Case No: CL-2019-000662

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

The Rolls Building
7 Rolls Buildings
London EC4A 1NL

Wednesday, 10 November 2021

[2021] EWHC 3657 (Comm)

BEFORE:

THE HON. MR JUSTICE BRYAN

BETWEEN:

(1) GATTAZ PROPERTY LIMITED
(2) FORTIMAT PROPERTIES SA

Claimants

- and -

VERSANT DEVELOPMENTS AND HOMES LIMITED & 9 OTHERS

Defendants

MR I QUIRK, QC (instructed by Wallace LLP) appeared on behalf of the Claimants
MR F MOUNTAIN appeared on behalf of the First, Third, Seventh and Eighth Defendants
MR I PENFOLD (the Second Defendant) appeared in person
MR R PENNINGTON-BENTON (instructed by Ince Gordon Dadds) appeared on behalf of the Fourth, Sixth, Ninth and Tenth Defendants
The Fifth Defendant did not appear and was not represented

APPROVED JUDGMENT

MR JUSTICE BRYAN:

(A) Introduction

(A.1) The Applications

1. There are two sets of applications before the court at this hearing. By their first application notice, the claimants seek permission to file and serve amended particulars of claim:

> (a) in the form of the draft amended particulars of claim ("APOC") attached to their application ("the Amendment Application"), including to incorporate allegations of dishonesty against the IV Fund Defendants (other than Mr Novikov); and
>
> (b) of a length of no longer than 75 pages ("the Filing Application").

2. The second application ("the Substitution Application") is an application by which the claimants seek orders pursuant to CPR rule 19.8(1)(b) or alternatively rule 19.8(1)(a) and/or (to the extent necessary) rule 19.2(4) that:

> (a) Mr Mikhailenko's widow be appointed to represent his estate in these proceedings or
>
> (b) alternatively, the proceedings and the claim against Mr Mikhailenko proceed in the absence of a person representing his estate.

3. In either case, the claimants also seek orders dealing with steps they have taken to bring the Substitution Application to the attention of Mr Mikhailenko's widow to have been good alternative service pursuant to CPR rule 6.15 and/or 6.27 (or alternatively dispensing with service pursuant to CPR rule 6.28).

(A.2) The Parties

4. The proceedings arise out of the claimants' participation in two property development projects in the United Kingdom, respectively "the Cambridge Project" and "the Maidenhead Project". As I shall come on to in more detail in due course in relation to the Amendment Application, the claimants allege that their investment in those projects has been fraudulently misappropriated and they seek to recover what they say are their stolen loan funds.

5. Turning to the identity of the defendants, they have been defined as essentially two sets of defendants:

(1) "The Versant Defendants" comprising:

(a) the first defendant (Versant), which was the developer of and an investor in both the Cambridge and Maidenhead Projects;

(b) the second and third defendants (Mr Mountain and Mr Penfold), who are Versant directors; and

(c) the seventh and eighth defendants (the Cambridge SPV and the Maidenhead SPV), the SPVs which were to undertake both projects

(The Versant Defendants were originally represented by Francis Wilkes and Jones but, since April 2020, they have been acting in person).

(2) "The IV Fund Defendants" comprising:

(a) the fourth defendant (IV Fund), a Bahamas company, which was also an investor in the Cambridge Project and the entity which marketed both projects to the claimant;

(b) the sixth defendant (Regency), an English company that acts as an advisor to IV Fund and which the claimants allege was appointed as the project monitor for both projects;

(c) the fifth and ninth defendants (Mr Mikhailenko and Mr Latsmanovich), who were at all material times, it is said, principals of IV Fund and directors of Regency (sadly, Mr Mikhailenko passed away in October 2020, which is the backdrop to the Substitution Application that I have referred to); and

(d) the tenth defendant (Mr Novikov), another principal of IV Fund and Regency and, per the claimants, believed to be a shareholder in both of them and, it is said, the ultimate decision-maker on the projects in which IV Fund invest.

6. Originally, all of the IV Fund Defendants were represented by Ince Gordan Dadds ("IGD") but, following Mr Mikhailenko's death, IGD only acts for IV Fund, Regency, Mr Latsmanovich and Mr Novikov. These four surviving IV Fund Defendants will be referred to by me, as they are in the proceedings, as "the IGD Defendants".

(A.3) Background to the Claims

7. I take the summary that follows from the summary required by the Commercial Court where there is a statement of case in excess of 25 pages. In this case, the draft amended particulars of claim for which permission is sought is some 75 pages odd. The summary is a convenient summary of the allegations being made by the claimants. I should say that that summary includes matters which are the subject matter of the Amendment Application and it goes without saying that what follows is not an agreed summary of events, as there might be if there had been a case memorandum or list of issues, the matter not yet having reached a case management conference. It is convenient, however, to utilise that summary both to set out the background to the claims advanced and also to set out the background to the Amendment Application which is before me.

8. In 2018, the claimants invested £3.5 million in two property development projects in the UK, one in Cambridge and the other in Maidenhead. The structure of the investment was to be by way of a shareholding in two special purposes vehicles ("the Cambridge and Maidenhead SPVs") and the provision of loans by the claimants to those SPVs for the purpose of the acquisition of the properties the subject of the Cambridge and Maidenhead Projects.

9. Versant, acting by its director Mr Mountain, was the developer in respect of both projects and a shareholder in both SPVs. Both projects were presented and marketed to the claimants by IV Fund and its principals, Mr Mikhailenko and Mr Latsmanovich. IV Fund was only itself a participant in the Cambridge Project and it only claimed to own shares in the Cambridge SPV. However, a related company called Regency, of which Mr Mikhailenko and Mr Latsmanovich were both directors, agreed to act as the project monitor in respect of the Cambridge and Maidenhead Projects.

10. In each case, the claimants' case is that they believed that the parties' rights and obligations were governed by a set of written contractual agreements. These included:

    (1) in respect of the Cambridge Project:

        (a) the Cambridge shareholders agreement amongst Fortimat, Versant, IV Fund and the Cambridge SPV;

        (b) the Cambridge loan agreement between Fortimat and the Cambridge SPV;

        (c) the Cambridge sale and purchase agreement between Fortimat and IV Fund; and

        (d) a project monitoring agreement amongst Fortimat, Regency and the Cambridge SPV (albeit that this contract was never formally executed); and

    (2) in respect of the Maidenhead Project:

(a) the Maidenhead shareholders agreement amongst Gattaz, Versant and the Maidenhead SPV;

(b) the Maidenhead loan agreement between Gattaz and the Maidenhead SPV; and

(c) a project monitoring agreement amongst Gattaz, Regency and the Maidenhead SPV.

11. It is said by the claimants that, in around September 2019, they discovered that firstly the Cambridge SPV had never acquired the Cambridge property and, secondly, while the Maidenhead property had been acquired, it was acquired by Versant (it is said through unlawful use of Gattaz loan funds) rather than by the Maidenhead SPV and was subsequently charged.

12. LPA receivers were appointed over the property in July 2019, it appears following default by Versant on the mortgage. The claimants, it is said, also believe that they never entered into the register of members for either SPV and/or that documents reflecting that they had been so registered were never filed with Companies House.

13. Prior to the commencement of these proceedings, no account was given of the whereabouts or use of the claimants' £3.5 million investment. However, the claimants have received a payment of £518,974.17 on 28 November 2019 from the LPA receivers following their sale of the Maidenhead property to a third party and a further payment of £28.43 in interest on 14 February 2020. The claimants have brought these proceedings in order to recover their missing investments or their proceeds or to obtain compensation in respect of the same.

14. In their original particulars of claim, which were dated 3 January 2020, the claimants advanced the following claims:

(1) as against Versant, Mr Mountain, Mr Penfold and the SPVs:

(a) that Mr Mountain and Versant made various fraudulent or alternatively negligent misrepresentations to the claimants prior

to their entry into the relevant agreements for each of the Cambridge and Maidenhead Projects;

(b) that Versant and the SPVs breached various of their contractual obligations in respect of the Cambridge and Maidenhead Projects;

(c) that Mr Mountain and Mr Penfold procured or induced Versant's and the SPVs' breaches of contract;

(d) that Versant, Mr Mountain and Mr Penfold were party to an unlawful means conspiracy to defraud the claimants;

(e) that Versant and the SPVs committed breaches of trust and fiduciary duty in respect of the claimants' investments in the Cambridge and Maidenhead Projects;

(f) that Versant knowingly received trust money in circumstances in which it would be unconscionable for it to retain it; and

(g) that Mr Mountain and Mr Penfold dishonesty assisted in Versant and the SPVs' breaches of trust and fiduciary duty; and

(2) as against IV Fund, Regency, Mr Mikhailenko, Mr Latsmanovich and Mr Novikov:

(a) that IV Fund, Mr Mikhailenko and Mr Novikov made various negligent misrepresentations to the claimants prior to their entry into the relevant agreements for each of the Cambridge and Maidenhead Projects;

(b) that IV Fund and Regency breached various of their contractual obligations in respect of the Cambridge and Maidenhead Projects;

(c) that Mr Mikhailenko and Mr Latsmanovich procured or induced Regency's breaches of contract; and

(d) that Regency, Mr Mikhailenko, Mr Latsmanovich and Mr Novikov were party to a non-fraudulent unlawful means conspiracy to conceal from the claimants the difficulties they were experiencing with Mr Mountain and Versant in various projects in which IV Fund had invested.

