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Case No: CL-2023-000143

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

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

Date: 07/03/2025

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between:

FINASTRA INTERNATIONAL LIMITED	**Claimant**
- and -	
THE CRDB BANK PLC	**Defendant**

- -
- -

Lawrence Akka KC and Fiona Whiteside (instructed by **Pinsent Masons LLP**) for the **Claimant**
Alex Charlton KC and Edward Meuli (instructed by Dentons UK and Middle East LLP) for the **Defendant**

Hearing date: 21 February 2025
Draft judgment circulated to parties: 26 February 2025

Approved Judgment

.....

Mr Justice Henshaw:

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(A) INTRODUCTION

1. The Claimant applies, by notice dated 29 January 2025, for permission to amend its Particulars of Claim in order to add a significant additional head of claim.

2. The trial of this action is listed for a five-day trial (plus one day of pre-reading) commencing on 7 April 2025.

3. The Claimant's claim is for alleged breach of a software licence agreement, and its loss is currently put in the region of US$23 million. The Claimant provides financial software to clients, including the Defendant ("***CRDB***"), a Tanzanian bank. By an agreement signed on 21 November 2017 (the "***November Agreement***"), the Claimant licenced its banking software to CRDB, including FusionBanking Essence ("***FBE***"). FBE is CRDB's core banking system for customer account information and financial transactions.

4. The Claimant's current claim alleges that CRDB breached the November Agreement by granting indirect access to FBE to its trained local agents called "*Wakalas*" ("Wakala" being the Swahili word for agent). Wakalas operate in areas of Tanzania where there are no ATMs or banks available. Wakalas are equipped with a handheld point of sale card machine ("***POS terminal***") on which is loaded an application called FahariHuduma (the "***FH App***"). As of 2023 there were 34,627 Wakalas.

5. Prior to its decommissioning in June 2024, a Wakala's POS terminal connected via a mobile network to CRDB's Transaction Management System ("***TMS***"). TMS interfaced, in turn, with FBE. The Claimant alleges that TMS was a 'single point of access' for all Wakalas to use FBE, and a breach of the November Agreement which, it argues, prohibited what the Claimant calls 'multiplexing'. In this regard, the Claimant relies on the final sentence of the definition of "*Concurrent User*" in the November Agreement, which states:

> "A "Concurrent User" licence permits any representative (e.g. employee, consultant, contractor) of the Client or an Affiliate up to the cumulative stated number of Concurrent Users to simultaneously access the specified Software at any one time. Access to the Software means that the user is logged on to the Software, regardless of whether the Software is actually

> processing any data. The use of technology to allow multiple end users to share a single access point to the Software is prohibited."

6. The November Agreement provides for 2,000 Concurrent Users of FBE. Based on assumptions set out in a Schedule to the Particulars of Claim, the Claimant estimated its loss in relation to Wakalas' use of the FH App at around US$23 million.

7. The issues arising for determination at trial include questions of contractual interpretation, a number of alleged estoppel and rectification issues, and (if relevant) the assessment for quantum purposes of how many Concurrent User licences would have been required by CRBD if it had not used the single TMS user/password, assuming that the same number of CRBD representatives would have accessed the Claimant's software as in fact did so via TMS. That requires an assessment of how much concurrent usage in fact took place, within the meaning of the relevant provisions and as a matter of fact. That is not a straightforward matter, and the experts have had to make a number of assumptions and extrapolations from the available data.

8. The proposed new claim rests on CRDB's use of a business software application called "*New Agency Banking*" or "*the New Agency Banking System*" ("***NAB***" or "***NABS***"). This application was introduced on a pilot basis in May 2022, and since June 2024 the Wakalas have used NABS in place of TMS. The Claimant states in its evidence that it estimates the financial impact of the NABS on the quantum of its claim to be an additional US$4.9 million.

9. For the reasons set out below, I have concluded that permission to amend should be refused. The amendment, if allowed, would threaten the trial date: indeed, in my view the trial would inevitably have to be adjourned. Even if the trial could have been maintained, allowing the amendment would have placed wholly unfair pressure on CRBD, its legal team and its expert, seriously prejudicing its ability to prepare properly for trial. No good reason has been put forward for the lateness of the amendment. On the contrary, CRBD made clear to the Claimant as long ago as February 2024 that the NABS was being introduced in parallel with TMS, and the Claimant was put on notice of this again on subsequent occasions up to and including October 2024. The Claimant has made no formal alternative application to adjourn the trial, though it has stated in its skeleton argument that it would prefer an adjournment to refusal of permission to amend. However, it would be prejudicial to the interests of justice, CRBD and other court users for the trial to be adjourned. In all the circumstances, the only just course in my view is to refuse the application.

(B) PROCEDURAL HISTORY

10. The claim was issued in March 2023, the Defence was served in May 2023 and the Reply in July 2023.

11. In August and September 2023 there was correspondence about requests for disclosure and information which the Claimant had made. In a letter of 15 August 2023, the Claimant's solicitors Pinsent Masons LLP ("***Pinsents***") among other things reiterated certain requests made in a letter of 28 June 2023 for "*Information relating to POS/TMS Connection"*. The letter indicated that the Claimant "*has been further considering the POS/TMS Connection, and the connection between TMS and FusionBanking Essence, and has the following additional questions*". Three of these questions were:

> *"f. In respect of the services offered by Wakalas set out in paragraphs 2.8(a) to (d) of the Defence:*
>
> *i. Could any of these services be provided by Wakalas if the User ID "TMS" was removed from FusionBanking Essence? If so, please describe how.*
>
> *ii. Could any of these services be provided by Wakalas if FusionBanking Essence was taken offline? If so, please describe how."*
>
> *g. If members of CRDB staff who can execute transactions do so directly within FusionBanking Essence using a User ID and password, why do presumably similar transactions performed by Wakalas need to be routed through TMS?"*
>
> *"l. How does CRDB monitor Wakala activity, for example for the purposes of financial reporting, future programme planning, expansion, regulatory requirements, etc? What data does CRDB utilise? How does CRDB link transactions processed to Wakalas?"*

12. CRBD's solicitors, Dentons UK and Middle East LLP ("***Dentons***") replied on 22 September 2023. Their opening paragraph referred to the Claimant's *"questions relating to the POS/TMS connection"*. The answer to question (f) began:

> "No. The interface user for TMS application "TMS" (User of type I in FusionBanking Essence, i.e. interface users)[5] is required for establishing single sign-on (SSO) for the TMS profile using CAS authentication within the bank active directory services. CAS is a SSO protocol for the web, a session that allows an authorised user or application to access the server, resource, or service using a ticketing scheme (TGT) without multiple requests for credentials"

Further details were provided, including a table listing *"some of the interface users in FusionBanking Essence"*. The answer to question (g) began:

> "Bank customers visiting bank branches may be served over the counter by bank staff who execute transactions directly within FusionBanking Essence. Otherwise, customers may access banking services via bank alternative channels (channels that allow customers to access banking services without physically visiting a traditional brick-and-mortar bank branch) such as ATMs, banking agents (TMS / CRDB Wakala), Merchant POS in retail stores etc., or through digital channels (online platforms and technologies that enable customers to access banking services and perform transactions through the internet and electronic devices) such as mobile banking app (Simbanking), and internet banking."

