Neutral Citation Number: [2025] EWHC 464 (TCC)

Case No: HT-2022-000022

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS (TCC)
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 March 2023

Before :

MR JUSTICE CONSTABLE

- -

Between :

Lloyds Developments Limited

Claimant

- and -

Accor HotelServices UK Limited

Defendant

- -
- -

William Webb KC (instructed by Hill Dickinson LLP) for the Claimant
Robert Blackett and Jack Spence of Haynes and Boone LLP for the Defendant

Hearing date: 25 February 2025

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JUDGMENT

This judgment was 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 10:30 on Monday 3RD of March 2025.

Mr Justice Constable:

1. This is an application by the Defendant for an order that the present proceedings are struck out by reason of a breach of three Unless Orders. There are also applications to strike out the Claimant's pleading at paragraphs 51B(1) and 72, relating to the Claimant's case for copyright misrepresentation; paragraphs 75(2) and (4) relating to delay and loss; and paragraph 4 of Appendix 1 relating to the increased costs and damages caused by the decision to contract with Virgin Glasgow.

2. The claim relates to agreements between the Claimant ('Lloyds') and the Defendant ('Accor') for the construction and management of a 290 bedroom hotel at 236-246 Clyde Street, Glasgow ("the Hotel"). Lloyds is a property developer (now in administration) which owned the land at 236-246 Clyde Street and wished to develop a hotel on the site. The Defendant is part of the Accor group which operates more than 5,000 hotels worldwide. One of its sub-brands is Tribe. The parties entered into two contracts, a hotel management agreement and a hotel consultancy services agreement, both dated December 2018. In broad terms, Lloyds was to construct the hotel on the site to "Brand Standards" which were set out by Accor and were specific to the "Tribe" sub-brand. Upon completion it would operate for 35 years as a Tribe branded hotel which would be owned by Lloyds but managed by Accor for a fee. Lloyds' case in essence is that its design was approved by Accor in December 2018, but that Accor changed its approach to Lloyds' design and sought that changes be made to the approved design. This, it is said, was potentially because of the influence of a Mr Peters, the founder of the Tribe Brand and/or Mr Walton, the interior designer of another Tribe hotel in Perth. Lloyds alleges that Accor represented that Lloyds' design infringed copyright(s) held by Mr Peters and/or Mr Walton, that Mr Peters and/or Mr Walters had rights under which they could impose their requirements and veto any design and/or had the right to insist upon changes. It is alleged that these representations were made fraudulently and were untrue. Lloyds says that the changes required by Accor and the concerns caused by potential copyright issues had severe consequences, causing immediate delay and cost increases, and thereafter funding issues. The agreement with Accor was terminated. Lloyds found a replacement Hotelier, Virgin Hotels. Practical Completion was not achieved until August 2023, by which point Lloyds says it had suffered very substantial losses.

3. This is a claim which, as Mr Webb KC for Lloyds recognises, has what can only be called an extremely unhappy procedural history to date. Lloyds started these proceedings more than three years ago, on 29 January 2022. At a CMC on 14 October 2022 HHJ Kelly gave directions leading instead to a trial starting 11 March 2024. Numerous deadlines were missed. Ultimately on 1 December 2023 Waksman J granted an application by Accor for the March 2024 trial date to be vacated and ordered Lloyds to pay £120,000 of costs. Lloyds went into administration in early 2024. Numerous Unless Orders have been made against Lloyds at various times and there has been repeated judicial criticism of numerous shortfalls in the manner in which Lloyds' claim has been litigated. Whilst little substantive progress has been made in the last year, there have nevertheless been a number of applications before the Court relating to procedural issues and the service of a substantive Defence.

