Neutral Citation Number: [2022] EWHC 2575 (Comm)

Case No: CL-2019-000320

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2022

Before :

MR JUSTICE ANDREW BAKER

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Between :

(1) VICTOR PISANTE **(2) SWINDON HOLDINGS & FINANCE LIMITED** **(3) BCA SHIPPING INVESTMENT CORPORATION** **(4) CASTOR NAVIGATION LIMITED**	**Claimants**
- and -	
(1) GEORGE LOGOTHETIS **(2) LOMAR CORPORATION LIMITED** **(3) LOMAR SHIPMANAGEMENT LIMITED** **(4) LIBRA HOLDINGS LIMITED**	**Defendants**

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Charles Béar KC & Laurentia de Bruyn (instructed by **Debevoise & Plimpton LLP**) for the **Claimants**
David Allen KC & Jason Robinson (instructed by **Stephenson Harwood LLP**) for the **Defendants**

Hearing dates: 4, 5 October 2022

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Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. Following the trial of this Claim in July 2021, on 28 January 2022 I handed down judgment, [2022] EWHC 161 (Comm). This further judgment dealing with consequential matters assumes familiarity with the main judgment and uses its terminology.

2. By ETFA 3, Swindon purchased from Libra, for US$6,250,000 (reflecting a sum due to Swindon under ETFA 1) plus US$2,741,250 (reflecting the sum treated by the parties as invested by Swindon in ETFA 2), an Equity Tracker Fee designed to be the financial equivalent of 30% of Lomar's interest in OMHL, that is to say a total purchase consideration of US$8,991,250. In the main judgment, I concluded that Swindon, acting by Mr Pisante, was induced to enter into ETFA 3 by deceit on the part of Libra, acting by Mr Logothetis.

3. There was also a claim concerning a loss suffered by Swindon on some Piraeus Bank shares, on which ultimately judgment was entered against Libra on an agreed basis as explained in the main judgment at [169].

4. By my Order dated 28 January 2022 ('the January Order'), upon the handing down of the main judgment, I declared that Swindon was entitled to rescind ETFA 3 by reason of that deceit and (if an order of the court was necessary for that purpose) I rescinded it. The January Order further ordered that:

   (1) Libra pay Swindon US$6,250,000, plus interest to be determined by the court if not agreed (with a payment on account of US$1,640,000), as a restitutionary payment consequent upon rescission;

   (2) there be judgment for Swindon against Mr Logothetis for damages for deceit to be assessed, with a payment on account of US$6,250,000, plus interest to be assessed if not agreed, with a payment on account of US$1,640,000;

   (3) any payment by Libra or Mr Logothetis of or towards those sums would to that extent relieve the other of the obligation to pay the same;

   (4) Libra pay Swindon €500,000 in relation to the Piraeus Bank shares claim, with interest thereon to be assessed if not agreed.

5. Centrally for present purposes, that Order further provided as follows:

   "*7. The question of what, if any, additional relief consequent upon rescission ought to be granted against Libra, and/or whether damages in addition to [the order for payment of US$6,250,000] should be awarded against it, together with the final assessment of damages against Mr Logothetis, is … adjourned and (absent agreement) shall be determined in accordance with [directions that were set out in the Order].*

   8. All other claims pleaded by the Claimants shall be and are hereby dismissed."

6. So far as material for present purposes, the relief sought by the claimants, on the case pleaded for and considered at trial, was to recover, through restitution and/or damages, the US$9m odd they said they had paid for ETFA 3. Later in this judgment, I set out in more detail how that came to be the case. The main judgment explained that I required further assistance from counsel as to whether, on the findings of fact I had made, Swindon was entitled to more, and if so how much more, than the US$6.25m granted to it by the January Order. The directions called for an exchange of written submissions and a one day argument to enable me to determine that.

7. At the parties' joint request, proceedings were stayed until 1 April 2022 in the hope that some or all of the outstanding consequential matters might be agreed. The stay, the time taken up by the exchange of further submissions I directed, and the intervention of the long vacation, together explain why those matters, having not been agreed, did not come back before me until 4-5 October 2022.

The US$2.7m

8. In the main judgment at [326] to [348], I explained why I was not comfortable, upon the basis of the argument at trial, to finalise there and then the relief to be granted consequent upon rescission or the amount to award in damages against Libra (if at all) or Mr Logothetis. My concerns related to the US$2,741,250 part of the stated consideration for ETFA 3 ('the US$2.7m').

9. One complication was that the US$2.7m was not paid in cash. That stood in contrast to the US$6,250,000, which was paid in cash in that the obligation on Swindon to pay was set off against Libra's accrued obligation to pay Swindon US$6,250,000 under ETFA 1. Swindon's obligation to pay the US$2.7m was discharged, by agreement, by the surrender by Swindon to Libra of ETFA 2. The agreement for the US$2.7m to be paid in that way was part of ETFA 3, the contract now rescinded *ab initio*. I did not think it was agreed or self-evidently correct to say that for the purpose of restitution consequent upon rescission, or for damages for deceit, the surrender of ETFA 2 should be equated to a cash payment of US$2.7m.

10. That complication no longer troubles me. The written submissions following the main judgment, and the skeleton arguments for the consequentials hearing, suggested that the surrender of ETFA 2 as part of concluding ETFA 3 was being treated by both sides, for present purposes, as equivalent to a payment of US$2,741,250. For example, the skeleton argument from Mr Allen KC for the defendants said in terms that the claimants were seeking "*to recover the consideration for ETFA3 in consequence of ETFA3 having been rescinded, <u>namely US$2,741,250</u>*" (my emphasis). The focus there, obviously, was on that part of the consideration not already ordered to be returned under the January Order.

11. Mr Béar KC opened on the basis that it was now common ground that US$6,250,000 plus US$2,741,250 was paid as the consideration for ETFA 3, and that was confirmed by Mr Allen KC, agreeing as he did that, for the purposes of considering either restitutionary or damages claims, Swindon is to be regarded as having transferred value in that amount when ETFA 3 was concluded, by way of the surrender of ETFA 2.

