Neutral Citation Number: [2025] EWHC 1354 (TCC)

Case No: HT-2023-000250

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

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

Date: 4 June 2025

Before:

ADRIAN WILLIAMSON KC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between:

KYNDRYL UK LIMITED	**Claimant**
- and -	
JAGUAR LAND ROVER LIMITED	**Defendant**

- -
- -

Benjamin Pilling KC and Gideon Shirazi (instructed by Stewarts) for the Claimant
Alex Charlton KC and Iain Munro (instructed by Mills and Reeve) for the **Defendant**

Hearing date: 7th May 2025

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JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 4 June 2025 at 10.30.

Adrian Williamson KC:

1. By application dated 20th December 2024, as amended on 5th February 2025 with permission from Roger ter Haar KC given at the CMC on 24 January 2025, the Defendant ("JLR") seeks the following relief against the Claimant ("Kyndryl"):

> *"The Defendant seeks an UNLESS Order requiring the Claimant to provide sufficient and proper Responses to Requests 1-7, 8, 9 and 11-14 of the Defendant's First Request for Further Information dated 25 September 2024 and Requests 1-3, 4-6 and 7.2 of its Second Request for Further Information dated 8 November 2024 (Requests 20-22, 23-25 and 27.2 in the Claimant's Response) (the "Requests"), failing which the claims to which such Requests relate be struck out. The Defendant seeks permission to amend Request 15 of the First RFI to delete the words "of the Variation Agreement". The Defendant seeks an Order under CPR Part 18 requiring the Claimant to provide sufficient and proper Responses to Requests 15-17 of the Defendant's First Request for Further Information dated 25 September 2024 and Requests 9-13 of its Second Request for Further Information dated 8 November 2024 (Requests 36-40 in the Claimant's Response).*

2. This Judgment deals with the application under the following headings:

    a) The nature of the claim;

    b) A brief history of the litigation;

    c) The relevant law;

    d) Requests 1-9 and 11-14;

    e) Requests 15-17 and 27.2;

    f) Requests 20-25;

    g) Requests 36-40;

    h) Conclusions.

A. The nature of the claim

3. As will be further discussed below, this matter was the subject of an extensive interlocutory hearing before Mr David Quest KC, sitting as a Deputy Judge of the High Court, in July 2024.

4. I gratefully adopt his summary of the background:

> "*The parties*
>
> *3. The Claimant is a member of the Kyndryl group, which is in business providing managed IT infrastructure services. The Kyndryl group was spun out of the IBM group in November 2021, taking over IBM's global technology services (GTS) business. In anticipation of the spin-out, that part of the GTS business that was operated by IBM United Kingdom Ltd was transferred to the Claimant by a sale and purchase agreement dated 1 September 2021 (the SPA). The Claimant's case is that it is entitled to bring its claims in the present proceedings as assignee of IBM United Kingdom Ltd pursuant to the SPA.*
>
> *4. The Defendant is a member of the Tata Motors group, which is in business manufacturing automobiles, including under the Jaguar and Land Rover brands. It was formerly a customer of IBM United Kingdom Ltd, which provided it with IT infrastructure services under a long-term Data Centre and Hosting Agreement (the DCHA). The DCHA terminated on 29 October 2021.*
>
> *5. In this judgment, I shall refer to the Claimant as "Kyndryl", the Defendant as "JLR", and IBM United Kingdom Ltd as "IBM".*
>
> ***The claims***
>
> *6. It is not necessary for present purposes to set out the parties' claims and defences in the full detail in which they are pleaded. I take the following summary of Kyndryl's claims from its Particulars of Claim, noting that much of it is disputed by JLR.*
>
> ***The Legacy Environment Claim***
>
> *7. By 2013, JLR's IT infrastructure—including software, servers, network devices, storage and backup devices—had become outdated and increasingly expensive for IBM to host, manage and maintain. In February 2013, IBM presented to JLR two possible ways forward for their commercial relationship. First, JLR could continue using its existing systems, but costs would increase substantially over time. Alternatively, those systems, or parts of them, could be migrated to a virtual multi-customer environment hosted by IBM known as "Flex". That would result in a substantial cost saving, for both IBM and JLR, by reducing the personnel and work required for maintenance of the systems.*

8. *JLR agreed to move forward in accordance with the second proposal. On 30 September 2013, IBM and JLR executed a Change Control Notice (CCN025) under the change control procedure in the DCHA, which I describe further below. CCN025 attached an amended and restated version of the DCHA, including, at schedule A, a statement of the services to be provided by IBM and, at schedule C, a statement of the charges to be paid by JLR. Kyndryl says that those charges were calculated on the assumption that the systems would be migrated to Flex as JLR had agreed.*

9. *JLR engaged Tata Consulting Services, a technology services business within the Tata group, to provide the software services necessary for the migration. However, in about mid-2015, JLR informed IBM that it did not have funding available for Tata Consulting Services to undertake or complete the work. In the event, the migration to Flex did not proceed and IBM continued to maintain the existing, outdated, systems. Anticipated savings from Flex were not achieved; on the contrary, supporting JLR's legacy infrastructure became more burdensome to IBM as time went on.*

10. *JLR's systems included mid-range and mainframe servers. The position in relation to the maintenance of mainframe servers was eventually resolved by a further change to the DCHA, recorded in CCN034 dated 30 September 2016. However, a separate resolution was required for midrange servers. Kyndryl says that there was a common understanding that the DCHA would require a further change to reflect the additional cost and lack of savings in relation to midrange servers. However, the parties failed to reach an agreement as to the form this change should take.*