The answer to question (l) was:-

> "Transactions that are processed in FusionBanking Essence are initiated by:
>
> □ channels such as ATM and internet banking.
>
> □ interfaced FusionBanking Essence applications such as Branch Teller, SAP, TMS, BankWorld (ATMS), Sparrow (POS), etc.; and
>
> □ UXP screens of FusionBanking Essence (for example Bank Posting, business processes in forex, and lending).
>
> Therefore, transactions in FusionBanking Essence are monitored through the channels from which the transaction originated (UBCHANNELID). Transactions processed through CRDB's Wakalas are posted under UBCHANNELID "TMS", as noted above.
>
> The system channels posted to FBE along with their channel description are as follows: …"

followed by a table which included an entry for *"ESB Enterprise Bus Service"* (sic.).

13. The Claimant complains that the answers to questions (f), (g) and (l) did not mention NABS, albeit the answer to question l did mention ESB (Enterprise Service Bus) which is linked to NABS as one of the system channels posted to FBE. However, I do not think there is anything in this point, for two reasons. First, the focus of all the questions and the answers was the TMS system, and the Claimant accepts that it did not in terms ask whether Wakalas were able to gain access to FBE using a system other than TMS. Secondly, as explained below, the position regarding NABS was stated in clear terms in communications beginning in February 2024, so the answers given in September 2023 were in that respect water under the bridge.

14. At the CMC on 3 November 2023, the court directed the parties to try to agree a schedule of technical facts to avoid (if possible) the need for extended disclosure relating to the nature of CRDB's IT systems. The Claimant produced the first draft schedule in January 2024, limited in scope to the FH App and TMS, with its expert's assistance, running to 9 pages.

15. On 27 February 2024, CRDB provided the Claimant with its own Draft Schedule of Agreed Technical Facts ("***DSATF1***"). Paragraph 17 of this document said:

> **"G. New Agency Banking System**
>
> 17. This is a system provided to CRDB by Panamax Inc, a supplier of banking IT solutions that is still in pilot phase since May 2022. It comprises a back-end server that connects with ESB (WS02) and an App that can be installed on a Smartphone or a Wakala POS Terminal. It allows a similar range of transactions to be carried out as the FH App, except that

> transactions requiring a customer card cannot be undertaken when using the smartphone App since the smartphone has no card reader. A Wakala can now choose whether to use the FH App or the New Agency Banking System App."

Section VII was as follows:

> **"VII. NEW AGENCY BANKING SYSTEM**
>
> 77. This is a new system whose implementation is planned to replace the current system that uses TMS and FH App. At present, while the new system is in the pilot phase, the two systems are being operated in parallel by Wakalas, who can choose which system to use. The New Agency Banking System can be used either via a smartphone App or via an App on the Wakala POS Terminal. The New Agency Banking System differs from the FH App in the following respects:
>
> 77.1. Wakalas log in to the App using their user ID and a PIN (plus a User ID for the initial login);
>
> 77.2. The New Agency Banking system does not interface with TMS but connects to its own designated back-end system. The Wakala POS Terminals connect to this via the private APN though the mobile phone network. The smartphone App is able to connect via Wi-Fi or the Internet. The New Agency Banking System back-end posts transactions to the ESB (WS02), which is interfaced with FBE via the FBE API.
>
> 78. The smartphone App can be used to perform similar types of transaction as could be performed through the Wakala POS Terminal, although it is limited to transactions not requiring a customer card.
>
> 79. The New Agency Banking System also provides functionality related to the management of the Wakala business."
>
> (my emphasis)

16. The Claimant suggests that the information quoted above did not put it on notice of the position regarding NABS, because it was part of a 50-page document containing a great deal of information which the Claimant considered to be irrelevant. It is submitted that the Claimant read the document *"in the belief that the sole means by which Wakala transactions were processed in FBE was via TMS"*. The Claimant's evidence does not go that far: rather, it is said that the information was *"not sufficient for Finastra or its expert to appreciate the relevance of NABS at that stage"*. However, objectively speaking, the information (including in particular the passages I have underlined above) made clear that NABS was already in use by Wakalas as an alternative to TMS, and

that it had an indirect link with FBE. The Claimant was clearly put on notice of the position, and could have made further enquiries if necessary.

17. Instead, however, the Claimant took the position that irrelevant material had been included in DSATF1. CRDB asked the Claimant to agree to parts of DSATF1, which the Claimant declined to do, and on 8 March 2024 the Claimant rejected DSAFT1 on the grounds that it contained irrelevant material and the Claimant could not be expected to agree it without more information. Dentons responded on 13 March 2024 saying *inter alia:*

> "5 CRDB does take issue with the draft Technical Schedule provided by you on 11 January 2024. That draft was not a technical document but provided a high-level synopsis of one of CRDB's IT systems. Further, in certain respects, the language used in that document was vague and/or contentious. Put simply, this was not the form of document that we consider the Court had in mind at the Case Management Conference on 3 November 2023 and we do not consider that it materially advanced the presentation or understanding of the systems beyond what is set out in the parties' pleaded statements of case, particularly our client's Amended Defence.
>
> 6 Together with our client, we have spent a considerable amount of time preparing an accurate and detailed document, which we consider meets the objective of the Technical Schedule contemplated by the Court. In light of such work, we do not consider there is any merit in revisiting your old draft now. We fully accept that there may be aspects of CRDB's IT systems we have detailed that your client is unaware of. To the extent that you require further confirmation and/or clarification in that regard, we are very willing to provide that.
>
> 7 In relation to the scope of our client's draft Technical Schedule, we have sought to be comprehensive because it is necessary and useful for the Court to have regard to the entire IT ecosystem in which TMS and the Wakala POS Terminals operate in order to avoid any misleading impression generated by focus on particular aspects of it. Some of this is covered in CRDB's Amended Defence, we refer to paragraphs 2.4 and 2.9 of the Amended Defence, for example. For the avoidance of any doubt, CRDB does not intend to amend its pleaded Amended Defence in relation to the technical aspects of CRDB's IT systems, albeit we and our client are keeping under review the desirability of any other amendments more generally."
>
> (my emphasis)

Once again, as the passages I have underlined make clear, the Claimant had a further opportunity to seek further information about the NABS system which, in the February 2024 document, it had been told was now in use by Wakalas alongside TMS.

