Neutral Citation Number: [2020] EWHC 2390 (QB)

Case No: HQ17X02903

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/09/2020

Before:

NAOMI ELLENBOGEN QC

(Sitting as a Deputy Judge of the High Court)

- -

Between:

BIOCONSTRUCT GMBH	**Claimant**
- and -	
(1) STEVEN WINSPEAR **(2) STEVENSON RENEWABLES LIMITED**	**Defendants**

- -
- -

Mr Rory Brown (instructed by **Brandsmiths**) for the **Claimant**
Mr Seth Kitson (instructed by **Kingswalk Law**) for the **First Defendant**
Mr Stephen Fletcher (instructed by **Kingswalk Law**) for the **Second Defendant**

Hearing dates: 17 January and 11 February 2020

- -

Approved Judgment

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NAOMI ELLENBOGEN QC

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by e-mail and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Friday 11 September 2020.

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The Deputy Judge:

Introduction and procedural chronology

1. On 17 January 2020, I handed down judgment following the trial of this matter [2020] EWHC 7 (QB), from which the background to this further judgment appears. I continue to adopt the definitions then used.

2. On 2 January 2020, the parties had been sent my draft judgment, embargoed until hand down. The draft judgment made clear that Bioconstruct's claim against both Defendants, under an alleged deed dated 19 July 2016, would be dismissed because that alleged deed was invalid, and an alternative argument of estoppel by convention could not be advanced, in each case as a matter of law. In the usual way, the notice of embargo directed that each party's written list of typing corrections and other obvious errors should be submitted to my clerk by midday on Friday, 10 January 2020. I further directed as follows:

   2.1 By 16:00 on 10 January 2020, the parties are to submit an agreed draft minute of Order arising from my judgment;

   2.2 In the event that the above agreed draft minute of order does not include provision for (1) the costs of and associated with (a) the parties' respective preliminary applications and/or (b) the outcome of trial; and (2) any additional consequential matters arising, by 16:00 on 10 January 2020 each party should submit written outline submissions on all disputed issues relating to costs and any additional matters consequential upon my judgment;

   2.3 Each party will be permitted to make oral submissions on costs and any other consequential matters arising (limited to 30 minutes per party) on 17 January 2020.

3. Those further directions were set out in the e-mail under cover of which the draft judgment was sent by the court to each party's solicitors. In accordance with those

directions, on 10 January 2020, counsel for each Defendant submitted proposed corrections and written submissions as to costs. For SRL, Mr Fletcher also submitted a draft minute of order, noting that there had been no agreement of any part of it at that time and that solicitors for Bioconstruct had said that they would revert 'by the deadline'. Accordingly, all submissions had been made on the basis that everything was in dispute. For Steven Winspear, Mr Kitson indicated his agreement with the draft minute of order prepared by Mr Fletcher. On behalf of Bioconstruct, on 10 January 2020, Mr Brown submitted proposed corrections to the draft judgment, but did not provide an alternative draft minute of order, or written outline submissions.

4. Having received no explanation for that fact, or application for an extension of time, on 13 January 2020, I wrote to Mr Brown, noting that I had not received any written submissions on behalf of Bioconstruct and asking him to confirm whether the Defendants' proposals as to costs and draft minute of Order were agreed and, if they were not, to provide his written submissions, by 16:00 the following day. Mr Brown's reply on that date was as follows:

> "…I am not in a position to agree the order. Due to other commitments, I also do not expect to be in a position to revert by the deadline you have stipulated. I am however in the process of taking instructions on costs and consequential matters. Please may I have until 0900hrs on Thursday to either agree the order or file any short submissions? That will leave a day before the hearing for the court to consider any submissions and Messrs Kitson and Fletcher to take instructions (if any are needed) and revert (if they wish to)."

5. I responded in the following terms:

> "…I'm afraid that your proposed further extension of the deadline for confirmation of your position and provision of written submissions is too long - Messrs Kitson and Fletcher will need to travel to London for a contested hearing and everyone will need suitable time to prepare for it, consistent with other professional commitments. Should it only become clear on Thursday that a contested hearing will not be required, there is the prospect of unnecessary further costs being incurred.
>
> In those circumstances, time for compliance with my direction is extended only until midday on Wednesday, 15 January."

6. At 11:46 on Wednesday 15 January, my clerk received Mr Brown's 9-page skeleton argument for the hand down hearing on 17 January. That document, first, sought permission to amend Bioconstruct's Particulars of Claim, to plead a claim of deceit against Steven Winspear, before going on to address the issue of costs against him, should that application fail, and costs against SRL, in any event. The application to amend had not been foreshadowed, nor was it consistent with the characterisation of the nature of the submissions which had been indicated in Mr Brown's e-mail to me of 13 January 2020. That position was compounded by later developments, to which I shall refer below. The prospect that Mr Kitson might not need to take instructions or wish to revert was, self-evidently, fanciful. On Mr Brown's originally proposed extended timetable, Mr Kitson and those instructing him would have had only one day in which to do so and, as Mr Brown was aware, counsel for each Defendant would need to travel to London from Manchester.

7. No draft amended Particulars of Claim were provided with the skeleton argument. At paragraph 5 of that document, Mr Brown stated as follows:

> "5. The nature of the amendment sought is to allege a case of deceit. Specifically, it is alleged that D1:
>
> 5.1. represented (in the last few iterations of the deed, and in emails, and in particular and most importantly by initialling the pages of the deed which contained personal obligations with which he was familiar from earlier iterations and which had been introduced in the course of negotiations) he intended personally to be bound by the Deed.
>
> 5.2. did not intend personally to be bound and told no-one that he did not in fact intend personally to be bound in circumstances in which:
>
> 5.2.1. he knew that without his providing security in the form of personal obligations the deal would not complete;
>
> 5.2.2. every other party was under the impression he intended to provide security personally; and
>
> 5.2.3. he apprehended that C might well fail to realise that he had not signed the Deed;
>
> 5.3. intended that C would be induced to complete the deal on the basis D1 manifested an intent personally to be bound;
>
> 5.4. C did act in reliance on this false representation by advancing money on loan; and
>
> 5.5. C suffered loss because the loan was not repaid and C could not call on D1's security."

8. In explaining the timing of his application, Mr Brown asserted, in summary, that he had not been in a position properly to make an allegation of fraud until he had received my draft judgment, containing certain findings of fact on which he relied for his proposed claim in deceit. He contended that the basis of Steven Winspear's case throughout the proceedings had disclosed no deceit and that Messrs Roth and Von Laun (whom Bioconstruct had called as witnesses at trial) had assumed and thought it likely that Steven Winspear had made an innocent mistake in failing to have signed the Deed in his personal capacity, on the basis that the relevant signature box had spanned two pages. It was said that, following the findings set out in my draft judgment, the test for alleging dishonesty, to which Lord Hobhouse had referred at paragraph 160 of *Three Rivers District Council v Bank of England* [2003] 2 AC, HL had been met.

