcontractor of LOR to a different design. Thus there is a complete causation defence.
 - (ii) there is no comprehensible case of non-compliance with Schedule 8 in that the design did not ensure the units were robust and/or securely affixed to the wall. That was a question of workmanship.
 - (iii) even if that were the case it would relate to para 117.1 and would not provide a case in respect of paras. 117.1b – 117.1e. Even if these raised

allegations, they do not disclose a failure to comply with Schedule 8. They do not appear to be allegations which can be levelled at an Independent Tester.

74. The response of LOR in oral argument at Day 1/139/7 and following is as follows. Its case is that even if the design was followed, which is not admitted, then there was a breach of Clause 5.4 which provides that the Independent Tester shall "*Visit the Site and monitor and inspect the works on a regular basis in accordance with the Project Agreement to monitor compliance the works in accordance with the Project Agreement...*". Reference is made to para. 120.2 of the Amended Particulars of Claim to the effect that Sweett failed to properly monitor and/or inspect the works for compliance with the Project Agreement.
75. Sweett also submitted by reference to a part that had been quoted by LOR, namely page 5 of Appendix 3. Sweett alighted on a part of that which appeared to have nothing to do with the vanity units, namely that the patient atmosphere had to be homely. Whilst that was true, the page went on to say that "*the internal and external environments should be durable and safe to deal with the physical demands that patients are likely to put on them.*" That was then the same obligation or directly related to the allegation at para. 117.1(a) of the Amended Particulars of Claim. The importance of this requirement was a concern that some mental health patients might pull such units off the wall. LOR relied on this point of detail to show that looking at some isolated aspects for the purpose of a strike out application involved dangers. Likewise, striking out because of irrelevance should be done sparingly because the full context might not be appreciated.
76. I do not accept that there is a knock-out point in respect of the vanity units. I accept that points with a real prospect of success have been raised by LOR. There is a danger in selecting passages or comments and seeing them out of context or selecting the wrong sentence. The foregoing does not illustrate that the point of LOR is necessarily a good point, but it does show the dangers of striking out in respect of a case where the points of the parties need to be appraised against the evidence as a whole and with the benefit of expert evidence. These matters require to be tested at a trial.
77. There is one minor point. The vanity units do not appear to be a complaint about design. There is no positive case to that effect by not admitting that the vanity units accorded with the design. There is a positive case that the failure of Sweett is about monitoring and inspection, rather than design. This was stated by Mr Hanna in answer to questions from the Court at Day 1/141/12 – Day 1/143/24. If there are any tweaks of the pleading in this regard, this should be considered as part of the consequential. This should not be elevated into a big point because the result of the above is that an allegation about the vanity units, which Sweett contended to be doomed to fail, will not be struck out.

XI The various appendices to Sweett's skeleton argument

78. In addition to a skeleton argument of just over 36 pages, Sweett has attached Appendices of about 20 pages of numerous points of criticism of the position of LOR

(excluding Appendix 1 which tracks the various versions of the Amended Particulars of Claim). They will be examined thematically rather than ruling on each point, which would add tens of pages to this judgment. Before so doing, there are general points to be made in respect of the Appendices 2-6.

79. The principles of law stated above about the circumstances in which a case is to be struck out do not require pleadings to be struck out because (a) they are not perfect, or (b) it would have been preferable to have pleaded the case in a different way, or (c) certain matters are vague or irrelevant.
80. Whilst it is a part of the overriding objective that a case should not come on to trial which could not be fairly tried due to its being unreasonably vague and incoherent, it is also the function of the Court where a case can be fairly tried to allow a case to move forward and to use its resources to try the case rather than to become bogged down in unduly protracted interlocutory skirmishes about pleadings. It is not every vagueness, lack of particularisation, inconsistency or other unsatisfactory aspect of the case that has to be corrected, let alone be struck out. A pleading should not be struck out because others would have pleaded it better or because there were faults on the way which if they had not been existed would have made for a clear pleading.
81. Without in any way signalling a comprehensive statement of what is expected, in a case which has a real prospect of success, the Court will not intervene simply because of some vagueness or inconsistencies or lack of clarity. The epithets of "unreasonably vague and incoherent" go together with a case being such that it does or might affect the fairness of a trial and the ability of the other parties and the Court to understand what is being alleged. In other cases, the epithets are about the conduct of a party which may be so scandalous, unreasonable or oppressive that it affects the justice of whether a case should be tried. In effect, a party may have forfeited its right to a fair and open trial of the issues.
82. Applying these tests to the case, there is no reason for a strike out in the instant case, nor is there a reason to require the case to be repleaded with a view to saving the case from strike out.