15. In other words, in their original particulars of claim, the claimants did not make allegations of dishonesty against any of IV Fund, Regency, Mr Mikhailenko, Mr Latsmanovich or Mr Novikov. However, following service of the defence of Versant, Mr Mountain, Mr Penfold and the SPVs dated 19 February 2020 and their receipt of certain additional documents which I shall come on to, the claimants now seek to allege the following in their amended particulars of claim:

(1) There was amongst Versant, Mr Mountain, Mr Penfold, IV Fund, Regency, Mr Mikhailenko and Mr Latsmanovich a secret "Investment Understanding" which was inherently dishonest in its purpose and the terms of which materially contradict the parties' contractual rights and obligations as expressly set out in their written agreements.

(2) It was agreed or understood amongst Versant, Mr Mountain, Mr Penfold, IV Fund, Regency, Mr Mikhailenko and Mr Latsmanovich that the secret Investment Understanding would apply to the claimants' investments in the Cambridge and Maidenhead Projects notwithstanding anything to the contrary in the parties' written agreements.

(3) The claimants were never informed or aware of the existence of the Investment Understanding or its terms or that it was intended to apply to the Cambridge and Maidenhead Projects. They did not agree to it and they would not have invested in those projects, they

say, had they known of it. It is said, therefore, that they were deceived into doing so by Versant, Mr Mountain, Mr Penfold, IV Fund, Regency, Mr Mikhailenko and Mr Latsmanovich.

(4) Pursuant to that Investment Undertaking, which they plead in the draft amended particulars of claim as in law an unlawful means conspiracy, Mr Mountain (and through him Versant) and Mr Mikhailenko (and through him IV Fund and Regency) made what are said to be a number of knowingly false and fraudulent misrepresentations to the claimants upon which the claimants relied in entering into the relevant agreements and investing in the Cambridge and Maidenhead Projects.

16. It is the claimants' case, and the claimants will say, that IV Fund, Regency, Mr Mikhailenko and Mr Latsmanovich are the parties primarily responsible for the losses for which they claim in the pleadings. Accordingly, and as is set out in more detail in their draft amended particulars of claim and for which they seek permission before me today:

(1) Mr Mikhailenko and Mr Latsmanovich first suggested investing in projects alongside IV Fund to Ilya Gorbatskiy and they made numerous attempts to persuade him to do so. It is said that the claimants would never have invested in the Cambridge and Maidenhead Projects had they not done so.

(2) Mr Mikhailenko procured a meeting at the Bulgari Hotel in London at which Mr Novikov persuaded Andrei Gorbatskiy to invest in projects alongside IV Fund. The claimants would never have invested, it is said, in the Cambridge and Maidenhead Projects had this not happened.

(3) It is said that Mr Latsmanovich orchestrated the Gorbatskiys' early exit from another project in which they had coinvested with IV Fund in the project so that their money tied up in that project

could be invested in the Cambridge Project. It is said the claimants would never have invested in the Cambridge Project had that not happened.

(4) Over a period of months, Mr Mikhailenko (and through him IV Fund and Regency), it is said, knowingly made a series of dishonest and false representations to the Gorbateskiys to induce them to invest in the Cambridge Project. Had the claimants known the truth about any of these allegedly false representations, it is said they would not have invested in either of the Cambridge or Maidenhead Projects.

(5) It is said that, throughout, IV Fund, Regency, Mr Mikhailenko and Mr Latsmanovich concealed the secret Investment Understanding from the claimants. It is said that deception continued even after the claimants had invested in the Cambridge and Maidenhead Projects and it is said that that persists to this day.

(6) IV Fund, Regency, Mr Mikhailenko and Mr Latsmanovich pursued, it is said, this fraudulent course of conduct because, it is said, IV Fund was over-exposed in its own investments and projects including Versant and/or to meet a shortfall in the existing funding for those projects. It is said those projects needed money and IV Fund, Regency, Mr Mikhailenko and Mr Latsmanovich accordingly, it is said, dishonestly procured that it was provided by the Gorbatskiys by way of their investment in the Cambridge and Maidenhead Projects.

17. In those circumstances and in what the claimants say are the premises from what has gone before, it is said that IV Fund, Regency, Mr Mikhailenko and Mr Latsmanovich, are liable to the claimants in damages to compensate them for the losses which they have suffered as a result of this dishonest conduct. In addition, it is said the other defendants are also liable to the claimants in respect of these losses.

(B) The Applicable Principles in Relation to Amendment

18. The relevant legal principles are well established and well known and were common ground between those appearing before me. They were summarised by the claimants in their skeleton argument in terms which are uncontroversial.

19. The factors relevant to the court's exercise of its discretion on an application to amend were recently summarised by Lambert J in *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB). At paragraph 10(a), she said:

> "In exercising the discretion under CPR 17.3, the overriding objective is of central importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general if the amendment is permitted."

20. A relevant consideration on an application to amend is whether or not any prejudice would be suffered as a result of the amendment. I interject at this stage that there is no suggestion on the part of any of the defendants in this case in relation to the proposed amendments to the particulars of claim that they would suffer any prejudice as a result of the amendments if I am to allow them. In particular, it is to be borne in mind that the proceedings are at an early stage, there are no hearings or other procedural deadlines which would be affected and, at this stage, the pleadings have not closed and the case management conference has not yet even taken place.

21. As Mr Goldman submits in his statement of 14 April 2021 (which is made in support of the various applications that are before me) and as I am satisfied, it is in the interests of the court and all parties to have all parties' true cases clearly pleaded at an early stage. That is a well-recognised principle, indeed a guiding principle, in relation to applications for permission to amend.

22. Another factor that is frequently taken into account on amendment applications is their prospects of success. As was said by Andrew Hochhauser QC (sitting as a deputy judge of the High Court) in *SPI North Ltd v Swiss Post International (UK) Ltd & Anor* [2019] EWHC 2004 (Ch) at [5]:

> "The test to be applied in an opposed application to amend a statement of case is the same as the test applied to an application for summary judgment. The question is whether the proposed new claim has a real prospect of success. A real prospect of success is to be contrasted with a 'fanciful' prospect of success: see *Swain v Hillman* [2001] 1 All ER 91. A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: see *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8], applied and approved in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]."

23. The leading case on "real prospect of success" remains *Three Rivers District Council v Governor and Company of the Bank of England* [2003] 2 AC 1. In this regard, the claimants draw particular attention to the following points:

(1) Per Lord Hobhouse at paragraph 158 on page 283:

> "The criterion which the judge has to apply under part 24 is not one of probability; it is absence of reality."

(2) Per Lord Hope at paragraph 95 on page 261, in some cases:

> "... it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. [However] more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence ... that is not the object of the rule."

24. It is accordingly equally well established that, in assessing whether amendments that are sought by a party have a real prospect of success, the court should not engage in a mini-trial on the documents. Indeed, unless it is satisfied that the amendments are "fanciful" and "entirely without substance" because they are, for example, "contradicted by all the documents", they should be granted and allowed to go to trial (subject, of course, to any questions of prejudice).

25. In the present case, and as I have already foreshadowed, the proceedings are at an early stage. Secondly, and particularly importantly in my view, they involve (as I have foreshadowed) allegations of fraudulent conspiracy. As has been said in previous

cases, the very nature of a case in conspiracy gives rise to its own particular considerations when considering whether a conspiracy plea can be properly advanced.

26. The matter has been addressed in a number of authorities, one of which is the decision of *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi VE Pazarlama AS & Ors* [2008] EWHC 659 (Ch). In that case, the twelfth defendant applied for reverse summary judgment on the conspiracy claims against him on the basis that they had no real prospect of success. Briggs J (as he then was) rejected that application stating at paragraph 32 that the claim passed "the relatively low hurdle presented by the reality test". Of more relevance to the present application before me, at [39], he stated:

> "... it is axiomatic that a case of conspiracy is rarely proved by documents recording either the relevant knowledge or the relevant agreement, all the more so in cases where, as here, the relevant transaction was carried out in secret. The question how much, if anything, an alleged conspirator knew and the extent to which he agreed to take part in the matters complained of is generally to be answered only upon a considered appreciation of the whole of the evidence after its deployment and testing at trial ..."

(C) The Amendment Application

(C.1) The Procedural History of the Amendment Application

27. The claimants' original points of claim ("OPOC") was served on 3 January 2020. As was also clear from the amended claim form, which was dated 2 December 2019, at that time, there were no allegations made of dishonesty against the IV Fund Defendants and they were not alleged to have conspired with the Versant Defendants.

28. On 19 February 2020, the Versant Defendants and the IV Fund Defendants served their defences. It is said by the claimants that those defences were materially inconsistent. In particular, the Versant Defendants alleged that there was a secret Investment Understanding between them and the IV Fund Defendants which was to apply to each project in which they participated. It was said to be to the effect that, notwithstanding any contractual documents to the contrary:

(i) IV Fund's investment would be by way of an investment, repayable only on completion of the development of the project, rather than a loan;

(ii) IV Fund would not receive any shares in the SPV developing the project and/or be entered into the SPV's register of members and/or be included as a shareholder in any return filed at Companies House in respect of the SPV until the development of the project was complete; and/or

(iii) IV Fund would not appoint any directors to the SPV developing the project until the development of the project was complete.

29. The Versant Defendants also allege that they and the IV Fund Defendants intended their Investment Understanding to apply to the Cambridge and Maidenhead Projects. In contrast, no mention was made of the Investment Understanding in the IV Fund Defendants' defence. Indeed, it is the position of those defendants that no such Investment Understanding ever existed.

30. The evidence before me is that the claimants did not necessarily believe what was being said by the Versant Defendants (which, of course, they themselves characterised as acting dishonestly) but that they did believe that the Investment Understanding could well exist. Accordingly, in those circumstances, they looked to amend the OPOC to set out what their position would be if the Investment Understanding was proved at trial.