18. On 19 March 2024, the Claimant served a Notice to Admit Facts referenced to parts of the Claimant's own proposed draft schedule of technical facts.

19. On 5 April 2024, CRBD served a shorter draft schedule ("***DSAFT2***"), which among other things omitted the section on NABS. On the same day, CRDB provided a response to the Claimant's Notice to Admit. The response contained language making clear that Wakala transactions were not processed solely through TMS; that Wakalas could process certain transactions on smartphones rather than the POS terminal; and that the FH App was not the only app installed on the POS terminals:

> "14. As to paragraph 12:
>
> …
>
> 14.3. It is denied that all Wakala-related transactions are processed through TMS, although all transactions inputted via the FH App on a Wakala POS Terminal are processed through TMS.
>
> …
>
> 15. As to paragraph 13:
>
> …
>
> 15.2. It is denied that all Wakala-related transactions are processed through TMS, although all transactions inputted via the FH App on a Wakala POS Terminal are processed through TMS.
>
> 16. As to paragraph 14:
>
> …
>
> 16.2. The second sentence is denied. Wakalas are now able to process certain transactions using an app downloaded on a smartphone.
>
> 17. As to paragraph 15:
>
> 17.1. The first sentence is admitted. For the avoidance of doubt, it is denied that the FH App is the only app installed on a Wakala POS Terminal.
>
> …"

Wakalas were able to access NABS using a smartphone.

20. On 12 April 2024, the Claimant complained that DSATF2 still contained irrelevant information, and made Model C disclosure requests for documents relating to the connections between the FH App and TMS and FBE (only).

21. In May 2024, CRDB provided a draft Re-Amended Defence and Counterclaim to the Claimant. New paragraph 1.6 (in both the draft and the final version) stated explicitly that *"This Defence addresses and is confined solely to the use by Wakalas of the FahariHuduma App (as defined below)".* As part of a letter dated 19 June 2024, the Claimant queried the purpose of this particular amendment. In response, CRDB on 30 June 2024 said:

> "The paragraph reflects the fact that the FH App is not the only application on the Wakala POS terminal."

22. The final Re-Amended Defence and Counterclaim was filed on 8 July 2024. It contained at Annex A CRBD's revised version of the Technical Schedule, based on DSATF2 and confined to the FH App and TMS. It included two passages referring to the use of TMS in the present tense. As CRBD accepts, that was incorrect because (as indicated below) TMS had been decommissioned in June 2024. The inaccuracy appears to have arisen because the document was drafted in May while TMS remained operational but not updated.

23. Over the ensuing months, CRDB provided disclosure, including in September 2024 logs of transactions from NABS, disclosed pursuant to CRDB's disclosure obligations. Those were presaged by a passage in a Dentons letter of 21 June 2024 saying:

> "CRDB has identified certain other logs and reports, beyond those being disclosed pursuant to Issues 4 and 5, which it considers it must disclose pursuant to its obligations. We are in the process of arranging extraction of these additional logs and reports and CRDB will disclose those as soon as it in a position to do so." (§ 3.3(b))

In response to an enquiry about what these additional logs were and why they were relevant, Dentons as part of a response on 16 September 2024 said:

> "Further to paragraph 3.3(b) of our letter dated 21 June 2024, our client is now in a position to disclose the certain other logs and reports. Those logs and reports relate to the following systems: Fast Account Opening (FAO), TellerPortal and New Agency Banking (NAB) (together, the Further Logs and Reports). Annex A to this letter sets out the names of the Further Logs and Reports, a brief description of their function, and the time period for which they have been extracted. We are investigating with our client whether data dictionaries can be prepared.
>
> Without waiving privilege, Dentons was not aware of the nature of the Further Logs and Reports when preparing the initial list of logs and reports. In disclosing the Further Logs and Reports our client has had regard to all its obligations under CPR PD57AD. To the extent that your client considers such documents irrelevant, it can simply ignore them."

Dentons provided brief explanations of what each log contained, including as follows:

> "CRDBELITE_TENGINE.TBLTransactionHistory
>
> The table contains transaction and non-transaction requests processed in the new agent banking system (known as the CRDB Wakala System), such as check balance, login, cash withdrawal, bills payment etc."
>
> "CRDBELITE_ADMIN.tblmservice
>
> The table stores information about services consumed by new agency banking application such as cash deposit, cash withdrawal, bills payment, Airtime top up, Government bills payment, commission disbursement, agent account creation service etc."

24. The Claimant submits that the relevance of the NABS logs would not have been clear to it even at this stage. I do not accept that. The February 2024 document quoted above made clear the relevance of NABS, and the communications referred to in §§ 17, 19 and 21 above served as reminders that there were more connections available to the Wakalas than the TMS system. The explanations referred to in § 23 were explicit about the types of activity the Wakalas were conducting using NABS. The logs themselves were provided on 20 September 2024 and referred to in a disclosure certificate dated 4 October 2024.

25. By a letter dated 27 September 2024, the Claimant made a Part 18 Request for Further Information which included a request as to whether Wakalas could perform transactions without a POS terminal, seeking confirmation of whether this could be done via NABS and asking for appropriate logs.