Appendix 2: Table of paragraphs subject to strike out due to issue of no relevant design produced and/or design in Schedule 8 itself defective, and draft amendments resisted on the same basis

83. This has been addressed above in the sections about the various defects. It is not necessary to refer to each of the items point by point.

Appendix 3: Table of amendments with unpleaded and/or irrelevant contractual obligations

84. In part, the criticism is that extracts from standards and codes e.g. HTM 05-02 are not pleaded out in full. Paragraphs are cited, but it is contended that they ought to be pleaded out and without that, they are not pleaded. I do not accept this. It is a

question in each case as to whether this is necessary, such that if it is not done, it requires correction. In my judgment, there is a good reason for not having pleaded out these matters in full. The pleading is already full to the point of being so detailed that it is capable of affecting its clarity. The effect of having to plead out all of these matters would be to add pages and pages to the pleading and would adversely affect the pleading.

85. In seeking to make good its case that the complaint is that Sweett did not comply with Schedule 8, many of LOR's draft amendments are directed at particularising that case. That involves referring to codes and standards which form part of Schedule 8. Where LOR has summarised parts of the codes and standards relied upon, Sweett says that this is inadequate and that an amended pleading should quote the exact words of the relevant codes and standards. In my judgment, that is unnecessary for the purpose of a pleading in that the relevant parts of the codes and standards that have been sufficiently identified.
86. Sweett also claims that many of the provisions are not relevant. That is contrary to expert advice having been provided to LOR. It may be that there will be a disagreement among the experts as to the relevance of the codes and standards. This is not to be the subject of a mini trial at this stage but all to be adjudicated upon at a trial. It therefore follows that the amendments referring to the codes and standards ought to be allowed.
87. There is no benefit in going through item by item those obligations which are considered to be irrelevant obligations. It is apparent from the above discussion that there is a wider argument which has been considered about the scope of the obligations of Sweett to LOR. Some of the criticisms are that Sweett was not a designer but an independent tester, and this point has been discussed above, and has been found to be sufficient on the basis of the pleadings as they stand.
88. This is not a case which is unreasonably vague or incoherent, but there are big picture points which arise from the pleadings and some of which have been discussed in this judgment. There are points of detail which do not form a basis for striking out a pleading or striking it out unless it is saved by amendment. These are points which in the ordinary course will emerge with greater focus through the evidence and the expert reports.

Appendix 4: Table of vague and unparticularised amendments

89. A part of this comprises the references to "Good Industry Practice" which has been used instead of "good and proper practice". There are numerous references to Good Industry Practice in the draft Amended Particulars of Claim. At para. 45 of LOR's skeleton argument, 17 instances are cited. The context in which Good Industry Practice is used in the draft Amended Particulars of Claim is as part of the allegations that the designs were non-compliant with Schedule 8. In the draft amendments, the term Good Industry Practice was introduced to replace references to "good and proper practice" (which, as Sweett pointed out, was not a form of words expressly found in the contract). Good Industry Practice is a defined term in Schedule 8. Schedule 8, Part 3 (Trust's Construction Requirements) at paragraph 3 states that,

“Project Co shall ensure that the Facilities comply with Good Industry Practice...”³⁷
Good Industry Practice is defined in Schedule 1 of the Project Agreement as, *“using standards, practices, methods and procedures conforming to the law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances”*.

90. The objections of Sweett to this pleading at best involve having a trial of issues which is inappropriate for the purpose of an amendment application. First, it is said that the plea does not add anything to non-compliance with a specific part of a British Standard. That is a matter which is for trial and on which expert evidence might be important. One possibility is that it will add nothing in which case, it will not cause harm. Another possibility is that it will add something if and to the extent that there is no overlap with a part of a British Standard. In that event, it will be prejudicial only to LOR if it is to be omitted. Second, it is said that the allegation does not have any prospect of success. There is at least an arguable case that Good Industry Practice is a requirement in Schedule 8, and that certain elements of the design were not compliant with (*inter alia*) Good Industry Practice (hence not compliant with Schedule 8), and that this ought to have been identified by Sweett during the review. There is no knock-out point on this issue, and it should be considered at trial.