9. In his skeleton argument, Mr Brown acknowledged that it was unusual for an application to amend a statement of case to be made after trial. Nonetheless, he submitted, the court had power to grant such an application and, in this case, it would be unjust were it not to do so. Permission to amend ought to be granted, Mr Brown contended, for the following reasons:

9.1 This court is in a good position to decide the issue, being familiar with all of the underlying facts and the individuals involved;

9.2 That course of action represents a more efficient use of court resources than would an entirely new trial on matters which have been traversed in detail during the trial before this court;

9.3 It would also prevent both parties involved from incurring a fresh set of costs in new proceedings over substantially the same facts;

9.4 Most important, it would give the court the opportunity to see justice done between the parties. In support of that submission, Mr Brown relied, first, on the lack of enthusiasm which, at paragraph 158 of my draft judgment, I had expressed for my conclusions of law, in light of certain findings of fact made earlier in the draft judgment, and, secondly, on Steven Winspear's conduct on 19 July 2016 and in the course of trial. It was Mr Brown's pre-emptive contention that none of the following arguments would provide an answer to his application:

9.4.1 that Steven Winspear would be put to further cost;

9.4.2 that Bioconstruct, or its lawyers, should have spotted the defects in the Deed;

9.4.3 that Steven Winspear had been silent as to his intention not personally to be bound, by the Deed, having manifested an intention to be bound, by his conduct;

9.4.4 that the Deed was invalid by reason of additional defects, such that Steven Winspear's deceit was not causative of Bioconstruct's need to call on the security which it believed itself to have: as Steven Winspear knew, the deal would not have proceeded at all without his offer of personal security. Any other negligent or irrational belief about another matter, without which Bioconstruct would not have parted with money either, would be similarly irrelevant: the law simply ignores the other reasons why payment was made, contended Mr Brown, relying on *Standard Chartered Bank v Pakistan National Shipping* [2003] 1 AC 959, HL, at paragraph 15.

10. At 11:42 on 16 January 2020, I received a bundle from Bioconstruct's solicitors, Brandsmiths, the existence, but not the content, of which had been first indicated by e-mail from Brandsmiths to me at 10:36 that morning; an e-mail which had not been copied to counsel or solicitors for the Defendants. At 10:40, I replied, copying in Messrs Kitson and Fletcher, asking whether the bundle had been agreed by all parties. The reply came at midday, as follows, '*The contents of bundle is not agreed but as it contains all of the relevant documents, it should not be controversial.* (sic) *Copies have now been sent to all parties. I shall notify you when the other side has agreed the contents of the bundle.'*

11. Bioconstruct's bundle contained a draft order which made provision, respectively, for Steven Winspear to file an amended Defence and, subsequently, evidence in support;

for Bioconstruct to file any evidence in reply within 14 days thereafter; and for the matter then to go to trial. An application notice, dated 15 January 2020 and seeking permission to amend in the form of a draft Particulars of Claim, was supported by the fifth witness statement of Mr Adam Morallee, of the same date[1], running to 14 pages. Mr Morallee is a partner in Brandsmiths. There was no explanation as to why the application had not been made until 15 January, some 13 days after my draft judgment had been circulated, why it had not been referred to in Mr Brown's skeleton argument, or why it had only been provided during the afternoon before the hearing at which it was intended to be heard and not foreshadowed at an earlier stage. This was, at best, highly discourteous. More significantly, it limited the time available to Steven Winspear and the court to consider (and for Steven Winspear to respond to) the matters set out in Mr Morallee's witness statement and took no account of the likely existing professional commitments of the other parties and the court.

12. By separate e-mails to me on the afternoon of 16 January 2020 (which followed their receipt of my e-mail to Brandsmiths), Messrs Kitson and Fletcher each informed me that my e-mail had been the first that he had known about the existence of a bundle, that he had not received a copy of it and was not in a position to agree even that its contents were, or should be, all that was relevant or non-controversial. Mr Kitson informed me:

> "I received Mr Brown's application yesterday shortly before lunch. I had not had any prior notice that any application would be made. Due to professional commitments I have only been able to consider it in any detail this morning and unfortunately, I am shortly going to have to travel down to London. Clearly both my client and those who instruct me face similar issues with travel.
>
> Candidly, at this stage all I can say is that I will try to be in a position to assist the Court with the late application tomorrow, should your Ladyship be minded to hear it. No disrespect is meant by this: it is simply a product of the late service and my pre-existing professional commitments.
>
> I have copied in Counsel for the Claimant as well as Counsel for the Second Defendant to this email."

13. In essence, Mr Morallee's witness statement in support of Bioconstruct's application contained expanded submissions as to why that application should be granted, coupled with (at paragraphs 16 to 35) an attempt to argue the significance of elements of the evidence already given.

14. The amendments in the draft Amended Particulars of Claim, pleaded by Mr Brown, ran to four pages. They referred to attached documents which were not, in fact, attached. In summary, they alleged that, by a course of conduct, acquiescence and silence, Steven Winspear had represented that he would, by deed, enter into the so-called 'personal security obligations' contained in specified clauses and headings of the Deed. Eight paragraphs of particulars followed. It was then averred that Steven Winspear had been well aware that no loan would be made, nor would the 'Development Finance Deal' complete, in the absence of those obligations and that the pleaded representations had been made in order to induce Bioconstruct to enter into 'the contractual arrangements'. Those arrangements, as defined, were *'dated on*

[1] later amended and supplemented by his sixth witness statement, dated 29 January 2020

or around 19/20 July 2019 (sic) *and made between the Claimant and BioPower Group Limited ('Group')* [by which] *the Claimant agreed to loan and Group agreed to borrow £3,867,655.90 in order to finance the construction of anaerobic digestion plant ('the Plant'). A copy of the contracts forming the contractual arrangements are attached hereto. They are referred to together as the Development Finance Deal'.* The allegations of inducement were said to be supported by certain pleaded respects in which Steven and Stuart Winspear would profit from that deal. The true position was then pleaded, as was Steven Winspear's alleged continuation of 'the deceitful pretence' after the meeting of 19 July 2016 at which the Deed was signed. Bioconstruct's alleged loss and damage was said to be constituted in its inability to recover outstanding loan moneys, contractual interest and solicitors' costs.

The hearing on 17 January 2020

15. At 07:44 on the morning of 17 January 2020, Mr Kitson circulated outline written submissions, together with five authorities to which they referred. At 08:52, Mr Fletcher circulated a speaking note and a further authority. As SRL is unaffected by Bioconstruct's application to amend the Particulars of Claim, Mr Fletcher made no submissions on it.

16. As set out in his outline submissions, Mr Kitson's position was that summary dismissal of Bioconstruct's application was the approach which would further the overriding objective *'for the reasons sketched below… Should the Court be minded to seriously entertain the application – D1 would clearly need time to answer it properly, with appropriate time set aside'*. Mr Kitson contended that Bioconstruct's application was doomed to fail by reason of one or more of delay, conduct, its prospects and prejudice. I shall return to the detail of those submissions later in this judgment.