31. That led to what was an original draft amended particulars of claim, which was sent to all the defendants in March 2020. That version is different from the draft amended points of claim which are before me today and in respect of which permission to amend is sought because that draft was expressly agnostic as to the existence of the Investment Understanding. In particular, it did not advance a "primary case" because it was said that whether or not in fact that existed was a matter outside the claimants' first-hand knowledge. In those circumstances, the claimants pleaded both possibilities.

32. It is relevant to note, however, at this point that many of the allegations in that version of the pleading are materially similar to the draft APOC that is before me today. That is relevant because all of the defendants in fact consented to the March 2020 draft amended particulars of claim. However, it was never filed at court, including in circumstances where the proceedings were subsequently stayed on 28 May 2020 so that the parties could attempt to mediate the dispute, as is explained by Mr Goldman in paragraphs 7.3 to 7.8 of his statement.

33. The evidence before me from Mr Goldman is that the mediation was not successful, the stay was lifted and the claimants confirmed that they still intended to amend their particulars of claim. By this stage, however, it is said that they had had an opportunity to consider all the historic events in conjunction with the documents in the defendants' initial disclosure. It is said that, in consequence, they realised that they had been deceived by Mr Mikhailenko and, through him, IV Fund and Regency. In those circumstances, they said (and say before me today) that there is good reason to believe that the Investment Understanding was credible and that they had been the victims of a deliberately dishonest scheme, which it is said was perpetrated by both the Versant Defendants and the IV Fund Defendants (other than Mr Novikov) to induce them to invest significant funds in Versant development projects.

34. It is those developments and other amendments, which I shall come on to, which are reflected in the draft APOC which is before me today and for which permission is sought.

35. As I have foreshadowed by reference to the summary in the draft APOC, the draft APOC now alleges that there was a secret Investment Understanding amongst the Versant Defendants and the IV Fund Defendants (other than Mr Novikov) which, it is said in law, is an unlawful means conspiracy. It also alleges that a number of fraudulent misrepresentations were made by Mr Mikhailenko and thus, it is said, by IV Fund and Regency. It is said that those are made pursuant to the Investment Understanding but it is said that there is also evidential material that is now available which means that they have an independent evidential basis.

36. As I am going to have to come on to in more detail when I come on to the question of costs, the draft APOC was sent to both the IGD Defendants and the Versant Defendants on 3 March 2021 in circumstances where Mr Mikhailenko had died in October 2020. The Versant Defendants never replied or at least never replied until yesterday, as I shall come on to. The IGD Defendants did reply on 12 March 2021. They refused their consent to the draft APOC which was described by IGD on their behalf as "so fundamentally flawed it is difficult to know where to begin" and that it "borders on an abuse". I merely note that those assertions were unparticularised and no further explanation was given at that time.

37. It would have appeared at that time, therefore, from that response and that refusal of consent, that the stance being adopted by the IGD Defendants was that the draft APOC had no real prospect of success and that any such application would be opposed by the IGD Defendants. That indeed is the consequence of the stance adopted in the 12 March 2021 letter.

38. It is in those circumstances, say the claimants – i.e. no response from the Versant Defendants and opposition from the IGD Defendants -- that they issued their Amendment Application. That was served on both defendants on 15 April 2021. I understand from the evidence before me today that thereafter neither the Versant Defendants nor the IGD Defendants engaged with the substance of the Amendment Application until shortly before the present hearing.

39. As I have already identified, the Amendment Application was accompanied by the detailed first witness statement of Mr Goldman in support. Accordingly and to the extent that it was not already clear from the APOC, Mr Goldman's statement elaborated upon the basis on which permission to amend was sought.

(C.2) Recent Developments

40. On 28 October 2021, IGD on behalf of the IGD Defendants wrote to the claimants indicating that they were no longer opposing the application. It was stated that:

> "Although we have serious reservations about the merits of the revised pleading and your clients' ability to make good any part of

> the claim, that is conceptually distinct from whether our clients should now oppose your application."

41. In any event, by withdrawing their opposition to the application, the IGD Defendants effectively have at this stage consented to the amendments which are made against them. I will have to return to this in the context of the application for costs but it is said by the claimants that, by so withdrawing their opposition, the IGD Defendants effectively also acknowledge that the amendments would have a real prospect of success.

42. Even more recently, so far as the Versant Defendants are concerned, those defendants, like the IGD Defendants, were provided with notice of this hearing (which I should say is fixed for a day and has been fixed for a very considerable period of time, indeed shortly after the Amendment Application and supporting evidence were served on 15 April) and were also more recently given notice of the details of this hearing. The parties who were actively taking part in this hearing at that stage were the claimants and the IGD Defendants. They indicated to the court that their wish would be for this hearing to be in person. That request was put before me and I considered it appropriate that the hearing would be in person and would take place in court in the Rolls Building. The parties proceeded on that basis and I was content with that course, which I considered to be in the interests of justice.

43. However, there was a development yesterday, which is that Mr Mountain emailed the court and enclosed a letter. In his email, he did two things. Firstly, he identified that he would be unable to attend the oral hearing of the applications because of the circumstances set out in the attached letter. The attached letter was essentially an NHS Track and Trace letter confirming that he was isolating because of close contact with someone who had tested positive for COVID-19.

44. The other matter that was raised in the letter was the fact that, in those circumstances, he also applied for an adjournment so that the other defendants that he represented (the Versant Defendants) could, on a subsequent occasion, make representations in relation to those applications. I should say that, at that stage, there had been no contact from Mr Penfold (the third defendant) and the other individual defendants so far as the Versant Defendants are concerned.

45. I considered carefully the application of Mr Mountain. In particular, I considered whether or not the applications should be adjourned in accordance with his request. I was satisfied, in circumstances where the applications have been fixed for many months and where he and the other Versant Defendants had had the draft amended pleading since 3 March 2021 and had had the application and supporting evidence since April 2021, that there was no good reason for an adjournment and indeed that an adjournment would be contrary to the overriding objective and would lead to an increase of costs. It would also have led to delay in the case, not least in circumstances where it would take some considerable period of time for a one-day application to be refixed before this court. In those circumstances, I refused the application for an adjournment.

46. However, I was sympathetic to the position of Mr Mountain and the fact that he was not able to attend in person. I considered the options as to how this hearing could take place and I took the view, particularly where there is a litigant in person who would be attending remotely, that, in order for there to be a level playing field all parties should appear remotely subject to any representations to the contrary. I accordingly indicated that I was minded to turn this hearing into a fully remote hearing, a course to which neither the claimants nor the IGD Defendants had any objection. Accordingly, this hearing today has proceeded as a fully remote hearing in circumstances where I was satisfied that it was in the interests of justice to so order.

(D) Discussion of the Draft Amended Particulars of Claim ("APOC")

47. The position of the IGD Defendants, as indicated on 28 October 2021 and confirmed to me by Mr Rowan Pennington-Benton, who appears on behalf of the IGD Defendants today, is that the IGD Defendants have consented to the amendments to the APOC.

48. In Mr Mountain's email yesterday, Mr Mountain indicated that he and those of the defendants on whose behalf he was acting or purporting to act amongst the Versant Defendants (that would be Versant, himself and the seventh and eighth defendants, which are the Cambridge SPV and the Maidenhead SPV) would be objecting to the amendment. However, today, before me, Mr Mountain has confirmed in fact, having had explained to him both the applicable legal principles and the low threshold test and

also the subject matter of the amendments, that he does not maintain any objection in relation to the amendments.

49. The approach adopted by Mr Iain Quirk QC, who appears on behalf of the claimants in this matter together with Mr Stuart Cribb, was to open the amendments at some length, identifying the different amendments and giving the reasons why it was submitted on behalf of the claimants that those amendments were appropriate amendments to make. Having heard that explanation, Mr Mountain was then given an opportunity to comment further and say whether or not, in the light of the manner in which those amendments had been opened, he had any further observations or whether or not he wished to object to any of those.

50. Mr Mountain (realistically, if I may say so) recognised the applicable legal test, which I have identified, and also recognised that in those circumstances he did not consider any objection could be made at this stage to the amendments, making quite clear that he did not agree with the allegations which were made against him and the other Versant Defendants and that those would be opposed in his and their defence in due course and would, of course, be considered on their merits at trial.

51. When this hearing commenced today, it transpired that I have also had the benefit of the attendance of Mr Ian Penfold, the third defendant. Mr Penfold, in his oral submissions to me this morning, confirmed that his position was the same as that of Mr Mountain and he did not pursue any objections to the amendments. However, in circumstances where both Mr Mountain and Mr Penfold are acting as litigants in person and no longer have the benefit of any legal advice, and in circumstances where the corporate entities are not themselves represented as such, it is appropriate that I address the proposed amendments and satisfy myself as to whether or not it is appropriate to grant permission to amend. I confirm that I have done so. In circumstances, however, where no party is objecting to the amendments, I can be more concise when addressing the amendments that might otherwise have been necessary had they been opposed.

52. The amendments can be broken down into a number of categories. The most serious category undoubtedly is what I, and the parties, have referred to as "the Dishonesty

Amendments". These are predominantly against the IV Fund Defendants and raise new allegations of dishonesty. The Versant Defendants, of course, were already alleged in the existing OPOC to be fraudulent. These amendments impact upon both the IGD Defendants but also the interests of the Mikhailenko estate.

53. That is a further reason why it is appropriate for me to consider them carefully as no one representing the interests of the Mikhailenko estate is before me today, although, as I will address in more detail when it comes to the Substitution Application, I am satisfied that the Mikhailenko estate and at least Mr Mikhailenko's widow has been properly notified of today's hearings.