The Unless Orders: General

4. The starting point is PD 3A 1.6 which says: "*Where a*[n] … *order states 'shall be struck out or dismissed' or 'will be struck out or dismissed' this means that the striking out or dismissal will be automatic and that no further order of the court is required*". Striking out is not discretionary or contingent on the non-breaching party doing anything, or doing it within any particular time frame. As Moore-Bick LJ said in Marcan Shipping (London) Ltd v Kefalas & Anor [2007] EWCA Civ 463 at [30]:

> *"… it is unnecessary, and indeed inappropriate, for a party who seeks to rely on non-compliance with an order of that kind to make an application to the court for the sanction to be imposed or, as the judge put it, "activated". The sanction prescribed by the order takes effect automatically as a result of the failure to comply with its terms. If an application to enter judgment is made under rule 3.5(5), the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect.*"

5. No applications for relief have been made. The position of Lloyds is, in respect of each of the three Unless Orders, that it complied. However, it takes the point in respect of the two Unless Orders dated May 2024 and February 2024 that it is too late to take the point in circumstances where both sides continued as though matters were not struck out, incurring costs, and attending contested applications which used Court time and judicial resources.

6. Each of the arguments around compliance involves consideration of the adequacy of the act carried out by Lloyds which is said to constitute compliance with the Order. In the context of sufficiency of particulars, the Court has been referred to the Court of Appeal's decision in QPS Consultants Ltd v Kruger Tissue (Manufacturing) Limited) [1999] BLR 366. That case made clear that the earlier approach of the Courts in Reiss v Woolf was no longer applicable. That had required the act of compliance (e.g. the provision of further particulars) to be a document produced in good faith and not illusory, rather than one of whether the demand for particulars had been substantially met. Having identified that it was unnecessary to construe Unless Orders as narrowly as in the past, Simon Browne LJ went on to sound two notes of caution:

> "*First, an order for further and better particulars (whether or not in Unless form) is not to be regarded as breached merely because one or more of the replies is insufficient. If the answers could reasonably have been thought complete and sufficient, then the correct view is that they required only expansion or elucidation for which a further order for particulars should be sought and made.*
> *Second, although I would regard an Unless Order as breached whenever a reply is plainly incomplete or insufficient, I would not expect the court's strike out discretion to be invoked, let alone exercised, unless the further and better particulars considered as a whole can be regarded as falling significantly short of what was required. Whether this would be so would depend in part on the number and proportion of those replies (including whether their inadequacies were due to deliberate obstructiveness, incompleteness or whatever), and in part upon their importance to the overall litigation. Satellite strike out litigation is not to be encouraged….*"

7. This was a pre-CPR case. There have been a number of cases in light of the post-CPR position, which is, as explained in Marcan above, that the sanction embodied in an Unless Order takes effect without the need for further order. In Owners of the Motor Vessel 'Gravity Highway' v Owners of the Motor Vessel 'Maritime Maisie' [2020] EWHC 1697 (Comm), Butcher J reviewed the authorities (and in particular two decisions in Griffith v Gourgey [2014] EWHC 4440 (Ch) and [2015] EWHC 1080 (Ch)) and summarised the position, which I respectfully repeat:

> "*(1) In assessing whether there has been compliance with an unless order for the provision of further information the Court will consider whether the information is plainly incomplete or insufficient given the terms of the order as to the information to be provided, including the terms of any request which it has been ordered should be answered. The further information will be plainly incomplete or insufficient if it could not reasonably be thought to be complete and sufficient.*
>
> *(2) In examining completeness and sufficiency, the Court is not concerned with the truth of the answers or with their logical coherence unless any lack of coherence goes to the completeness or sufficiency of the response.*
>
> *(3) If there is non-compliance with an unless order for further information, then the sanction will take effect unless there is relief from it. In considering relief from sanction, amongst the other matters which will be taken into account, are the matters which were, in the pre-CPR context of QPS Consultants, regarded as going to the exercise of the discretion as to whether a sanction should be imposed. These will include whether the further information taken as a whole falls significantly short of what is required, and that this will depend in part 'on the number and proportion of the inadequate replies, in part upon the quality of those replies (including whether their inadequacies were due to deliberate obstructiveness, incompetence or whatever), and in part upon their importance to the overall litigation."*

11 December 2024 Unless Order

8. On 9 May 2024, Lloyds was ordered to appoint an Independent Reviewer and e-Disclosure provider. The 9 May Order required that the appointment be made "*jointly*" by Lloyds and Accor. On 3 October 2024, the Court ordered that the Independent Reviewer and e-Disclosure Provider be Hogan Lovells.