17. At the outset of the hearing, I asked Mr Brown to explain why it was that he had not complied with my directions of 2 January 2020 and to explain the timing of Bioconstruct's application to amend its Particulars of Claim. In summary, he told me, first, that he had been unaware of my original directions until I had written to him on 13 January 2020, as he had not received the covering e-mail which the court had sent to his instructing solicitors. Later, he stated that he did not wish to *'throw his solicitors under a bus'* and that it was possible that he had received the e-mail but had focused on the draft judgment. In either event, he had not appreciated that the relevant directions had been made. As to the timing of the application to amend, there had been no attempt to ambush Steven Winspear, or his legal team; it had taken time to consider the effect of, and take instructions on, my (105-page) draft judgment. Bioconstruct had acted with appropriate dispatch and, should Mr Kitson require additional time to respond, *'then he must have it'*.

18. In the event, I heard argument from all counsel on the issue of costs (addressed later in this judgment) and made the following orders:

    18.1 Bioconstruct's claim against SRL be dismissed;

    18.2 Consideration of Bioconstruct's application to amend its Particulars of Claim in relation to Steven Winspear ('the Application'), and of the appropriate costs order, be adjourned to 11 February 2020, with a time estimate of one day;

18.3 Steven Winspear was to file any evidence in response to the Application by no later than 4:00pm on 22 January 2020. If he did not wish to rely upon any such evidence, a nil return should be filed by the same date;

18.4 By no later than 4:00pm on 27 January 2020, Bioconstruct was to file any further written submissions and authorities upon which reliance would be placed. If applicable, a nil return was required by the same date;

18.5 By no later than 4:00pm on 3 February 2020, Steven Winspear was to file any further written submissions and authorities upon which reliance would be placed. If applicable, a nil return was required by the same date;

18.6 Pending the determination of the Application, the claim against Steven Winspear would not be dismissed;

18.7 Judgment on all outstanding applications for costs, including the costs of the 17 January hearing, was reserved.

19. In the event, Steven Winspear elected not to file evidence in response to Bioconstruct's application. Both parties filed further written submissions and authorities, as directed. In Mr Brown's case, those submissions were expressly further to his skeleton argument filed on 15 January 2020. Mr Kitson filed a composite document, incorporating his outline submissions of 16 January 2020.

The hearing on 11 February 2020

20. SRL did not attend and was not represented on 11 February 2020: as previously noted, it was unaffected by the Application and had already made its submissions as to costs.

21. The updated bundle provided for that hearing contained a further, sixth, witness statement of Mr Morallee, in response to Mr Kitson's submission (in his skeleton argument relating to the 17 January hearing) that Bioconstruct had sought to ambush the Defendants and the court.

22. I begin by setting out the submissions made, respectively, on behalf of Bioconstruct and Steven Winspear in relation to the Application, and my conclusions. Thereafter, I address all parties' submissions as to costs.

The Application

Bioconstruct's submissions

23. I have summarised the submissions set out in Mr Brown's first skeleton argument of 15 January 2020. In his further written and/or oral submissions, he made the following additional points:

23.1 A judge's power to revisit and reverse decisions after an order had been perfected, but before it had been sealed, is set out in *L v B* [2013] UKSC 8, [2013] 1 WLR 634. Whilst that case is not on all fours with these proceedings, the general principles there set out apply to the Application;

23.2 The general rule is that amendments should be allowed in order that cases may be tried, if the non-amending party can be compensated in costs for any required consequential amendments to its case. As Bioconstruct is seeking to plead an entirely new cause of action against Steven Winspear, no issue of compensation arises: his only costs would be those of pleading to a new claim;

23.3 Against the background of *L v B* and of *Macleod v Mears* [2014] EWHC 3140 (in particular at paragraphs 4, 21, 27 and 41 to 45), it was difficult to see how this court could refuse the amendment sought. To do so *'would be to punish a commercial actor acting in good faith and to grant immunity to a person who was not only acting in bad faith, but who sought to take advantage of his culpable silence. It is because D so effectively deceived C that C could not plead any false representation as to intention until receipt of the draft judgment containing key factual findings'*. Unlike the position in *Macleod* and any other authority upon which Steven Winspear relies, the claim alleges fraud and only crystallised when the findings of fact were made in my earlier judgment. Prior to that, as at close of evidence, a plea of deceit would have required a hypothesis and Mr Brown had no instructions to plead such a case.

23.4 In response to the written outline submissions provided by Mr Kitson, on 17 January 2020:

Delay

23.4.1 There had been no delay and Mr Kitson's submission to the contrary was 'unusual': Steven Winspear could not simultaneously contend that the facts on which the Application was based ought to have been apparent prior to judgment and that Bioconstruct's case in deceit lacked merit;

23.4.2 In any event, the case in deceit had not been apparent at an earlier stage. It had never been Steven Winspear's case that, although, in the course of negotiations, he had manifested an intention personally to be bound, he had not mentioned to anyone that he had secretly lacked that intention and had then taken advantage of the rush to close the deal on 19 July 2016 by not adding his signature to the Deed in a personal capacity. To the contrary, his case (including at trial) had been that he *had* communicated to Bioconstruct, or its lawyers, his intention not to be bound in a personal capacity and had travelled to London on 18 July 2016 with an amended version of an earlier draft of the Deed. Both such assertions had been rejected, at paragraph 103 of my earlier judgment, prior to which there had been no reasonable basis for pleading a claim in deceit. Even if an application ought to have been made at the conclusion of Steven Winspear's evidence, any delay since then had caused no prejudice to Steven Winspear. It was material to note that the claim in deceit was not statute-barred.

Bioconstruct's conduct

23.4.3 There had been no intention to ambush the court, nor could it be ambushed. The assertion that Bioconstruct's legal team had been preparing to ambush Steven Winspear should not have been made and ought to be retracted, or supported by evidence.

23.4.4 In any event, those in glass houses should not throw stones: Steven Winspear's conduct at trial 'could hardly have been worse';

23.4.5 In fact, the draft judgment (but not its covering e-mail) had been forwarded to Mr Brown by those instructing him at 15:23 on 2 January 2020. At 22:28 on 9 January 2020, he had sent his advice to those instructing him. Instructions had then been received from Bioconstruct (which has a collective decision-making process) at 07:22 on 14 January 2020. Draft amended Particulars of Claim had been sent to Bioconstruct's solicitors at 09:09 on 15 January 2020 and the application had been served by e-mail at 11:41 that same day. Whilst it was accepted that the Application had been made late, or very late, it had been made as soon as it could have been made. Any suggestion of delay was untenable and, in any event, the timing of the application was a relevant, but not a determinative, factor: the answer here lay in the question of prejudice and proportionality;

Prospects of success

23.4.6 The parties held different views of the merit in a claim of deceit. Bioconstruct's position is that my first judgment describes Steven Winspear (a sophisticated, dishonest man) working a deceit on Bioconstruct and that it is improbable that Steven Winspear will escape liability. Steven Winspear takes a pleadings point: *'that a draft pleading is imperfect in the eyes of the prospective defendant's counsel is not a reason not to permit an amendment'*.