26. CRBD answered the Request on 25 October 2024, pointing out that the Claimant's pleaded case was limited to TMS and did not include NABS, but that NABS had already been explained in DSAFT1 (§ 2). Paragraph 8 of the response went on to say:

> "8. The Claimant is not entitled to the information sought. The Requests do not relate to a matter which is in dispute in the proceedings, the Claimant's case being limited to the use by the Defendant of TMS (as defined in the parties' statements of case). Without prejudice to the illegitimacy of the Request:
>
> 8.1. A Wakala that has been approved by the Bank of Tanzania but not yet issued and set up with a Wakala POS Terminal will not be able to facilitate transactions on behalf of customers. Further, a Wakala is able to operate more than one Wakala POS Terminal, such that there is not a direct correlation between the number of Wakalas and the number of Wakala POS Terminals. No reliance should therefore be placed on the Claimant's figure of 11,612. A Wakala is unable to facilitate transactions without either a Wakala POS Terminal, or the New Agency Banking System smartphone app. For the avoidance of any doubt, a Wakala can use the

> New Agency Banking System through their Wakala POS Terminal.
>
> 8.2. A Wakala is able to perform transactions through the New Agency Banking System. The relevant information has been provided in the Draft Schedule. Principally a Wakala will use a Wakala POS Terminal for the New Agency Banking System, although some (but not all) functionality is available through the New Agency Banking System smartphone app. The Defendant has disclosed logs and reports relating to the New Agency Banking System on 20 September 2024, as detailed in its Disclosure Certificate dated 4 October 2024.
>
> 8.3. A Wakala is unable to facilitate customer transactions without either a Wakala POS Terminal, or the New Agency Banking System smartphone app."

27. On 29 October 2024, CRDB told the Claimant that TMS had been decommissioned. The precise date was stated as 23 May 2024 in a letter of 11 November 2024, but this was corrected to 26 June 2024 in a letter of 11 December 2024.

28. In a letter of 27 November 2024, Pinsents referred to Dentons' statement in their 16 September 2024 response – two months earlier – about the possibility of providing data dictionaries:

> **"New Agency Banking Logs and Reports**
>
> 1. Your 16 September letter said that you were investigating whether data dictionaries could be prepared for the further logs and reports produced on 20 September, including those related to the New Agency Banking ("NAB") system. Finastra's experts are having difficulty in interpreting what each of the fields in the NAB logs and reports relate to, for example there appear to be multiple fields containing user identifiers, but it is not possible to determine which of these are relevant.
>
> 2. We therefore ask that CRDB provide a description, including any variations, of each of the fields, as well as the status codes and flags used in the fields, that appear in the NAB logs and reports as soon as possible. We understand that this is a relatively newly developed system and so assume that this information must be readily available. We also assume that CRDB's experts will have access to such explanations."

29. On 11 December 2024, Dentons replied:

> "2 We note the reference in your letter to your experts (plural) having trouble interpreting the data that has been disclosed in relation to New Agency Banking (NAB) as they seek "to confidently analyse the log data and fully understand the impact of the movement away from TMS". Given that NAB is not

> relevant to issues of liability (your client's claim being limited to the FH App and the Transaction Management System (TMS) as an alleged single access point), we understand the analysis of the NAB data is relevant only to issues of quantum and then only insofar as such data explains usage of the FH App. For the avoidance of any doubt, our expert is also analysing the NAB data to better understand the historical levels of concurrency via the FH App and TMS.
>
> **NAB logs and extracts**
>
> 3 We enclose at Appendix A the data dictionaries provided by our client for the following NAB system logs and extracts."

The same letter stated that from May 2022, around 8,000 Wakalas had been entitled to use the NABS provided that they had had NABS installed on their POS terminal or had visited a CRDB branch to have the smartphone app installed.

30. Also on 11 December 2024, the parties exchanged witness statements.

31. On 24 December 2024, the Claimant for the first time intimated an intention to seek permission to amend its case, via a paragraph of a draft witness statement of its solicitor in support of a proposed application for specific disclosure.

32. The first round of experts' reports was served on 15 January 2025. The Claimant's expert, Mr Eastwood, as part of his report sought to calculate figures for the usage of NABS on the assumption that the system worked in the same way as the FH App.

33. On 17 January 2025, the Claimant provided CRDB with a draft of its application to amend. CRDB responded on 24 January 2025, opposing the NABS amendments (and amendments in relation to another system, FAO, which CRDB understood the Claimant to be seeking to make) but confirming agreement to other amendments.

34. The Claimant issued its application to amend on 29 January 2025.

35. On 3 February 2025, a joint experts' statement was filed.

36. Supplemental experts' reports were filed on 14 February 2025.

37. Trial bundles were due on 24 February 2025 and skeleton arguments are due in early April 2025.

(C) THE PROPOSED AMENDMENT

38. The contested proposed amendment would alter §§ 21-23 and 28 of the body of the Claimant's Amended Particulars of Claim as follows:

> "21. Wakalas connect to the CBS [Core Banking System] via <u>either of the following means</u>:
>
> 21.1 a physical Point of Sale terminal which connects to CRDB's digital Transaction Management System ("TMS").

> The TMS in turn connects to the CBS via a single access point. The TMS was decommissioned in respect of Wakala usage on 26 June 2024.
>
> 21.2 the New Agency Banking System ("NABS"), which connects to the CBS via a single access point. A Wakala accesses NABS either via a smartphone app or via an app installed on a physical Point of Sale terminal. NABS was made available to Wakalas as a pilot in May 2022 and has since been fully rolled out by CRDB over 2 years. Since 26 June 2024 NABS has been the only means by which Wakalas can carry out their banking activities.
>
> 22. While there are multiple connections between Wakala Point of Sale terminals or smartphones and each of the TMS and NABS, reflecting the actual number of Wakalas providing services underpinned by the CBS at any one time, there ~~is~~ was only one connection between the TMS and the CBS and only one connection between the NABS and the CBS.
>
> 23. This amounts to a breach of the multiplexing prohibition, in that the TMS and the New Agency Banking System each provide~~s~~ a single point of access to the Software for multiple end users.
>
> …
>
> 28. Finastra's best estimate of its loss under the multiplexing head is between USD 23,280,000.00 and USD 46,697,000.00 ~~USD 23,065,912.30~~. The calculations and assumptions supporting this estimate are set out in the Part B of the Confidential Schedule of Loss and the expert report of Mr. David Eastwood dated 15 January 2025 filed on behalf of the Claimant."

39. Annex B to the existing Particulars of Claim deals with the multiplexing claim in Part B, which states:

> **"Part B: Multiplexing**
>
> 10. So far as relevant, the FusionBanking Essence Software is licensed on a Concurrent User basis (see paragraph 10.2 of the Particulars of Claim).
>
> 11. Finastra can license any number of Concurrent Users for FusionBanking Essence, down to a single user.
>
> 12. As CRDB agreed the Concurrent User basis for licensing the FusionBanking Essence Software, each module of this program is licensed on that basis. That means CRDB must have the requisite number of Concurrent User licences for each module in

> the program. Additional Concurrent User licences are charged as an increase in the Annual Fee.
>
> 13. Additional Concurrent User licences, like a transaction volume upgrade, apply in the year in which they are purchased and each remaining year of the Licence Term.
>
> 14. The table below sets out the numerical assumptions on which Finastra relies in calculating the increase in the Annual Fee which was lost as a result of CRDB's breach of the multiplexing prohibition. …"

That is followed by a series of assumptions, and then a table setting out the figures leading to the claimed additional fee of US$23,065,912.30.