9. On 11 December 2024, Jefford J ordered as follows:

> *"1. The Claimant's claim shall be struck out and judgment on that claim entered for the Defendant unless the Claimant complies with the orders of Jefford J dated 9 March 2024 and 3 October 2024 by appointing Hogan Lovells LLP as e-Disclosure Provider and Independent Reviewer, by 4pm on 4.00pm [sic] on 16 December 2024.*"

10. Lloyds says that it did so. It relies upon the Second Witness Statement of Ms Emerson, a partner at Hill Dickinson, the substance of which is not disputed. Ms Emerson provides the email to Hogan Lovells timed at 14.54 on 16 December 2024, which was

not copied to Haynes Boone, solicitors for Accor. The email provided some background to the delays which had occurred, and the difficulties encountered in obtaining the devices giving rise to the independent review. The email attached a copy of the Joint Appointment letter, addressed to both parties' solicitors, signed for and on behalf of Lloyds. The letter starts, '*Thank you for appointing Hogan Lovells….*'.

11. Accor says that the appointment was ineffective for two reasons.

12. First, the terms required £30,000 to be provided on account. The relevant section of the letter states: '*We have discussed arrangements for Lloyds to pay anticipated fees and disbursements on account, and we understand that this has been agreed. Based on our current understand of how the matter is likely to progress we required that Lloyds provides us with £30,000 on account of our costs.'*

13. The covering email from Lloyds returning the signed agreement said this sum had not been paid in circumstances where there were no devices to work on at the time, and where the funds were not at that point available. Mr Blackett therefore argued that the communication from Lloyds was a counter offer, in respect of which there is no evidence of acceptance.

14. The correct analysis is that the terms required Hogan Lovells to be paid in advance of starting work. Receipt of these funds was not stated to be, and was not, a pre-condition of the appointment becoming effective as a binding contract. The covering email did not suggest that Hogan Lovells' term about payment in advance was itself objectionable, and the letter was signed with that term unamended. Signing the letter was not a counter offer, as suggested by Mr Blackett; it was an acceptance of the terms in the engagement letter. It was not an immediate breach of the agreement not to pay moneys on account at the same time: the money would need to be paid in order to expect Hogan Lovells to start their work, but this was academic at the time as there was no work for them to do. This analysis can be tested in the following way: would, following receipt of the signed terms of engagement Hogan Lovells, be able to say they were unilaterally entitled to change the hourly rates they had agreed to charge in this exchange of correspondence because the payment in advance of starting work had not yet been paid? In my view, not (although it may be that a term would be implied that the payment on account and/or instructions to start work would follow within a reasonable time). The parties are bound by the agreement, assuming Accor also had provided their acceptance.

15. The second point raised is that appointment was not joint, because it was made in a unilateral communication not copied to Accor. The Unless Order itself did not use the word 'jointly' although it of course referred back to the previous Orders which did refer to the joint nature of the appointment. I consider that the wording of the Unless Order most likely reflects an assumption that Accor had already agreed or signed Hogan Lovells' terms, or potentially would do upon Lloyds doing so, such that Lloyds' unilateral expression of agreement by signing the terms unamended would be sufficient to instigate joint appointment for the purposes of the Unless Order. If it were otherwise, compliance with the Unless Order (and the risk of the draconian sanction) would not be wholly within the gift of Lloyds. If Accor has signed the equivalent letter, Hogan Lovells have already been jointly appointed. If Accor has not done so, the reason Hogan Lovells have not been jointly appointed is not because of a failure on Lloyds' part. The

fact that the email communication between Lloyds and Hogan Lovells providing the signed terms was not copied to Accor is not relevant to this analysis, although I do consider that it was an odd and unhelpful approach by Lloyds to fail to have done so.