54. Many but not all of the Dishonesty Amendments are directed at Mr Mikhailenko. It is said in many cases that it is through his conduct that IV Fund and Regency are alleged to have been dishonest. There are in fact four aspects of the Dishonesty Amendments:

> (i) the introduction of a new allegation of one single fraudulent unlawful means conspiracy against Versant, Mr Mountain, Mr Penfold, IV Fund, Mr Mikhailenko, Regency and Mr Latsmanovich constituted by the Investment Understanding that is said to exist amongst them;
>
> (ii) the introduction of new allegations of deceit against Mr Mikhailenko, IV Fund and Regency;
>
> (iii) the refinement of the existing deceit allegations against Versant and Mr Mountain in light of the new documents and information now at the claimants' disposal; and
>
> (iv) various consequential amendments to other paragraphs of the draft APOC in the light of those main sets of changes.

55. Dealing first with the Investment Understanding and the new claim for unlawful means conspiracy, the key paragraphs of the draft APOC which set out the alleged Investment

Understanding are at paragraphs 19(a) to 19(c) of the APOC. These provide as follows:

> "19(a). Further, unbeknownst to the claimants, there was amongst Versant, Mr Mountain, Mr Penfold, IV Fund, Regency, Mr Mikhailenko and Mr Latsmanovich (or any two or more of them) a secret agreement or understanding ('the Investment Understanding') to the effect that:
>
> (i) for each project in which IV Fund co-invested and/or participated with Versant, that project would be governed by the secret Investment Understanding rather than the written contractual documents executed in respect of the project; and
>
> (ii) notwithstanding any written contractual documents to the contrary for any given project:
>
> (a) IV Fund's investment would be by way of an investment repayable only upon completion of the development of the project rather than a loan;
>
> (b) IV Fund would not receive any shares in the SPV developing the project and/or be entered into the SPV's register of members and/or be included as a shareholder in any return file at Companies House in respect of the SPV until the development of the project was complete; and/or
>
> (c) IV Fund would not appoint any directors to the SPV developing the project until the development of the project was complete.
>
> 19(b). The purpose of the Investment Understanding was the deception of potential third party investors in the projects by concealing IV Fund's participation in those projects which the defendants believe was likely to deter third party investors from participating or investing in the projects.
>
> 19(c). Further still, also unbeknownst to the claimants, Versant, Mr Mountain, Mr Penfold, IV Fund, Regency, Mr Mikhailenko and Mr Latsmanovich (or any two or more of them) also intended that the Investment Understanding would apply mutatis mutandis to the claimants' participation in the Cambridge Project and the Maidenhead Project (as defined below) notwithstanding that the claimants were at no material time informed or aware of the Investment Understanding and never agreed to it nor authorised anyone else to agree to it on their behalf."

56. The allegation of unlawful means conspiracy based upon that Investment Understanding is set out in full at paragraphs 105 to 109 of the APOC. It is important to bear in mind that the Investment Understanding is in fact already in issue in these proceedings, as I have already foreshadowed, for two reasons:

(1) As I have already identified, it forms a key part of the Versant Defendants' defence, which is verified by a statement of truth. The claimants make clear that they do not accept that what is there pleaded vindicates the Versant Defendants -- indeed they say quite the opposite -- but, of course, that will be a matter for trial. However, it perhaps goes without saying but the Versant Defendants are entitled to pursue the factual allegations upon which what they say amounts to their defence is based and, in due course, the court will have to make findings in respect of the Investment Understanding in any event.

(2) The claimants have already pleaded to the Investment Understanding in their March 2020 draft amended particulars of claim as one of the two possible factual conclusions the court could reach (i.e. there either was or was not an Investment Understanding). They also pleaded to the legal consequences of the Investment Understanding, if established, and alleged amongst other matters that it would follow that:

(i) there was one single unlawful means conspiracy amongst the Versant Defendants and the IV Fund Defendants (other than Mr Novikov); and

(ii) that misrepresentations were made by Mr Mikhailenko which were made dishonestly rather than negligently.

57. As I have already noted, all the defendants consented to the March 2020 draft amended particulars of claim, which included such allegations albeit crafted in the terms that they were at that time, and that included the late Mr Mikhailenko.

58. It is against that backdrop that the allegations in respect of the Investment Understanding are now advanced in the draft APOC, which are materially similar in their nature albeit they are now advanced as the claimants' primary case, as I have already identified. Indeed, the IGD Defendants acknowledged as much in their letter of 12 March 2021 in which they said, "Many of the amendments are not new points."

59. The claimants stress, however, that they say that there is an independent evidential basis for the Investment Understanding in the documentary evidence. Today is not the time for a detailed consideration of such documentary evidence, nor indeed the merits or otherwise as to what can be derived from that documentary evidence.

60. I have already made clear that the defendants deny the allegations that are made by the claimants and no doubt the defendants will have their own explanation for that documentary evidential material. However, for completeness, I will identify the documents that are relied upon specifically in support of the current application. They include an email from a Ms Faulkner of Versant to Mr Mikhailenko, copied to Mr Mountain, dated 29 May 2018, which is referred to in paragraph 24(b) of the draft APOC, which stated:

> "Attached is our company registers for Versant (Cheddars Lane) Limited. This information is not yet on the public record as we would then have to submit further information to fund us which could then cause problems."

Another document, the attached company register for the Cambridge SPV, included Mr Mountain and IV Fund on its register of members.

61. The claimants say that the fact that IV Fund was not so listed on any public version of the Cambridge SPV's register of members and what they say is Mr Mikhailenko's knowledge of that fact is entirely consistent with and corroborative of the secret Investment Understanding alleged by the Versant Defendants. It is said that, if there was no Investment Understanding, that email should have been a clear red flag to

Mr Mikhailenko that IV Fund had been defrauded. It is said, however, that it was not taken as such.

62. I am satisfied based on the evidence before me, including the evidence of Mr Goldman and the matters that I have identified and a careful consideration of the draft amended points of claim, that there is no valid basis on which either Mr Mikhailenko's estate or indeed any of the defendants could validly oppose the claimants' application to incorporate the allegations based on the Investment Understanding into their pleading. I am satisfied that such allegations have a real prospect of success and there is no suggestion that any prejudice would be suffered in any relevant respect if I allow that amendment. Accordingly and for those reasons, I grant those amendments.

63. The next set of amendments relates to fraudulent misrepresentation and deceit. The new deceit claims against Mr Mikhailenko, IV Fund and Regency are set out at paragraphs 83(a) to (m). It is alleged that those defendants deceived the claimants in at least three respects:

> (1) The claimants had been told that part of the property the subject of the Cambridge Project (Cheddars Lane) had already been acquired and that contracts to purchase the remainder were in place. The claimants say that in fact (as they say IV Fund, Mr Mikhailenko and Regency well knew but did not tell the claimants) those contracts had all expired and the deposits paid under them had been forfeited prior to the claimants' investment. This knowledge, it is said, arose out of documents which have been provided by way of disclosure. I bear in mind the relevant chronology which is set out in the claimants' skeleton but do not consider it necessary to go into that in any detail. Suffice it to note that, at the time when Fortimat (that is the second claimant) signed contracts in respect of the Cambridge Project on 20 June 2018 and when it transferred its £2 million loan funds to the Cambridge SPV on 28 June 2018, there were in fact no valid contracts in force for the acquisition of Cheddars Lane. It is said that all this was deliberately concealed from the claimants, including at what is said

to be a key meeting with Mr Mikhailenko and Mr Mountain that took place in Moscow on around 27 April 2018. What was said by Mr Mikhailenko is particularised in detail at paragraphs 23 to 23(b) of the draft APOC but, in short, it is alleged that he misled the claimants to believe that the contracts to acquire Cheddars Lane were still valid and in force and that it was a good investment. It is said, however, that the reality was that those contracts had expired and the Cambridge Project was on the brink of collapse. It was, it is said, following that meeting that the claimants decided to invest in the Cambridge Project and Mr Mikhailenko deliberately never revealed the truth to them.

(2) Further allegations are made that the claimants had been told that IV Fund was a shareholder in the Cambridge SPV and that Fortimat would become a shareholder in the Cambridge SPV pursuant to its investment in the Cambridge Project. In fact, it is said that Mr Mikhailenko, IV Fund and Regency well knew but did not tell the claimants that IV Fund was deliberately not listed as a shareholder of the Cambridge SPV on publicly-available records.

(3) The claimants had been told that Fortimat would recover its (**Inaudible**) forward sale of the Cambridge Project in nine months and that it had good prospects. In fact, it is alleged that Mr Mikhailenko, IV Fund and Regency knew but did not tell the claimants that the Cambridge Project was in dire financial straits and urgently needed capital. It is said that not only had the purchase contracts for Cheddars Lane been forfeited but Versant and Mr Mountain had already tried to arrange a forward sale of it for many months without success, and again contemporary emails are referred to.

64. In the above circumstances and having regard to the content of the draft amended particulars of claim and the matters relied upon in support thereof in Mr Goldman's witness statement, I am satisfied that those amendments also have a real prospect of

success and that there is no prejudice in any relevant sense that could be suffered either by Mr Mikhailenko's estate or indeed by the Versant Defendants or any of the other defendants in relation to those amendments. Accordingly, I am satisfied it is appropriate to grant permission to make those amendments.

65. The other amendments sought to be introduced by the draft APOC have been summarised by Mr Goldman in his witness statement. It is convenient to address them by reference to the same categorisation. They comprise:

(1) "The Prosaic Amendments"

These amendments simply correct typographical errors in the OPOC, clarify how Gattaz's investment in the Maidenhead Project was paid and update the draft amended points of claim to cover developments since the OPOC. I am satisfied that such amendments are appropriate and have a real prospect of success and that there is no suggestion that they cause prejudice to any parties. Accordingly, I grant permission to make the Prosaic Amendments.