40. The proposed amended Annex B Part B would replace § 14, the list of assumptions and the table with the following text:

> "For the reasons set out in the expert report of Mr. David Eastwood dated 15 January 2025, Finastra's best estimate of the additional Annual Fee which it lost as a result of CRDB's breach of the multiplexing prohibition is between USD 23,280,000.00 and USD 46,697,000.00, depending on the assumption made regarding timeout duration, which is explained in detail in the expert report of Mr. Eastwood."

41. The Claimant's proposed timetable, provided in submissions by way of update to the draft order accompanying the application to amend, would appear to be as follows:

i) The Claimant to serve its Amended Particulars of Claim by 24 February 2025;

ii) CRBD to make consequential amendments to its Re-Amended Defence and Counterclaim by 28 February (or 7 March) 2025;

iii) CRBD to provide additional Extended Disclosure by 28 February 2025 (14 March 2025, according to the Claimant's previous proposal); and

iv) Experts' further reports to be served by 7 March 2025 (21 March according to the Claimant's previous proposal) i.e. 7 days after the further Extended Disclosure.

42. The list of proposed further Extended Disclosure documents appended to the draft order accompanying the application was:

> "i. Technical user manuals for NABS (or similar).
>
> ii. Documents recording the process by which users are added to, and can be identified within, NABS.
>
> iii. Architecture diagrams showing detailed data flows into and out of NAB, including between NABS and TMS.

> iv. Documents recording the process by which Wakalas log onto NABS, execute transactions and log off again.
>
> v. Wakala guides relating to NABS."

43. Another version of the appendix to the draft order, provided on 19 February 2025, states the list in these terms:

> "(i) Technical user manual for NABS (the NABS equivalent of document CRDB_009093 already disclosed by CRDB in relation to TMS).
>
> (ii) High-level architecture diagram of NABS showing the systems with which it integrates (as would have been provided by CRDB to the developer or vice versa).
>
> (iii) Documents recording the process by which Wakalas log onto NABS, authorize and execute transactions and log off again.
>
> (iv) Confirmation that NABS transactions are recorded in FusionBanking Essence under an interface user ID, like TMS.
>
> (v) Wakala guide relating to NABS (the NABS equivalent of document CRDB_009083 already disclosed by CRDB in relation to TMS)."

44. The Claimant's solicitors' reply witness statement, also dated 19 February 2025, in support of the application said Mr Eastwood had indicated that the Model C disclosure requests in relation to NABS could be made more specific as follows:

> "(i) Technical user manual for NABS (the NABS equivalent of document CRDB_009093 already disclosed by CRDB in relation to TMS).
>
> (ii) Not required.
>
> (iii) High-level architecture diagram of NABS showing the systems with which it integrates (as would have been provided by CRDB to the developer or vice versa).
>
> (iv) Documents recording the process by which Wakalas log onto NABS, authorise and execute transactions and log off again. In particular, Mr Eastwood would expect there to be a few documents from Panamax on this. He has pointed out that he cannot see these activities in the NABS logs already disclosed and he infers that there may therefore be one or possibly two additional logs that record the initial authentication of a Wakala initiating a transaction and any customer authorisation.
>
> (v) Confirmation that NABS transactions are recorded in FusionBanking Essence under an interface user ID, like TMS.

(vi) Wakala guide relating to NABS (the NABS equivalent of document CRDB_009083 already disclosed by CRDB in relation to TMS)."

(D) PRINCIPLES

45. The applicable principles were not disputed between the parties. They have been recently summarised in *Invest Bank P.S.C. v Ahmad Mohammad El-Husseini* [2024] EWHC 1235 (Comm) at [24]-[29] and [46]-[55], *Município De v BHP Group (UK) Limited* [2024] EWHC 23 (TCC) at [14]-[16] and *Airwave Solutions v Secretary of State for the Home Department* [2025] EWHC 108 (TCC) at [38]-[54]. The following distillation is sufficient for the purposes of the present case:-

i) Under CPR 17.1(2)(b), the court has discretion to allow or refuse the proposed amendments. In exercising its discretion, the overriding objective is of the greatest importance. Under CPR 1.1(2), dealing with cases justly and at proportionate cost means ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence; saving expense; ensuring the case is dealt with expeditiously and fairly; and allocating to each case no more than a fair share of the court's limited resources.

ii) The court must strike a balance between the interests of the applicant and those of the other party and other court users, having regard to the injustice if the amendments are refused and the injustice if the amendments are allowed.

iii) It is relevant to consider to what extent the case sought to be advanced by the amendment is one the parties have already been considering. However, the mere fact that the issue has received some attention in the preparation of the case and the experts' reports is not necessarily sufficient to make permission to amend appropriate.

iv) Consideration of whether the amendments should be allowed takes place as at the date of the hearing. There is no reason for a responding party to take steps to meet the case advanced in a contested amended pleading for which permission has not been granted.

v) The lateness of the amendment is a relevant factor. Lateness is a relative concept. An amendment is late if it could have been advanced earlier, or involves a duplication of cost and effort, or if it requires the opposing party to revisit any of the significant steps in the litigation (e.g. disclosure, witness statements and expert reports). There will need to be a fair appreciation of the consequences in terms of the work wasted and consequential work to be done if the amendment were to be allowed.

vi) An application to make substantive amendments in the lead up to trial is a late amendment, and if it threatens the trial date, it is a very late amendment. There is a heavy burden on the applicant to justify a very late amendment. Parties have a legitimate expectation that trial dates will be met and not adjourned without a good reason. The applicant must explain the lateness of the amendment and have a good reason or explanation for any delay. The prejudice to a respondent

by virtue of the disruption and additional pressure on parties and lawyers and experts in the run up to trial is a relevant factor. If the amendment would necessitate the adjournment of the trial that may be an overwhelming reason to refuse permission. By contrast, where the prejudice to an applicant in not being able to advance the amended case is attributable to their own conduct, that is a much less important factor.

vii) In considering the impact on the trial, the court is not concerned just with the ability to complete all necessary consequential steps but also with the impact on the overall ability to prepare properly for trial. Additional pressure on a party preparing in the intense run up period to trial is a substantial reason not to allow amendments.

viii) Where a very late application to amend is made, the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to the applicant, the respondent and other court users require the applicant to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission.

ix) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused.