23.4.7 Bioconstruct's case did not rely upon mere silence, but upon a course of conduct leading up to the closing meeting on 19 July 2016. A representation must be as to something which is known at the time at which that representation is made.

Prejudice

23.4.8 The assertion of prejudice was not understood. Steven Winspear had chosen not to file evidence in opposition to the application. Any assertion of prejudice called for supporting evidence;

23.4.9 There is no prejudice; as the draft minute of order previously submitted provides, Steven Winspear can plead a Defence and file any evidence in response. Bioconstruct had made clear that it would not be intending to call any further evidence of its own, were the proposed amendment to be allowed. For that reason, Steven Winspear's reliance on *Ladd v Marshall* [1954] 1 WLR 1489 (see

below) was misconceived. No further disclosure would be required of Bioconstruct, either;

23.4.10 There would be no prejudice to other court users in circumstances in which Bioconstruct could commence fresh proceedings, were the Application to be refused. By contrast, in any such proceedings, it could fairly be said against Bioconstruct that it ought to have made an application to amend its original claims, in accordance with the principles in *Henderson v Henderson* 3 Hare 100. The course adopted constituted a more efficient use of resources;

23.4.11 Steven Winspear's position that there must be finality to litigation is bad. The judgment handed down on 17 January finally determines the validity of the Deed and the availability of estoppel by convention. Steven Winspear retains the benefit of those determinations. The deceit claim is entirely separate and there is no reason why he should be exempted from defending it. Bringing a new claim would not constitute a sensible use of resources, given that this court has detailed knowledge of the case. Bioconstruct has already paid to bring proceedings. In the course of unexpected forensic discoveries at trial and in light of the court's inferential findings of fact, the position is that a claim can be brought without an issue fee and the need for fresh proceedings, with the possibility of a different judge who does not have a mastery of the facts. Protection under the Civil Procedure Rules could be accorded to ensure fairness to Steven Winspear, including in relation to costs budgeting;

23.4.12 By contrast, Bioconstruct would suffer obvious prejudice (as explained in the fifth witness statement (as amended) of Mr Morallee). It would be prevented from suing in deceit and from recovering its losses from Steven Winspear. It is material that Steven Winspear knew that the deal would not close without the security which, according to the draft deed, he was supposed to be providing. Any inconvenience to Steven Winspear in having to answer a deceit claim is outweighed by Bioconstruct's interest in recovering its losses. The position is a fortiori, if, as Steven Winspear contends, he has a defence to the claim in deceit. Further, there is a public interest in his answering that claim. It cannot be right that, because his pretence was effective to trick Bioconstruct (on 19 July 2016 and afterwards, when the loans were advanced and up to and including trial), he should not have to answer for that pretence.

Steven Winspear's submissions

24. Mr Kitson submits that the Application should be dismissed, for the reasons summarised below:

24.1 The framework within which it must be viewed is set out in *Vringo Infrastructure Inc v ZTE (UK) Ltd* [2015] R.P.C. 23 ('Vringo'). The court must consider:

24.1.1 the principles in *Ladd v Marshall* [1954] 1 WLR 1489;

24.1.2 the principles on amendment (and late amendment) in, amongst other cases, *Swain-Mason v Mills & Reeve* (a firm) [2011] EWCA Civ 14 and *Nesbit Law Group LLP v Acasta European Insurance Company Ltd* [2018] EWCA Civ 268; and

24.1.3 the application of the overriding objective.

Having done so, it ought to conclude that the application falls foul of the *Ladd v Marshall* principles; is terminally late; does not disclose a 'real' prospect of success (because Bioconstruct is issue-estopped on a key element of its claim and the proposed amendment does not disclose a viable claim in deceit); the prejudice to Steven Winspear and other court-users outweighs any prejudice to Bioconstruct; proportionality dictates that Steven Winspear ought to have all the relevant CPR protections of a fresh claim; and the amended claim is an avoidable and unjustifiable drain on the court's limited resources.

24.2 *L v B* is relevant, but not directly on point. In that case, the Supreme Court was concerned with when it is proper for a judge to re-open his or her own judgment because of a subsequent change of heart. That can be distinguished from the instant case in which an unsuccessful party is requesting that the court allow it to (a) plead a new issue; and (b) re-open the trial of the claim, with the potential for fresh evidence to enable that issue to be determined. Whilst *Macleod* contains several useful statements of principle, it is readily distinguishable on the facts from the instant case. In *Macleod*, the court was concerned with a claim for a bonus by an individual. The amendment to the claim was to allow that individual to claim a share of a bonus to which her team was said to be entitled. It was a case in which a split trial of quantum and liability had been ordered at an earlier stage and the further hearing required to determine the amended claim would *'significantly overlap with the anticipated quantum issues'*. Here, submits Mr Kitson, Bioconstruct seeks to advance an entirely new species of claim and there are no further hearings listed. It is submitted that these are material bases upon which *Macleod* can be distinguished.

24.3 Furthermore, as this is not a case in which a further trial would have been required in any event, the ratio of *Vringo* (the facts of which were much closer to those of the instant case) should be preferred. As set out in that case, at paragraph 38, the applicable principles are as follows:

> "38 The court has a jurisdiction, at least before the order is drawn up, to entertain an application of this kind as in [issue] here. The principle to be applied generally is the overriding objective to deal with cases justly and at proportionate cost. This involves dealing with cases expeditiously and fairly and allocating an appropriate share of the court's resources to a dispute. In a case like this one, in which the application is to amend the statement of case, call

> fresh evidence and then have a further trial, the principles relevant to amending pleadings have a role to play but the Ladd v Marshall factors are also likely to have real significance."

24.4 Mr Kitson also places reliance upon paragraphs 39 and 40 of Birss J's judgment in *Vringo*:

> "39 As regards principles applicable to amendments, the modern view is probably the Court of Appeal in *Swain v Hillman* [2001] All ER 91. If the court would not have permitted the amendment before trial, it is hard to see how it is likely to be admitted after trial, apart from some very unusual circumstances. Nevertheless, just because a court would have permitted the amendment sought before, or even during the trial, if it had been raised at that stage, it does not mean that it should be permitted after judgment.
>
> 40. As to *Ladd v Marshall*, the trial judge is in some ways in a better position than the appellate court to assess the significance of a new point and new evidence. In any case, at this stage the *Ladd v Marshall* factors should be applied more leniently to an applicant than they might be applied in an appellate court; but, all the same, the Ladd v Marshall factors are clearly relevant because the application is an attempt to call new evidence after judgment. If those factors, even applied more leniently, are against the applicant, it is likely that powerful factors in the applicant's favour will be needed to justify the application."