12. Some flexibility and realism may be exercised in considering the relief to be granted consequent upon rescission: see *Snell's Equity*, 34th Ed., at 15-021. In the present case, subject to the prior point of principle now advanced by Libra to which I turn next, restoring the parties (that is to say Swindon and Libra) "*to their original positions or … as near to those positions as may be*", as *Snell* puts it, is achieved, given the measure of agreement to which I have just referred, by treating the surrender of ETFA 2 as a payment of US$2,741,250 and therefore requiring that 'payment' to be refunded, i.e. requiring Libra now to pay Swindon US$2,741,250. If that is to be ordered, there may be a drafting question whether to record or provide, for the avoidance of doubt, that ETFA 2 stands surrendered and will not revive.

13. The other complication was that, when judging the question of inducement, my finding on the evidence at trial was that the 'cash and ships' deception practised upon Mr Pisante (and therefore upon Swindon) induced ETFA 3, *in that it induced Mr Pisante to invest Swindon's ETFA 1 cash (indirectly) into the KKR deal and not only its (indirect, derivative) share in the K Ships*. That was sufficient to make out a cause of action for the rescission of ETFA 3, with whatever would be proper relief consequent upon that rescission, and a cause of action for damages for deceit, in which accurate account would need to be taken of any relief granted consequent upon rescission so as to avoid double recovery.

14. I said in the main judgment at [327] that although I had not reached a final landing on *quantum*, I was making "*such findings as I consider I am able to make that may inform the parties as they attempt to agree an outcome or formulate further submissions if they cannot agree*". One such finding was that if the false 'cash and ships' representation had not been made to Mr Pisante, then Swindon would have taken its US$6,250,000 from ETFA 1, and not reinvested it with Libra, but would still have surrendered ETFA 2, in order to purchase an ETFA 3* (as I labelled it), as more particularly set out in the main judgment at [346] ('the counter-factual finding').

15. It was accepted on both sides that it was open to the court to make the counter-factual finding on the evidence at trial, although it was not a finding either side had proposed. Neither side has suggested they could ask the court to revisit it, or that they would do so if they could. Without forming any view on the point, I raised for consideration by the parties, and further submissions from them if they found they were not in agreement on it, the question whether the counter-factual finding affected the relief to be granted consequent upon rescission (main judgment at [327]-[328] and [345]-[347]). While that query was open, I concluded that I should not finalise the damages for deceit either (*ibid* at [348] and [350]).

16. Those matters now fall to be decided, the parties having found they were not in agreement upon them, and subject to the impact, if any, of the application to amend that the claimants now make, which is the other main subject matter of this judgment.

17. Swindon's position is that the counter-factual finding has no impact on the relief properly to be granted upon the rescission of ETFA 3. That relief is to be fashioned so as to restore the *status quo ante* ETFA 3 as between Swindon and Libra, *in specie* if possible, in financial substance if not. The *status quo ante* ETFA 3, as between Swindon and Libra, was that:

(i) Swindon had US$8,991,250, comprising (a) an ETFA 1 receivable of US$6,250,000 and (b) value of US$2,741,250 in the form of ETFA 2, and

(ii) ETFA 3 had not been issued by Libra.

The rescission of ETFA 3 restored (ii). The payment of US$6,250,000 by Libra to Swindon, as ordered upon the handing down of the main judgment, would restore (i)(a), which is of course why it was ordered. A further payment by Libra to Swindon of US$2,741,250 should be ordered so as in substance to restore (i)(b).

18. Libra's position is that:

(1) "*In circumstances where ETFA3* would have been entered into (in consideration for US$2,741,250), but for the deceit inducing ETFA 3, it stands to reason that Swindon cannot recover the US$2,741,250. The US$2,741,250 is the consideration that Swindon would have "paid" for ETFA3*, a contract the Court has concluded the parties would have entered into but for the deceit. Swindon cannot simultaneously get the benefit of what ETFA3* had to offer … and keep the consideration for ETFA3*, namely the US$2,741,250. That would be unfair and grossly inequitable*" (original emphasis).

(2) "*It would … flout the rules of restitution to award … the US$2,741,250. Equity can do no more than reinstate the parties to the position they would have been in but for the deceit. But for the deceit, ETFA3* would have been entered into at a "cost" to the Claimants of US$2,741,250. Therefore, to award the Claimants US$6.25m and US$2,741,250 would not effect restitution at all. It would over-compensate*" (original emphasis again).

(3) "*Put another way, restitution consequent on rescission of ETFA 3 requires the payment of US$6.25m plus US$2,741,250, but counter-restitution, by way of restitutio in integrum, in consequence of the finding that the parties entered into ETFA3*, requires the reversal, or return, of that element of the ETFA 3 consideration that would have been paid for ETFA3*, namely the US$2,741,250.*"

19. Thus, so Libra contends, relief consequent upon rescission should properly be limited to the order already made giving Swindon back its US$6,250,000. I refer there to the commercial substance of the matter; Libra making a payment to Swindon now does not involve the return *in specie* of any item of property originally held by Swindon but conveyed under the rescinded contract to Libra. The argument, then, is that relief is available, if at all, in respect of the US$2,741,250 paid for ETFA 3, in addition to the US$6,250,000, only as (part of) an award of damages, in this case that is to say damages for deceit.

20. With the benefit I have now had of the submissions provoked by the main judgment, I consider that Libra's argument is novel and heretical. The simple logic of Swindon's contrary argument, as summarised in paragraph above, is orthodox and correct. The flaw in Libra's argument is that it identifies the wrong target. The target of restitutionary relief consequent upon rescission is the *status quo ante*, i.e. the actual position the parties were in, as between themselves, prior to the conclusion of the rescinded contract. Libra's argument instead says that the target is the counter-factual

position the parties would have been in thereafter, had Libra not practised deceit upon Swindon. It takes account of a payment by Swindon of US$2,741,250 that in the *status quo ante* had not been made, and the issuance to Swindon of an investment product, ETFA 3*, that had not been and was never issued.

21. That the target is the *status quo ante* has long been the law. As *Snell* puts it at 15-021, from which I have already quoted, "*Following rescission relief may be given with the object of restoring the parties to their original positions or, where rescission occurs in equity, as near to those positions as may be*" (my emphasis). Later in the same paragraph, "*Although the financial adjustments made upon rescission are sometimes labelled "compensation" or "equitable compensation", their function is restitutionary not reparative.*" To similar effect, see *O'Sullivan et al.*, "*The Law of Rescission*", 2nd Ed., at 13.01-13.02, including this at 13.02: "*The parties are released from the obligations created by the contract, have returned to them any advantages transferred under the contract, and are indemnified for any detriments incurred pursuant to the contract. That is what is meant by restitutio in integrum when that term is used in connection with rescission, and this is also what is meant when it is said that the parties should be returned to the status quo ante*" (my emphasis).