11. *In late 2019, IBM and JLR entered into discussions aimed at finding a "re-solutioning" for the midrange servers. Those discussions, which were referred to as "Project Defender", proceeded on the common understanding that, if such a solution could not be found, then JLR would pay additional charges reflecting the difference between the services specified in schedule A (i.e. as agreed under CCN025) and those actually being provided by IBM. The difference is referred to by Kyndryl as the "Services Delta".*

12. *By December 2019, IBM and JLR had agreed the commercial principles for Project Defender. There was to be a variation to the DCHA, which would extend its period, replace the existing services schedule, and update the schedule of charges so that the contractual services and charges reflected what was actually being provided by IBM. Following negotiations in early 2020, on 21 April 2020, IBM and JLR agreed a revised schedule A, referred to as the "Red Schedule", as a record of the services that IBM was in fact providing.*

13. *On 14 September 2020, IBM issued to JLR a draft Change Control Notice, CCN050. Under the heading "brief description of change", the draft stated:*

    The terms of the Agreement as set out under CCN025 provide that the JLR Legacy Midrange estate will predominantly be replaced by a shared environment Flex Hosting Services which includes network and storage infrastructure. The terms and Charges for the provision of Operational Services to JLR by IBM were premised on this shared environment Flex Hosting

Services. As a result of the Flex Hosting Services not being deployed as intended this Contract Change Note sets out the adjustments required to the Agreement to reflect the Services as provided and corresponding operational Charges.

The draft set out the changes, and attached replacement schedules A and C specifying services and charges.

14. *JLR declined to approve or execute CCN050. On 6 November 2020, JLR gave notice to terminate the DCHA for convenience, and the DCHA therefore came to an end in accordance with its terms on 29 October 2021. There is no issue about the validity of that termination.*

15. *On those facts, as elaborated in the Particulars of Claim, Kyndryl advances three principal claims.*

    a First, it argues that, as a result of their conduct between 2013 and 2020, IBM and JLR agreed (expressly or impliedly by their conduct in agreeing the Red Schedule as part of Project Defender) that IBM was entitled to a variation of the DCHA to reflect the difference between the services set out in DCHA schedule A and the services in fact being provided as set out in the Red Schedule, and that IBM would be entitled to the difference in price reflecting that difference in services. Kyndryl refers to that agreement as the "Variation Agreement". In breach of the Variation Agreement, JLR failed to execute or pay the sums due under CCN050 or to pay compensation for the additional work that IBM carried out at JLR's request in order to provide the Services Delta.

    b Second, it argues that there were express or implied terms of the DCHA that: (i) JLR would undertake and cooperate in the transformation and migration project; and (ii) in the event that it did not carry out that project and instead requested that IBM provide additional services to host and maintain the legacy estate, IBM would be entitled to a variation of the contract requiring JLR to pay IBM for that additional work. In breach of the second of those terms, JLR failed to execute CCN050 or to pay the sums due in respect of the Services Delta.

    c Kyndryl argues in the alternative that JLR is estopped (by convention, by representation or by promise) from denying that IBM was entitled to a variation of the DCHA.

    d Third, it claims in restitution. It argues that: (i) JLR was enriched by receiving the benefit of the additional work provided by IBM; (ii) that enrichment was at IBM's expense because IBM provided those services at JLR's request and/or because JLR freely accepted the services; and (iii) the enrichment was unjust because there was a failure of basis for, and/or free acceptance of, that additional work, which fell outside the contractual provisions.

16. *The value of the Legacy Environment Claim is approximately £19.5 million, reflecting the cost or value of the Services Delta.*

The Storage Solution Claim

17. *In the summer of 2017, JLR requested IBM to provide a new data storage solution. IBM was to build a new hardware environment and IBM and JLR were to cooperate to migrate the existing data into that environment. IBM and JLR agreed three connected contractual Statements of Work dated 18 August 2017 covering the work to be carried out. IBM purchased the relevant hardware and software, but JLR failed to comply with its own obligations including the requirement under Statement of Work 894 to complete the remediation of applications on their servers. As a result, IBM was required at JLR's request to maintain and manage both the old and new environments. That resulted in additional work and costs in a total amount of approximately £2.9 million between February 2019 and October 2021.*

18. *On those facts, Kyndryl claims: (a) that it is entitled under the terms of the DCHA to a variation of the DCHA reflecting those additional costs; (b) alternatively, damages for breach of the terms of Statement of Work 894; (c) alternatively, restitution on the ground that JLR was unjustly enriched by the additional work at the expense of IBM."*

5. It should be noted that Kyndryl seek to advance a very broad, merits-based case. Whilst there is scope for debate as to the legal basis and factual accuracy of the claim made, the breadth of the case put forward is of importance when considering the present application. Of course, for present purposes, one should assume that the claim has real prospects of success in the light of the judgment of Mr Quest KC.

6. This is put as follows in Kyndryl's skeleton argument:

"17. The question posed by this case is whether, on consideration of the full facts of the case, the Claimant (as IBM's assignee) is entitled either to a contractual or restitutionary remedy to provide it with compensation for providing services for nearly five years in a way which was not what was contemplated or agreed; or whether the Defendant will "get away" with stringing IBM along for five years, all the while receiving services which it understood did not reflect what the parties had anticipated and agreed when they extended the DCHA.