16. In these circumstances, I consider that the Unless Order was complied with. The application for strike out in respect of breach of the Unless Order of 11 December 2024 fails.

9 May 2024 Unless Order

17. This relates to 937 documents amongst some 13,250 which were provided by Mr Whaley, Lloyds' expert, to Mr Yendall, Accor's expert, which had been provided directly by Lloyds to Mr Whaley. Lloyds was ordered to provide a witness statement explaining how they had come not previously to have been disclosed. Mr Patel, erstwhile solicitor for Lloyds, sought to do so in his 7th witness statement, but said that it was not possible to identify why they had not been caught by the disclosure exercise in relation to 72 documents. An unless order was made directed at this shortfall in the following terms:

> *"The Claimant's claim shall be struck out and judgment on that claim entered for the Defendant unless the Claimant by no later than 4pm on 31 May 2024 serves a witness statement on the Defendant explaining, for any documents which were provided to Mr Yendall on or around 13 and 19 October 2023 but which had not previously been disclosed:*
> *(a) why such documents were disclosed on 13 and 19 October 2023; and*
> *(b) why such documents were not disclosed by 5pm on 9 May 2023."*

18. A witness statement, Mr Patel's 13th, was served on time in response to the Unless Order. The argument is whether Mr Patel's 13th witness statement was sufficiently comprehensive and/or accurate to satisfy the Unless Order. The complaints made by Accor as to its inadequacy were made in its letter of 19 December 2024, some 6-7 months after the alleged non-compliance.

19. The main complaint highlighted by Mr Esly, solicitor for Accor, in his witness evidence and relied upon in oral argument by Mr Blackett as the clearest non-compliance relates to 5 documents Mr Patel said he believed to have been previously disclosed, whilst accepting that he was struggling to verify that because of issues with Lloyds' e-disclosure provider. Mr Esly's evidence is that whilst this may be right for 2 documents, 3 of the documents were not similar to previous disclosure (on a '90% similarity search), and so by definition there was no satisfactory explanation in relation to them. In other words, it seems that Mr Patel was probably mistaken in his response about 3 of the 72 documents. Mr Webb KC accepted that he could not dispute this conclusion. Does this fact mean that the Unless Order has not been complied with? In my judgment, the clear answer is no. The witness statement was plainly required in order to ascertain whether there were any material holes in Lloyds' disclosure process that needed correction, or whether the Court should conclude that it could not rely upon the processes adopted to provide reasonable and proportionate disclosure in accordance with the rules. The substance of the witness statement, which I accept would have been the product of significant work by Mr Patel analysing documents, plainly serves that

purpose. Applying the approach set out by Butcher J in Gravity Highway it cannot be said that the witness statement falls significantly short of what was required by the Unless Order, even if there is room for (perhaps, inevitably) different views about the completeness of the answers in relation to every single document or if it contains an error. This is particularly so given the scale of the error in light of the task carried out, and where no particular point is made as to the particular significance of the three documents about which Mr Patel may have misstated the position. It is not, for example, suggested that they are highly relevant documents which might of itself invite some scepticism as to how or why they came not to be disclosed. I consider that the explanations given by Mr Patel could and would reasonably have been thought by him to be complete and sufficient. Indeed, it is highly likely that Accor's solicitors came to the same conclusion at the time the witness evidence was served. Accor did not suggest the Unless Order had not been complied with, and state that the action was therefore struck out. Had Accor considered the response '*plainly incomplete or insufficient*', it would, and indeed should, have said so at the time, and proceeded on the basis that the action had been struck out. Whilst it is quite right that there is no onus on the party benefiting from an automatic strike out to apply to the Court for an Order saying so, it is quite another thing for that party to continue with the usual course of the proceedings, making applications and serving a substantial pleading as though the matter had not been struck out for many months. By reason of this reaction, both sides continued to incur significant costs and, equally importantly, continued to use the Court's time and resources.