22. In the present case, ordering payment of US$2,741,250 to give effect to the parties' agreement on what might otherwise have been an issue for decision as to *valuation* (see paragraph above) is compensatory in the restitutionary sense explained by *Snell*. It is a satisfactory means, by the ordering of a payment to be made by Libra to Swindon, to restore Swindon to the position it was in prior to concluding ETFA 3. What Swindon would have done from there (a counter-factual matter) is a pertinent enquiry only if the issue is whether reparative compensation, i.e. damages, are to be awarded.

23. That the restitutionary target is the *status quo ante* merely reflects, and is the necessary consequence of, the basic nature of the remedy of rescission under English law. Mr Béar KC referred me to the learned discussion of the nature of that remedy by Colman J in *De Molestina v Ponton* [2002] 1 Lloyd's Rep 271 at 286-288, [6.1]-[6.4]. I consider that exposition, with respect, to be entirely sound, and I gratefully adopt it. It is particularly pertinent because its primary focus was to confirm and explain that English law does not recognise a concept of partial rescission. It follows that English law does not recognise a concept of partial *restitutio* consequent upon rescission.

24. That it is sufficient, to found the cause of action, that only some particular element of the contract was influenced by misrepresentation does not mean that only that part of the contract is set aside (even if such a thing be meaningfully possible in the given case), or that the court, in the remedy of rescission, seeks to construct for the parties a different bargain that they would or might have concluded together absent the misrepresentation. The nature and measure of the restitution that must be given, and therefore the relief properly to be granted to achieve it, must mirror the total nature of the rescission that founds it.

25. As Colman J put it, *ibid* at [6.2], "*... the principle that there cannot be partial rescission is part of the wider requirement that there cannot be rescission unless there can be restitutio in integrum. Further, that requirement is the conceptual consequence of the basic nature of the remedy of rescission which is to discharge all the parties from the bargain into which the misrepresentor has induced them to enter.*

It is not and never has had the function of providing compensation for the misrepresentation or some hybrid solution to reflect what would be fair between the parties having regard to the nature of the representation and the extent to which one party has been misled by another. Consistent with that, the Court has no power to create a new bargain for the parties. What has been induced is the original bargain and it is the purpose of the remedy to return the parties to their position before that particular bargain was made. ..."

26. If English law recognised a concept of partial rescission, or the fashioning of a 'hybrid solution' as Colman J described it, then perhaps in the present case the primary remedy might have been to rescind ETFA 3 in part so as to turn it into ETFA 3*; and the restitution that would have gone with that partial rescission might then have been limited to the return of the US$6,250,000 that purchased the rescinded part. Libra's argument in the present case, ETFA 3 having been rescinded, necessarily, that is, rescinded *ab initio et totum*, is to say that the matching restitution can and should be only partial. That is not an available outcome under English law.

27. A consequence is that restitution upon rescission can result in that which *from a damages perspective (reparative compensation)* might be called a windfall. That is noted by *O'Sullivan et al.*, *supra*, at 13.04-13.06, with all of which I agree:

"**13.04** The distinction between the relief given upon rescission and damages requires emphasis because it is not always understood. The object of the relief given upon rescission is not to restore the claimant to his pre-contractual position in the sense of making good whatever financial loss he may have suffered by reason of the misrepresentation or other event that entitles him to rescind. It is only the immediate consequences of the contract itself that must be reversed. If following rescission the claimant will still be suffering losses, for example as a result of expenses he has incurred in connection with the contract but not under it, or by reason of a foregone opportunity, those losses are recoverable only as damages. If the claimant does not have a claim for damages, then those losses will be irrecoverable.

13.05 Just as rescission can leave uncompensated losses, so it can also leave windfalls. The rescinding claimant in *Banwaitt v Dewji* [2014] EWCA Civ 67 had been fraudulently induced to pay the defendant US$750,000 under an investment agreement. The claimant paid about £318,000 out of his sterling account, converting to US dollars en route to the defendant's account. Since that time the US dollar had appreciated so that US$750,000 would greatly enrich the claimant compared with his sterling position before the transaction. This windfall did not concern the Court of Appeal, which required the defendant to repay the dollar amount he received.

13.06 To put the point another way, *damages are designed to adjust the claimant's financial position to achieve an equivalence with the position he would have occupied had the wrong not been committed or had the obligation been performed. In working out the consequences of rescission the court makes no similar adjustment.* Rescission may produce a windfall for one of the parties in financial terms or it may leave one of them in a worse position financially than if the contract had never been made. *The exercise is simply one of unravelling the transaction*" (my emphasis).

28. That is not "*unfair and grossly inequitable*", as Libra contends. The complete undoing of the rescinded contract (restoration to the *status quo ante*) is a just response to the claimant's proof that it was misled into giving its consent to that contract. It is not unfair or inequitable that, in certain circumstances, that can leave the claimant better off than if there had been no misrepresentation.

29. As between Swindon and Libra, the consequence is that Libra must pay Swindon US$2,741,250 in order to complete the unravelling of ETFA 3 *ab initio et totum* that is rescission.

30. It is convenient at that point to turn to the position of Mr Logothetis, on the basis of the case pleaded for and considered at trial. On that basis, the proper measure of Swindon's damages against Mr Logothetis is US$8,991,250, not only the US$6,250,000 ordered to be paid on account, subject to allowing for any restitution effected by Libra prior to a damages judgment being entered against Mr Logothetis. That is because:

    (1) Swindon was deceived into paying Libra US$8,991,250 in return for nothing, *ETFA 3 having been rescinded on the ground of the deceit practised by Mr Logothetis*, and

    (2) no case was raised to the effect that Swindon would have lost (some or all of) its money invested in ETFA 2 had it not been sunk into the now-rescinded ETFA 3, so that

    (3) Swindon's loss, recoverable against Mr Logothetis as ordinary damages at common law, is US$8,991,250, less any part thereof made good by Libra prior to the damages judgment.