(E) APPLICATION

46. It is clear that the amendment, if allowed, would require the parties to revisit earlier steps in the litigation process: specifically, disclosure, witness statements (probably) and expert evidence. Moreover, it would require these steps to be revisited during an extremely compressed period of time, with the start of trial only six weeks away and the date for lodging of trial bundles having already occurred on 24 February 2025 (one working day after the hearing of the application to amend).

47. Further, the Claimants' proposed timetable:

i) would require CRBD to plead to the new case on NABS within at most 11 days of the Amended Particulars of Claim;

ii) would require CRBD to plead simultaneously with, or only a few days after, the further Extended Disclosure;

iii) makes the highly optimistic assumption that the further Extended Disclosure could be produced within 7 days of the hearing;

iv) makes no provision for any further witness evidence about NABS (over and above a short summary given in the witness statement for trial of Mr Daudi of CRDB);

v) makes no provision, in relation to the new NABS material, for the experts to meet, produce a joint memorandum or produce supplemental reports;

vi) as previously framed (based on the original draft order read with the Claimants' letter of 29 January 2025) would seemingly have required the experts to report only 7 days after the further Extended Disclosure, and on a date (21 March) only about 10 days before skeleton arguments for trial became due; and

vii) as revised at the hearing, would still require the experts to report only 7 days after the further Extended Disclosure, even assuming that such disclosure could be produced within 7 days of the hearing.

48. The Claimant suggested that provision of the further Extended Disclosure sought would be simple, its requests being confined to a short list of further documents. However, there are at least three potential difficulties with this.

49. First, Mr Leyland of CRDB's solicitors points out in his responsive witness statement dated 12 February 2025:

> "There is an additional complication that, whereas TMS was a system that the Defendant built, NABS was developed by a third party. It may take additional time to seek the third party's cooperation, identify relevant individuals and/or consult with those individuals to fully understand the nature and operation of the systems. None of this work has begun and nor should it until the Application has been ruled on. Further, I do not know who was responsible for creating the WS02 ESB (the system that NABS interfaces with, and which is itself interfaced with FBE). There is a tendency on the part of the Claimant (perhaps the result of understandable ignorance on its part) to speak of NABS as though it was a single system. As DSATF1 made clear, NABS comprises an app, a back-end system, which connects to an 'enterprise service bus' WS02 ESB that itself is connected with FBE. It may therefore be necessary to liaise with more than one third party about these component systems."

50. Secondly, because documents would have to be sought from third parties, it cannot be assumed either that they will necessarily be willing to provide them – for example, a third party software developer may regard a 'high level architectural diagram' as part of its own proprietary information – or that they will be able and willing to do so within 7 days. The Claimant points out that CRBD was able to obtain some information in relation to NABS from one of the third parties involved, Panamax Inc., within two weeks over the Christmas period. However, it does not follow that the Claimant's list of further documents could or would be produced within a similar period, still less a period of a week.

51. Thirdly, it is clear from the Claimant's evidence quoted in § 44 above that an important part of the information the experts would need, in order to assess concurrency of use, would be logs recording the Wakalas' use of the NAB system. This is no small matter. As an illustration, Mr Eastwood in his 15 January 2025 report stated that the TMS log for March 2024 had 27,039,650 rows of data recording every interaction between a

Wakala and TMS and between TMS and other systems, including FBE, during that period (§ 5.90).

52. Counsel for the Claimant responded that the logs already disclosed comprised some 180 million records, and the experts already had the infrastructure necessary to process such volumes of data. Thus Mr Britton in his report said:

> "Even with the limitations in the data provided set out in the relevant subsections below, the volumes of data that have been provided are far too large to be practical to analyse using Microsoft Excel, Microsoft Access or equivalent tools from other sources. The FBE Transactional Journal extract has, for example, over 180 million records. I have therefore made use of a database management system that is capable of processing larger amounts of data in order to pre-process the data extracts. The database management system I have chosen is called "MySQL", which an open source "relational" database management product that is freely available and essentially the same as that used to support many commercial systems." (§ 214)

However, the amendment would still require CRBD's expert (a) to gain a secure understanding of how the NABS works, including as regards concurrency of use and (b) to perform new data analysis, in the light of that understanding, on a large volume of data.

53. As to (a) above (how NABS works), it is true that section VII of CRBD's February 2024 document referred to earlier, and Mr Daudi's witness statement for trial, provide a high level summary of the operation of the NAB system. However, the expert issues are complex. Expert issue (c) is:

> "If Wakalas are Concurrent Users within the meaning of that term under the Licence Schedule, the extent, if any, to which it is possible to determine whether the 2,000 Concurrent User licence was exceeded in the period (a) from 31 August 2017 to the date when proceedings were issued and (b) from the date proceedings were issued to the date of trial. In particular:
>
> i. What are the means and/or modelling by which it is possible to determine the same?
>
> ii. With what results?
>
> iii. With what degree of accuracy and/or reliability?"

Mr Britton in his report goes on to address that issue using two methodologies, based on his understanding of how the TMS system works.

54. Mr Leyland explains in his witness statement that:

> "[44] (d) …Mr Britton's knowledge of NABS is limited to Section VII in DSATF1. Further, Mr Britton has confirmed to

me that it is not possible for him to reverse engineer how NABS works from the NABS-related data that has been provided, because the data provided to date comprises lists of users and transactions (which amount to point in time activity). This is in marked contrast to the data that has been provided in respect of TMS, which allow the experts to model and count Wakala sessions. Mr Eastwood has rejected any approach to concurrency that looks at transactions. Beyond this, neither expert has information as to the nature of interactions between the Wakala and POS terminal/smartphone (which is an entirely novel feature of NABS), or POS terminal/smartphone and the backend system, or between the backend system and the WS02 ESB, or between WS02 ESB and FBE, that might allow him to model a proxy for when a Wakala using NABS should be counted as a concurrent user (assuming they are to be treated as concurrent users at all), nor do they have the full set of data logs that might become available if NABS became a pleaded issue.

(e) The reality is that both parties' experts, and ultimately the Court, require a level of detail before they can begin to consider NABS. The information would need to be more detailed than the short Section VII, if the Application were to be allowed, to allow the Court a full understanding of NABS. Mr Eastwood has confirmed the inadequacy of the description of NABS in DSATF1 in his first report. It is plainly sensible for all systems to be covered the Technical Schedule. …

(f) … To date, in respect of the FH App/TMS claim, the experts have had the benefit of the Technical Schedule, supported by a Statement of Truth on behalf of the Defendant and corroborating witness statements.