20. In circumstances where I have found there to have been compliance with the Unless Order, it is not necessary for me to consider Lloyds' argument that, even if it had been in breach, the actions of Accor mean that the Court should not strike the action out. Nevertheless, I make these observations. Whilst Mr Blackett was undoubtedly correct that the effect of non-compliance automatically gives rise to the action being struck out, it does not follow that if the party who would otherwise benefit from the strike out can be taken to have expressly or impliedly waived the non-compliance, the Court cannot in an appropriate case, and irrespective of any application for relief, give effect to that waiver by declaring that there had been no effective non-compliance and the claim had not, therefore, automatically been struck out. It may be that there are better analytical frameworks to deal with the situation where a party, fully aware of the action which either does or does not constitute compliance with an Unless Order, elects to continue with the proceedings as though the matter had not been struck out, incurring costs and using Court resources, but then chooses at some later point to change tack and contend that in fact proceedings were no longer on foot. For example, an alternative analysis advanced by Mr Webb KC was that there may be an estoppel by which, in the face of an argument that a party had complied with the Unless Order (so that the proceedings had not been struck out), the other party is prevented from contending months later that there had been a non-compliance. But, irrespective of the precise route, it would defy the overriding objective were the Court to be powerless to give meaningful effect to the proposition that a party cannot generally contend, after continuing to substantively and consciously engage in proceedings for a significant period, that in fact the matter had been struck out many months earlier.

21. The application for strike out in respect of breach of the Unless Order of 24 February 2024 fails.

Order of 23 February 2024

22. On 18 October 2023, Accor issued its 4th Request for Further Information pursuant to Part 18. A response was outstanding at the time of a hearing dated 1 December 2023 and therefore Waksman J ordered a response by 18 January 2024. The Claimant did not comply with this deadline and therefore the following Unless Order was obtained.

> *"2. The Claimant's claim shall be struck out and judgment on that claim entered for the Defendant unless the Claimant serves on the Defendant a response to the Defendant's 4th Part 18 Request by 4pm on 22 March 2024."*

23. There is no dispute that a response to the 4th Part 18 Request was served on time in response to the Unless Order. The argument is whether the response was sufficient to satisfy the Order. No complaint was made by the Accor as to the adequacy of the answer when it was provided in March 2024.

24. The response was as follows:

> "*The delay to the Development by the Redesigns imposition of the bedrooms alone was at least 4 months. This delay does not take into consideration the various consequential factors arising from Accor's Redesigns imposition, such as Lloyds requiring additional new funding.*
> *The delay to the bedrooms described above was from 26 February 2019 (when Ms Jorge failed to attend Site to review the joinery 'quality' in the second/third sample rooms), to 24 May 2019, when Lloyds received Accor's second sample room approval report for the fourth (Redesign) sample room, plus an additional month for remobilisation.*
> *Given the bedrooms were always the priority, the FOH Redesigns followed which caused further delay beyond the 4 months delay for the bedroom redesigns.*"

25. Accor contends that the Lloyds' document does not contain a "*response*" to Request 2(d) at all, because it does not give "*particulars of: … (d) what delay Lloyds alleges would have been caused to the Development by reason of its being built according to the Redesigns rather than according to the so-called Approved Design*". It makes the points that (a) there is a difference between 'actual' delay ('was caused') and hypothetical ('would have been caused'); (b) the period given is a minimum delay not all the delay that is alleged; (c) relates to the bedrooms', with the remainder undefined.

26. The context of the delay allegation is important. This is not a traditional critical path-delay claim with one side claiming its costs of delay caused by a period of critical project delay, where precision as to the amount of delay is of particular importance. Instead, the delay forms part of the plea that the amendment to the designs '*would cause a significant delay to the Development….*' Which delay constituted one of the reasons that Lloyds allege the delay was repudiatory. Lloyds' pleading is therefore that the delay they identify (of '*at least four months*') was sufficiently significant in the context of the development that, when taken with other factors, entitled Lloyds to terminate the agreements. In this context, does the pleading provide sufficient particulars of the case