18.That is important. The Claimant's case is not a granular case. It is not advancing a claim which requires the court to consider the details of hundreds of individual requests made every day for five years (totalling well over 100,000 over that period), and to consider the extent to which each individual request gives rise to an additional entitlement to compensation.

19. It ought not to be controversial that, as a matter of fact, IBM maintained the Defendant's IT estate in its legacy environment from January 2017 until the end

of the contract period in October 2021 and that because of the age of the estate that became increasingly difficult, time consuming and expensive. The Claimant's case is that it is entitled to compensation to reflect the fact that for nearly five years it was having to provide a service which was not the service which the parties had anticipated and agreed that it should provide. The Claimant's case depends only on a high level analysis of interactions at a management level, in which the fact of the hundreds of daily requests are relevant context but not the crux of the case."

B. A brief history of the litigation

7. The Claim Form was issued on 20th July 2023. Pleadings were exchanged between then and February 2024.

8. On 20th February 2024, JLR issued an application for summary judgment and/or to strike out the claims against it. There was also a cross-application by Kyndryl by notice dated 12th June 2024 to amend its Particulars of Claim. The applications were argued over two days in July 2024.

9. Mr Quest delivered his judgment on 18th September 2024. This was substantially in favour of Kyndryl. The resulting order of 27th November 2024, made after a contested consequentials hearing, provided as follows:

"***IT IS ORDERED THAT:***

Strike Out Application

2. There be summary judgment for the Defendant in relation to the Claimant's claim that there was an express or implied term as set out in paragraph 15.2 of the Particulars of Claim and its claim that there was a breach of such a term as pleaded at paragraphs 45, 49, 70 and 71 of the Particulars of Claim and such claims are struck out.

3. Save as appears in paragraphs 1 and 2 above, the Strike Out Application is dismissed.

Amendment Application

4. The Claimant has permission to amend its Particulars of Claim in the form of the draft amendments provided to the Court on 25 November 2024.

RFI Application/Further Directions

…6. By 4 PM on 18 December 2024, the Claimant shall file and serve its Response to Requests 1 to 14 of the First RFI in accordance with CPR Part 18 and shall file and serve its Response to the remainder of the First RFI and Second RFI."

10. By order dated 10th February 2025, Mr Roger ter Haar KC, sitting as a deputy High Court Judge, gave directions leading to a trial in October 2026, with a time estimate of 22 days. This order provided for sequential exchange of witness statements and forensic accountant experts' reports, with Kyndryl to go first in both instances.

C. The relevant law

11. The present application is concerned with requests for further information. The court's powers in this respect are set out in CPR part 18.1 as follows:

"(1) The court may at any time order a party to—
(a) clarify any matter which is in dispute in the proceedings; or
(b) give additional information in relation to any such matter,
whether or not the matter is contained or referred to in a statement of case."

12. Practice Direction 18 provides at para 1.2 that "A Request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet.".

13. I have emphasised in the above passages wording which seems to me of particular relevance.

14. The relevant principles were recently summarised by Mr Richard Salter KC, sitting as a Deputy High Court Judge, in *HRH Prince Khaled Bin Abdulaziz Al Saud v Gibbs* [2022] 1 WLR 3082, and I gratefully adopt what he says there:

"35. In my judgment, the requirement of the rule that the information sought must relate to a "matter which is in dispute in the proceedings", and the requirement of the practice direction that any request must be strictly confined to matters which are reasonably necessary and proportionate for one or other of the stated purposes, are threshold conditions. If those conditions are not satisfied, then the court simply has no jurisdiction to make any order under CPR Pt 18 (though, as Thirlwall J has pointed out, there may be other powers available to the court to assist in avoiding the waste of time and costs and in achieving the "swift and .. proportionate and economical litigation" referred to by Irwin J).

36. If, however, those threshold conditions are satisfied, then the question becomes a matter for the court's discretion. The power under CPR Pt 18 is one of the court's case management powers, and its exercise should be considered in the context of the overall case management of the action: see Toussaint v Mattis [2001] CP Rep 61 , CA, at [16], per Schiemann LJ.

37. CPR Pt 1.2 requires the court to seek to give effect to the overriding objective when considering whether and, if so, how to exercise a power such as that under CPR Pt 18. As Roth J noted in the cartel case of National Grid Electricity Transmission plc v ABB Ltd [2014] [EWHC] 1555 (Ch) at [39]:

A Part 18 request .. is to be interpreted in the light of the overriding objective and is part of the more open approach to litigation which the CPR seeks to establish and promote.

38. As the notes at paragraph 18.1.10 of the White Book state, that will usually mean in cases involving CPR Pt 18 having regard:

.. (a) to the likely benefit which will result if the information is given and (b) to the likely cost of giving it; and (c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with such an order ..

39. The requirement in the Practice Direction that requests under CPR Pt 18 must be strictly confined to matters which are reasonably necessary and proportionate for one or other of the stated purposes reflects that fact that requests and orders under CPR Pt 18 are not an automatic aspect of the progress of litigation under the CPR , and should not therefore be made as a matter of routine.