24.5 The fact that new evidence might come from only one of the parties does not displace the application of *Ladd v Marshall* principles, but those principles could not sensibly apply to the findings of fact made in the court's earlier judgment. CPR 17.1(2) requires that the court only grant permission for a proposed amendment if it has a real prospect of success, i.e. better than merely arguable. Regard must be had to the overriding objective, with a heavier burden to discharge where the application is made late: *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), at paragraph 36. In *Nesbit*, the Chancellor of the High Court (with whom Sharp LJ and Hamblen LJ agreed) summarised the applicable principles as follows, at paragraph 41:

> "The principles relating to the grant of permission to amend are set out in Swain-Mason and in a series of recent authorities. The parties referred particularly to Mrs Justice Carr's summary in Quah Su-Ling v. Goldman Sachs International [2015] EWHC 759 (Comm) at paragraphs 36-38 of her judgment. In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal."

24.6 Relying upon the principles set out at paragraphs 36-38 of *Quah Su-Ling* (as approved by the Court of Appeal):

24.6.1 even if the Application had been made prior to trial, it would have been rejected. Its late timing simply compounds Bioconstruct's difficulty;

24.6.2 the proposed amendment has no real prospect of success because:

24.6.2.1 for a claim in deceit to succeed, a claimant must establish each of the following elements:

24.6.2.1.1 the defendant made a representation which was false;

24.6.2.1.2 the defendant knew that the representation was untrue, or was reckless as to its truth or falsity;

24.6.2.1.3 the defendant intended that the representation would induce the claimant to act, or refrain from acting; and

24.6.2.1.4 the claimant thereby suffered loss;

24.6.2.2 the pleaded content of the representation on which Bioconstruct relies is to be found at paragraphs 3 and 4 of the draft Amended Particulars of Claim[2]: respectively, *'the First Defendant represented that he would by Deed enter into the personal obligations* […]' [Application/126/3]; and '*the First Defendant represented* […] *that he would enter into and intended to enter into the Personal Security Obligations'* [Application/126/4];

24.6.2.3 The averment of falsity and Steven Winspear's knowledge that the representation was untrue is pleaded at paragraph 8[3]: '*Contrary to his representation, the First Defendant did not intend to enter into the Personal Security Obligations.'* That could not succeed as being contrary to the finding at paragraph 104 of the court's earlier judgment: '*Nonetheless, I find that Steven Winspear's intention throughout was to avoid incurring personal liability, <u>if and to the extent possible</u>. I, therefore, accept his evidence that he did not sign the signature pages to the agreement as it had stood on 18 July in his personal capacity, because, at that stage, he had wanted his personal guarantee to be removed'* (emphasis added). The emphasised text (implicit in which is the prospect that personal liability would have been assumed) is not reflected in Bioconstruct's pleaded case;

[2] This was the paragraph numbering as it stood at the time of Mr Kitson's written and oral submissions, but it changed subsequently, in circumstances described later in this judgment.

[3] See footnote 2, above.

24.6.2.4 Furthermore, as a matter of law, a statement of future intent (especially one made in the course of negotiation) could not found a claim in deceit. In addition, the mere fact that an intended event does not, in fact, occur will not in itself create liability, unless the representation has contractual effect. The draft deed as it had stood on 18 July 2016 had been the subject of further negotiation on 19 July 2016, resulting in a document ('the Deed') which had been fundamentally different in certain key respects, as paragraph 88 of the court's earlier judgment made clear. Thus, any argument to the effect that the statements on which reliance is placed were of present intent must fall away. In any event, each statement could only latch on the agreement as it had stood at the time of the statement in question. Any subsequent change in the state of affairs as it had then stood rendered the statement inoperative: *'If A represents to B that he would be willing to enter into a contract to buy a horse, B cannot use that representation to found a deceit claim if A later backs out of buying a zebra from B. The representation has ceased to have operative effect.'*;

24.6.2.5 As Grant on Civil Fraud observes, '*it is a daily occurrence that where parties are engaged in negotiating a contract, they adopt negotiating positions which do not necessarily represent their final position. The law has traditionally adopted a realistic view on representations made in such circumstances and judges have been unwilling to impose liability in situations where dissembling is a fact of life (such that both parties can reasonably be expected to be aware of and engaged in it)'*.[4] Those observations are on all fours with the facts before this court. As in *Vernon v Keys* (1810) 12 East 632, the court should refuse to entertain claims of deceit arising out of representations made during commercial negotiations;

24.6.2.6 In so far as Bioconstruct's pleaded case relies upon Steven Winspear's silence, that, too, is misconceived, as a matter of law: per *Peek v Gurney* [1873] LR 6 H 377, at 403, in the absence of a fiduciary relationship (not, here, in issue), silence by itself cannot found a claim in deceit, no matter how morally wrong the silent party is considered to be;

24.6.2.7 In any event, Bioconstruct's pleaded case on inducement is defective, in failing to specify which representation is said to have induced Bioconstruct into entering into the

[4] Grant, *Civil Fraud,* [48]

Deed, and did not disclose a viable cause of action. As *Grant* states (at 34-06), under the heading 'Late Amendments', *'it is generally a requirement that the proposed amended case be immediately clear and comprehensible to the opposing party; but this is of particular importance in a fraud claim where clarity and particularity in pleadings is in any event paramount'*.[5] Bioconstruct has fallen short of this high threshold;

24.6.2.8 Furthermore, Bioconstruct relies upon paragraph 105 of the court's earlier judgment in support of its claim in relation to inducement, however that paragraph had referred to SRL only: *'I am satisfied that it was, at all material times, equally clear to Steven and Stuart Winspear that the deal could not complete unless SRL executed the Deed in its final form.'* Steven Winspear cannot be expected to respond to irrelevant allegations, or to 'gaze into the tea leaves' to ascertain what relevance Bioconstruct places upon them, if any;

24.6.2.9 Without prejudice to the deficiency of Bioconstruct's pleading, if Bioconstruct, in fact, wishes to state that it had been induced by Steven Winspear's representation that he 'would' be bound, that, too, would lack merit. It is nonsensical to say that Bioconstruct advanced money on the basis of an individual's 'intent' to be bound. It is a complex commercial entity, which employs a specialist lawyer having expertise in English contract law. It had also been advised by Mr Colclough, who had been retained to provide legal advice in connection with the Deed. Bioconstruct had sought to have the agreement recorded in a deed, with all its incumbent formalities, for a reason. As the court's earlier judgment had recorded, at paragraph 126.1: *'the notice at page 14 of the Deed, which immediately preceded the signature boxes, made clear to Steven Winspear (<u>and others</u>) that he would not be legally bound unless he signed the Deed.'* (emphasis added). The evidence of Bioconstruct's director (as recorded at paragraph 126.7.2 of the court's earlier judgment) had been that he had only considered Bioconstruct to have been bound at the point at which he had signed the agreement. Against the backdrop of those established facts, the suggestion that Bioconstruct could have been induced to advance millions of pounds upon the basis of an individual's intention to enter into a deed is doomed to failure;

24.6.3 Bioconstruct had been aware of the 'secret intent' upon which it now relies during Steven Winspear's cross-examination. If it had thought

[5] *Ibid* 34-06.

that there were legs in any deceit claim, the proper course would have been to request an adjournment, in order to plead deceit, during the trial. Alternatively, it could have applied at any time between the end of the trial and receipt of the draft judgment. Instead, it had chosen to await the outcome of its primary claim before attempting to have a second bite of the cherry;