Accor has to meet? In my judgment, the answer is yes. The period of time which is said to be the significant effect of the redesign and its cause is identified, albeit by a minimum period. The way that period was calculated was also explained. It is implicit from the further particulars that there is no other period of hypothetical delay that is in fact being alleged as the consequence of the breach and which caused or contributed to the decision to terminate. Notwithstanding the unhelpful reference to '*at least*', which Mr Webb KC conceded was not a term he would necessarily have deployed in the pleading (which was not his), given the limits of this simple case, if Lloyds wished to allege some greater detail, or other or longer specific delays which were material to the validity of the repudiatory breach, it would no doubt require permission to amend. Mr Webb KC accepted this. The case is a simple one. A broad plea explaining the cause of calculation of the amount of delay which Lloyds say was 'significant' in the context of the alleged repudiatory breach is sufficient for Accor to understand the case it has to meet.

27. The application for strike out in respect of breach of the Unless Order of 24 February 2024 fails. However, had it been necessary to do so, I would in any event have determined that the continued engagement in the proceedings for the best part of a year had the effect of waiving any earlier non-compliance and/or gave rise to an estoppel.

The Copyright Misrepresentation Claim

28. Accor seeks to strike out paragraph 51B(1) of the Re-Amended Particulars of Claim ('RAPoC') that Accor made a fraudulent misrepresentation in the following terms:

> "*Lloyd's design infringed copyright(s) held by Mr. Peters and/or Mr. Walton.*"

29. CPR PD 16.8.2(3) requires that "*The claimant must specifically set out the following matters in the particulars of claim where they wish to rely on them in support of the claim – …(3) details of any misrepresentation*".

30. Accor says none of the words set out in the RAPoC amounts to the representation which is being alleged - that Lloyds' design actually infringes copyright. Putting them at their highest, it is said that the pleaded representations were only that there was an "*issue"* related to copyright, this being that "*the Tribe designer is complaining about copyright of his design*". It is right that no single communication states in terms the content of paragraph 51B(1) of the RAPoC. However, that is not the test. The question is whether it is fanciful that, taken together and in context, the various statements relied upon are capable of bearing the meaning Lloyds alleges. It is not fanciful. It is also a sufficiently fact sensitive issue that it would be wrong for the Court to determine the point against Lloyds summarily. It is a matter to be determined when the Court has heard all the evidence.

31. Accor also says that the Claimant has no real prospect of succeeding on the claim at paragraph 72 of the RAPoC that on 30 May 2019 Mr Lassman and Mr Dubaere told Mr Singh and Mr Diamond that "*both Mr Peters and Mr Walton could be very disruptive for Tribe Glasgow over copyright issues*" because that is not Mr Singh and Mr Diamond's evidence. Paragraph 198 of the witness statement of Mr Singh does not, as one would expect, use precisely the same language as paragraph 72 of the pleading, but the import of the evidence is, at least arguably, the same. Even if there were some slight

discrepancies, or if the witness evidence arguably did not make good the pleaded case, the circumstances where such a point should be dealt with by way of an interlocutory application, rather than leaving the matter for submission at trial, will be rare. It would be necessary for the point to be one which, if correct, would change the shape and/or duration of the trial or the steps necessary to get there, or there is some other good reason why such matter cannot be left to trial. Even if Mr Blackett was correct in relation to its analysis of the factual evidence overlain on the pleading, this point is not of any consequence to preparation for or the shape of the trial. It is precisely the sort of point which should be taken at trial, and should not trouble the Court on an interlocutory basis.

32. Finally, I observe that CPR PD3A, 5.1 requires all applications under 3.4(2) to be made as soon as possible. The re-amended pleading of which complaint is made was introduced in September 2023. Notwithstanding the other matters which were (or were not) progressing in the intervening period, there is no proper explanation why the point was not taken when permission to amend was sought. A reason not to permit an amendment is that it stands no reasonable prospect of success or that it is a plea capable of being struck out. Even if it was not possible (for some reason) to have taken the point when permission to amend was sought, such points should generally be taken before their inclusion within the pleaded claim affects the conduct of the litigation (e.g. disclosure). If the point raised had been finely balanced (it is not), the considerable delay by Accor in taking the point would have counted against it in the overall exercise of discretion.