(2) "The Summary Amendments"

These introduce a summary section so as to comply with practice direction 16, paragraph 1.4 and paragraph C1.2 of the Commercial Court Guide. I am satisfied that there can be no objection to those amendments given that they are a requirement of the Commercial Court in circumstances where there is a pleading of the length for which permission is sought. Accordingly, I grant permission for those amendments.

(3) "The Document Amendments"

These make reference to new documents disclosed by the defendants that had not been seen when the claimants filed their

OPOC. Some of those new documents, as I have foreshadowed, form the basis of some of the new allegations of fraud introduced by the Dishonesty Amendments. Again, I consider it is appropriate that those amendments are allowed to reflect the true case being advanced by the claimants. They arise out of documents which have been disclosed subsequent to the original OPOC and it is appropriate that they are introduced into the pleading. I accordingly grant permission for the Document Amendments.

(4) "The Debt Amendments"

These introduce debt claims against the SPVs. Again, I consider those to be properly pleaded, to stand a real prospect of success and there is no suggestion of any prejudice. I accordingly grant permission for those amendments.

(5) "The Novikov Amendments"

These amendments further particularise the allegations against Mr Novikov and seek to distinguish the existing allegations of negligence against him and the new allegations of fraud against the other IV Fund Defendants (ie save for Mr Novikov). I consider it appropriate that such amendments are made and for the purpose that I have identified. I am satisfied that they stand a real prospect of success and there is no prejudice suggested by any party in the making of those amendments. I accordingly grant permission for the Novikov Amendments.

(6) "The April Meeting Amendments"

These further particularise the allegations made in respect of the April 2018 meeting in Moscow. I consider them unobjectionable and it is appropriate that full particulars are given of the allegations

in relation to that meeting. Accordingly, I grant permission for those amendments.

(7) "The July Meeting Amendments"

These further particularise the allegations made in respect of the July 2018 meeting in Maidenhead. Again and for the same reasons, I consider it appropriate to grant permission for the making of those amendments.

(8) "The Negligence Amendments"

These refine the claimants' existing allegations of negligence against the Versant Defendants, Mr Mikhailenko, IV Fund and Regency in order to align with the basis on which they now put their primary case on fraudulent misrepresentation, which they say arises out of the new information which they have at their disposal. I am satisfied that the Negligence Amendments stand a real prospect of success and there is no suggestion that any defendant would suffer any prejudice in any relevant sense by them being advanced. Accordingly, I grant permission for the Negligence Amendments.

66. Accordingly and for the reasons which I have given, I grant permission for the entirety of the draft APOC in the terms that are before me in draft.

(E) The Filing Application

67. By order of Butcher J dated 14 January 2020, the claimants' OPOC was permitted to be no more than 50 pages in length. The justification for that plea was:

(i) the claims are made against ten defendants and the cases against them varied and needed to be set out separately;

(ii) the claimants made serious allegations of fraud against the Versant Defendants which were required to be distinctly pleaded and properly particularised (see *Three Rivers v Bank of England* per Lord Millett at [184-186];

(iii) the parties' rights and obligations are complex and set out in at least six written agreements, the terms of each of which had to be summarised in order for the claims for breach to be understood; and

(iv) the claimants were relying on at least eight causes of action, the requirements of each of which had to be addressed individually.

68. All those points continue to apply but it is said that, in addition, the draft APOC is now longer for what is said to be justified reasons, being 74 pages in length including a 5-page schedule 1. It is said that, in addition to those previous reasons, which remain apposite, there are a number of additional reasons why the draft APOC is necessarily longer than the OPOC:

(1) In accordance with paragraph C5.1(a) of the Admiralty and Commercial Court Guide, amendments to a statement of case must show the original text unless the court orders otherwise. That is correct and no doubt is a reason for some of the additional length.

(2) The draft APOC continues to advance claims against ten defendants with different allegations being made against the various defendants. That remains the position.

(3) Importantly, the serious allegations of fraud and dishonesty are now being made against Mr Mikhailenko, IV Fund, Regency and Mr Latsmanovich as well, whereas previously they were only made against the Versant Defendants. For the same reasons, those claims also have to be properly particularised, raising as they do serious allegations of fraud and dishonesty.

(4) Additional contractual agreements relevant to the claimants' claims have been disclosed, in particular what are known as the Cheddars Lane purchase and lease agreements, and they feature in the new allegations of dishonesty against Mr Mikhailenko, IV Fund and Regency and (entirely appropriately) what are said to be their material terms also had to be set out in the APOC.

(5) The claimants are now relying on additional causes of action which were not set out in the OPOC and again those had to be properly particularised.

(6) In the OPOC, causes of action in negligent misrepresentation and non-fraudulent unlawful means conspiracy were advanced against the IV Fund Defendants.

69. As regards Mr Mikhailenko, Mr Latsmanovich, IV Fund and Regency, the claimants now rely primarily on their allegations of dishonesty in the draft APOC. However, the claimants have retained their original claims as an alternative case. Inevitably, therefore, there has been no reduction in length as a result of any deletions.

70. I am satisfied, in what is a complex case raising allegations of fraud and serious misconduct against no less than ten defendants, that the pleading that is before me of 74 pages in length is appropriate and I give my permission for service of the APOC of that length.

(F) Costs in Relation to the Amendment Application

(F.1) Costs of and Occasioned by the Amendment

71. The original position of the IGD Defendants in correspondence was that the costs of and occasioned by the amendment should be borne by the claimants. It is fair to say that that is the normal order, as was accepted by Mr Quirk during the course of his oral submissions.

72. However, Mr Quirk on behalf of the claimants set out the fact that there are a number of features of the present amendments which he says mean that the just order is that the order should be costs in the case essentially so that they should be recoverable by the successful party, whether that be (as he hopes) by the claimants or (as he recognises) if the defendants succeed, by the defendants. He identifies three points in that regard:

> (1) He says that many of the amendments are based on documents they did not have when they pleaded the OPOC and that they have obtained from the initial disclosure. The matter could not have been pleaded earlier and so the claimants, it is said, should not bear the costs of those.
>
> (2) More fundamentally, it is said that the case that the claimants seek to introduce by the amendments is that all the defendants (other than Mr Novikov) were party to one single fraudulent conspiracy which he said was concealed from them. They are only now, they say, beginning to unravel what they say is a conspiracy and the full extent of what they characterise as a fraud perpetrated upon them, so it would not be just for them, they say, to be required to pay the costs of amending to allege a case which they say they will succeed on at trial and could not previously have pleaded.
>
> (3) It is said that the amendments predominantly introduce new allegations rather than changing allegations previously pleaded and there will not have been, therefore, any wasted costs by previously pleading to causes of action no longer being pursued. In other words, it is said they are in no worse a position than they would have been had the allegations been in the OPOC, which, for the reasons that have been identified, they cannot.

73. By the time of the skeleton arguments, the IGD Defendants had moved from their position of seeking their costs of and occasioned by the amendments. By the time of

their skeleton argument, they describe the suggestion of costs in the case as less egregious.

74. During the course of his oral submissions, Mr Pennington-Benton (realistically, I might say) recognised that there was some force on the unusual facts of this case in the three reasons given by the claimant as to why costs in the case might be considered by the court to be appropriate. In particular, it was recognised that it might well be considered just, in circumstances whereby it would not have been possible to plead the unlawful means conspiracy initially, that those costs should carry with the overall merits as they would have carried, of course, if it had been possible to plead them initially.

75. In those circumstances and on the rather unusual facts of the present case, I do consider that the appropriate order is that the costs of and occasioned by the amendments should be costs in the case and I so order.

(F.2) The Costs of the Amendment Application

76. I have already set out the chronological history of the Amendment Application but, to recap, the draft APOC was sent to both the IGD and Versant Defendants on 3 March 2021 against the backdrop of Mr Mikhailenko having died in October 2020. No response was received by the Versant Defendants. The letter of 3 March 2021, which was sent by Wallace to IGD, made clear on its face that the IGD Defendants were to confirm by no later than 4.00 pm on 12 March whether or not their clients consented.

77. They wrote a similar letter on 3 March to Mr Mountain and Mr Penfold, again inviting consent and asking for their consent and the consent of the first, seventh and eighth defendants by 4.00 pm on 17 March. There was no response from Mr Penfold or Mr Mountain or indeed from the first, seventh and eighth defendants by 4.00 pm on 17 March or at all.

78. So far as the IGD Defendants were concerned and as I have already quoted, on 12 March, there was a response from IGD. In that response on 12 March, it was said, amongst other matters:

> "We do not consent to the proposed amendments to the particulars of claim, which represent an even greater misread of the situation than was already the case in the previous iterations. The conspiracy to defraud involving our clients or our former client, Mr Mikhailenko, is so fundamentally flawed, it is difficult to know where to begin and we are surprised that it forms such a large part of your clients' claims and borders on an abuse of process. Your other allegations are disputed. It is wrong of you to adopt wholesale the investment understanding as a valid theory. What new information have you obtained since the last occasion which has caused you to make these further proposed amendments given that the developer defendants filed their defence more than a year ago? Lest the developer defendants have provided you with new documents or information that we have not seen, we do not know what that information is. At first reading, many of the amendments are not new points, merely counsel tinkering with the wording of the existing flawed claim."