24.6.4 Applying *Quah Su-Ling*, it is apparent that this is a 'very late' amendment. Carr J had observed that a 'very late' amendment is one which would cause the trial date to be lost. The fact that this amendment is sought *after* the trial worsens, rather than ameliorates, the situation. Applying the slightly broader test set out at paragraph 38(d) of Carr J's judgment:

24.6.4.1 the nature of the proposed amendment is a deleterious factor; this is not simply an ancillary claim (for example, an argument that the agreement in the Deed survives as a simple contract), but rather a new species of claim entirely;

24.6.4.2 the quality of explanation for its timing is weak;

24.6.4.3 there would be a large amount of consequential work to be carried out. Bioconstruct is inviting the court to list an entirely new hearing: case management would be required, as would amended costs budgets, and further disclosure, for example in relation to the issue of inducement;

24.6.5 Thus, by reference to the factors set out in *Nesbit* and *Quah Su-Ling*, respectively:

24.6.5.1 Bioconstruct has failed to discharge its heavy burden to show the strength of its proposed new claim. The claim, as pleaded, is doomed to failure; alternatively is so weak that there is no great prejudice to Bioconstruct in not being able to bring it. To allow it to bring a further spurious claim would be to occupy the court's time unreasonably, to the exclusion of other court-users;

24.6.5.2 This is not a case in which there is a currently listed trial date which is threatened; rather the relevant trial and the time at which these issues ought to have been raised, if at all, was approximately 10-11 months ago. The fact that Bioconstruct is requesting that the court list a further trial in this matter, is at least analogous to, if not worse than, a scenario in which a trial date would be lost. As per *Quah*

Su-Ling, that fact alone should cause the balance to be 'heavily loaded' against the grant of permission[6];

24.6.6 Bioconstruct's contention that Steven Winspear would suffer no prejudice is untenable:

24.6.6.1 Steven Winspear has a reasonable expectation in the finality of litigation (*Macleod*, at paragraph 30), not simply of particular causes of action, and has had the current proceedings hanging over him since August 2017. As per Carr J, this is not a matter which can be simply compensated in costs[7] and there would be prejudice to other court-users brought about by the need for a second trial. Bioconstruct had chosen to pursue a claim against Steven Winspear which had been flawed from the outset. That had been pointed out in Steven Winspear's Defence. Over two years down the line, he had received the judgment to which he was always going to be entitled and now had to face — at five seconds to midnight — an application to plead an entirely new species of claim against him;

24.6.6.2 If the Application were granted, Steven Winspear would be put to unnecessary cost and inconvenience in meeting a claim which ought to have been made months ago. Had Bioconstruct acted promptly, the lion's share of additional costs involved in the Application (and in any adjudication of the claim, should permission be granted) could have been avoided;

24.6.6.3 It is no answer for Bioconstruct to state that it could simply bring a fresh claim if the Application were to be dismissed. First, it is by no means guaranteed that it would do so. Secondly, it would have to engage with potential abuse of process arguments. Thirdly, a fresh claim (if pursued) would allow Steven Winspear the benefit of finality in this litigation and the full gamut of relevant CPR protection in any new claim. Overall, Bioconstruct's ability to bring a fresh claim underlines the minimal prejudice which it would face were the Application to be dismissed. Equally, the inherent weakness of its proposed new claim is a relevant factor in balancing the prejudice to each party. Bioconstruct is not prejudiced in being unable to bring a further weak claim within this litigation. If it is serious about the merit in its claim, it can bring fresh proceedings and have it tested;

[6] *Quah Su-Ling* [at 38(b)]

[7] *Ibid* [at 38(e)]

24.6.6.4 In *Charlesworth v Relay Roads* [2000] 1 WLR 230, followed in *Vringo*, at paragraph 28, considering a post-judgment application to amend and re-open a trial by a Defendant, Neuberger J (as he then was) had observed, '*it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him"*. That had been echoed by the observation of Chadwick LJ in *Coflexip v Stolt Comex Seaway MS Ltd* [2001] RPC 182 (also cited in *Vringo*, at paragraph 34) that, *'it is no answer for the appellants to say the respondents would not be prejudiced if there were to be a retrial. That is to ignore the interests of other court users; who will be prejudiced if time and resources which could be used to hear and dispose of their cases have to be devoted in the re-trial of a case which has already been heard.'*;

24.6.6.5 Furthermore, if faced with new proceedings alleging deceit, Steven Winspear would have the right to demand a trial by jury in the Queen's Bench Division, under section 69 of the Senior Courts Act 1981 – see Grant on Civil Fraud, at paragraph 1-015. He would need to consider his position in that respect. In the existing proceedings, it would not be feasible for a jury to decide that claim; how could the loss of that option not be prejudicial to him? It would not be possible for there to be two different fact-finding bodies and all relevant evidence on which findings had not been made in the court's earlier judgment would need to be given. In the original trial, matters relevant to deceit had not been in play. Reserving any new proceedings to this court would afford no answer to those issues; there might be an application under CPR 32.1 to render inadmissible evidence which had already been received, which it would not be appropriate for this court to determine. Had a claim of deceit been made in the existing proceedings, Steven Winspear might have been more circumspect in his evidence;

24.6.7 Bioconstruct had failed to provide a good explanation for its delay and ought not to be granted the court's indulgence[8]. Whilst, in accordance with *Three Rivers,* it could not plead a case in the hope that something would turn up in cross-examination, it could have sought more time, once something had turned up. Steven Winspear's closing written submissions for trial, at paragraph 125, page 33 (regarding the evidence recited at paragraph 110 of my earlier judgment), indicated the interpretation then placed upon matters by Bioconstruct and that it could not be said that the matters giving rise

[8] *Ibid* [at 38(f)]

to the Application were not then in its mind. Mr Brown's use of the word 'implausibly' underlines Bioconstruct's then suspicion of what is now pleaded to have been the case. That is buttressed by Mr Morallee's fifth witness statement, at paragraph 24, going to the heart of Bioconstruct's case. The final sentence of that paragraph (*'In fact, until the Trial, the First Defendant had remained silent as to this secretly harboured* intention') showed that Mr Morallee had been aware of the secretly harboured intention at trial. *Three Rivers*, thus, does not assist Bioconstruct; it operates to its detriment. The court's earlier judgment does not provide a reasonably credible basis for a claim in deceit, but, if it does, it cannot be said that Bioconstruct was not aware of all relevant material, at the time of trial. If the Application had been made at close of evidence, submissions could have been adjourned pending its determination;

24.6.8 Achieving justice is not a simple matter of adjudicating all the claims between the parties which they wish to bring. Justice, in this case, would be to dismiss the Application and thereby further the wider public interest by ensuring that parties do not delay in making applications of this nature as well as ensuring that other litigants can obtain justice efficiently[9];

24.6.9 Per *Nesbit* (at paragraph 40), the above factors fall to be applied with even greater stringency when an application is made after a judgment has been circulated. Bioconstruct's application falls well-short of the high threshold demanded by *Nesbit* and *Quah Su-Ling* and, accordingly, should be dismissed;

