Neutral Citation Number: [2022] EWHC 2000 (TCC)

Case No: HT-2021-000094
Case No: HT-2021-000438

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, EC4Y 1NL

Date: 27/07/2022

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

MW HIGH TECH PROJECTS UK LIMITED

Claimant

- and -

(1) MR PETER GREENHALGH
(2) MR SPENCER BABER
(3) MR JOHN TAYLOR

Defendant

- -
- -

Roger ter Haar QC & Jason Evans-Tovey (instructed by **Howard Kennedy LLP**) for the **Claimant**
Daniel Shapiro QC & James Sharpe (instructed by **Beale & Co LLP**) for the **Defendant**

Hearing date: 29th June 2022

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Approved Judgment

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

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 27th July 2022 at 10.30am

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. There are a number of matters before the Court:

    i) the Claimant's application to amend the Particulars of Claim in Claim HT-2021-000094;

    ii) the Claimant's application for an order consolidating Claim HT-2021-000094 and Claim HT-2021-000438;

    iii) the Defendants' application to strike out parts of the claims, and/or for summary judgment in respect of those parts, on the basis that the relevant parts of the pleading in each case have no real prospect of success and/or are so vague as to amount to an abuse of process or are likely to obstruct the just disposal of the proceedings;

    iv) the Defendants' application for disclosure, by way of Initial Disclosure or Extended Disclosure; and

    v) the Defendants' application for further time to file and serve their defence.

Background to the dispute

2. This claim arises out of three waste-to-energy projects undertaken by the Claimant:

    i) the Suez Project at the Eco Park, Charlton Lane, Shepperton, Surrey, comprising a gasification facility, designed to process 60,000 tonnes per year of mixed municipal waste, and an anaerobic digestion facility, designed to process 40,000 tonnes of food waste per annum;

    ii) the Levenseat Project at Levenseat, Forth in Lanarkshire, comprising a gasification facility, designed to process 90,000 tonnes per year of refuse derived fuel ("RDF");

    iii) the Hull Project at Cleveland Street, Kingston-upon-Hull, Yorkshire, comprising a gasification facility, designed to process in the region of 300,000 tonnes per year of RDF.

3. The Claimant is a private limited company incorporated in England, which at all material times carried on business in the provision of engineering and construction services. The Claimant is 100% owned by M+W Germany GmbH and is a member of the M+W Group.

4. Each of the Defendants is a former statutory director of the Claimant:

    i) Mr Greenhalgh was a statutory director of the Claimant from 14 July 2004 to 29 November 2016;

    ii) Mr Baber was a statutory director of the Claimant and managing director from 10 October 2014 to 21 September 2016;

iii) Mr Taylor was a statutory director of the Claimant and chief financial officer from 1 May 2013 to 31 March 2017.

5. The material statutory duties owed by directors to a company are set out in the following provisions of the Companies Act 2006 ("the 2006 Act"):

> Section 170 - Scope and nature of general duties
>
> (1) The general duties specified in sections 171 to 177 are owed by a director of a company to the company.
>
> …
>
> (3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
>
> (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.
>
> …
>
> Section 171 - Duty to act within powers
>
> A director of a company must –
>
> (a) act in accordance with the company's constitution; and
>
> (b) only exercise powers for the purposes for which they are conferred.
>
> …
>
> Section 173 - Duty to exercise independent judgment
>
> (1) A director of a company must exercise independent judgment.
>
> (2) The duty is not infringed by his acting –
>
> (a) in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors; or
>
> (b) in a way authorised by the company's constitution.

> Section 174 - Duty to exercise reasonable care, skill and diligence
>
> (1) A director of a company must exercise reasonable care, skill and diligence.
>
> (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with –
>
> (a) the general knowledge, skill and diligence to be expected of a person carrying out the functions carried out by the director in relation to the company; and
>
> (b) the general knowledge, skill and experience that the director has.
>
> …
>
> Section 178 - Civil consequences of breach of general duties
>
> (1) The consequences of breach (or threatened breach) of section 171 to 177 are the same as would apply if the corresponding common law rule or equitable principle applied.
>
> (2) The duties in those sections (with the exception of section 174 (duty to exercise reasonable care, skill and diligence)) are, accordingly, enforceable in the same way as any other fiduciary duty owed to a company by its directors.

6. On 11 October 2013 the Claimant entered into an EPC contract in respect of the Suez Project in the sum of £71 million.

7. On 20 March 2015 the Claimant entered into an EPC contract in respect of the Levenseat Project in the sum of £87 million.

8. On 19 May 2015 the Claimant entered into a variation agreement in respect of the Suez Project in the sum of £91 million.

9. On 20 November 2015 the Claimant entered into an EPC contract in respect of the Hull project in the sum of £154 million.

10. The projects were not a success. The Claimant estimates that it has suffered losses of approximately £320 million across the three projects.

11. The Claimant's case is that the Defendants were in breach of their duties and obligations as directors of the Claimant by entering into contracts for the above projects without engaging adequate and suitably experienced personnel, without adequate investigation into new technologies, without adequate designs or information, without taking proper and reasonable account of the project risks,

without properly examining profitability and using tender prices which were far too low.

12. It is the Claimant's case that, had the Defendants not been in breach of their duties and obligations, the Claimant would not have entered into the contracts for any of the projects, or would have exercised its right to disengage from the same.