31. In relation to paragraph above, and I repeat that this is on the basis of the case pleaded for and considered at trial, the defendants' case was that ETFA 3 as issued to Swindon was worth (at least) what Swindon paid for it at the time. On the trial evidence and argument, that would also have been my clear finding had it been in dispute. Furthermore, on the trial evidence, including the evidence by reference to which Swindon now seeks permission to amend to claim damages for an alleged consequential loss, my clear finding would also be that Swindon would not have lost money on ETFA 3*. Indeed, it would hardly lie in the defendants' mouth to argue against such a finding, given Mr Logothetis's evidence at trial. (I note for completeness, since nothing turns on it for the purpose of this judgment, that on authority the defendants would bear the relevant burden of proof: see *Clerk & Lindsell on Torts*, 23rd Ed., at 17-41, citing *Parallel Imports (Europe) Ltd v Radivan* [2007] EWCA Civ 1373.) I could not find whether Swindon would have made a profit on ETFA 3*, no claim to any such effect having been part of the case.

32. That would mean that if Libra has satisfied the order requiring it to pay US$6,250,000 to Swindon, and leaving aside questions of interest, the final damages judgment against Mr Logothetis would be for US$2,741,250 only, on the basis that the prior payment by Libra did *not* discharge any part of that final damages judgment. In that regard the substance and intent of the January Order – and, thankfully, also the language used, namely that of relieving Mr Logothetis's corresponding obligation, not that of discharging it – was that payment by Libra of or towards the US$6,250,000

would reduce *pro tanto* the amount the court required Mr Logothetis to have paid on account of damages prior to assessment, because *pro tanto* it would have reduced Swindon's loss prior to any damages judgment being entered against Mr Logothetis. Therefore, if Libra had paid in full, then at the date of a final damages judgment entered now, the position would be that Mr Logothetis had not been required to pay, and had not paid, anything on account of his liability for damages; and Swindon's loss, as at the date of the final damages assessment, would then be US$2,741,250.

33. The position on damages is complicated, however, by the matter to which I turn next, which is Swindon's application to amend to introduce a new particularisation of loss and damage for the purpose of (a) pursuing against Libra an assessment of damages on top of the restitutionary payments of US$6,250,000 ordered in January and US$2,741,250 to be ordered now, and (b) pursuing further against Mr Logothetis the assessment of damages ordered against him in January that was supposed to have been concluded now. The amendment, if allowed, would turn those damages assessments from the one day argument envisaged and directed by the January Order, and now completed (in the event a 1-2 day hearing, as finally listed, that occupied 1½ days), into a substantial further damages trial, complete with fresh case management, disclosure, factual witness evidence and (quite possibly) expert evidence.

34. Libra resists the amendment, given *inter alia* that that would be the consequence of allowing it. The present point, before turning to deal with that contentious issue, is to note that the nature of the amendment, stated broadly, is to claim that what I have called ETFA 3*, had it come into existence, would have been substantially profitable for Swindon, directly or indirectly. It is apparent from the argument on the amendment application that that would be hotly contested. Furthermore, it would involve such a widening and re-shaping of the damages enquiry that it would not be fair to the defendants to hold them to their stance at trial in relation to the value of ETFA 3 (paragraph above). It would have to be open to them to revisit that, even potentially to the point of pursuing a defence that, far from being profitable, Swindon would have lost (some or all of) its US$2,741,250 if it had purchased an ETFA 3* with it.

35. That would disrupt the logic of paragraph above. Not only could there not yet be any final damages judgments, but nor would it be appropriate to make any order for a further payment on account, at all events at this stage, Libra and Mr Logothetis having not yet even had to plead to the new allegations.

36. I conclude this section of the analysis, therefore, as to the US$2.7m, as follows:

(1) Libra must pay US$2,741,250 to Swindon to complete the restoration of the *status quo ante* between those parties consequent upon the rescission of ETFA 3.

(2) If the amendment application is not allowed, there will be:

(a) no damages liability to award against Libra; and

(b) a final damages judgment against Mr Logothetis for US$8,991,250 less any amount paid by Libra, prior to that judgment now being entered against Mr Logothetis, in respect of its liability under the January

Order to restore to Swindon its US$6,250,000. In that respect, it is fair to proceed by reference to the case on both sides as pleaded for and presented at trial, if (as the defendants say should be the position) all questions of relief are to be finalised on that basis.

(3) If the amendment application is allowed, however, matters will be thrown into the air and left open, and substantially redefined. There could then be no damages judgments, but nor would I make any further orders for payments on account at this stage, and there would need to be directions leading to the further trial that Swindon now seeks.

The Amendment Application

37. The claimants' claims pleaded for and considered at trial were set out in their Re-Re-Re-Amended Particulars of Claim ('the P/C'), which were settled by the re-re-re-amendments I allowed at the start of the trial (main judgment at [205]*ff*). The claim for damages for deceit that succeeded, as thus pleaded for and considered at trial, was that:

(1) Swindon was induced to enter into ETFA 3 by the deceitful 'cash and ships' representation.

(2) Swindon was therefore entitled to rescind ETFA 3 and had rescinded it, or (to the extent required) sought a final order of the court rescinding it.

(3) "*In the premises, Swindon is entitled to payment (and/or damages) from Libra and/or Lomar in the sums of at least US* ***$6,250,000*** *and US* ***$2,767,000****, being the sums due (or that were or would have been due) under ETFA1 and ETFA2*" (P/C at [46]). Nothing turns now on the difference between the pleaded figure of US$2,767,000 and the figure to which I have been referring of US$2,741,250.

(4) There should be, as the prayer sought, "*Damages, as pleaded, to be assessed*".

38. In the original version of the pleading, Swindon had also pleaded (P/C at [48]) an entitlement to "*damages to reflect its lost opportunity as a result of investing in ETFA3 as opposed to an alternative investment, in a sum to be assessed.*" That was particularised in general terms in the next sentence by the plea that Swindon would have invested what was in fact invested in ETFA3, "*partly in shipping opportunities, partly in real estate and financial investments and would likely have profited from those investments.*" That plea was struck through as one of the re-re-amendments the claimants made on 21 May 2021, six weeks before the start of the trial.