24.6.10 Per *Macleod* (at paragraph 22), clarity of pleading is a relevant consideration for the court on any late application to amend. Bioconstruct's pleaded case is deficient – in particular as regards inducement – an additional reason why the application ought to be dismissed;

24.6.11 On any reading of the overriding objective, the Application ought to be dismissed;

24.6.12 Further, as the court's earlier judgment reflects, there is no evidence before the court as to the capacity in which Steven Winspear initialled the Deed. Bioconstruct's case at trial had been that those initials had constituted his mark for the purposes of section 1(3) of the 1989 Act. Its failure to adduce any evidence of that (also inimical to its proposed amended claim) ought to weigh heavily against it. Bioconstruct should not be given a second opportunity to establish matters which it ought to have established, but failed to establish, at trial. As Stuart-Smith LJ observed, *in Imperial Chemical Industries v Montedisom (UK) Ltd* [1995] RPC 449, cited in *Vringo* (at paragraph 26), *'it is incumbent on a party to adduce such evidence as he considers relevant and persuasive relating to*

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[9] *Ibid* [at 38(g)]

the findings of fact which the judge may make. He cannot wait for the findings and then say, 'Oh well, I could have called more evidence on that point';

24.6.13 The commentary regarding late amendments in the White Book, at paragraph 17.3.8, states, *'The modern approach in litigation is to require parties to be open, above board and co-operative. Thus, once the necessity to amend has become apparent, a party should tell his opponents about the amendment he intends to seek so as to enable them to consider whether to oppose or consent to it. In Bourke v Favre [2015] EWHC 277 (Ch) the claimants' application for permission to amend (made some weeks before trial) was refused because they had delayed revealing to the defendants the details of their amended claim until after they had seen the defendants' witness statements.'* Bioconstruct has fallen well below this requirement of openness and co-operation. There is no good reason why its application could not have been made substantially earlier than it had been. Bioconstruct did not lodge any submissions on time, nor provide any explanation until prompted by the court. Thereafter, rather than indicating that consideration was being given to an application to amend (even in general terms), Bioconstruct's counsel had indicated that it might be the case that no instructions would be required on behalf of Steven Winspear; a contention stretching the bounds of credibility. What is now known is that, during this time, Bioconstruct's legal team had been preparing to ambush the parties and the court with a late application to amend. Furthermore, Bioconstruct had profited from its delay by its counsel having advance notice of Mr Kitson's submissions as to costs, allowing Bioconstruct to respond directly in its own written submissions, at paragraphs 19 and 21;

24.6.14 The late service of Bioconstruct's application had resulted in the necessity for an additional hearing, with the consequential increase in costs on both sides. Its application notice had invited the court to set aside one hour to hear the Application; a ludicrously short time estimate and was indicative of the cavalier approach which Bioconstruct had taken to the Application. The commentary at paragraph 23.7.1 of the White Book makes clear what the position should be when there is insufficient time in which to file an application notice prior to a hearing. In *Bourke* (see sub-paragraph 24.5.13 above), a case which had concerned an application to amend made some months in advance of trial, following the exchange of witness statements, Nugee J had made the following observation about late amendments (at paragraph 12):

> "Once the necessity to amend has become apparent, a party really ought to tell the other side not only of their intention to amend but, at least in outline, of what the amendment consists, so that the opposing party has sufficient advance notice in order to enable him or her to give consideration whether to oppose or consent to such an amendment…. The purpose of pleading is to identify the issues so that

> disclosure and witness statements can be focused appropriately. It is putting the cart before the horse to wait until you have seen what the other side says before deciding whether or not to pursue an amendment."

In the instant case, Bioconstruct had waited until after trial to amend its claims and had provided no notice (informal or otherwise) of its application. Far beyond waiting to see Steven Winspear's witness evidence, it had waited until a draft judgment had been circulated to the parties, notwithstanding the fact that its costs schedule indicated that preparation of a witness statement must have been underway for some time before the application had been intimated, or made[10]. As noted in that first judgment (at paragraph 53), Bioconstruct had been forced to seek relief from sanctions twice, owing to the late provision of (a) a costs budget; and (b) a witness statement. Regrettably, its approach to litigation had not changed. This also marks Bioconstruct's second attempt to pursue a claim which had not been pleaded as at the first day of trial. Enforcing compliance with rules, practice directions and orders is a key element of the overriding objective. Bioconstruct's conduct in connection with the Application (and its statements of case generally) ought to weigh against the granting of its very late application to amend;

24.6.15 To allow the Application would run counter to the need for litigation to be conducted expeditiously. As to proportionality, given the gravity of the allegations now made, the proportionate way forward would be for Steven Winspear to have the CPR protections conferred by the Part 7 procedure, including case management, costs budgeting and disclosure.

Subsequent developments

25. In the course of the hearing on 11 February 2020, it appeared to me that Bioconstruct's case as to the findings in my earlier judgment upon which it relied for its proposed claim in deceit were not clear: in particular, different references to my earlier judgment and the transcript of evidence had been made, variously, in Bioconstruct's skeleton arguments, the Application, supporting witness statements and oral submissions. I, therefore, directed that Mr Brown serve and lodge a comprehensive document setting out, in respect of each element of the proposed new cause of action, the paragraphs within my earlier judgment and the transcript of evidence upon which he relied. I made clear that this was not an opportunity to recast Bioconstruct's case, but to identify, in a single document, the material on which each element of the new cause of action was said to be based. Thereafter, Mr Kitson was to indicate whether any issues as to recasting arose.

[10] In reply, Mr Brown stated that work on the relevant witness statement had begun at 15:00 on 10 January 2020, before instructions had been received to advance the Application, which had been confirmed on 14 January, at 07:22. The work had been completed shortly before the Application had been served and had been carried out in order to advance matters as much as possible, in order to be in a position to deal with the Application on 17 January.

26. On 17 February 2020, Mr Brown lodged and served what he described as 'consolidated references to the transcript and judgment', together with 'an updated draft pleading incorporating those references'. The latter document is appended to this judgment. It included a new introductory paragraph, incorporating the following sentence, *'In support of the facts and matters pleaded herein, the Claimant relies generally on the judgment, the written evidence (including documentary evidence) and oral testimony of the witnesses at trial.'* Mr Brown pleaded Bioconstruct's reliance upon the following paragraphs of my earlier judgment and extracts from the transcript of evidence:

    26.1 As to the allegedly false representation:

        26.1.1 judgment, paragraphs 78-93; 103; and 108-110; and

        26.1.2 transcript, day 3, 345:17-346:3; 369:14-370:1; 370:4-371:4; 377:12-379:9; 385:2-8; and 386:18-389:22;

    26.2 As to Steven Winspear's alleged inducement and intention that Bioconstruct should rely upon the representations made:

        26.2.1 judgment, paragraphs 105 (knowledge); 86 and 110 (inducement); and

        26.2.2 transcript, day 2, 286:9-12; and 287:5-9; and day 3, 343:25-344:4; 392: 8-10; 418:14- 422:8; and 431:24-432:19;

    26.3 As to the true position and Steven Winspear's alleged knowledge of/recklessness as to falsity:

        26.3.1 judgment, paragraphs 75; 78-93; 86; 91 (especially 91.1); 94-98; 99; 104; 108-110; and

        26.3.2 transcript, day 2, 294:9-295:3; 296:7-297:5; 311:10-312:18; 313:9-24; 317:13-16; and day 3, 366:17-25; 393:24-397:9; 414:3-418:4; 418:14-422:8; and 431:24-432:19.