The Delay and Loss Complaints

33. Accor says the RAPoC discloses no reasonable (or any) grounds for claiming that the Redesigns caused/would have caused delay, so falls to be struck out under CPR 3.4(2)(a). Mr Blackett says that the pleading provides no agenda for a trial on the issue of what delay was/would have been caused by the Redesigns, and asks that this element of Lloyds' claim be struck out as an abuse of the Court's process. Further or alternatively Mr Blackett says Lloyds has no real prospect of succeeding on the claims that the Redesigns caused/would have caused delay and Accor asks that summary judgment be given against Lloyds on those claims under CPR 24.3.

34. Accor relies upon Wharf Properties v Eric Cumine [1991] UKPC 5, where a claim was struck out in circumstances where: "*The failure even to attempt to specify any discernible nexus between the wrong alleged and the consequent delay provides, to use Mr Thomas' phrase 'no agenda' for the trial*". Also relied upon is an extract from *Litigation in the TCC,* authored by Adam Constable KC (as he then was) together with Ms Garrett and Mr Lamont, both now KCs, in relation to guidance on how to plead a delay claim.

35. However, as has already been pointed out, this is not a traditional delay claim. The fact of delay is part of the causal nexus between the breach and the decision to terminate. It is not a claim in its own right, leading to specific delay-related losses. It is the termination that leads to losses. The delay is part of (if Lloyds is right) what led to the termination. In the context of the Unless Order discussion, I have already determined that the particulars provided are sufficient in the context of the relevance of delay to the

claim. It is clear what case Accor has to meet. It is clear that the pleading sets out a complete cause of action relating to the wrongful termination of the Contract and a claim for the loss flowing from the breaches and ensuing termination.

36. The analysis is the same for the complaints about loss. There is no claim for £1.6m, said to be the cost difference between carrying out the original designs and the construction required further to the alleged redesigns. It is right to say that the figure is general and round, and it may be that there is no contemporaneous evidence supporting it. That may go, in due course, to whether Lloyds did consider and/or were justified in considering that the effect of the redesigns to be so significant so as to justify termination. The level of particularisation does not have to be the same as if the sum was claimed as a loss that in fact occurred, which would no doubt require a detailed calculation so Accor could see how the figure was built up. In the present context, however, it is sufficient for Accor to understand the case it has to meet.

The Virgin Glasgow claim

37. Lloyds initially pleaded that the decision to pursue a Virgin hotel was an independent business decision which should have no effect on damages, effectively a *res inter alios acta*. It pleaded as follows:

> *"For the avoidance of doubt, when it is completed for Virgin in 2022 the Hotel will be to a higher standard, and of greater value, that Tribe Glasgow would have been. The costs to achieve that outcome and the benefits derived from it are the result of Lloyds' commercial decisions which are independent of the loss and damage which it has suffered as a result of Accor's breaches. Lloyds does not claim that element of its costs and losses as are properly referable to its independent commercial decision to complete the Development to a different standard and value."*

38. On August 2023 witness evidence was served. Amongst that evidence, Mr Singh (one of the directors of Lloyds at the relevant time), gave evidence that, '*Virgin was the only potential route out of this disaster….With absolutely no other alternative available, we decided to proceed with Virgin*.'

39. In September 2023, Lloyds amended its pleading, with the permission of the Court. Lloyds' approach to how matters related to the Virgin Glasgow hotel should be dealt with as a matter of causation changed about face:

> *"For the avoidance of doubt, when it is completed for Virgin the Hotel will be to a higher standard, and of a greater value, than Tribe Glasgow would have been. Lloyds' decision to contract with Virgin for a replacement hotel was a reasonable decision and act of mitigation. However, the Virgin hotel was not as profitable as the Tribe Glasgow hotel would have been (and in fact will result in a loss). Those losses are for Accor's account."*

40. When asked what new evidence or knowledge brought about the change, Lloyds stated:

> *"It became apparent on an incremental basis that the cost for the Virgin development would be far in excess than* [sic] *originally contemplated."*