40. Statements of Case, if properly drafted, should already contain all the information necessary to define the issues which the court has to decide and to ensure that each party knows the case which it has to meet: see eg Ventra Investments Ltd v Bank of Scotland [2019] EWHC 2058 (Comm) at [22] to [25] . Moreover, clarity is usually better served by brevity than prolixity. As Lord Woolf MR pointed out in McPhilemy v Times Newspapers Ltd and others [1999] 3 All ER 775 at 793:

.. As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification ...

41. It follows that it will not usually be either necessary or proportionate (or in accordance with the overriding objective) for the other party to request (or for the court to order) a party who has served a compliant but concise statement of case to expand upon that pleading by the provision of more detailed further information.

42. In cases begun using the procedure in CPR Pt 7, disclosure under CPR Pt 31 will normally be followed by the exchange of witness statements under CPR Pt 32. It will therefore also not often be necessary or proportionate (or in accordance with the overriding objective) for the other party to request (or for the court to order) a party to provide at any earlier stage information which will in due course be revealed on disclosure or which will be contained in those witness statements or in expert reports: see eg National Grid Electricity Transmission plc v ABB Ltd [2012] EWHC 869 (Ch) at [73] to [74] , per Roth J, and Stocker v Stocker [2014] EWHC 2402 (QB) at [27] , per HHJ Richard Parkes QC (sitting as a judge of the High Court).

43. Of course each case must depend upon its own facts. As Schiemann LJ went on to say in Toussaint (supra), "The court now has a wide range of case management powers, and they are capable of being used flexibly to meet the precise needs of an individual case".

44. There will always, regrettably, be cases in which the statements of case do not, as they should, ensure that each party knows the case which it has to meet. There will also be other cases in which the court can be satisfied that "a clear litigious purpose will be served" (per Lord Woolf MR in Hall v Sevalco (supra)) by ordering the provision of further information either at an earlier stage or in a more extensive fashion than would normally be the case under the CPR. Such cases may, perhaps, include those where a clearer early understanding of the other party's position than can be obtained by correspondence is realistically likely to help the parties to narrow the issues between them, to avoid wasting costs on unnecessary steps connected with the litigation (eg in relation to disclosure, witnesses of fact or expert witnesses), or to promote settlement.

45. The burden must nevertheless always be on the party seeking an order under CPR Pt 18, both to demonstrate that the threshold conditions identified in paragraph 35 above are met and (to the extent not already implicit in the satisfaction of those conditions) to satisfy the court that, in all the circumstances, the making of such an order would assist in dealing with the case justly in accordance with the overriding objective.

46. One of the complaints made by the claimants about Mr Gibbs' responses to the RFI is that they show that he has failed to exercise reasonable diligence in examining relevant documents and undertaking reasonable enquiries. Mr Atrill invited my attention to the following passage in paragraphs [20.96], [20.98] and [20.101] of Matthews and Malek, Disclosure (5th edn, Sweet & Maxwell 2017):

.. It is incumbent upon a party responding to a Request to a Pt 18 order to exercise reasonable diligence in formulating a response ..

.. [T]he court is likely to regard a party [as] being under a duty to undertake reasonable enquiries, but what constitutes reasonable enquiries will depend on the circumstances .. [A] party is not bound to make enquiries to the extent that such enquiries place an unfair or oppressive burden on him ..

.. If it is necessary for the purposes of responding to a Request, the party must examine the documents in his control .. or that of his servants or agents held in that capacity. If a such search would be unduly burdensome, then that may be a ground for objecting to the Request ..

47. In my judgment, those passages accurately state the law in this area. I would, however, add this rider. Where, as in the present case, a request under Pt 18 has already been answered, and the objection is that the answer given is inadequate because reasonable diligence has not been exercised, the proper way forward will not usually be to ask the court (as the claimants in the present case have done) simply to order that the original generally worded request should be answered again. Such a course will often just postpone until an application for sanctions for non-compliance or for relief from such sanctions is made the inevitable issue of what reasonable diligence in formulating a response to that request - and thus compliance with the order – actually requires. By that time it is likely to be too late to consider the appropriateness of the scope of the original order: see eg Griffith v Gourgey [2015] EWHC 1080 (Ch) at [40] and [54 (1)].

48. The better course will usually be, wherever possible, to ask the court to specify in its order precisely what further enquiries the party responding to the Pt 18 request should carry out, so that the issue of what proper compliance requires is plainly defined from the outset."

15. I agree with Mr Salter that each case must depend upon its own facts. It is germane to note here that:

i) The claim is substantial, but not enormous by the standards of the Business and Property Courts;

ii) The parties are sophisticated and sizeable commercial entities, with extensive legal representation on each side;

iii) The issues, although not without some complexity, are of a kind with which this court is familiar;

iv) The court has extensive case management powers to ensure that the parties are able to proceed on an even footing, powers which have already been exercised to some extent in this case;

v) Much of Kyndryl's merits-based claim will continue in any event. As Mr Quest put it at para 111 of his judgment:

> *"I am fortified in my view that that is the correct approach in the present case by the consideration that Kyndryl's unjust enrichment claim will proceed to trial in any event on the basis of free acceptance, so the court will in any event have to examine the parties' conduct in order to decide whether JLR was unjustly enriched by accepting services provided by IBM outside the contract."*

16. This application seeks unless orders. A court should always be cautious, in my view, in making such orders on the basis of the failure to provide particulars of a case. A point of this kind was considered by the Court of Appeal in *QPS Consultants v Kruger Tissue* [1999] BLR 366.[1] Simon Brown LJ, as he then was, noted that:

> *"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…."*

D. Requests 1-9 and 11-14

[1] A pre-CPR case, but still good law under the new regime.