Proceedings

13. On 17 March 2021 the Claimant commenced proceedings against the Defendants in Claim No. HT-2021-000094, the Suez and Levenseat Proceedings.

14. On 14 July 2021 Particulars of Claim were served in the Suez and Levenseat Proceedings.

15. On 16 November 2021 the Claimant commenced proceedings against the Defendants in Claim No. HT-2021-000438, the Hull Proceedings.

16. On 8 February 2022, the Claimant served draft amended Particulars of Claim in the Suez and Levenseat Proceedings, draft Particulars of Claim in the Hull Proceedings, and draft Consolidated Particulars of Claim.

The applications

17. On 17 March 2022 the Claimant issued an application in the Suez and Levenseat Proceedings, seeking an order pursuant to CPR17.1(2)(b) and CPR17.4 that the Claimant has permission to amend the Particulars of Claim.

18. The application is supported by the first witness statement of Dominic Offord, a partner in Howard Kennedy LLP, dated 17 March 2022.

19. Also on 17 March 2022, the Claimant issued an application in each claim, seeking to consolidate the Suez and Levenseat Proceedings and the Hull Proceedings.

20. That application is supported by the second witness statement of Mr Offord, dated 17 March 2022.

21. On 25 March 2022, the Defendants issued an application in each claim, seeking an order that those parts of the claims that:

    i) have no real prospect of success; and/or

    ii) are so vague as to amount to an abuse of process or otherwise be likely to obstruct the just disposal of the proceedings; and/or

    iii) fail to comply with CPR 16.4; and/or

    iv) are not supported by sufficient documentation as required by paragraph 5.1 of CPR PD51U so that the Defendants can understand the case they have to meet and respond to the same;

be struck out pursuant to CPR 3.4(2)(a) or (b) and/or summary judgment be given on those parts of the claim pursuant to CPR 24.2.

22. Further, the Defendants seek an unless order in respect of disclosure of documents set out in a schedule attached to the application, and an extension of time for filing the Defence in each claim until after sufficient disclosure and adequate particularisation of the same.

23. The basis for the Defendants' applications and opposition to the Claimant's applications are set out in the first witness statement of David McArdle, solicitor and partner of Beale & Co LLP, dated 25 March 2022 and his second witness statement dated 23 June 2022.

24. The Defendants' applications are opposed by the Claimant and reliance is placed on the third witness statement of Mr Offord dated 16 June 2022.

Claimant's application to amend

25. The Claimant seeks to amend the Particulars of Claim in the Suez and Levenseat Proceedings in the following respects:

    i) the Claimant limits its claims to damages and interest in respect of any cause of action for breach of contract or for breach of the 2006 Act to claims which accrued six or less years before the issue of the Claim Form on 17 March 2021 and sets out its case as to accrual of causes of action for breach of contract and breach of the statutory duties under sections 171, 173 and 174 of the 2006 Act;

    ii) the Claimant sets out particulars of its allegations that the Defendants failed to act in accordance with the Claimant's constitution, namely, the rules of procedure and the Red Book;

    iii) the Claimant sets out its claim that it relies on the pleaded allegations of breach, whether taken individually or in any combination, as causative of its losses.

26. Following objections raised by the Defendants, the Claimant has withdrawn claims for breach of fiduciary duty and breach of section 172 of the 2006 Act, together with claims for common law negligence. Additionally, there is agreement as to the proposed amendments by way of deletion.

27. However, the Defendants oppose the proposed amendments at paragraphs 8, 9, 32-35, 48-49, 128-131, 133, 134, 136, 195, 198, 199 and 201 on the basis that they do not adequately particularise the claims.

Test on applications to amend

28. Once a statement of case has been served, a party may amend it only with the consent of the other party or with permission of the court: CPR 17.1.

29. Amendments to a pleading must be made by formal application but a party amending their statement of case is not obliged to retain the superseded text in the amended document unless the court directs them to do so: Paragraphs 17.1.2 and 17.1.4 of the

notes to CPR 17. This ground of the Defendants' objection is rejected, especially as all the proposed deletions have been agreed.

30. CPR 17.3 provides that the court has a general discretion to allow an amendment to a statement of case.

31. The principles applicable to applications to amend are not in dispute and are helpfully set out in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) per Coulson J (as he then was) at [19]; *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 per Carr J (as she then was) at [36]-[38]; and *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 per Popplewell LJ at [17]-[18].

32. The relevant considerations for the court in this case can be summarised as follows:

    i) In exercising the court's discretion whether to allow an amendment, the overriding objective is of the greatest importance. Although the court will have regard to the desirability of determining the real dispute between the parties, it must also deal with the case justly and at proportionate cost, which includes (amongst other things) saving expense, ensuring that the case is dealt with expeditiously and fairly, and allocating to it no more than a fair share of the court's limited resources.

    ii) Therefore, such applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.

    iii) The proposed amendment must be clearly formulated, coherent and adequately particularised.

    iv) An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success.

    v) An amendment is late if it could have been advanced earlier, or involves duplication of steps in the litigation, costs and effort. Lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done.

    vi) It is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay.

    vii) The lateness of an application will weigh as one factor against the applicant in the court's consideration of the application, especially if it will result in additional or wasted expenditure in the pursuit or defence of the action.

    viii) Any prejudice caused by the amendments must be compensatable in costs and the public interest in the administration of justice must not be significantly harmed.