79. Wallace did respond on behalf of the claimants on 18 March in relation to that and identified (rightly, in my view) that the thrust of the IGD letter was that their clients objected to the amendment and they addressed the basis on which they said that there was an objection. They also said:

> "Notwithstanding the above and given your letter makes clear that your clients will not be engaging either properly or further in relation to the proposed amendments, the claimants have no option but to proceed with an application to court. The claimants have not received any response from the Versant defendants in relation to the proposed amendments. The claimants reserve the right to seek that the costs of the application are borne by your clients in light of their refusal even to attempt to agree the inclusion of the amendments."

80. That then led, after a gap of nearly a month, to the Amendment Application being issued and served on both sets of defendants on 15 April, together with Mr Goldman's first witness statement, which explained in some considerable detail the subject matter of the amendments.

81. Thereafter, neither group has ever engaged substantively in relation to the applications until, in the case of the IGD Defendants, on 28 October, when it will be recalled that IGD wrote to the claimants indicating that they no longer opposed the application and the reason given was:

> "Although we have serious reservations about the merits of the revised pleading and your clients' ability to make good any part of the claim, that is conceptually distinct from whether our clients should now oppose your application."

The reality is that, however it is characterised, that was a consent at a late stage to the amendments.

82. For the reasons that I have given earlier on in my judgment, I am satisfied that it was an appropriate case to grant permission to amend the particulars of claim in the terms which were sought.

83. Mr Quirk QC on behalf of the claimants now seeks the costs of the application against both sets of defendants, if I can put it like that. His submission is a short and succinct one but no less forceful for that. He says that, on normal principles, the draft amendment was sent to the defendants beforehand, they had a reasonable opportunity to consider whether to consent to it or not, the IGD Defendants made clear that they would not consent to it and therefore an application was inevitable. The other defendants, in particular Mr Mountain and Mr Penfold, did not respond. Therefore, they had not given their consent and therefore again, if there was to be an amendment, the court would have to give permission. He says the court has found that the application was an appropriate one and it has succeeded. Therefore, on normal principles, costs follow the event and the defendants should pay the claimants' costs.

84. He goes further than that. He says not only should they pay the costs but that those costs, so far as they relate to the IGD Defendants, should be on an indemnity basis. He says that in circumstances where he says that the delay between when the application was issued in April 2021 and when the IGD Defendants consented on 28 October was a deliberate and tactical one to delay the action and that such tactics should be condemned by the court and amount to conduct which justify the making of an order for indemnity costs.

85. Whilst he does not expressly address the relevant principles in his skeleton argument, he accepts (as is common ground) that, in order for there to be indemnity costs, there must be some conduct which takes the matter out of the norm. The relevant principles are well established and arise from cases such as the *Three Rivers* case and also the

decision of Andrew Smith J in the *Fiona Trust* costs litigation (*Fiona Trust & Ors v Yuri Privalov & Ors* [2010] EWHC 3199 (Comm))..

86. The application for costs and indemnity costs is resisted on behalf of the IGD Defendants by Mr Pennington-Benton. A number of reasons are given in the skeleton argument which was served on 8 November in relation to the application. In that skeleton argument, he makes the following points which I will address as I go through them.

87. Firstly, he describes the application for costs as controversial costs submissions. I disagree. Leaving side the question as to whether or not indemnity costs are appropriate, the costs submissions that are made follow the normal principle that, if an application is necessitated and the party is successful on that application, costs will normally follow the event.

88. He says that there are -- and this is per his skeleton argument -- four reasons which need to be addressed. The first is the submission that the IGD Defendants ought to have consented to the amendments when they were first produced in March 2021. He says this is not accepted. Firstly, he says the allegations were of a new and more serious nature than those previous intimated and agreed in March 2020. He says that, despite requests for the reasons for the significant change, including any documents in support, the claimants refused to provide any such explanation and it is said that the claimants' position on this point remains vague to this day.

89. Elaborating upon that in his oral submissions, he says that there was a marked distinction between the original amendments which were consented to and the amendments for which I have given permission, which cried out for an explanation.

90. I have a number of difficulties with that submission. The first one is that it is the position of the IGD Defendants that such explanation has never been given. That rather begs the question, therefore, as to what has changed between March 2021 when they were provided with the amendment and 28 October when they consented to the amendment.

91. Secondly, I do not accept in fact that there has not been any explanation because there has been the application itself and there has been the witness statement of Mr Goldman. That submission might have had more force if, following receipt of the application and Mr Goldman's evidence, which I am satisfied does contain a detailed explanation as to the content of the new amendments, they had responded that they understood the position in the light of that explanation and gave their consent, but they did not. Some many months passed without any consent being given and in circumstances where the position remains that nothing has changed. As I say, I do not accept that they have not been given an explanation but, even if that was correct, the fact is that they have consented to the amendment, thereby recognising that it is an appropriate application for permission to be granted.

92. The next limb in relation to this is it is said that the allegations continue to rely on the Investment Understanding but this time, rather than in the alternative, it now takes centre stage as part of a primary case. It is said that no consideration appeared or appears to have been given to the fact that Mr Mountain, the architect of the Investment Understanding, has already admitted it to be false. It is said he has also been found liable for fraud, dishonest assistance and breach of trust for his diversion and dissipation of IV Fund's investment monies and it is said that the claimants seem to have entirely ignored this fundamental point.

93. There are a number of problems with this submission. First and fundamentally, none of what is now set out in the skeleton argument is in evidence before me. This was a heavy application which was issued in April 2021 and was fixed as such. Accordingly, in accordance with section F.6 of the Commercial Court Guide in relation to heavy applications, the timetable under F6.3 for heavy applications (as set out in practice direction 58, paragraph 13.2) involved at (b)

> "... evidence in answer must be filed and served within 28 days thereafter."

94. The IGD Defendants did not put in any evidence in response to Mr Goldman's witness statement and have never done so. It is neither satisfactory nor appropriate in those circumstances for such factual matters to be led in the skeleton argument when the witness statement foundation for that has not been set, as is contemplated by the Guide.

95. In any event, there is a more fundamental point, which is that the claimants' case and their pleading is what it is and the position is that the defendants have consented to it, set against the backdrop that it is founded on the defence of the Versant Defendants, which is supported by a statement of truth. Whatever may or may not have changed with this litigation, that remains the backdrop to the current application and the fact is that the IGD Defendants have consented to the amended particulars of claim.

96. The third point under this heading that is relied upon by the IGD Defendants is that the IGD Defendants took the view (and it is said they still do) that, in pursuing them, the claimants are (as it is put) "barking up the wrong tree". It is said that IV Fund and Mr Novikov themselves invested millions of pounds in the ten projects and it was hoped that, as matters advanced against Mr Mountain and the SPVs, the claimants would see sense in this regard.

97. It is said that, since the judgment order, IV Fund, Regency and Mr Novikov have sought various orders, including for disclosure of bank statements and other documents showing where the investment funds have gone. They say that they, like the claimants, are actively seeking to recover their investment funds. They say that IV Fund in particular considers it something inherently problematic in an allegation that it colluded with others to lose its own money.

98. The difficulty with that at the end of the day is, whatever the belief of the IGD Defendants, the amended particulars of claim are what they are and they have consented to those amendments. Therefore, the points they make in this regard cannot be a reason which impacts upon the normal incidence of costs.

99. It is also said that, since at least March 2021, IV Fund has been seeking to appoint a trustee in bankruptcy over Mr Mountain's estate and affairs, which it is said is an important part of the recovery and tracing process. It is said that that bankruptcy of Mr Mountain is also relevant to the question of amendment, but again none of that justifies any failure to consent to the amendment or to be exposed to the risk that the court would agree to the amendment in that regard.

100. Finally under this heading, it is said that if IGD had given their consent in April as opposed to in October, that would have made no difference. It is said there is no correspondence in the intervening period and the hearing must still go ahead as the Versant Defendants had not consented. It was pointed out the consent of all parties would be required to avoid the making of an application (see CPR rule 17.1(2)(a)).

101. It is also said that the IGD Defendants consented just shy of two weeks before the hearing, which it is said "gave [the claimants] plenty of time". It is also said, "No sensible complaint can be made about this."

102. I do not consider that this point bears examination, either. The fact of the matter is that the IGD Defendants had made absolutely plain in March 2021 that they would not consent to the amendment. It is their conduct which inevitably resulted in the application being made with its supporting evidence. If they had consented, there is no doubt in my mind whatsoever that (i) events would have taken a different course; and (ii) costs would have been saved.

103. Firstly, as is clear from the conduct of Mr Mountain and indeed Mr Penfold before me this morning and as I have already addressed in a different context, in circumstances where the IGD Defendants had consented, they did not pursue any objection to the amendments. I consider the overwhelming likelihood is that, if the Versant Defendants had consented and consented at an earlier stage either before an application was brought or immediately after the application was brought, the Versant Defendants would not have maintained any objection, not least in circumstances where they are unrepresented and do not have the benefit of legal advice. They would no doubt give serious consideration to the position of the other defendants (who, of course, do have the benefit both of legal advice from their solicitor and also from the counsel that is instructed). I do not consider it right to say that consent of the IGD Defendants would have made no difference had they given their consent in April 2021.

104. Summarising their first objection and the submission that they should have consented to the amendments when they were first produced in March 2021, I am satisfied that they were given a fair opportunity to consider the amendments before an application was made, the application was not made precipitously but at a time which gave them

and the other defendants an opportunity to respond and consent. Their response was in strong terms, which made quite clear that they did not consent and would not consent to the amendments.

105. Also, the suggestion that they required an explanation as to how that situation comes about can itself be tested by the fact that, when they received Goldman 1 and a detailed explanation in relation to the content of the amended statement of case, they still did not consent to the amendment.