17. The background to these requests is that Kyndryl sought permission from Mr Quest KC to amend their Particulars of Claim. He dealt with the matter as follows, with emphasis added in bold (the underlining appears in the text):

> *"**Ground 4 – Unjust enrichment***
>
> *105. Kyndryl's unjust enrichment claim is pleaded at paragraph 50 of the Particulars of Claim:*
>
> *50. … the Defendant has been unjustly enriched at the expense of the Claimant in that:*
> *50.1. The Defendant was enriched by receiving the benefit of the additional work provided by the Claimant which constituted the Services Delta;*
> *50.2. That enrichment was at the Claimant's expense because the Claimant provided those services at the Defendant's request and without receiving payment and/or the Defendant freely accepted those services;*
> *50.3. The enrichment was unjust because there was a failure of basis for and/or free acceptance of that additional work which fell outside the contractual provisions.*
> *51. Consequently, the Claimant is entitled to a restitutionary award on a quantum meruit basis reflecting the value of the additional services by which the Defendant has been unjustly enriched at its expense, totalling £19,459,513.334 have not been paid to it. The basis on which that sum is calculated reflects the additional price of providing the Services Delta from 1 January 2017 to 29 October 2021 as set out in Appendix 3.*
>
> *106. Kyndryl seeks to introduce the underlined words by amendment in order to pursue an unjust enrichment claim based on the principle of free acceptance. That principle is set out in Goff & Jones on Unjust Enrichment, 10th edition, paragraph 17–03 as follows:*
>
> *A defendant will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the claimant who rendered the services expected to be paid for them, and yet did not take a reasonable opportunity open to him to reject the proffered services. Moreover, in such a case, he cannot deny that he has been unjustly enriched.*
>
> *107. JLR consents to that amendment and does not seek summary dismissal of the unjust enrichment claim insofar as it is based on free acceptance. However, insofar as the claim is also based on requests by JLR for additional services, JLR objects that no requests have been pleaded and none was made.*
>
> *108. In response, Kyndryl applies to amend the Legacy Environment Claim to introduce the following paragraphs:*
>
> *42A. There was a course of conduct throughout the period from 1 January 2017 until the DCHA expired in which the Defendant repeatedly instructed IBM to*

carry out additional works outside the scope of the contract consisting of the Services Delta and/or freely accepted such works understanding that they were not being provided gratuitously. The course of conduct involved the Defendant making repeated requests expressly and/or by conduct through requests in meeting, discussions at management level, requests and operational level for daily tasks and/or generally by failing to engage in the required transformation and migration to Flex which would have allowed the anticipated services to be carried out. The additional works carried out by IBM were carried out pursuant to that course of conduct.
42B. Further the implicit premise of the discussions between the parties pleaded at paragraphs 28 to 42 above was that the Defendant understood that IBM was providing services beyond those provided for in the DCHA; was not paying for those services; and wanted IBM to continue to provide those services. The Claimant will rely at trial on the entirety of the interactions between IBM and the Defendant in the period from 1 January 2017 until the expiry of the DCHA in providing the course of conduct.
Kyndryl also seeks to amend the Storage Solution Claim to similar effect by the introduction of new paragraphs 69A and 69B. Kyndryl says that the amendments make explicit a "theme" underlying the Particulars of Claim that JLR had consistently requested additional services.

109. *JLR opposes those amendments. It argues that they are inadequate, and do not answer its objection, because they do not properly particularise the requests, contrary to the requirements of CPR 16.4(1)(a), 16PD7 paragraphs 7.4 and 7.5, and the overriding objective. It says that Kyndryl should at least identify when the alleged requests were made, by whom, and in what terms. There is force to this complaint.* ***Kyndryl says that its case is that there was a consistent course of conduct giving rise to the requests, and that to plead every individual request would be burdensome and unnecessary. But in my view, although the amendments set out the general nature of the case, JLR is at least entitled to know whether Kyndryl relies on any specific requests or whether its case is confined to an implication from a course of conduct. If the former, then JLR is entitled to particulars of the requests; if the latter, it is entitled to confirmation that the case is limited in that way and to an explanation of how the implication nevertheless arises. To say only that Kyndryl will rely on the course of conduct over many years and on the entirety of interactions between the parties is not satisfactory****.*

110. *I am not persuaded, however, that JLR's criticisms of the existing pleading and the proposed amendments, are such that it would be right to refuse permission to amend and to dismiss the claim summarily now, as JLR asks. As JLR accepted in argument, this is a pure pleading point—whether there were in fact requests for additional services sufficient to give rise to an unjust enrichment claim is an evidential matter for trial. I therefore have in mind what Tugendhat J said in Kim v Park [2011] EWHC 1781 (QB) at [40]:*

[W]here the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right.

Moreover, in ACS v Efacec [2021] EWHC 915 (TCC), Mr Roger ter Haar KC said at [56] that where a proposed amended pleading calls for further particulars, the remedy is for the other party to request further information rather than for the court to refuse permission to amend.

111. I am fortified in my view that that is the correct approach in the present case by the consideration that Kyndryl's unjust enrichment claim will proceed to trial in any event on the basis of free acceptance, so the court will in any event have to examine the parties' conduct in order to decide whether JLR was unjustly enriched by accepting services provided by IBM outside the contract.