Limitation

33. The proposed pleaded case on causation and loss for the purpose of limitation is set out in paragraphs 8, 9, 133, 134, 136, 198, 199 and 201 as follows:

> 8. The Claimant's causes of action for breaches of contract accrued when the breaches took place and/or its causes of action for breaches of the 2006 Act accrued when damage was sustained as a result.
>
> 9. Given that the Defendants have intimated since service of proceedings that they intend to rely upon defences of limitation, for the avoidance of doubt the Claimant expressly limits its claims to damages and interest in respect of any cause of action for breach of contract or for breach of the 2006 Act arising out of the Suez EPC contract and/or the Suez Variation and/or the Levenseat EPC contract which accrued 6 or less years before the issue of the claim form on 17 March 2021.
>
> 133. By reason of one or more of the aforesaid breaches in section 4 and/or this section, the Claimant entered into the Suez Variation and did so at far too low a price.
>
> 134. This is a no transaction case. Had each Defendant not breached one or more of his duties then the Claimant should not and would not have entered into the Suez Variation.
>
> (1) If and insofar as necessary, the Claimant should and would have terminated the Suez EPC contract.
>
> (2) Further or alternatively, the Claimant should and would not have prepared and submitted a revised contract price for the purposes of the Suez EPC contract.
>
> (3) Alternatively, after SITA had rejected the revised contract price, the Claimant should not and would not have negotiated with SITA and/or prepared or submitted further contract prices.
>
> (4) Alternatively, the Claimant would have prepared and submitted further revised contract prices well in excess of £100 million and/or with revised terms which SITA would not have accepted and/or SITA would not have entered into the Suez Variation or preceded with the Suez Project pursuant to a contract with the Claimant.

> 198. By reason of one or more of the aforesaid breaches in section 4 and/or this section, the Claimant entered into the Levenseat EPC contract and did so at far too low a price.
>
> 199. This is a no transaction case. Had each Defendant not breached one or more of his duties then:
>
> (1) the Claimant should not and would not have entered into the Levenseat EPC contract;
>
> (2) alternatively, the Claimant should and would have prepared and submitted revised contract prices totalling well in excess of £100 million and/or terms which Levenseat would not have accepted and/or Levenseat would not have entered into the Levenseat EPC contract or preceded with the Levenseat Project pursuant to a contract with the Claimant
>
> 201. By reason of one or more of the aforesaid breaches in section 4 and/or this section, the Claimant has suffered loss and damage.

34. Mr Shapiro QC, leading counsel for the Defendants, objects to the above paragraphs on the basis that they do not set out a case on causation and loss so that the Defendants can understand whether the claims are statute-barred. Mr Ter Haar QC, leading counsel for the Claimant, submits that the basis of the claim is sufficiently particularised and the express limitation in paragraph 9 is a sensible and permissible pre-emptive plea, clarifying the limitation issues.

35. I am satisfied that the proposed pleading as to accrual of any cause of action is sufficiently clear, coherent and particularised so that it should be permitted. The Defendants' concern stems from the fact that the Particulars of Claim identify facts and matters relied on that occurred more than six years prior to the commencement of proceedings on 17 March 2021. Those facts and matters are relied on by the Claimant as giving rise to continuing breaches up to the date of the relevant agreement; the case on causation is that, absent the Defendants' breaches, the Claimant would not have entered into (a) the Suez Variation on 19 May 2015; and/or (b) the Levenseat EPC contract on 20 March 2015. Those dates are alleged to be both the date of breach and damage; they are within six years of the date of issue of the claim form; therefore, on the face of the pleading, the claims made are not statute-barred.

36. There is an argument between the parties as to the appropriate limitation period for breaches under different sections of the 2006 Act and the date from which time starts running. In those circumstances, the Claimant's recognition in paragraph 9 that its claims are subject to those issues and limited to claims brought within the applicable limitation period, is a sensible and permissible approach.

Section 171 claims

37. The Claimant sets out particulars of its allegations that the Defendants failed to act in accordance with the Claimant's constitution, contrary to section 171 of the 2006 Act, in paragraphs 7, 32, 33, 34, 35, 131, 196 as follows:

> 7. The claimant claims damages and interest. Its causes of action are breaches of contract and breaches of ss. 174, 173 and/or 171 of the 2006 Act.
>
> …
>
> 32. First on 12 August 2009 and then on 5 May 2015 M+W Germany (as the sole shareholder of the Claimant) brought rules of procedure into force with immediate effect by special resolutions (alternatively agreements) to which Chapter 3 of the 2006 Act applied. By virtue of ss.17 and 257 of the 2006 Act, the special resolutions (alternatively agreements) and thus the rules of procedure became part of the Claimant's constitution and the Defendants' duties under s.171 of the 2006 Act included complying with the rules of procedure.
>
> 33. As to those rules of procedure:
>
> (1) the 2009 rules of procedure provided …
>
> (2) the 2015 rules of procedure provided …
>
> 34. In the premises from 5 May 2015 the M+W Red Book was also incorporated into the Claimant's constitution for the purposes of the 2006 Act such that from 5 May 2015 the Defendants' duties under s.171 of the 2006 Act also included complying with the M+W Red Book.
>
> 35. The M+W Red Book contained PRM requirements and for the Claimant those requirements included those matters set out in paragraphs 39 and 40 below. …
>
> 131. For the avoidance of doubt, the matters complained about in sub-paragraphs 128(6), 129(9-12), (14-15), 130(6), (8), (16), (24), (27-30), (35-39), (45) and (48) above amounted to breaches by each Defendant of his duty under s.171 of the 2006 Act. …
>
> 196. For the avoidance of doubt, the matters complained about in sub-paragraphs 195(6), (20-21), (24-25), (27-30), (32), (40) and (43) above amounted to breaches by each Defendant of his duty under s.171 of the 2006 Act.