(g) Mr Eastwood relies heavily on the Technical Schedule in his report, commenting that *"it does provide a useful overview of the main elements of the technical landscape and the way in which the transactions take place"*. He relies on the information in the Technical Schedule in paragraphs 4.27, 5.37, 5.38, 5.64-5.65, 5.73-5.99 and 8.7. He also engages closely with areas in which he considers it may be incorrect, which suggests the importance of the document's accuracy and, therefore, the importance of ensuring it is accurate vis-à-vis NABS. By way of illustration, Mr Eastwood assumes from the Technical Schedule, that tokens expire based on the time of the transaction rather than the time they are granted. It appears this is an error based on an inaccurate summary of paragraph 5.38 of the Technical Schedule.

(h) The importance of amending the Technical Schedule to include NABS is evidenced by the inability of Mr Eastwood to set out any analysis on NABS. His report assumes that it operates in the same way as the FH App, although it is clear that he is expecting to revise his analysis once he gains a full

> understanding of the NABS system. That process, as a matter of logic and fairness, has to happen before the experts begin their analysis, and not, as the Claimant suggests, simultaneously while the experts are preparing further reports.
>
> (i) … the impact of the NABS claim is alleged to increase the quantum significantly. It is therefore important that the Court has full sight of the relevant technical matters and the Defendant has time to consider, with its expert, and plead back." (footnotes omitted)

55. That evidence is supported by the fact that Mr Eastwood's report makes clear that he has had to make a number of unverified assumptions in his consideration to date of NABS use. He says:

> "1.9 There are important gaps in the information which has been made available to me, either because it has not been able to be produced or because it does not exist at all or in an accessible form. These gaps include, for example:
>
> …
>
> (3) Information as to the operation of the New Agency Banking System ("NABS") which progressively replaced TMS from May 2022, and entirely superseded TMS from June 2024.
>
> …
>
> 2.4 The architecture of the IT systems supporting CRDB's Wakala network is described in a Technical Schedule attached to the Re-Amended Statement of Defence and Counterclaim. Whilst in my view the Technical Schedule is helpful as far as it goes, there are important omissions and inaccuracies. These include:
>
> (1) The Technical Schedule is incomplete and omits significant Wakala activity outside TMS which affects the level of concurrent use of FBE, in particular the use of NABS.
>
> …
>
> 2.10 The agency banking channel of TMS was decommissioned in June 2024 and all Wakalas now conduct CRDB's agency business through NABS. This switchover took place progressively from May 2022 to June 2024. Only the briefest of information has been provided in relation to this system and this is not sufficient for me to properly understand how, if at all, this differs from TMS. I have therefore had to assume that it operates in essentially the same way and that concurrent usage of FBE by

Wakalas via NABS will have the same characteristics as concurrent usage via TMS.

…

7.1 In my First Report I estimate the concurrent use of FBE by Wakalas via NABS. The information available on the way in which NABS operates was, and remains, very limited. I therefore make an assumption that NABS operated in broadly the same way as TMS operated in March 2024 (i.e. with a 5-minute timeout). I continue to make the same assumption in this Supplemental Report. I consider this to be a reasonable assumption for the following reasons:

(1) CRDB was clearly comparing the way in which the two systems operated when considering changes to authentication and timeout processes in December 2023;

(2) CRDB would seek to maintain a consistent customer experience and, as best it could, a consistent experience for Wakalas in order to minimise the time and costs of migrating Wakalas to NABS, especially with an extended period when both systems were operating; and

(3) The logs suggest that transactions are processed in a similar way with comparable records retained.

7.2 There are however significant differences between TMS and NABS which might affect the extent of concurrency but which I do not have the information to assess. These are:

(1) The greater variety of transactions apparently available via NABS. This appears because there are 168 active services provided by NABS59 and 29 categories of transactions (including administrative ones) in TMS. It may however be that that these are simply different categorisations of essentially the same services (which are largely defined by regulation).

(2) Potential use of NABS by CRDB staff in addition to Wakalas. Some of the additional transaction types appear to relate to management of Wakala activity and it seems likely that some CRDB staff are able to log on to NABS. Whether they then access FBE and therefore ought to be considered for concurrency is unclear. I assume for present purposes that if they do the extent of this use is limited in comparison to use by Wakalas.

…

7.6 As with the TMS Log, the NABS data does not appear to directly record the start and finish of a session. I have no information as to the log-in process for NABS other than a reference in passing in an email concerning adjustments to the timeout in TMS. This states:

> "After conducting a thorough review, we have identified that the newly implemented agency banking solution follows a similar approach in utilizing a username (as agent code) and a password (as PIN)."

7.7 I assume therefore that a session will commence on NABS with entry of a password and PIN, equivalent to the POS Terminal initialisation step in TMS. I expect that this will take the same length of time that initialisation takes, roughly 10-20 seconds.

…

7.17 For the purposes of my calculations of overall concurrency, and therefore quantum, I take the three-minute duration as the most appropriate estimate because it is consistent with the three-minute transaction cycle time I propose in Section 6 above in considering the average number of transactions that could be dealt with by a Wakala in an hour. I do not apply a timeout in the same way that I did for TMS because I do not know that NABS works in that way. An overall duration of three minutes is therefore shorter than a TMS session which ends in a timeout. If further information on NABS becomes available I may need to adjust this assumption.

…

Estimating concurrency

9.8 Given the available information, I have estimated concurrency via NABS by comparing the number of Wakalas active on TMS and on NABS and using this to scale my estimate of the FBE concurrency via TMS. This assumes that the behaviour of Wakalas on the new system is the same as on TMS and therefore that Wakalas are logged-on for the same proportion of their time whichever system they use.

9.9 This assumption may well be incorrect because of, for example, additional functionality in the new system. I note in particular that the new system enables the Wakalas to conduct account management activity which may require them to be logged in to FBE. NABS has 168 different active transaction types. This is significantly more than the 29 transaction types in TMS."