112. JLR objects to the amendments on the further ground that they are inconsistent with the existing pleading. It says that the existing case (at paragraphs 1.1, 9.3, 23.1, 23.2 and appendix 3 of the Particulars of Claim) is that IBM suffered loss by failing to achieve expected savings on the migration to Flex, whereas the proposed amendments advance the case that IBM incurred additional costs by performing additional requested services. I do not think that that objection takes matters any further for present purposes. There is no reason in principle why Kyndryl could not pursue both claims together or in the alternative.

113. ***I will therefore permit the amendments to paragraphs 42A, 42B, 69A and 69B. JLR may make a request for further information, if so advised, and is at liberty to seek further appropriate relief if it considers that the request has not been properly answered or that the claims remain insufficiently particularised****."*

18. Paragraphs 42A/B and 69A/B of the Amended Particulars of Claim therefore now set out this case for the Legacy Environment Claim and the Storage Solution Claim respectively.

19. Requests 1 and 2 (42A/B) and 8 and 9(69A/B) essentially seek further and better particulars of each specific request made by JLR. The nature of the response by Kyndryl may be gleaned from the following passage at the start of Response 1. Response 8 is in similar vein. In each case these introductory assertions are followed by many pages of detailed information:

"The Claimant does not at this stage rely on specific requests in relation to its claim based on unjust enrichment in relation to the Legacy Environment Claim, but rather relies on an implication arising from a course of conduct in which the Defendant repeatedly and consistently made clear that IBM should continue to provide the additional services consisting of the Services Delta and/or which

amounted to a request that IBM should do so, notwithstanding that the Defendant had failed to transform its IT estate so as to enable the migration to Flex to take place. That course of conduct was reflected in very large numbers of interactions which took place between the parties at a management and at an operational level between 2017 and the expiration of the DCHA in October 2021. Whilst those interactions included an extremely high number of express or implied requests for additional services which comprised the Services Delta, the Claimant's case is not at this stage advanced on the basis of details of specific requests, but rather on a course of conduct over years. It would not be proportionate, and is not necessary, to plead all the facts which are relevant to that course of conduct…The Claimant sets out here an explanation as to how the implication arises…"

20. It seems to me that, subject to one small caveat, this is an adequate response to the requests, as envisaged by Mr Quest KC. Kyndryl have, in effect, been put to their election as to whether they wish to pursue a case based on specific requests or whether its case is confined to an implication from a course of conduct. They have chosen the latter course and given the required confirmation that the case is limited in that way and an explanation of how the implication nevertheless arises. That is now Kyndryl's case and they will stand or fall on it at trial.

21. The caveat is that, as set out above and elsewhere in the Responses, Kyndryl qualify their answers with the words "at this stage", which suggests that they may at a later stage seek to rely upon specific requests. I think that this is unacceptable and that Kyndryl should make clear that this is now their case. Of course, one can never say never in litigation and Kyndryl could at a later stage in the proceedings seek to further amend their case in this respect, albeit they would have a procedural mountain to climb in order to do so. But, in order to comply with the judgment of Mr Quest KC, the words "at this stage" and any similar qualifications should be removed.

22. Request 3 has been adequately answered in the response.

23. Requests 4-7 and 11-14 essentially seek further details of the course of conduct relied upon. However, in my view, these matters are now adequately pleaded in the Amended Particulars of Claim, as further particularised in the Responses.

E. Requests 15-17 and 27.2

24. Paragraphs 30-37 of the Amended Particulars of Claim set out a course of negotiations between the parties during 2019 and 2020. The upshot of these exchanges is said to be as follows:

> *"38. In May and June 2020, while all key contractual terms had been agreed, the parties continued to agree minor changes to the Red Schedule:*
>
> *38.1. A "Key Issue List" dated 6 May 2020 created by IBM and circulated between the parties detailed the progress of each of the contractual documents which were subject to negotiation. For the item "Services A. Red" there were no "open discussion points" remaining, with the only outstanding areas those where "drafting principles agreed but wording not agreed" and "cross reference, conformance, drafting agreed but not included"; and*
>
> *38.2. On 16 June 2020, the parties prepared a "Defender Close Plan" which made clear the Red Schedule was at 95% completion and was with "JLR/M&R to clean and resolve their actions".*
>
> *39. As a result of their conduct as described above, IBM and the Defendant agreed (expressly or impliedly by their conduct in agreeing the Red Schedule as part of Project Defender) that IBM was entitled to a variation of the DCHA which would reflect the difference between the service set out in the DCHA Schedule A and the service being provided and set out in the Red Schedule (the "Services Delta") and that the Claimant IBM would be entitled to the difference in price reflecting the Services Delta since the date that the Defendant's systems should have been migrated to Flex (the "Variation Agreement")"*

25. Requests 15-17 and 27.2 effectively seek, in a fairly traditional way, particulars of the alleged agreement, as if it were a fully concluded agreement. As to this, I agree with the submission of Mr Pilling KC, Counsel for Kyndryl, that this is to misread the pleading. The agreement was inchoate.

26. Furthermore, paragraphs 30-37 of the Amended Particulars of Claim, taken as a whole and read with responses 15-17, sufficiently set out the course of negotiations between the parties during 2019 and 2020 which is said to lead to the averments at paragraphs 38 and 39 of the Amended Particulars of Claim.

27. For these reasons, I do not think that any further particularisation of paragraphs 38 and 39 of the Amended Particulars of Claim is required.