38. Mr Shapiro submits that the allegations are vague and need to be properly particularised.

39. That complaint is rejected. The pleading explains the basis on which the Red Book is said to be incorporated into the constitution, identifies the relevant provisions relied on and alleges that the existing pleaded breaches in the pleading amount to breaches of section 171 of the 2006 Act. It follows that the proposed amendments arise out of the same facts, or substantially the same facts, as are already in issue. It is open to the Defendants to identify any flaws in the Claimant's argument and to challenge the facts relied on but the basis of the claim and details of the alleged breaches are set out with sufficient particularity so that the Defendants can understand and meet the claims.

Causal link between breach and loss

40. The Claimant's proposed amendments include:

    i) assertions that it relies on the identified failures of the Defendants as breaches of their duties and contracts: "whether taken individually or in any combination" (paragraphs 48-49, 128-130 and 195); and

    ii) its case that the Claimant entered into the Suez Variation and/or the Levenseat EPC contract and, as a result, suffered loss and damage: "by reason of one or more of the aforesaid breaches" (paragraphs 133, 136, 198, 199 and 201).

41. Mr Shapiro submits that the Claimant has failed to identify which breaches are alleged to cause which losses and objects to the Claimant's reliance on cumulative breaches to establish causation.

42. That complaint is rejected. The Claimant's existing pleading sets out in detail particulars of the alleged failures on the part of each Defendant. It is legitimate for the Claimant to assert that each failure or any combination of failures amount to a breach of the statutory obligations. The Defendants can respond to each alleged failure and challenge whether it constitutes a breach, on its own or otherwise.

43. Further, the complaint that the Claimant has failed to plead a causal link between each breach and the loss suffered is a mischaracterisation of the claim. The Claimant's case is that in respect of each of the Levenseat EPC contract and the Suez Variation agreement, there was one loss, namely, the Claimant's entry into the material contract. It is open to the Defendant to challenge that case, on the evidence or as a matter of principle, but on its face it is an arguable claim.

44. In conclusion, the proposed amendments set out the basis of the claim, details of the alleged breaches and loss with sufficient particularity so that the Defendants can understand and meet the claims. Therefore, subject to the Defendants' application to strike out and/or for summary judgment, considered below, permission is given for the proposed amendments.

Consolidation

45. The Claimant seeks an order for consolidation of Claim HT-2021-000094 and HT-2021-000438, having regard to the similarity and overlap in the claims. Draft Consolidated Particulars of Claim have been produced.

46. The Defendant does not object to the possibility of future consolidation but opposes the application to consolidate the claims at this stage. Mr Shapiro submits that the proper management of the three claims should be considered once they are properly pleaded and the issues arising in them can be identified.

47. It is common ground that the court has jurisdiction to order consolidation, now or at any future stage.

48. CPR 1.1 sets out the overriding objective of enabling the court to deal with cases justly and at proportionate cost, including dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and financial position of the parties; ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the court's resources, taking into account the need to allot resources to other cases.

49. Section 49(2) of the Senior Courts Act 1981 provides that subject to the provisions of that Act itself or any other enactment, every court shall so exercise its jurisdiction in every cause or matter before it so as to secure that (a) as far as possible, all matters in dispute between the parties are completely and finally determined, and (b) as far as possible, all multiplicity of legal proceedings with respect to any of those matters is avoided.

50. CPR 3.1(2)(g) provides that the court's case management powers include the power to consolidate proceedings so that two or more claims proceed as one claim. The benefit of consolidating proceedings is that there can be a significant saving of costs and time in the avoidance of a multiplicity of proceedings.

51. In this case, I am satisfied that it would be appropriate to consolidate the claims for the following reasons:

    i) The claims concern the same parties in the same capacities.

    ii) The parties have the same legal representation.

    iii) The claims concern different projects but a common feature is that they are all waste to energy projects.

    iv) Different factual allegations are relied on as amounting to the breaches, but the claims are concerned with the same employment contracts for each Defendant, the same obligations under the 2006 Act, and similar, or the same, types of breach.

    v) In each claim the causal link identified is the same, namely, that had the Defendants not breached their obligations, the relevant contract would not have been entered into.

    vi) The basis on which the loss in each claim is quantified is the same, namely, the loss resulting from the Claimant's entry into the relevant contract.

52. An order for consolidation is likely to lead to considerable savings in time, effort and cost. A significant benefit of consolidation at this stage is that the parties can file consolidated pleadings. As no defences have yet been served, and the Consolidated Particulars of Claim was prepared at the same time as the Hull claim, there will be no, or minimal, duplication or disruption resulting from consolidation.

53. Mr Shapiro has raised a valid concern that the parties and the court are not yet in a position to determine how the claims could, or should, be case managed. In the absence of completed pleadings in each claim, it is not possible to identify the key or common issues that might be tried together or sequentially. In particular, the court does not have sufficient information to decide whether the claim in respect of one of the projects should be tried before the others, as a lead claim. Before giving directions on any of these issues, the court will afford the parties a full opportunity to make full submissions so that procedures can be used to facilitate a fair and efficient resolution of the disputes. However, an order for consolidation does not involve any pre-determination of those matters; it simply ensures that the claims in respect of all three projects will be before the court in one set of pleadings, so that the extent of overlap and common issues is apparent, when the material case management decisions are made.