(footnotes omitted)

56. In response, the Claimant's solicitor states that Mr Eastwood has said that, as regards the operation of the NABS system, he requires to know *"only a couple of things"*:

> "a) First, how NABS interacts with FusionBanking Essence and, in particular, whether it (or the EBS Bus [*sic.*] which it uses) authenticates to FBE in the same way as TMS, namely through a single interface ID (a process described in a few lines of Mr Daudi's statement), at paragraph 25). Mr Eastwood has to date assumed, based on things that CRDB has already said, that it does. Whether that is indeed so should be very straightforward for CRDB to answer, particularly when the description of NABS included in the draft Technical Schedule originally produced by CRDB and described by Dentons as being "accurate and detailed" (CAH2/24), states that NABS "differs from the FH App" in only two respects (CAH2/19).
>
> b) Secondly, for the purposes of assessing how many Wakalas were concurrently using FBE, he requires to know more detail about the manner in which Wakalas authenticate themselves to NABS when they conduct transactions (noting that CRDB has already produced detail of those transactions) and how, if at all, customers authorise those transactions. Mr Eastwood as already started looked at the issue of concurrent usage via NABS. Mr Britton has considered the volume of relevant transactions carried out via NABS and Mr Eastwood has advised that the additional work to convert this analysis into a concurrency analysis is very small (essentially the application of a similar logic to the approach taken in respect of TMS). Again, any additional information required by the experts to complete this analysis ought to be relatively straightforward to obtain.
>
> 12 The technical documentation held on CRDB's behalf by Panamax will no doubt answer these questions. On no view will there need to be the wholesale investigation of the inner workings of the NABS system which Mr Leyland appears to envisage, but, even then, the Panamax documentation will cover those points. There is no reason why Mr Eastwood and Mr Britton could not jointly approach Panamax for answers to appropriate questions in the next few days. Mr Eastwood considers that could be done swiftly and cheaply, and the need for additional disclosure might be avoided entirely as a result."

57. Despite the optimism expressed there, it is evident from these materials considered as a whole that important relevant information about the NABS system is currently lacking. The two differences between TMS and NABS noted in the February 2024 document (quoted earlier) are stated at a high level of generality and leave key questions unanswered, as is evident from Mr Eastwood's report. Consideration would also need to be given, following a closer understanding of the operation of the NABS, to whether/how the defence pleaded in Re-Amended Defence and Counterclaim § 2.11 (to

the effect that there is no licence breach because the relevant end-user is the bank's customer, not the Wakala) applies to the NABS. None of these are matters that have to date had to be considered by CRBD's expert, Mr Britton, who has looked at NABS only to a limited degree and in a different context. The Claimant's assertion that all the missing detail can fairly be obtained from third parties, considered by CRBD with its expert, pleaded to, and covered in supplemental experts' reports (including analysis regarding revisiting of quantities of data in order to quantify the alleged additional claim) within the highly compressed periods of time available between now and the start of trial is in my view wholly unrealistic.

58. Even if it were possible:

i) it would be highly unsatisfactory for a substantial additional claim to be addressed without any opportunity for further witness statements and without the experts having the time, sufficiently in advance of skeleton arguments and trial, to take the usual steps of meeting to consider their provisional conclusions, producing a joint memorandum and serving supplemental reports on points of disagreement; and

ii) the process would in any event place entirely unfair additional burdens on CRBD, its legal team and its expert at a time when they are already occupied with final preparations for trial.

59. Moreover, the Claimant in my view has shown no good reason for having left the proposed amendment so late. The documents summarised in section (B) above indicate that the Claimant was put squarely on notice of the NABS system and its potential relevance as long ago as February 2024, a full year before this application came on for hearing and 11 months before it was issued. Further enquires could and should have been made then, if the Claimant was in a timely fashion going to formulate an additional claim. The subsequent events in summer/autumn 2024 reinforced the relevance of the NAB system, and provided a further opportunity for the Claimant to make any necessary further enquiries and formulate a proposed claim. Given the increasing proximity of trial, it was not acceptable for the Claimant belatedly and gradually to seek to increase its knowledge, and then instruct its expert pre-emptively to seek to quantify the additional claim, before having obtained consent or permission to amend.

60. I have had regard to the potential injustice to the Claimant of refusing permission to amend, though the significance of that factor is diminished by the lack of any good reason for the lateness of the application. The Claimant is to a large degree the author of its own misfortune.

61. To a degree related to the above points, I consider the proposed amendment to the Particulars of Claim to be defective in form. The amendments to §§ 21-23 would allege a breach of the multiplexing prohibition by reason of the use of the NABS. However, there is no explanation of how the NABS, including the ESB, is said to work or of how/to what extent its use breaches the licence. Further, the amendments would remove all the previous assumptions indicating how the alleged multiplexing was identified and assessed, instead substituting a cross-reference to an expert's report. It is not acceptable to seek to plead via an expert's report in this way (see, e.g., *Gladman Commercial Properties v Fisher Hargreaves & Ors* [2013] EWHC 25 (Ch) § 171). Still less is it appropriate to do so in circumstances where, as outlined above, the report in

question (Mr Eastwood's 15 January 2025 report) makes clear that it has made assumptions about NABS that will need to be revisited, in the light of the Extended Disclosure which the Claimant now hopes to obtain. Thus, as CRBD points out, in seeking permission for a third report from Mr Eastwood, the Claimant is in substance proposing a situation where CRBD will not learn the Claimant's pleaded case on causation and loss in relation to NABS until that third report is served: less than a month before the start of trial.

62. Finally, there is no formal application to adjourn the trial. The Claimant in its skeleton argument stated that if the court were to conclude that the trial could not go ahead without the NABS amendments on 7 April 2025, the Claimant "*would reluctantly ask for the trial to be adjourned*". I would not accede to such an application. The events involved, particularly those relevant to the estoppel and rectification arguments, date back to autumn 2017, already more than 7 years ago. Recollections would be bound to have faded further by the time of a relisted trial following the steps that would be necessary in order properly to deal with the NABS issue (following a properly formulated amendment). An adjournment at this late stage would also be inconsistent with CRBD's reasonable expectation of finality, and the interests of other court users. As to the alternative suggestion, floated for the first time in oral submissions, that permission should allowed on the basis that the NABS issues would be heard on a later date, I would nonetheless refuse permission to amend if only on the basis that (as already indicated) the amendment currently proposed is not properly formulated. In any event, it seems highly questionable whether a party should be permitted to make a late/very late amendment, permission for which would otherwise be refused, on the basis that the trial can be followed by a second stage in the litigation and a second trial.

63. For all these reasons, the only just course in my view is to refuse permission to amend, save as regards those amendments which do not concern the NABS and are not contested. I shall hear further submissions in the event of any remaining disagreement in that regard.

(F) CONCLUSION

64. The application for permission to amend is refused. I am grateful for counsel's clear and helpful written and oral submissions.