Appendix 5: Table of amendments pleading cross-references to the Response to Part 18 Request for Further Information

91. There are repeated cross references in the draft Amended Particulars of Claim to the RFI response. Examples are at paras. 113.2(a)(3)-(6), 113.2(b) and 167.2(a). Sweett takes objection to this form of pleading in that:
- (i) it is said to be confusing to have to cross reference to other pleadings and therefore impeding the trial as parties, witnesses, the experts and the Court may have to read disparate documents together;
 - (ii) sometimes although the reference is only to one document, it is to disparate parts of that document, and so one has to leaf through the RFI response to understand what ought to be in the amended Particulars of Claim;
 - (iii) it denies Sweett the opportunity in its responsive pleading to the Particulars of Claim to respond by way of defence.
92. Sweett submits that the relevant cross references form fundamental parts of LOR's causes of action. As such, they ought to have been included in the Particulars of Claim: see CPR pt.16.4 (1)(a). In my judgment, it is a question of degree as to whether cross referencing is so great that it would, unless corrected, impede the conduct of the litigation. In this case, it does not have that effect. Even if the pleadings are not as tidy as they would have been in the event that everything had been in one place, that does not justify the cost and inconvenience of reordering the pleadings. The benefit is outweighed by the burden. Besides, there would be

considerable repetition between the amended Particulars of Claim and the RFI response, unless the RFI was to be edited substantially, which only adds unnecessarily to the overall exercise. LOR observes that Sweett is able to respond in its Amended Defence to the extent that matters have appeared in the RFI response since the time of the Defence.

93. Although the point is not exactly the same, Sweett has cross referenced other pleadings in its Amended Defence. There are references in Sweett's skeleton argument at para 43(f) to incorporation of MAAP's defence and Deeside's defence by cross references. Although this is not the same in that it is not two documents by the same party, the practical need to turn from one document to another is the same. This presents no real difficulty as regards the ability of LOR to present its case. The same applies to Sweett as regards incorporation of documents into LOR's claim.

Appendix 6 to Sweett skeleton argument: changes to Sweett position due to V4 amendments

94. These matters are strictly by reference to the amendment application. The suggestion is that the references to Schedule 8 is incomprehensible. As appears above, the amendments are sufficient and are not properly characterised as unreasonably vague or incoherent. It is noted that some of the amendments includes deletions of paras. 163.2 -163.5 of the Particulars of Claim, as to which deletion, there is no dispute.

XII Conclusion

95. For all the above reasons, the application for striking out any part of the pleading or for deferring a decision to strike out conditional on amendments and redrafts being advanced to the Court is rejected. The case has been pleaded at length. There have been alleged shortcomings of the pleadings, particularly as regards the differentiation between the claims against Sweett and MAAP, and in the identification of the non-compliance of Schedule 8 relied upon. This has in turn led to large scale amendments of the Particulars of Claim and the RFI Responses.
96. In respect of the case as regards the Vanity Units, I am satisfied that there is a case to answer and I reject the case to the effect that this was both defective and not being capable of being saved by way of amendment. As regards the other aspects of the case, if it was the case before that there was no real prospect of success in the case against Sweett, I am satisfied that there is a real prospect of success on the basis of the current versions. If it was the case that the pleading was deficient in being unreasonably vague or unparticularised, I am satisfied that it is sufficiently clear to provide a basis to go forward. The time has come to move forward.
97. The Court has applied the learning from authorities referred to above in the section about the legal principles. Each case has to be considered on its own facts. This case is very far removed from those cases where the Court has struck out cases on the grounds that they were unreasonably vague or incoherent or the like. In my judgment, whatever the history of the case up to now, on the basis of the pleadings as they now stand, there is a case to go forward.

XIII The four points referred to at para. 22 above

98. The judgment will now deal with the four objections mentioned at para. 22 above.

(i) Initial design review v design monitoring

99. The criticism is a failure to specify whether the alleged failings in design review occurred during the “initial full review” of the design or during the subsequent “monitoring of the development of the design”. The amendments to the RFI response state that Sweett did not undertake a distinct initial review, but reviewed drawings on a rolling basis: see the amended RFI Response at para.9. Accordingly, it is not possible to say whether the design review failure occurred during the “initial full review” or afterwards.

100. There are also criticisms of form that the RFI response ought to appear in the Amended Particulars of Claim. That might have been preferable if the pleadings were being constructed from scratch, but it is not a basis for a strike out application or to justify recasting the pleadings. It is also said that there is a contradiction between the Reply and this allegation. If this were the case, it can be picked up in the Amended Reply which will follow the Amended Defence, and it would be unnecessary for that to be undertaken at this stage. In any event, LOR says that this is a misinterpretation of the Reply: see para. 76 (a) of LOR’s skeleton. It is unnecessary to drill down into this point because it can be clarified in any future Amended Reply.