39. For the amendment application now made, the claimants adduced no evidence explaining why the decision was made not to pursue that claim. Mr Béar KC invited me to imagine it plausible that a view might have been taken that it was not worth pursuing, given that it would add value for Swindon in the litigation only if, and then to the extent that, Swindon could show that, more probably than not, it would have generated a return better than the court was likely to award in interest upon the restitution and/or damages that would be awarded in respect of the US$8,991,250 paid for ETFA 3. It is plausible to imagine such a view being taken, but being of that view

would not be the only possible reason for dropping the claim. Positing a plausible view that might have been taken is not a substitute for evidence as to why in fact the claim was dropped.

40. The upshot, therefore, is that Swindon must be taken to have made a conscious choice, as it prepared for trial, to limit its claim for financial remedies to the recovery, whether in restitution or as damages, of what it had invested in ETFA 3, plus interest. Given the pleading history, that involved in particular a conscious choice by Swindon not to claim that it had suffered a damaging loss of opportunity to invest in an alternative investment, i.e. an investment that was not ETFA 3. Within that, there was, in particular, a choice by Swindon not to claim that it had suffered a damaging loss of opportunity to invest in shipping opportunities in an alternative manner than through ETFA 3.

41. As I shall explain below, the amendment application now made seeks to introduce, within the damages assessment that was supposed to be concluded now, a new claim of exactly that type, alleging ETFA 3* as the specific lost alternative opportunity to invest in shipping. To be clear, I agree with Mr Béar KC, as did Mr Allen KC, that the proposed pleading does not seek to introduce a new cause of action, only a new claim of particularised loss and damage for the cause of action in deceit upon which liability was established at trial. It is natural and convenient nonetheless to refer to that which Swindon wishes to introduce as a 'new claim', and I shall continue to do so.

42. The prayer to the P/C included a final claim for "*Further or other relief*", but that would not encompass a claim for damages otherwise than as (different in kind than) pleaded. That would have been true even without the deleted claim for consequential loss by way of a damaging lost investment opportunity and even if the primary damages prayer had said only "*Damages*", not "*Damages, as pleaded*". All the more so with those features, it would not have been open to the claimants at trial to pursue the new claim or any similar claim without seeking and obtaining the permission of the court to do so. I would not have entertained any such application without, as a minimum necessary but not sufficient condition, a clear, coherent and properly particularised pleading, evidence explaining the timing (including the then recent decision not to pursue any such claim, and the *volte face* on that decision), and an understanding of how the new claim was to be accommodated, if it could be, up to and including the possibility of adjourning the trial part heard.

43. To introduce the amendment application now made, by Application Notice dated 9 September 2022, I return to the counter-factual finding. It was in issue whether the 'cash and ships' misrepresentation, if made (as I held it had been) induced ETFA 3. The counter-factual finding was a natural corollary, that I was satisfied it was correct to draw out, of the finding I made as to inducement, in the light of how Mr Pisante said in his evidence that 'cash and ships' influenced his thinking and, more generally, how he explained in his evidence his shipping investment business relationship with Mr Logothetis. Thus, as I found in the main judgment at [312]-[314]:

> "*312. ... I am satisfied that Mr Pisante would not have thought to [put cash into the KKR deal], or suggest doing so, unless prompted by Mr Logothetis, and that he only agreed to do so, such that he would be indirectly contributing cash as well as ships, because he understood from Mr Logothetis that Lomar would be contributing cash as well as ships.*

> *313. Those assessments on the evidence mean I can and do find that ETFA 3, as in fact concluded, was induced by misrepresentation. …*
>
> *314. They also mean, however, that I can and do further find that:*
>
> *(1) the misdescription of the KKR deal by Mr Logothetis did not induce Mr Pisante to agree to the K Ships going into the KKR joint venture, or to having his 50% share of the K Ships taken off the books;*
>
> *(2) without the misdescription …, it is not that Swindon would have been left with ETFA 2, but rather a third ETFA would still have been concluded ("ETFA 3*"), by which Swindon would have bought, on terms equivalent to those of ETFA 3, the economic equivalent of a 15% share of Lomar's share of OMHL, in return for giving up ETFA 2.*"

44. I agree with the submission of Mr Allen KC that none of that reasonably should have come as a surprise to the claimants. It is true that the exact detail of the finding I made might or might not have been predicted with accuracy, but that is little to the point. It was an obvious and substantial possibility, knowing what had mattered to Mr Pisante in 2014 and how he had been influenced by what Mr Logothetis said to him, as the claimants must be taken to have known throughout, that the court would say Mr Pisante would have agreed to (his share of) the K Ships going into the KKR deal had there been no misrepresentation about that deal.

45. Mr Béar KC emphasised that the counter-factual finding proceeded from an assessment on my part not only of what Mr Pisante would have been looking to do, absent the lie about Lomar putting in cash, but also of whether the KKR deal would have concluded successfully without Mr Pisante's (indirect) cash contribution. I do not accept that means the claimants could not reasonably have appreciated prior to trial that there was a viable counter-factual case of the kind I found established by the evidence. Indeed, knowing what Mr Pisante knew of Libra/Lomar and Mr Logothetis, he was well able to give instructions sufficient to justify pleading that Mr Logothetis would have ensured that the KKR deal went through even if Libra/Lomar were not getting Mr Pisante's US$6,250,000.

46. Mr Béar KC suggested that it was only with the lifting of the unjustified redactions that had hidden the evidence of Lomar's cash-flow issues that it might have been assessed on the claimants' side that the KKR deal could have gone ahead without Mr Pisante's cash. If that were so, it would still mean that the claimants ought reasonably to have identified a counter-factual case of the kind I found to be demonstrated by the evidence in the immediate run-up to trial. However, I do not agree with the premise. In fact, the redacted passages, by their content, so far as germane to the present question, tended if anything to raise a measure of doubt over whether the KKR deal could fly without Mr Pisante's cash. I appreciated that when making the counter-factual finding; and I am confident that Mr Pisante equally, and rightly, would not have been put off from believing and alleging that the KKR deal *would* have gone ahead without his cash if he had otherwise been looking to put forward such a case.

47. I also agree with the further submission of Mr Allen KC that on any view the counter-factual finding to which I felt driven by the evidence was on the cards once Mr

Pisante and Mr Logothetis had given their evidence at trial, if I found in favour of the claimants, on that evidence, that Mr Logothetis told Mr Pisante, contrary to the truth, that Lomar's contribution to the KKR deal was to be both ships and cash (meaning cash in addition to and separately from the ships to be contributed).