54. For the above reasons, the application for consolidation of the claims is granted.

Application to strike out or for summary judgment

55. Mr Shapiro submits that parts of the claims should be struck out and/or summary judgment granted on the following grounds:

    i) the claims in contract and pursuant to sections 171 and 173 of the 2006 Act have no real prospect of success;

    ii) claims based on allegations of breach that occurred more than six years prior to the issue of the claim forms are statute-barred;

    iii) the claims pursuant to section 174 of the 2006 Act and the losses claimed are so vague and unparticularised that they amount to an abuse of process or are likely to obstruct the just disposal of the proceedings;

    iv) the Particulars of Claim fail to comply with CPR 16.4(1);

    v) the Claimant has failed to provide sufficient documentation so that the Defendants can understand the case they have to meet.

56. Mr Ter Haar submits that it would be inappropriate for the Court to strike out the claim or grant summary judgment:

    i) the claims in contract and pursuant to sections 171 and 173 of the 2006 Act disclose arguable claims in law;

    ii) the allegations of breach that occurred more than six years prior to the issue of the claim forms are relevant to the allegations that the Defendants were in breach of their contractual and statutory obligations in entering into the

material agreements and reliance is placed on continuing breaches up to the date of those agreements;

iii) the claims pursuant to section 174 of the 2006 Act and the losses claimed are sufficiently particularised so that the Defendants may understand the nature of the claims made and respond to them;

iv) the alleged failure to comply with CPR 16.4(1) is disputed and is no longer relied on by the Defendants as a separate ground;

v) the Claimant has provided documentation in accordance with its obligations under the disclosure pilot practice direction.

The applicable test

57. CPR 3.4(2) provides that:

> "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 …"

58. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant … 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; … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

59. Where, as in this case, the court has to consider an application under CPR 3.4 and/or CPR 24.2, the principles to be applied are well-established: *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 per Coulson LJ at [20]-[24]; *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37 per Hamblen LJ at [27]. They can be summarised 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] 1 All ER 91.

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].

iii) In reaching its conclusion the court must not conduct a "mini-trial". If the pleaded facts do not disclose any legally recognisable claim against a defendant, it is liable to be struck out. However, the factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable: *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3 at [20]-[22].

iv) 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: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63.

v) If the court is satisfied that it has before it all the evidence necessary for the proper determination of a short point of law or construction and the parties have had an adequate opportunity to address the question in argument, it should grasp the nettle and decide it: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

vi) However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since in such areas, decisions as to novel points of law should be based on actual findings of fact: *Barratt v Enfield BC* [2001] 2 AC 550 per Lord Browne-Wilkinson at p.557.

vii) The court must be certain that the claim is bound to fail; unless it is certain, the case is inappropriate for striking out: *Hughes v Colin Richards & Co* [2004] EWCA Civ 266 per Peter Gibson LJ [22]-[23]; *Rushbond v JS Design Partnership* [2021] EWCA Civ 1889 per Coulson LJ at [41]-[42].

60. The burden of proof remains on the Defendants to establish that the Claimant has no real prospect of success and that there is no other reason for a trial.

Claims in contract and under sections 171 & 173 of the 2006 Act

61. Mr Shapiro submits that the claims in contract and under sections 171 and 173 of the 2006 Act have no real prospect of success. Section 171 provides that a director of a company must (a) act in accordance with the company's constitution; and (b) only exercise powers for the purposes for which they are conferred. Section 257 states that references to the company's constitution include any resolution or other decision come to in accordance with the constitution. It is said that the Claimant's pleading does not state whether the breaches relied on are breaches of (a) or (b) and does not provide particulars as to the respects in which the Defendants acted outside the company's constitution or improperly exercised powers. Section 173 provides that a director of a company must exercise independent judgment but it is said that the

pleading does not provide particulars as to any respect in which the Defendants allegedly fettered their discretion.

62. The Defendants' position is that the claims in contract are precluded by section 170(3) of the 2006 Act, which provides that the general statutory duties replace the common law rules and equitable principles from which they are derived; therefore, any claims against directors must be based on breach of the statutory provisions and not on the common law rules and equitable principles.

63. As to the claims under section 171, Mr Ter Haar draws attention to the proposed amendments at paragraphs 32 to 35 of the Particulars of Claim, setting out the rules of procedure, including the Red Book, that it is said were incorporated into the Claimant's constitution, and to the alleged failures to comply with those rules, by failing to assess and/or price adequately the risks involved in the projects prior to entering into the material contracts, referred to in paragraphs 131 and 196 of the pleading. As to the claims under section 173, Mr Ter Haar draws attention to the Defendants' alleged failures to consider, understand or take into account the limitations of the Claimant, pleaded as breaches of their obligations to exercise independent judgment, set out in paragraphs 48 and 49 of the Particulars of Claim, together with the alleged failures to assess and/or price adequately the risks involved in the projects as set out in paragraphs 128, 129, 130 and 195.