F. Requests 20-25

28. Paragraphs 29 and 31 of the Amended Particulars of Claim allege as follows, with my underlining:

> "*29. Further, there was a convention between the parties from January 2017 onwards that the DCHA would require further amendment to reflect the additional cost and absence of savings caused by the transformation project and migration of midrange servers to Flex not being carried out. The Claimant will rely at trial on all relevant written and oral exchanges between IBM and the Defendant in this period to evidence this convention <u>including</u>…*
>
> *31. The Project Defender discussions proceeded on the common convention that, if Project Defender failed to produce a new solution, then the Defendant would pay the difference in Charges between those envisaged and the services provided by IBM for the midrange servers. The Claimant will rely at trial on all relevant written and oral exchanges between IBM and the Defendant in this period to evidence this convention <u>including</u>…"*

29. Requests 20-25 essentially seek particularisation of all the evidence to be relied upon to establish the pleaded conventions, and not merely the non-exhaustive list of matters set out in these paragraphs (11 items in paragraph 29 and 3 items in paragraph 31).

30. I agree with Mr Pilling KC that this approach on the part of JLR is misconceived. Kyndryl have set out the nature of their case in sufficient detail to allow JLR to answer it and to prepare their evidence for trial, not least in

circumstances where the evidence will be disclosed sequentially. It is not necessary or appropriate to require Kyndryl to particularise now every single conversation or exchange which is said to underpin the pleaded conventions.

G. Requests 36-40

31. These requests relate to quantum. As to these it should be noted at the outset that Kyndryl have provided a reasonably detailed case as to quantum at Appendix 3 to the Amended Particulars of Claim. JLR have not yet pleaded to this Appendix. Furthermore, as already noted above, quantum expert evidence is to be dealt with sequentially. In those circumstances, I would begin from the position that quantum should be progressed through JLR setting out its case in equivalent detail and through the work of the experts.

32. Against that background I can deal quite briefly with the disputed requests. In my view:

    i) Requests 36, 36.1, 37.2 and 38 have been sufficiently answered;

    ii) Request 37.1 does not arise on Kyndryl's pleaded case;

    iii) Requests 37.3 and 39 trespass into the field of evidence rather than pleading;

    iv) Request 40 returns to the areas traversed in relation to specific requests and course of conduct discussed above. Subject to the deletion of the words "at this stage", the position is clear enough.

H. Conclusions

33. For these reasons, and subject to some minor tidying up of the responses, this application fails.

34. Standing back from the detail of particular requests, the following overall points should be made.

35. First of all, I do not think that these requests have been strictly confined to matters which are reasonably necessary and proportionate to enable JLR to prepare its own case or to understand the case it has to meet. These are threshold conditions. Since those conditions are not satisfied, the court has no jurisdiction to make any order under CPR Pt 18. The requests are much more akin to the sort of very wide-ranging requests for further and better particulars which were common under the pre-CPR procedure.

36. Secondly, if those threshold conditions had been satisfied, I would not have exercised my discretion in favour of JLR. The power under CPR Part 18 is one of the court's case management powers, and its exercise should be considered in the context of the overall case management of the action. Here the court can, and has, sought to case manage the dispute in a way which will protect the legitimate interests of both parties, notably by directing the sequential exchange of factual and quantum evidence. Furthermore, the facts of this case militate against the exercise of this discretion in favour of JLR: see paragraph 15 above.

37. Thirdly, even if I had concluded that there were deficiencies in the responses given, I would have been very reluctant to grant the relief sought, let alone

unless orders. I think that a party complaining about responses to requests for further information needs to be much more specific than JLR has been here in pinpointing exactly what is wrong with the answers and what is needed to put this right. The application made is expressed in the most general terms, even though unless orders are sought.

38. Fourthly, it is of considerable importance, in relation to JLR's overall complaint that they are being faced with an amorphous claim, that Kyndryl's unjust enrichment claim on the basis of free acceptance will proceed to trial in any event, so the court will, come what may, have to examine the parties' conduct over a long period. This fact, it seems to me, renders artificial many of the points that might otherwise be made about the vagueness of Kyndryl's case.

39. Finally, I do not think the parties are well served by this further round of extensive (and no doubt expensive) interlocutory skirmishing. Mr ter Haar KC has now set out a detailed and sophisticated timetable leading to a trial towards the end of 2026. The parties should seek to work within that timetable. If there are genuine and specific difficulties the parties should seek to resolve those by agreement, and if one party or the other is being uncooperative, the matter can be brought back to this court for resolution. But that should be a last, not a first, resort.

40. For all these reasons, this application is dismissed.

41. By way of postscript, I should add that this judgment was circulated in draft on 19th May 2025, in the usual way and with the customary note that this was "to enable the parties to make suggestions for the correction of errors, prepare

submissions on consequential matters and draft orders and to prepare themselves for the publication of the judgment."

42. On 23rd May 2025, in addition to proposed corrections, I received a letter from Mr Charlton KC and Mr Munro, Counsel for JLR, asking "the Court to clarify four matters which are highly material to the decisions that have been taken and how they are to be understood by the parties for the purposes of the consequentials hearing, further pleadings, disclosure, witness statements and trial." This was said to be in accordance with a Practice Note issued by the Court of Appeal in the case of *In re YM (A Child)* [2024] 1 W.L.R. 3873.