48. Furthermore, with the benefit of Mr Logothetis's evidence at trial, the claimants had the basis, if they do now, for alleging that as things turned out, Lomar ultimately generated a good return on its capital originally contributed to the KKR deal, albeit only indirectly and with some not insignificant entrepreneurial flair along the way to get there. In the absence of pertinent evidence in support of the amendment application now made, I cannot and do not find in the claimants' favour that they needed Mr Logothetis's evidence to be able to plead such a case concerning the ultimate (indirect) outcome of the KKR deal. It is apparent from the material now relied on to persuade the court that there is a viable case to be pleaded that it could readily have been obtained for trial if looked for; and for all I know, in the absence as I have said of pertinent evidence on the point in support of the application, Mr Pisante or those working for him may have had a sufficient general awareness of those matters to provide a proper basis to plead.

49. In my judgment, therefore, if interested to pursue monetary relief beyond the recovery in one form or other of the value put into the KKR deal by Swindon, the claimants readily could have pleaded the kind of case they now propose to plead, alleging as they would by the proposed new amendment that:

    (1) but for Mr Logothetis's deceit, Swindon would still have participated in the KKR deal, indirectly in derivative form, but only to the extent of contributing its indirect interest in the K Ships and not by putting in its ETFA 1 cash;

    (2) that would have been done on terms materially similar to the terms of ETFA 3, but adjusted as to the consideration payable by Swindon and the percentage share of Lomar's share of the deal to reflect the smaller contribution;

    (3) Lomar eventually generated substantial capital profit for itself, (a) outside OMHL by taking debt-laden ships out of the structure and turning their fortunes around, and (b) as still retained in OMHL;

    (4) Swindon would have enjoyed a percentage share of that success.

50. The audited accounts of OMHL that are in evidence on the application indicate that there is no realistic prospect for element (3)(b) above. They have been prepared in contemplation of liquidation, not on a going concern basis, and show the common equity, the fortunes of a percentage of which Swindon would be saying it would have had a derivative right to follow, to be hopelessly under water. The balance sheet at 31 March 2022 shows total assets of US$4.7m (down from US$139.4m at 31 December 2020, the previous accounting date) and total liabilities of US$103m (down from US$293.4m). The equity in OMHL thus had a value of (US$98.3m) at 31 March 2022 ((US$154m) at 31 December 2020).

51. I asked Mr Logothetis some questions during his evidence at trial, with a view only to having a general understanding, as current context, of whether if ETFA 3 were not rescinded there was or would be any value in it for Swindon. In his answers, he gave

evidence that might support the possible case now proposed that if Swindon had been invested in the KKR deal (indirectly on a derivative basis) in a world where there had been no deceit, a way would have been found for it to have a share in element (3)(a) above. In a press release issued by Libra the working day after I handed down the main judgment, in which Libra claimed to respect the judgment while simultaneously expressing itself in nakedly disrespectful terms, one comment with similar possible connotation was made, to the effect that Swindon would have done well out of staying with the KKR deal rather than disowning it.

52. It cannot be said in those circumstances, as Mr Allen KC sought to suggest, that the proposed new claim would have no real prospect of success. Nor do I accept – but it is not necessary to rake over the detail – a submission made that the draft pleading is incoherent or inadequate so far as it pleads the particular basis for saying that, and means by which, as Swindon wishes to allege, a way would have been found (as I just put it) for it to share in what Lomar ultimately managed to salvage, indirectly, from the financial ashes of the KKR deal.

53. That is not to say, as Mr Béar KC contended, that there is a strong *prima facie* case for thinking that the new claim would probably succeed in some substantial amount. Even without there having yet been an obligation on Libra and Mr Logothetis to plead a defence to the new claim, it is evident that one plausible outcome is that ETFA 3*, had it been concluded back in 2014 and though worth what Swindon paid for it at that point, would ultimately have generated only *de minimis* Exit Receivables (and a nil residual value).

54. An invidious aspect of the new claim, invidious notwithstanding that I found Mr Logothetis (and Libra) liable for deceit, is precisely the way in which certain passages of evidence given at a trial when something materially similar to the new claim could have been but was not put forward, would now be relied upon. Likewise from the court's perspective, it is invidious that findings of fact I considered it appropriate and helpful to make with a view to confining and assisting in a concise final argument on remedies, understanding as I did that the only relief sought was the recovery, by one means or another, of the US$9m odd invested, should now be used as the launching pad to widen the case substantively and reopen it procedurally, to take in a new, complex and potentially difficult claim, of a type the claimants had decided to withdraw, no doubt for their own good reasons (it may be including tactical reasons), for (so it is said) at least US$12.5m or so on top.

55. As the above analysis, and those last observations, will have indicated, in my view the new claim properly belonged to the subject of this litigation that was tried last July and dealt with by my main judgment, i.e. it should have been part of the Claim as put before the court for and considered at trial last July. Exercising reasonable diligence to ensure that Swindon's whole case was put forward in one go, the new claim (or any claim of its ilk) ought to have been brought forward then if it was to be advanced. As I concluded in relation to the defendants in *Gruber v AIG Management France SA et al.* [2019] EWHC 1676 (Comm) (followed as to applicable principles by Zacaroli J in *Kensell v Khoury* [2020] EWHC 567 (Ch)), so here in relation to Swindon I conclude that the new claim is an attempt, opportunistically and unfairly following the main judgment, after what was the final trial of all issues in the action, substantially to re-draw the nature of the case as to remedies.

56. I accept Mr Béar KC's submission that there is a policy of English law, reflected in a range of individual principles, substantive and procedural, to assist the victim of a fraud to recover full compensation, and indeed not to allow a fraudster to profit from his fraud. But I also accept Mr Allen KC's submission that it cannot trump the policy in favour of finality in litigation, or the more fundamental policy of which that is one product, namely that litigation must be conducted fairly. That includes being procedurally fair to a party found liable for fraud.

57. The material impact of the policy in favour of assisting a victim of fraud, in the present context, is that the court must be particularly astute not to find too readily that Swindon should properly have brought the new claim so it could have been part of the trial last July. That in turn has two aspects: first, the court must be alive to the possibility that a fraud might affect the victim's ability to identify fully the case that may reasonably be available to it, differently or more substantially than might be true with honest tortfeasance; second, that the claimant is a victim of fraud may weigh in the scales in favour of the litigation continuing, even though that may be at the expense of finality, if that would or might assist towards fuller recovery. Questions of degree will be important – the degree to which finality will be impaired and the strength of the possibility that fuller recovery will result.