64. Mr Ter Haar submits that the claims in contract are not precluded by section 170(3). The common law rules and equitable principles that have been replaced by the statutory obligations in sections 171 and 173 are fiduciary duties (in equity or common law); they do not include contractual obligations imposed on directors by their contracts of employment, which are likely to extend beyond the statutory obligations. At the very least, there is no settled law on this issue and no authority has been identified.

65. Having carefully considered the Particulars of Claim, including the proposed amendments, I am satisfied that the pleaded facts disclose legally recognisable claims against the Defendants. Paragraphs 128, 129, 130 and 195 set out in detail allegations of specific failures on the part of the Defendants. The court must proceed on the basis that the facts and matters asserted by the Claimant could be established at trial. On that basis, it is reasonably arguable that the alleged failures to consider adequately the contractual, technical and commercial risks posed by the projects when entering into the material contracts constituted breaches of a director's duties set out in sections 171 and/or 173 of the 2006 Act.

66. The parties have identified an issue as to whether any claim could be advanced against the Defendants for breach of contract in the circumstances of this case or whether such common law claims have been displaced by the statutory framework of the 2006 Act. Neither party has found any legal authority on the availability of common law remedies in contract alongside the remedies provided by the 2006 Act. In those circumstances, it would not be appropriate for the court to make a determination of this issue without a trial at which all relevant facts can be ascertained and full argument made against the factual evidence.

67. For those reasons, the court refuses the application to strike out or grant summary judgment in respect of the claims in contract, or for breach of sections 171 and/or 173 of the 2006 Act.

Whether the claims are statute-barred

68. The Defendants' case is that the claims based on allegations of breach that occurred more than six years prior to the issue of the claim forms are statute-barred. Mr Shapiro submits that it is well established that in contract, the cause of action accrues for limitation purposes as soon as the relevant breach(es) of contract occurred, notwithstanding that at that time no damage (beyond the purely nominal) may have been suffered by the claimant: *Su v Clarksons Platou Futures Ltd* [2017] 1 Lloyd's Rep 568 per Teare J at [9]. The claims brought under sections 171 and 173 of the 2006 Act are akin to contract and therefore the cause of action accrues for limitation purposes as soon as the relevant breach(es) occurred: *Gwembe Valley Development Company Ltd v Koshy* [2003] EWCA Civ 1048 per Mummery LJ at [111]; *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2015] AC 1503.

69. Mr Shapiro submits that, with respect to the claims under section 174 of the 2006 Act, the position is analogous to the position in tort and time starts to run upon loss being suffered. Although the pleading is unclear, it is apparent that the vast majority of allegations of breach took place more than six years prior to the issuing of the claim forms. The Claimant can't avoid these difficulties simply by purporting to claim only in respect of damage occurring within the limitation period: *Khan v Falvey* [2002] PNLR 28 per Sir Murray Stuart-Smith at [23].

70. The Claimant's case is that the allegations of breach that occurred more than six years prior to the issue of the claim forms are relevant to the allegations that the Defendants were in breach of their contractual and statutory obligations in entering into the material agreements and reliance is placed on continuing breaches up to the date of those agreements. Further, it is submitted that the allegations of breach of duty under sections 171 and 173 of the 2006 Act amount to breach of fiduciary duty, an equitable wrong which is analogous to a tort; therefore, a claim for damages for breach of such fiduciary duty does not accrue until attributable non-negligible damage is first sustained. Material damage was not sustained until the Claimant entered into the relevant contracts. In any event, the Claimant relies on continuing breaches of duty up until the relevant contracts were entered into; therefore, the claims are not statute-barred.

71. As set out above, there is an argument between the parties as to the appropriate limitation period for breaches under different sections of the 2006 Act and the date from which time starts running. Although there are authorities indicating the approach that should be taken to claims against directors, there is no direct authority on the limitation period or date from which time starts to run for limitation purposes in respect of the claims pleaded in this case. Further, the allegations are identified by the Claimant as continuing breaches up to the date of the material contracts, which are within any of the competing limitation periods. In those circumstances, it would not be appropriate for the court to make a determination of this issue without a trial at which all relevant facts can be ascertained and full argument made against the factual evidence.

Whether section 174 claims adequately pleaded

72. The Defendants' position is that the claims pursuant to section 174 of the 2006 Act and the losses claimed are so vague and unparticularised that they amount to an abuse of process or are likely to obstruct the just disposal of the proceedings. The Claimant's position is that the claims are sufficiently particularised so that the Defendants may understand the nature of the claims made and respond to them.

73. There is no dispute as to the two limbs of the test applicable under section 174 of the 2006 Act: section 174(2)(a) specifies the minimum standard that is objectively expected of a person carrying out the functions of the director in relation to the company; section 174(2)(b) introduces a subjective element by reference to any special knowledge, skill and experience of the director.

74. I am satisfied that the pleaded allegations as to breach of the duties under section 174 of the 2006 Act are properly particularised. Paragraphs 16 to 20 set out the asserted knowledge, skill and experience of the Defendants. Paragraphs 128, 129, 130 and 195 set out in detail allegations of specific failures on the part of the Defendants. This includes allegations that the Defendants failed to follow the prescribed procedural steps to assess the contractual, technical and commercial risks posed by the projects when entering into the material contracts.