(ii) Failure to plead a cause of action specifically in relation to the allegation of failure to monitor the development of the design at paragraphs 112.2(b), 119.2(b) and 166.2(b)

101. It may have been that this criticism pre-dated amendments to the Particulars of Claim, where these matters have been addressed especially at paragraphs 113.2(b), 120.2 and 167.2. Whether or not it is the case that the criticism was overtaken, there is enough that now appears in this regard in the draft Amended Particulars of Claim, and it is not necessary in order to plead the cause of action or to avoid a strike out of the pleading to have to add further to the draft Amended Particulars of Claim.

(iii) Allegations as to vanity units

102. This has been addressed above in this judgment in the rejection for the purpose of strike out of the case in respect of the vanity units.

(iv) The remaining reference to “good practice” at paragraph 105.8(c)

103. This ought to be reviewed at the time of dealing with the consequential for good order. It may be a legacy of what was amended to Good Industry Practice, which was

a term within Schedule 8 of the Project Agreement. In the context of all of the amendments of a similar kind, it is not an important matter in respect of the understanding of the case against Sweett.

XIV Alleged inconsistency between cases advanced in the Sweett and MAAP proceedings.

104. In the skeleton of Sweett at paras. 109-112, it is submitted that there is an inconsistency between the cases advanced in the Sweett and the MAAP proceedings as regards the allegations as to Linings in Services Crawlway. It is said that the allegation in para. 34 of the Reply of LOR in its claim against MAAP is inconsistent with the case now being advanced. This is said to be an abuse of process and liable to obstruct the just disposal of the proceedings.
105. Sweett has answered this allegation in an Appendix to the witness statement of Mr Kippax. In my judgment, there is not a clear inconsistency, or not one sufficiently clear as to require rectification, in a strike out application. For the following reasons, the Court will not strike out this allegation or require it to be repleaded, namely:
- (i) generally for the reasons set out in the column of the comments of LOR in the Appendix at p.1416 of the applications bundle;
 - (ii) if the point had been so striking, it would have been taken in the Amended Defence of Sweett which itself had already referred to the Reply of LOR in its claim against MAAP without raising this inconsistency allegation;
 - (iii) the substance of the design deficiency is said to be the same in respect of both the allegations against MAAP and Sweett, whereas there is a particular factual detail about the drawings which is raised in the Reply in the MAAP proceedings which does not end the design deficiency allegation common to both proceedings.
106. The Court on this strike out application is not deciding this point, and in refusing to strike out or to require further amendment, the Court does not bar this matter from being raised at trial in the determination of the case on the merits rather than by way of striking out.

XV Application to amend

107. The discussion above about the various Appendices is all repeated above and is incorporated into the amendment application. The application has been considered without making the possible distinction between amendments which raise a new cause of action and amendments which simply add particulars to an existing case. If the latter kind of amendment did not require the raising of a case with a real prospect of success, it has been assumed that the requirement is the same for either kind of

amendment. This is not to make a determination about that point, but it is in order not to have to decide a point which need not arise for decision.

108. In the discussion about strike out, the amendments were considered in the decision as to whether to strike out. It will be recalled that at the outset, the Court followed the lead of Sweett in deciding to have the applications dealt with together rather than consecutively. That approach has been appropriate because the analysis of the strike out application depended on considering proposed amendments which enabled the Court to conclude that the case had a real prospect of success. In so doing, the sections above on strike out, and particularly the consideration of the Appendices has resulted in the amendments being taken into account as part of the strike out application. The amendments are all allowed because the amendments and the underlying case have real prospects of success.
109. In addition to the Appendices, there have been prepared about 20 further pages of a schedule recording numerous objections to proposed amendments. An oft repeated theme in the amendment application is that the amendments will increase the cost and time involved in the proceedings and unnecessarily complicate matters, but it is also important not to introduce cost, time and complexity by a minute examination of literally hundreds of points of detail about the pleadings instead of concentrating on the bigger picture. No clarity or coherence would be achieved by going through each and every point of detail. The Court has been assisted by the written and oral submissions of the parties who have analysed objections thematically, which has given rise to a more coherent presentation than would have been the case otherwise.

XVI Final remarks

110. The Court is grateful to all Counsel for the quality and clarity of their written and oral submissions. The parties are asked to agree an order to reflect this judgment.