106. Also, the suggestion that what they needed was an explanation and it is because there was no explanation that they had not given their consent does not ring true in any event because, certainly per their version of events, they have never received an explanation and yet, in October 2021, they gave their consent.

107. The second of the points that is made by Mr Pennington-Benton in his skeleton argument is that, whilst it is said that the IGD Defendants have caused a delay of six months to the application, they say that is plainly a nonsense. They say the application was listed for hearing on 10 November 2021 on 23 April. Having consented to the claimants' applications, the claimants nevertheless insisted that the hearing must proceed and for a full day. It is said that would have been the position had the IGD Defendants conceded the application at any point between April and October 2021.

108. I do not consider that point bears examination, either. I have already given my reasons why I consider that, if the IGD Defendants had given their consent either in March or shortly thereafter in April, the likelihood is that it would not have been necessary to have a one-day hearing having regard to the position of the other defendants, in relation to which there is every likelihood that their position would have followed that of the legally-represented IGD Defendants.

109. On any view, if the IGD Defendants had given their consent promptly, I have no doubt in my mind that, even if this hearing had to go ahead, it would have been of a shorter length than it has been. That is illustrated by the fact that the argument in relation to the amendment itself, such as it was, was completed within two hours of the start of this hearing involving all parties.

110. It is then said (perhaps bravely, it might be thought) that it is, as a matter of principle, quite wrong to criticise a party for reserving their position until:

> (a) they see the application in full together with any intended submissions (which, as noted, the claimants require to file in any event); and
>
> (b) a reasonable point in advance of the hearing lest the application be overtaken by other matters.

111. I do not agree that it is wrong in principle to criticise a party for reserving their position. This court, like any court, expects a party to consider any request for an amendment and either consent to it or object to it, in either event recognising what the consequences of that are. Again, there might have been some substance in this point had the IGD Defendants, upon receipt of the application notice and Mr Goldman's explanation, said that they were now satisfied and consented. At most, there would then be a debate as to whether or not it was necessary for there to have been an application and whether it was necessary or not for the costs of Mr Goldman's witness statement to be incurred. But that is not the situation because, as we know, when the IGD Defendants did receive all that material, it made no difference to their stance and, for a period of many months, they did not indicate their consent to the application.

112. Equally, I disagree that they gave their consent at a reasonable point in advance of the hearing. In fact, it was within days of when the claimants' skeleton argument had to be lodged, which was lodged on 4 November. It is signed by both leading and junior counsel and no doubt, in the period prior to that, it would have gone through a drafting process involving junior and then leading counsel, the instructing solicitor and the client and would then have been finalised. If anything, the timing illustrates that it was not a reasonable period in advance that consent was given; it was consent which was given very much at the last minute.

113. It is convenient for me to address at this point the basis on which the claimants say that there should be an award of indemnity costs in that it is said that what had occurred was a tactical decision not to give consent until the last moment. That is a serious

allegation to make and it would need commensurate evidence to justify a finding by the court that there was a deliberate tactical decision on the part of the IGD Defendants not to give their consent until the last moment.

114. The evidential material before me does not justify me in reaching that conclusion. Sadly, it is all too common for parties to see the light of day and to consent to an application close to the hearing. While such behaviour is to be regretted, it does not as such, in the normal course of events, take the matter "out of the norm" or justify the incurring and making of an indemnity costs order.

115. Whilst it is regrettable that the IGD Defendants only gave their consent very shortly before the hearing, I do not consider that it is appropriate to draw the conclusion that, in doing so, they were acting tactically and deliberately trying to delay the progress of this action. In such circumstances, I do not consider it appropriate to order indemnity costs.

116. I turn then to the third and fourth points that are made by the IGD Defendants in resistance of the application for costs against them. They say thirdly that the claimants aver that any objection to their proposed amendments would be hopeless, it being plain that they have real prospects of success, and it is said that it is unusual that the claimants are talking about the merits and it is said that the IGD Defendants' consent to the application put out of the picture the only defendants with a fully-briefed law firm and counsel instructed and whom have been dealing with parallel proceedings concerning the Versant Defendants for some two years.

117. Points which are made in relation to the merits are then set out in the skeleton argument. They conclude by saying that they say no more about the merits but suffice to say that commercial considerations played a significant role in its "entirety timely" agreement to "go quietly on the amendments".

118. In relation to that submission, I simply say the fact is that the IGD Defendants did give their consent, it is unhelpful to reopen the merits in circumstances where they have consented (albeit belatedly) to those amendments and, in any event, the correct and appropriate time for them to have consented would have been in March 2021 before an

application was made and they were at risk once an application was made and evidence was provided **a fortiori** if they did not consent once they had considered that evidence and, of course, they did not.

119. The final point is one where they address and grapple with the claimants' allegations that the IGD Defendants had acted unreasonably in terms of their conduct. I have already addressed this point. I am satisfied that they did not act at any stage in an improper manner but they failed to give their consent to an application which has been successful and costs should therefore follow the event.

120. Mr Pennington-Benton, with a view to summarising his submissions in his oral submissions, essentially made three headline points which I have largely dealt with already but I will confirm my reasons in relation to each of those.

121. His first point, which he said was an overarching point, was that it really made no difference whether they gave their consent in March 2021 or consent on 28 October 2021. I have already dealt with that. I consider it would have made a difference. The overwhelming likelihood is that the stance of the other defendants would have been forthcoming and different at an early stage and that it is inherently unlikely that anything like a one-day hearing would have been required.

122. The consequence of the consent only being given on 28 October is that, in reality, we have had effectively at least half a day's argument on who should pay the costs of the Amendment Application. It would have been better if the defendants, recognising that they had lost the application for an amendment in the sense that they were no longer opposing it and were now consenting to it, had recognised that costs would follow the event in the normal way.

123. The second point that is taken is about the circumstances in which the application was issued and the fact that there had, it is said, been a delay on the part of the claimants prior to giving the amended particulars of claim for consideration by them. I do not consider it appropriate to explore the backdrop over that time period. For part of the time period, there had been a mediation and the case had been stayed. In addition, the way initially that the claimants had gone about it was to seek part 18 requests with a

view to them serving their pleading once those had been dealt with. In the event, no part 18 requests were forthcoming and, once it was clear that they were not going to be forthcoming, in due course the amendment was provided in March.

124. In any event, the reality of the matter is that, whatever happened in the period up to March 2021, they did give in March 2021 the amended particulars of claim to the IGD Defendants, who had a reasonable opportunity to consider them. Notwithstanding such reasonable opportunity, they did not consent to the amendment and, equally, after the application had been issued and Mr Goldman had given his witness statement, there was still no consent given.

125. I also consider the submissions that were made in relation to the early period of time also have to be seen in the context of the fact that, once an application was made and an explanation was given, that still did not bring forth any consent.

126. The third point, which really is a variation of the first point, was to say there was not a tactical decision not to respond and it really made no difference whether or not they consented in March and October. I have already addressed the question of indemnity costs. I am satisfied that there was not a tactical decision not to give consent earlier. But, on the latter point, for the reasons I have already given, I do consider it would have made a real difference.

127. In those circumstances and for those reasons, I am satisfied that costs follow the event in the normal way and that the IGD Defendants should pay the claimants' costs of the Amendment Application.

128. So far as the position of Mr Mountain is concerned, he is a litigant in person. He candidly says that the reality is that he cannot afford and has not had the benefit of legal advice and that, had he had legal advice, he would probably have consented as he has now indicated he does this morning.

129. Mr Penfold's position is slightly different. He says in fact that he thought, as is correct, that he and Mr Mountain had consented to the original amendments and that these were

really more of the same and that effectively he had given his consent to those amendments.

130. Whilst I have some sympathy for Mr Mountain and Mr Penfold as litigants in person, the fact of the matter is that they were served with the Amendment Application and that they have to be treated like any other litigant in litigation. I am satisfied that it was made clear to them in correspondence in March 2021 that their consent was being sought and that, if they did not give their consent, an application would be made and they would be exposed to costs if that application succeeded. There is no doubt that they received that correspondence and there is no doubt in my mind that they must have understood at that time that an application was being made, their consent was necessary and, if they failed to give their consent, they were at risk of costs.

131. In those circumstances and although I have given careful consideration to the reasons given by Mr Mountain and Mr Penfold as to why they should not pay the costs, the reality of the matter is that it was not until today that they gave their consent. Whether or not they might have given their consent earlier if the IGD Defendants had consented earlier, the fact of the matter is that they have never consented to the application, it was necessary therefore for the claimants to open that application before me today and the costs should follow the event in the normal way.

132. Accordingly, I am satisfied that both Mr Mountain and Mr Penfold and the corporate defendants associated with them (that is the first defendant and the seventh and eighth defendants) should pay the claimants' costs of the application.

(G) The Reamended Claim Form

133. There is an application. which is not opposed, to reamend the claim form in the draft which is before me. I am satisfied it is appropriate to grant that amendment and I do accordingly do so.

(H) Summary Assessment of Costs

134. I have found that the defendants are liable to pay the costs of the claimants. The first point that arises before I consider the question of summary assessment is whether they should be jointly and severally liable for those costs. It is suggested by Mr Pennington-Benton that I should in some way apportion responsibility even if on a rough-and-ready basis and that the IGD defendants should only be responsible for, say, 50 per cent of those costs or whatever. There are in fact ten defendants in this case. He said that the reason for that is the reality is they will end up paying all the costs, no doubt to prevent any default events occurring.

135. Against that, it is said by Mr Quirk on behalf of the claimants that the normal order is that there should be joint and several liability. I have found that all the defendants are responsible for the costs having been incurred, none of the defendants having consented to those costs. However, the position in one sense is no different than it would be at trial where the defendants would be jointly and severally responsible for the costs if they were the unsuccessful party.