43. On the same day Mr Pilling KC responded as follows:

> *"Mr Charlton K.C. copied me into his email to you in the chain below, which attached his letter to you dated 23 May 2025. The matters raised in that letter have not been discussed between the parties. I assume that you would not welcome comments from my client on the matters raised by Mr Charlton, which were the subject of written and oral submissions and which you no doubt considered when writing the draft judgment. If the court is considering making substantive amendments to the draft judgment, we would be respectfully ask that my client be permitted to make observations on the letter before amendments are made."*
>
> (my emphasis)

44. On 26th May 2025, I informed Counsel that I would let the parties know if I required any further submissions; otherwise, the final judgment would be handed down at the beginning of the coming term.

45. Since the practice developed of circulating draft Judgments, the appellate courts have made clear that the request for "correction of errors" is intended to be a strictly limited function.

46. In *Egan v Motor Services (Bath) Ltd* [2008] 1 All E.R. 1156, CA the Court of Appeal (1) deprecated the growing practice of counsel writing to the judge upon receipt of draft judgment, asking him to reconsider his conclusions, and (2) stated that, (a) circulation of a draft is not intended to provide counsel with an opportunity to re-argue the issues in the case, and (b) only in the most exceptional circumstances is it appropriate to ask the judge to reconsider a point of substance.

47. More recently, the Court of Appeal explained the purpose of the circulation of draft Judgments in *George v Cannell* [2022] EWCA Civ 1067 at [24]:

> *"The purposes of circulating a judgment in draft are to enable the parties to identify typographical and other obvious errors and to prepare an agreed order or submissions on consequential matters. The authorities make clear that this is not to be treated as an opportunity to advance further argument."*

48. Finally, reference should be made to the case cited by JLR, *In re YM (A Child)* [2024] 1 W.L.R. 3873, in which the following guidance was given (my emphasis):

> *90. Finally I return to the vexed issue of requests for clarification. It may be, as Ms Fottrell suggested during the appeal hearing, that it takes time for the messages from reported cases in this court to get through. But, if I may adopt the words of Wall LJ quoted above, it is high time they did. This case illustrates that the procedure is still being misused. I would therefore draw the following lessons to be learned from this case, in the context of other cases which have involved similar examples of the practice being misused:*
>
> *(1) A judgment does not need to address every point that has arisen in the case. The court should only be asked to address any omission, ambiguity or deficiency in the reasoning in the judgment if it is material to the decisions that have to be taken in the proceedings. In care proceedings, the decisions are whether the threshold criteria for making orders under section 31(2) are satisfied and, if so, what orders should be made to meet the child's welfare needs.*
>
> *(2) When making a request for clarification of any perceived omission, ambiguity or deficiency in the reasoning in the judgment, counsel should*

therefore identify why the clarification is material to the decisions that have to be taken in the proceedings.

(3) Counsel should never use a request for clarification as an opportunity to re-argue the case, reiterate submissions, or invite the judge to reconsider the findings.

(4) Requests for clarification should not be sent in separately by the parties but rather in a single document compiled by one of the advocates. If necessary, there should be an advocates meeting to compile the document. Save in exceptional circumstances, there should never be repeated requests for clarification.

(5) Judges should only respond to requests for clarification that are material to the decisions that have to be taken in the proceedings.

91. The purpose of the process of clarifications is to head off unnecessary appeals. In a number of recent cases, the misuse of the process has had the opposite effect. I hope that hereafter counsel will confine requests to matters which are material to the proceedings and that judges will deal robustly with requests that exceed what is permissible.

49. The passages highlighted above in the case of *In re YM (A Child)* show, in my view, the misconceived nature of the present request for clarification:

i) The decisions that have to be taken in the current proceedings (guideline 1) are whether an order should be made requiring Kyndryl to provide further information. For the reasons given at paragraphs 35 to 39 above, I have concluded that no such order should be made. These paragraphs are stated to be "standing back from the detail of particular requests" and they explain why, in my view, there are overarching reasons why no order should be made. These reasons are additional to the conclusions I have expressed about particular requests. This point is sufficient to dispose of the request for additional reasons to be given in relation to paragraphs 19-21 and 23 of the Judgment and paragraphs 31 and 32(i) of the Judgment: matters 1 and 3 raised by JLR;

ii) Matter 2 from JLR relates to paragraph 25 of the draft Judgment and is really a criticism of the reasoning there given. That seems to me to be an attempt to re-argue the case, reiterate submissions, or invite the judge to reconsider the findings, contrary to guideline 4, *Egan* and *George*. The point at (i) above is also fatal to this matter;

iii) Matter 4 cites various interchanges between Mr Pilling KC and me in the course of the hearing. However, if this were to be a proper request for clarification, it should have been preceded by an exchange of comments between Counsel for JLR and Kyndryl, which has not happened, contrary to guideline 4. The point at (i) above is also fatal to this matter.

50. Finally, it should be emphasised that the purpose of clarifications is to head off unnecessary appeals, unnecessary in the sense that some ambiguity or uncertainty could be resolved quickly and without the delay and expense attendant upon an appeal. However, as I have sought to explain, I am not disposed to make the orders sought by JLR, because of the overall views I have expressed above as to the case management of this litigation. If JLR wish to persuade the Court of Appeal to take a different view as to case management, that is their entitlement, of course. But that would be a necessary appeal because the Court of Appeal was asked to adopt a radically different view as to case management than I have set out.

51.