58. In the present case, I do not consider that the nature or consequences of the deceit that Swindon proved had any bearing upon its reasonable ability to assess whether a loss of opportunity claim such as the new claim was or might be available to it, or to plead any such claim, if it wished to pursue one, well in advance of trial. In any event, there was nothing at all about the fraud, as alleged and in the event found proved, to hinder Swindon from taking stock with its advisers, with the benefit of the evidence at trial, as acting diligently it should have done, so as to alert the court (if so advised) during closing argument, or at the very least prior to judgment being finalised and handed down, to the possibility that it might seek to expand the relief to be sought.

59. As for the final assessment, I do place on Swindon's side of the scales the possibility that allowing the new claim to proceed might result in a fuller recovery for Swindon as the victim of fraud, although I am not persuaded to consider that better than a credible possibility which is outweighed by the degree to which the policy of finality would be undermined by reopening the proceedings to the extent required to accommodate the new claim, by the practical impact on Libra and Mr Logothetis (even bearing in mind they have been held liable for fraud), and by the imposition on the court with consequent impact on its other users and the orderly administration of justice.

60. Whether by operation of the rule in *Henderson v Henderson*, or as a matter of discretion in the grant or refusal of permission to amend, in my view it would be unjust to allow the new claim to be introduced now. The amendment application is refused.

Costs

61. The January Order provided that Libra and Mr Logothetis were liable for the claimants' costs of the proceedings (save for the claim relating to the Piraeus Bank shares), to be assessed if not agreed on the standard basis but with liberty to the claimants to apply for the assessment to be on the indemnity basis. In what follows,

all references to costs are to the costs covered by that order, i.e. excluding the costs of the Piraeus Bank shares claim.

62. The claimants now apply pursuant to that liberty, proposing that:

(1) the court should recognise a presumptive rule that where fraud is proved, the claimant's costs should be assessed on an indemnity basis;

(2) alternatively, there was unreasonable behaviour going 'beyond the norm' in the conduct of the defence, making it just to order costs on an indemnity basis; but

(3) the court should not order that all costs be assessed on that basis, to acknowledge that there were aspects of the litigation in respect of which it would not be right to criticise the conduct of the defence as unreasonable.

63. By reference to that last consideration, the claimants' application proposed, arbitrarily and unworkably, that there be an order for 75% of their costs to be assessed on the indemnity basis. As must always be borne in mind, the purpose and effect of an order that costs be assessed on the indemnity basis is only that: (a) it becomes the paying party's burden to show that costs were incurred unreasonably or in unreasonable amount, rather than the receiving party's burden to prove reasonableness; (b) there is no added requirement that costs be proportionate as well as reasonable in order to be recoverable. The question to which 75% of the claimants' costs bill a costs judge on assessment was supposed to disapply proportionality and put the burden of disproving reasonableness on Libra and Mr Logothetis did not receive any meaningful answer in argument.

64. In reply, having reflected upon that difficulty, Mr Béar KC proposed instead that the court should order assessment on the indemnity basis in respect of costs incurred on or after (i) 1 June 2020, alternatively (ii) 1 February 2021. The logic behind the first of those, I was told, was that it was the date prior to which c.25% of the claimants' costs had been incurred, so it fitted the original thought that they should have 75% of their costs on the indemnity basis. It is thus as arbitrary as the 75% and for that reason alone I would not adopt it. The logic behind the second of those was that it could be said that by 1 February 2021, disclosure was substantially complete, following which the available evidence was materially all 'on the table' (including, from the defendants' perspective, the redacted content of the emails they disclosed in redacted form). In fact, on the detailed procedural chronology appended to Mr Allen KC's skeleton argument, there were significant rounds of disclosure on 5 February 2021 (both sides), 16 February 2021 (claimants) and 1 March 2021 (defendants). I would take 1 March 2021, therefore, rather than 1 February 2021, as the date from which it should be said that disclosure was substantially complete.

65. I do not regard it as appropriate to say that there is some presumption that successful fraud claimants should have their costs on the indemnity basis. The fact that the allegation successfully made was of dishonest wrongdoing does not, without more, make it more appropriate than in any other kind of case that a claimant's costs should be recoverable though incurred disproportionately or that the claimant should not have to show that its costs were reasonably incurred and reasonable in amount. The considerations applicable to a defendant who has successfully fought off a fraud

allegation, in which there is authority coming close to creating a presumption, are not the same.

66. However, I agree with the claimants that the conduct of the defence in this case involved significant unreasonable behaviour that went beyond the norm, from the outset and from time to time throughout. I do not think it would be fair, given the way the application was put forward and evolved, to consider ordering assessment on the indemnity basis except by reference to the least onerous of the options proposed by the claimants, i.e. indemnity basis from when disclosure was substantially complete. Therefore, the order will be that the assessment of the claimants' costs is to be on the indemnity basis for costs incurred on or after 1 March 2021 (and on the standard basis for costs incurred prior to that date).

67. The conduct in the defence that was unreasonable and which, taken in the round, takes this case outside the norm, was the following:

(1) There was contemporaneous documentary evidence indicating strongly that Mr Pisante had been misled by a false description of the KKR deal to him by Mr Logothetis as involving an investment by Lomar of cash as well as ships. The response was to concoct a strained meaning and to give evidence claiming it to be what Mr Logothetis would have meant, in a contrived attempt to create plausible deniability.

(2) The improper redaction of highly material evidence during disclosure.

(3) Other important instances of seeking to mislead the court or not being candid with the court (see the main judgment at [63], [65] and [87]), and the inappropriate, highly confrontational approach to the litigation and the court of Mr Attlee (*ibid* at [202]). The last might have been less troubling, as regards the conduct of the case as a whole, if Mr Attlee had been but a rogue factual witness called by the losing side. He was more than that, however, having plainly had a significant role in the conduct of the litigation generally.

(4) The defendants responded to a serious and measured letter before action in wholly inappropriate, polemic terms, calculated to intimidate. They included the baseless suggestion that Mr Pisante was threatening spurious claims that were "*nothing more than a thinly veiled attempt to coerce Mr Logothetis to settle … with the threat of negative publicity*". It was said to be "*obviously vexatious, scurrilous and ill-founded*" to make claims against Mr Logothetis personally. It was suggested that complaints of professional misconduct would lie and would be pursued against the claimants' solicitors and counsel, and that costs would be sought against them personally, if the intimated claims were pursued.