136. I consider that Mr Quirk is right in that submission and that there is no good reason to depart from the normal order that the defendants should be jointly and severally liable for those costs, and I so order.

137. So far as summary assessment is concerned, the claimants' statement of costs for summary assessment comes to some £55,295.92. Off that perhaps needs to be taken a small amount to take into account the fact that this was not in fact a live oral hearing but was done remotely. But, in addition to that, the fact is that it was based on attendance of four hours and in fact the hearing has gone on for longer than four hours, so those factors may well cancel each other out.

138. Mr Pennington-Benton makes a number of points of detail in relation to the claim. In particular, he draws attention to the schedule of work done on documents and in particular he says the amount of time for the preparation of the hearing bundle is too large, particularly when having regard to the Substitution Application. He also, as a point of principle, says that, after the IGD Defendants had consented on 28 October, it was no longer appropriate, if it was ever appropriate, for leading counsel to be instructed for this hearing. Alternatively, his submission is, if it was appropriate for

there to be leading counsel, then there was no need for there to be junior counsel as well.

139. I am satisfied that the amendment was an important matter for the claimant. It was raising serious allegations and those were allegations which, on any view, the court would look at carefully whatever the position was of any individual party. I consider that it was reasonable and proportionate for leading counsel to be involved. No doubt costs were saved by the fact that junior counsel were also involved. I do bear in mind, though, the overall brief fee for the two and the fact that, in the event, sadly, Mr Cribb has not had an opportunity to do any of the oral advocacy, something I had hoped he might have done but he has not in the event. I encourage juniors to be given parts of the case because it gives them an opportunity to improve their advocacy skills. Nevertheless, I do not consider it to be unreasonable or disproportionate for there to be both leading and junior counsel in relation to what is a serious matter with serious allegations being raised.

140. I do bear in mind, however, the points that are made in relation to the quantum of the overall brief fee in the context of what was ultimately an application which was not opposed in the event, although it only became clear that that was the case shortly before the hearing.

141. The courts have repeatedly said that summary assessment is a broad brush exercise. I bear in mind those points. I also bear in mind the points that were made by Mr Mountain and Mr Penfold. In particular, they highlight the fact that certainly to someone who is a litigant in person not experienced in commercial litigation, the sums involved are large. That is right.

142. I do also bear in mind that the claimants had the lion's share of the preparation, which is one reason why the IGD Defendants are not really in a position to draw attention to a distinction between their costs at £20,000-odd and the claimants at £55,000.

143. Doing the best I can, I summarily assess the claimants' costs at the figure of £46,500 and order those to be paid within 14 days unless any of the defendants wish to ask for additional time.

(I) The Substitution Application

144. As I have already noted, sadly, the fifth defendant, Mr Mikhailenko, has died and, by the Substitution Application, the claimants seek an order that his widow be appointed to represent his estate in these proceedings.

145. So far as the other defendants are concerned, the IGD Defendants neither consent nor object to the Substitution Application and I have had no representations from either Mr Mountain or Mr Penfold in relation to the proposal. Equally, in circumstances where I am satisfied that Mr Mikhailenko's widow has been properly notified of the Substitution Application and has not appeared before me today either herself or by legal representative, her position, as it were, is unknown and, at the very least, no objection has been taken by her to such course in circumstances where I am satisfied that proper notice of the application and of today's hearing was given to her.

(I.1) Applicable Legal Principles

146. The Substitution Application is brought under CPR rule 19.8(1). As Rimer LJ explained in *Millburn-Snell v Evans* [2012] 1 WLR 41 at [22], that rule is "concerned only" with "proceedings that have already been issued".

147. The applicable rule is rule 19.8(1), which provides:

> "Where a person who had an interest in a claim has died and that person has no personal representative, the court may order—
>
> (a) the claim to proceed in the absence of a person representing the estate of the deceased; or
>
> (b) a person to be appointed to represent the estate of the deceased."

148. As is noted in the White Book at paragraph 19.8.1 on page 724 of Volume 1:

> "An order under rule 19.8(1) is made in order to facilitate the continuance of the proceedings so as to determine the rights and obligations of the parties to those proceedings."

149. As is pointed out on behalf of the claimant, the rule essentially therefore involves four elements, three jurisdictional and one discretionary:

(i) "a person who had an interest in a claim";

(ii) "has died";

(iii) "and that person has no personal representative"; and

(iv) "the court may order", the latter being discretionary.

150. As was said in *Millburn-Snell v Evans* itself, the relevant death "will usually be of a party" (see paragraph 30). I am satisfied on the evidence before me that Mr Mikhailenko is sadly deceased and that requirement is therefore met. Also, I should say that that person (that is the fifth defendant) not only has died but he also had an interest in a claim.

151. So far as that person has no personal representative, the evidence before me is that, having made reasonable inquiries, including through the solicitors acting for the IGD Defendants (that is IGD) who previously acted for the fifth defendant, Mr Mikhailenko, nothing has emerged to suggest that Mr Mikhailenko has a personal representative. Clearly, if it were subsequently to transpire that there was a personal representative, then the matter would have to be brought back to court and there are alternatives available to the claimant in that scenario involving joinder. I am, however, satisfied on the evidence currently before me that there is nothing to suggest that there is a personal representative which has been appointed at this time.

152. So far as the discretionary element of "the court may order" is concerned, and as was explained by Robert Walker LJ in *Berti v Steele Raymond (A Firm)* [2001] EWCA Civ 2079 at [5], that provision (CPR rule 19.8(1)):

> "... gives the court quite wide powers to dispense with the need for a formal grant of probate or letters of administration after the death of a party ..."

153. I am satisfied that the requirements are met and that, in the exercise of my discretion, it is appropriate to make an order. In particular, Mr Quirk highlights (and I agree) three particular points:

> (i) that Mr Mikhailenko was the main point of contact in relation to the subject matter of the allegations in this claim and the claimants are saying that he was indeed the individual who was primarily responsible;
>
> (ii) that it is necessary to appoint a representative on behalf of the estate so that the estate can participate in relation to the allegations that are made; and
>
> (iii) that the rights and obligations of the estate are likely to be affected by this litigation and serious allegations are made against Mr Mikhailenko which it would be appropriate for the representative to have the opportunity to defend in whatever are considered to be the best interests of the estate.

154. In those circumstances, I am satisfied it is an appropriate case in which to appoint someone to represent the estate of Mr Mikhailenko. Again, on the information currently before me, the closest living relative to Mr Mikhailenko is his widow, Mrs Mikhailenko, and the evidence before me is that this application has been served upon her and she is aware of today's application. No representations have been made on her behalf and no suggestion or objection has been given that she should not be ordered to be appointed the representative to represent the estate of the deceased.

155. I note in that regard that the White Book notes at paragraph 19.8.1 on page 724 of Volume 1:

> "The best person for the court to appoint under rule 19.8(1) is the person most likely to have a right to apply for a formal grant of representation. For that reason, applications made under subparagraph (b) tend to be to appoint a relative of the deceased."

That was, for example, what was ordered in *Berti v Steele Raymond*, where the Court of Appeal made an order permitting the deceased's son to represent the estate in bankruptcy proceedings in order to dispute the petition debt.

156. On the evidence currently before me, the person most likely to have a right to apply for any formal grant of representation would be indeed Mrs Mikhailenko as the widow of the deceased and I consider that the requirements of CPR rule 19.8(1) are satisfied and, in the exercise of my discretion, it is appropriate to appoint Mrs Mikhailenko to represent the estate of the deceased.

157. Finally, I merely note that one of the reasons for making such an application is the consequence set out in rule 19.8(5), which is that:

> "... any judgment or order made or given in the claim is binding on the estate of the deceased."

I am satisfied that in all the circumstances that I have identified, including the serious allegations that are made against Mr Mikhailenko, it is appropriate that Mrs Mikhailenko be appointed to represent the estate of the deceased so that those issues can be aired and so that there is an opportunity to make representations in that regard at trial and also so that the outcome is binding upon the estate of Mr Mikhailenko.

158. For those reasons, I grant the application that is sought that Mr Mikhailenko's widow be appointed to represent his estate in these proceedings.

(J) Costs of the Substitution Application

159. The final matter that arises before me today relates to the question of the costs of the Substitution Application. The application has been successful but, of course, I have not heard from anyone on behalf of the estate, nor indeed do we know at this stage how matters may proceed hereafter, that order having been made. It is also right to note that the claimants have put markers down in relation to certain of the other defendants and their conduct in relation to the claim against the fifth defendant and getting to the bottom of who is involved in the administration of that estate.

160. I consider that the appropriate order to make is that the costs of the Substitution Application be reserved in the first instance to the judge hearing the case management conference. That judge will be far better placed in fact to consider the question of costs in circumstances whereby, at that stage, it will become clear what the involvement of the substituted party is at that stage and will be going forward.

161. This is not one of those cases where the judge hearing the Substitution Application is far better placed to deal with it. The judge at that hearing can be brought up to speed within short order in relation to the order that was made and the reason for it.

162. In reserving the costs to the judge hearing the case management conference, I make clear that I am not fettering the hands of that judge and all options will be available to that judge, including deciding that that occasion is not the right occasion in which to address the question of costs and that there may be a more appropriate occasion thereafter, but that is entirely a matter for the judge hearing that case management conference.

163. Accordingly and for the reasons that I have given, I order that the costs be reserved to the judge hearing the case management conference in relation to the Substitution Application costs.

164. That only leaves me to thank the parties and their legal representatives for the quality of their written and oral submissions, which I do.