75. Mr Shapiro correctly draws attention to general assertions that the Defendants were "unreasonably eager for the Claimant to continue participating in the Suez Project" which, it is recognised, is likely to be met by an equally general denial. However, the vast majority of the allegations are detailed and precise, including failures to comply with specific provisions of the Project Risk Management processes set out in the Red Book, namely, submission of adequate Project Initial Risk Assessment ("PIRA"), Tender Executive Risk Approval ("TERA") and Tender Follow-Up ("TFU") documents for approval by the Corporate Risk Committee ("CRC").

76. It is understood that the Defendants vigorously deny the allegations, including a defence that the decisions to enter into the material contracts were approved by the M+W Group. That defence can be pleaded. Likewise, it is open to the Defendants to make further requests for further information in respect of any part of the claim that they do not fully understand. However, the claims are sufficiently precise and particularised to enable them to understand the case they have to meet and respond to the same.

CPR 16.4(1)

77. The Defendants contend that the Particulars of Claim fail to comply with CPR 16.4(1) in that they do not contain a concise statement of the facts on which the Claimant relies. Having regard to the nature, complexity and value of the claims, that complaint is rejected. As set out above, the claims are adequately pleaded.

Disclosure

78. The Defendants seek to strike out the claim pursuant to CPR 3.4(2)(c) for the Claimant's failure to provide sufficient documentation in accordance with paragraph 5.1 of CPR PD51U; alternatively, the Defendants seek an order for relevant

documentation pursuant to paragraph 5.11 of PD51U, so that the Defendants can understand the case they have to meet and respond to it.

79. Paragraph 5.1 of the practice direction provides for Initial Disclosure to be given as follows:

> "Save as provided below, and save in the case of a Part 7 claim form without particulars of claim or a Part 8 claim form, each party must provide to all other parties at the same time as its statement of case an Initial Disclosure List of Documents that lists and is accompanied by copies of –
>
> (1) the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case); and
>
> (2) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet."

80. Paragraph 5.3 provides for exceptions, including the following:

> "Initial Disclosure is not required where –
>
> (1) the parties have agreed to dispense with it (see paragraph 5.8 below);
>
> (2) the court has ordered that it is not required (see paragraph 5.10 below); or
>
> (3) a party concludes and states in writing, approaching the matter in good faith, that giving Initial Disclosure would involve it or any other party providing (after removing duplicates, and including documents referred to at paragraph 5.4(3)(a)) more than (about) whichever is the larger of 1000 pages or 200 documents (or such higher but reasonable figure as the parties may agree), at which point the requirement to give Initial Disclosure ceases for all parties for the purposes of the case."

81. Paragraph 5.4 states:

> "A party giving Initial Disclosure –
>
> (1) is under no obligation to undertake a search for documents beyond any search it has already undertaken or caused to be undertaken for the purposes of the proceedings (including in advance of the commencement of the proceedings);
>
> …

> (3) need not provide unless requested documents by way of Initial Disclosure if such documents –
>
> > (a) have already been provided to the other party, whether by disclosure before proceedings start (see CPR 31.16) or through pre-action correspondence or otherwise in the period following intimation of the proceedings (and including when giving Initial Disclosure with a statement of case that is being amended); or
> >
> > (b) are known to be or have been in the other party's possession;
>
> (4) need not disclose adverse documents."

82. Paragraph 5.5 states:

> "Unless otherwise ordered, or agreed between the parties, copies of documents shall be provided in electronic form for the purpose of Initial Disclosure. The Initial Disclosure List of Documents should be filed but the documents must not be filed."

83. The Claimant's position is that it has complied with its obligation to give Initial Disclosure, as explained by Mr Offord in his first and third witness statements, and any other application for disclosure is premature. The Claimant was forced to issue proceedings prior to compliance with the pre-action protocol because of concerns regarding limitation. In July 2021, following service of the Particulars of Claim in the Suez and Levenseat proceedings, the Claimant gave access to the Defendants to a data room containing copies of key documents referred to in the pleading. The parties agreed a stay of six months to allow the pre-action protocol process to take place, during the course of which the Claimant issued the Hull proceedings. In February 2022 the Claimant gave access to the Defendants to a data room containing copies of key documents referred to in the Hull pleading. Howard Kennedy concluded that giving Initial Disclosure in each set of proceedings would involve the Claimant providing more than 1,000 pages and informed Beale & Co in writing of its reliance on paragraph 5.3(3) of the practice direction.

84. The categories of document that have been made available by the Claimant to the Defendant include the following:

i) the Defendants' service contracts;

ii) the Special Resolutions bringing into effect Rules of Procedure in 2009 and 2015;

iii) the Claimant's internal project risk management requirements and procedures, including the Red Book;

iv) documents prepared during the tender process for the projects as part of the internal project risk management requirements in order to obtain PIRA, TERA and TFU approval and enter into the contracts;

v) P&IDs;

vi) the EPC contracts for each project and the Suez Variation agreement;

vii) relevant sub-contracts, including the sub-contracts with Outotec for each project;

viii) correspondence and other documents referred to in the statements of case.

85. On 1 June 2022, the Claimant provided further voluntary disclosure to the Defendants, including annexures to the PIRA, TERA and TFU documents not already provided, Hull tender documents, pre-EPC/Deed of Variation internal status reports for the projects, and pleadings in the associated Hull litigation brought against the Claimant.