41. Although the pleading has been in place now for 16 or so months, and which has led to (for example) Lloyds carrying out disclosure in accordance with the amended case, Accor seeks now to strike out the claimed costs on the grounds that it is an abusive pleading. In particular, reliance is placed on the judgment of Joanna Smith J in Ashraf v Attarian & Anor [2023] EWHC 2800 (Ch) where she said:

> *"71. A related form of abuse, also concerned with the way in which a party chooses to put her case, arises where a party "blows hot and cold" as to the nature of that case; this is also known as the doctrine of approbation and reprobation. Edwin Johnson J described this doctrine in the following terms in the March 2022 Judgment (at [242]):*
>
> > *"The doctrine usually applies where one party pursues a particular case in proceedings and then seeks to do an about face, in the same proceedings or in other proceedings, for the purposes of pursuing an inconsistent case".."*

42. In that case, Joanna Smith J struck the case out. It is difficult to consider a more extreme example of vacillation, which had continued for over 7 years and was continuing, than Ashraf. There had been five versions of actual or draft pleadings through which the facts had changed. Joanna Smith J specifically found that the confusing and muddled nature of the pleadings was 'apparently designed' to preserve Ashraf's ability to advance any case against any one of the defendants: it was a deliberate strategy. There had also been prior judicial comment as to previous 'flip-flopping' which had given rise to 'last chances'. Moreover, the application to strike out was made in the teeth of the application to amend. It did relate to a pleading, as here, which has been in place for 16 months. The vacillation referred to by Joanna Smith J was, therefore, just one element of a much broader set of concerns identified when striking the claim out. Whilst this case has had its own troubling history, it has not been one of vacillating pleadings and constant flip-flopping on the facts which underpin the claim.

43. The change in position in this case is a single change. Lloyds sought originally, at a time when it considered it likely that the additional costs incurred in fitting out the Virgin Glasgow hotel would be recovered and more by the success, to frame its case legally to coincide with those cases where there is said to be a break in the chain of causation between the breach and some benefit derived to the Claiming party. It is plain that when it became clear that there was no upside, and only downside, it has sought to reconsider the basis upon which it says causation should be analysed. It is of some relevance that, in this case, the witness statement of Mr Singh was served in August 2023, a month prior to the RAPoC in respect of which complaint is made. That witness evidence supports the case pleaded in RAPoC, albeit it is potentially inconsistent with the original pleading which was, of course, accompanied with a statement of truth.

44. The correct analysis of causation is a legal one overlaying the facts. It is also undoubtedly a tricky area of legal analysis in respect of which views can reasonably differ: see for example where the Court of Appeal reached the same conclusion on the basis of a different legal analysis on the question of 'collateral benefit' in ED&F Man Capital Markets v Come Harvest and others [2022] EWCA Civ 1704. It is also correct that whilst the facts which Mr Singh set out in his witness statement may contradict the original pleading, they are consistent with the case now put. Mr Singh's role in approving the original case, and any explanation for the apparent volte face will no

doubt be a matter which will give rise to cross-examination. There may be a credible explanation; there may not. However, I do not regard it as proportionate or appropriate to strike out the relevant claim within the RAPoC as an abuse of process on account of the change of position which has taken place. I add that, for reasons that I have already addressed, this point ought also properly to have been taken when permission to make the amendment was sought.

45. The application to strike out Lloyds' case in respect of the Virgin Glasgow hotel losses fails.

46. Finally, I add that the fact that Accor's applications have failed is emphatically not to be taken as some tacit approval of the way in which, at least until very recently, Lloyds and/or its administrators and/or representatives have conducted this litigation, not least in accruing numerous Unless Orders and by, at least to some extent, only narrowly complying with them. Lloyds have instructed new solicitors and counsel, and it is hoped that, further to their apology to the Court for past conduct, their recognition that from now on, the litigation must be conducted in a manner befitting to 21st century litigation in the TCC, marks a sea-shift in the orderly and efficient progress of this case to trial.