68. In relation to the last of those elements, Mr Allen KC sought to excuse the defendants' response on the basis that the 'cash and ships' misrepresentation upon which the deceit claim succeeded was not in the case until the first day of trial. That was not my conclusion. I allowed a clarificatory amendment in relation to that key element of the case in the final round of amendments effected at the start of the trial, and that is not the same thing at all (main judgment at [205]*ff* again, for present purposes especially [209]).

69. To respond to a serious letter before action in the intemperate and intimidatory manner the defendants chose in this case is to invite the reasonable response on the claimants' side that there is far more at stake than the merits and the financial relief to be sought through the causes of action pleaded. It is the mildest of responses by the court, and a just consequence, that defendants who so sought to bully the claimants as to the merits of their claim should be required as fully as the costs rules will permit to indemnify the claimants in respect of their costs after they have made the claim good.

70. One further point arose on the claimants' costs entitlement under the January Order. They seek a further payment on account, on the contingent basis that if Swindon now recovers additional primary relief (as it will do pursuant to the first main section of this judgment), that may entitle the claimants' solicitors to greater fees on the terms agreed for the conduct of the case. The payment on account ordered in January was fixed without reference to that factor, on the basis that it would be open to the claimants to seek a further payment on account if it came into play. I shall deal with that separately, if there is no agreement about it in the light of this judgment. If there is to be any further payment on account, it may be appropriate to bear in mind also the extent to which costs are now to be assessed on the indemnity basis.

Interest

71. In respect of the equitable relief consequent upon rescission previously granted and now to be granted against Libra, it was common ground that the court could order interest on a compound basis, and in my judgment it is appropriate to do so, with compounding by quarterly rests. In respect of the final damages judgment that will now be entered against Mr Logothetis, given the refusal of the amendment application, there will be simple interest under s.35A of the Senior Courts Act 1981.

72. On the latter point (interest on damages), I asked for and received brief written submissions after the hearing because, on reflection, I was concerned (rightly so, as matters transpired) that the claimants may have understood the common ground about compounding to extend to damages, and the defendants may not have intended that. The reach of the equitable remedy of compound interest is in a state of development on the authorities. However, I am not persuaded that on any view it extends to the common law damages for deceit awarded against Mr Logothetis. As between Swindon and Mr Logothetis, any damages award is simply a common law damages remedy compensating for loss caused to Swindon by Mr Logothetis's deceit, nothing more.

73. I am asked to settle the rate of interest. Swindon is the relevant claimant. It is an offshore (BVI) investment holding company for some of Mr Pisante's investment activities. Mr Pisante is substantially based in the United States, and it was evident from some of his evidence that the funds invested with Mr Logothetis were intended for eventual use domestically there (e.g. to fund school and college fees). Save for the claim relating to the Piraeus Bank shares, the judgment sums are in US dollars.

74. The task of the court is to choose an interest rate it considers will be a realistic reflection of the cost of borrowing for a claimant such as Swindon, in the absence of evidence seeking to prove its actual borrowing costs (since no such evidence was provided). Given the factors set out in the previous paragraph, I consider that US Prime + 2%, as proposed by the claimants, is such a rate. The defendants proposed

US$ libor + 2½%. It suffices to say that there is no presumption or practice favouring the use of US$ libor over US Prime. If anything, the court has for some time now tended to accept that US Prime represents more realistically than does US$ libor a base line for real-world US$ borrowing costs, at all events away from the world of major financial institutions or other businesses of that sort of magnitude.

75. On the Piraeus Bank shares claim, as with the damages claim I shall award interest under s.35A of the 1981 Act, so that is simple interest. I am content to adopt the rate proposed by Mr Béar KC, to which no specific objection was taken, of Euribor + 2½ %. Mr Béar KC did not suggest a particular tenor. The order will be for the 12-month Euribor rate.

Conclusions

76. The amendment application is dismissed. The new claim should properly have been brought forward, if it was to be brought forward at all, so as to be part of the trial in July 2021 and/or so as to be before the court when it was preparing judgment upon that trial. It is not in the interests of justice for the new claim to be allowed in now, notwithstanding that if the new claim were allowed in it would create a credible prospect of a more complete recovery for a victim of fraud in respect of the consequences thereof.

77. There will be an order, to complete the substantive relief consequent upon rescission (i.e. leaving aside questions of interest and costs), that Libra pay US$2,741,250 to Swindon.

78. There will be no damages judgment against Libra, because with the dismissal of the amendment application there is neither claim nor proof of loss beyond the US$8,991,250 that (in aggregate) Libra will have been ordered to restore to Swindon consequent upon rescission.

79. There will be a damages judgment against Mr Logothetis for US$8,991,250 less any amount paid by Libra, prior to judgment now being entered, in respect of its liability under the January Order to restore to Swindon its US$6,250,000. Subject to any observations from counsel, I think it may be helpful and appropriate to spell out, in line with the approach adopted in the January Order but now in the language of discharge since the judgment against Mr Logothetis will be final, that any payment by Libra in respect of its restitutionary obligations made after the date of the judgment now entered against Mr Logothetis will discharge the judgment liability *pro tanto*.

80. Interest is to be calculated and ordered as follows:

    (1) on the sums Libra has been ordered to pay Swindon, interest at US Prime + 2%, compounded with quarterly rests;

    (2) on the damages judgment entered against Mr Logothetis, simple interest at US Prime + 2%;

    (3) on the €500,000 Libra was ordered to pay Swindon in relation to the Piraeus Bank shares claim, simple interest at 12-month Euribor plus 2½%.

81. I hope that the parties will be able to agree those interest calculations and any wording for the Order on this judgment that may be thought necessary to deal with any payment that has been made under the January Order of the amount then ordered to be paid on account.

82. Finally, the assessment of the costs ordered in the claimants' favour under the January Order shall be on the indemnity basis to the extent those costs were incurred on or after 1 March 2021, on the standard basis for costs incurred prior to that date. I shall deal separately with any question of a further payment on account of costs in the light of the decisions that have now been made on the other consequential matters, as summarised above.