86. The Defendants' position is that the disclosure given (including the recent voluntary disclosure) is insufficient, as explained by Mr McArdle in his witness statements. In particular, it is said that:

i) the sub-contract documentation provided is incomplete;

ii) the risk management documents are incomplete and do not cover the full extent of PIRA, TERA and TFU for the projects;

iii) the project design documents are incomplete;

iv) the employment contracts are incomplete;

v) the internal risk review documents are incomplete;

vi) correspondence between the Defendants and external parties relating to the pricing of the projects is incomplete.

87. The relevant events giving rise to the allegations of breach occurred many years ago. Although the Defendants were directors of the Claimant when the material contracts were entered into, they did not continue in that role for the duration of the projects, and, as former directors, they are not in possession of the relevant underlying documents. Therefore, they have no personal knowledge of how the projects were delivered or why it is alleged that the projects caused the Claimant to suffer such significant losses.

88. The Claimant has refused to provide documentation which would enable the Defendants to understand the claims. The Claimant has provided documentation as part of initial disclosure, but the disclosure essentially only documents the transactions. Critically, it does not assist with the Defendants in understanding the decision making process that was undertaken when deciding to embark on the projects nor does the disclosure document why the projects went wrong, leading to the claims made against the Defendants.

89. The scope of Initial Disclosure pursuant to the practice direction is intended to be limited to the key documents on which the Claimant relies or those which are necessary for the Defendants to understand the pleaded case: *State of Qatar v Banque Havilland* [2020] EWHC 1248 (Comm) per Cockerill J at [16]; *Breitenbach v Canaccord Genuity Financial Planning Limited* [2020] EWHC 1355 (Ch) per Fancourt J, sitting with Master Kaye, at [14]. Paragraph 5.4 of the practical direction expressly states that there is no obligation to undertake a search for documents for that purpose. Further, the Claimant has explained the basis on which it concluded that it was not required to give Initial Disclosure beyond 1,000 pages. In this case, I am satisfied that the Claimant has complied with the obligation to give Initial Disclosure in respect of each claim pursuant to paragraph 5.1 of PD51U.

90. However, I consider that this is a case where paragraph 5.11 of PD51U is engaged. Paragraph 5.11 states:

> "In an appropriate case the court may, on application, and whether or not Initial Disclosure has been given, require a party to disclose documents to another party where that is necessary to enable the other party to understand the claim or defence they have to meet or to formulate a defence or a reply."

91. On its face, paragraph 5.11 gives the court wide discretion to order disclosure at this stage. It is clear from the words: "whether or not Initial Disclosure has been given", that the practice direction contemplates an order under paragraph 5.11 that may go beyond the scope of Initial Disclosure; it is not limited to cases where there has been any deficiency or failure to comply with paragraph 5.1. Although the context of an application under paragraph 5.11 is initial disclosure, which is deliberately narrow in scope, the test is whether an order for disclosure is necessary to enable the other party to understand the claim they have to meet or to formulate a response. Where, as in these proceedings, the Claimant has limited its disclosure on the ground that Initial Disclosure is not obligatory given the volume of documents, the test of necessity may require careful scrutiny. Each case where the court has to consider whether to make such an order will depend on the facts and circumstances before the court.

92. In this case, the Defendants face a particular challenge in understanding the detail of the claims against them so as to enable them to formulate a defence. Firstly, unlike parties in many technical and commercial claims where both sides will have access to the relevant contractual and project documents, as former directors of the Claimant, they do not have possession of the material documents. Secondly, the nature of these claims is that they depend heavily on documents. An audit trail will need to be followed to determine what each Defendant knew, or should have known, at the material time. Documents will be relied on to identify the project risk management processes with which the Defendants were obliged to comply, the risk assessments carried out by or on behalf of the Defendants, and the information available for the CRC approvals. Audits and other reports will be relied on to ascertain what went wrong on each project. Thirdly, the Defendants will not be in a position to investigate and formulate their defence to the claims without access to the above documents.

93. Accordingly, in the circumstances that arise in these proceedings, I conclude that further disclosure is required to enable the Defendants to understand the claims they have to meet and to formulate their defences. In making such order, I have regard to

the fact that the Claimant has disclosed a significant amount of documentation to date, and this additional disclosure is at the Initial Disclosure stage, as opposed to extended disclosure, which should follow the pleadings and identified issues for disclosure. The categories of documentation that the Claimant is ordered to disclose are the following items from Schedule A:

i) Item 4 – all reports to the Board regarding the Levenseat, Suez and Hull Projects, including reports in the lead up to the Projects, the inception of the Projects and throughout the course of them;

ii) Items 5, 6, 16 and 25 – if not yet disclosed, the PIRA, TERA and TFU documents, including all annexures, for each project;

iii) Items 8, 18 and 27 – all minutes of the CRC meetings in respect of the approvals to enter into the material contracts for each project;

iv) Items 13, 22 and 31 – all internal and external audit reports on each of the projects.

94. The court will give the parties an opportunity to agree, or make submissions to the court on, the timetable for the above disclosure and service of the Consolidated Defence.

Conclusion

95. For the reasons set out above:

i) the Claimant has permission to amend the Particulars of Claim in Claim HT-2021-000094;

ii) Claim HT-2021-000094 and Claim HT-2021-000438 are consolidated;

iii) the Defendants' application to strike out parts of the pleading or for summary judgment on those parts is dismissed;

iv) the Claimant shall give further disclosure to the Defendants of the categories of documents set out above;

v) the Defendants have further time to file and serve the Consolidated Defence until after such disclosure.

96. The court will hear the parties on all consequential matters arising out of this judgment.