27. In response, Mr Kitson wrote as follows:

> "D was surprised to see that C's document does not simply consolidate pre-existing references to the transcript and judgment contained within the skeleton, witness statements and amended particulars filed in support of their application. Rather, it introduces new references which are not cited in those documents. On the face of it, this is beyond what C was invited to prepare over the lunchtime adjournment on 11/02/2020 in order to assist the Court. That said – and without prejudice to any costs arguments – D is in the Court's hands as to the approach to be taken to the new document. Chiefly, D wishes to avoid any further delay in the resolution of this application. The same position is taken as to the re-amended Particulars of Claim, for which no permission (nor consent) has been previously sought by C. Save as set out above, D relies on the written and oral submissions already before the Court and seeks the dismissal of C's application."

Discussion and conclusion

The legal principles

28. I begin by reviewing the applicable legal principles.

29. As summarised by the Court of Appeal in *ECO3 Capital Ltd & Ors v Ludsin Overseas Ltd* [2013] EWCA Civ 413, the tort of deceit contains four ingredients: (a) the defendant made a false representation to the claimant; (b) the defendant knew that representation to be false, or was reckless as to its truth; (c) the defendant intended that the claimant should act in reliance upon it; and (d) the claimant did act in reliance upon it and, in consequence, suffered loss.

30. The principles governing permission to amend in the instant circumstances are as follows:

30.1 The Application is made following trial and the circulation of a draft judgment. Each party acknowledges that I have power to grant such an amendment. Each party notes that Bioconstruct is not asking me to revisit my earlier judgment (c.f. the position in *L v B*); rather to permit the proposed amendment so as to allow it to advance a new cause of action.

30.2 The principles relating to the grant of permission to amend are summarised at paragraph 41 of *Nesbit*, citing with approval those previously set out in *Quah Su-Ling*:

> "41. The principles relating to the grant of permission to amend are set out in Swain-Mason and in a series of recent authorities. The parties referred particularly to Mrs Justice Carr's summary in Quah Su-Ling v. Goldman Sachs International [2015] EWHC 759 (Comm) at paragraphs 36-38 of her judgment. In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal."

30.3 At paragraphs 36 to 38 of Quah *Su-Ling*, Carr J (as she then was) held:

> "…the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest 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;

> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

30.4 This being an application which, if granted, would require the trial to be re-opened in relation to Steven Winspear, I consider that paragraphs 38 to 40 and 44 of *Vringo* are also of relevance (albeit that, in context, it would appear that, at paragraph 39, Birss J had been intending to refer to *Swain-Mason & others v Mills & Reeve (a firm)* [2011] EWCA Civ 14, rather than to *Swain v Hillman*):

> "38. I can summarise the principles in this way. The court has a jurisdiction, at least before the order is drawn up, to entertain an application of this kind as in [issue] here. The principle to be applied generally is the overriding objective to deal with cases justly and at proportionate cost. This involves dealing with cases expeditiously and fairly and allocating an appropriate share of the court's

> resources to a dispute. In a case like this one, in which the application is to amend the statement of case, call fresh evidence and then have a further trial, the principles relevant to amending pleadings have a role to play but the Ladd v Marshall factors are also likely to have real significance.
>
> 39. As regards principles applicable to amendments, the modern view is probably the Court of Appeal in *Swain v Hillman* [2001] All ER 91. If the court would not have permitted the amendment before trial, it is hard to see how it is likely to be admitted after trial, apart from some very unusual circumstances. Nevertheless, just because a court would have permitted the amendment sought before, or even during the trial, if it had been raised at that stage, it does not mean that it should be permitted after judgment.
>
> 40. As to *Ladd v Marshall*, the trial judge is in some ways in a better position than the appellate court to assess the significance of a new point and new evidence. In any case, at this stage the *Ladd v Marshall* factors should be applied more leniently to an applicant than they might be applied in an appellate court; but, all the same, the *Ladd v Marshall* factors are clearly relevant because the application is an attempt to call new evidence after judgment. If those factors, even applied more leniently, are against the applicant, it is likely that powerful factors in the applicant's favour will be needed to justify the application.
>
> …
>
> 44. In the end, however, although *Ladd v Marshall* and the principles applicable to amendments to statements of case should be considered and provide a useful framework, it is important to look at the matter overall and consider the overriding objective to do justice."

30.5 The Ladd v Marshall principles are well known: leave to adduce further evidence (in that case, on appeal) will only be granted if (1) it is shown that the evidence could not have been obtained with reasonable diligence for use at trial; (2) the further evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and (3) the evidence is such as is presumably to be believed.

30.6 At paragraphs 72 and 73 of Swain-Mason, Lloyd LJ held:

> "72. ….I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court.
>
> 73. A point which also seems to me to be highly pertinent is that, if a very late amendment is to be

> made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from the evidence to be adduced in due course, or by way of further information if requested, or as volunteered without any request. The opponent must know from the moment that the amendment is made what is the amended case that he has to meet, with as much clarity and detail as he is entitled to under the rules."

30.7 As Mr Kitson emphasises, the requirement that a case be properly pleaded is all the more important where the allegation made is one of fraud.

The principles applied to the facts

The timing of the Application

31. Mr Brown acknowledges that, procedurally, the timing of the Application is to be characterised as 'very late'. It was made after the trial of this matter (listed to deal with liability and, if applicable, quantum) had taken place and a draft judgment had been circulated. However, he contends that his ability to plead a case in deceit (as a matter of law and taking account of his regulatory obligations) only 'crystallised' upon receipt of my draft judgment. He asserts that any earlier pleading of that cause of action would have risked falling foul of the dictum of Lord Hobhouse, in *Three Rivers (No. 3)*, at paragraph 160:

> "…Where an allegation of dishonesty is being made as part of the cause of action of the plaintiff, there is no reason why the rule should not apply that the plaintiff must have a proper basis for making an allegation of dishonesty in his pleading. The hope that something may turn up during the cross-examination of a witness at the trial does not suffice. It is of course different if the admissible material available discloses a reasonable prima facie case which the other party will have to answer at the trial."

32. Reliance is also placed upon the dictum of Flaux J (as he then was), at paragraph 20 of *JSC Bank of Moscow v Kekhman & Others* [2015] EWHC 3073 (Comm):

> "…The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge…."

33. Mr Brown says that the requisite bar had not been reached prior to the findings in my earlier judgment because:

33.1 Steven Winspear's case throughout the proceedings had been put on a substantially different footing, which had disclosed no deceit:

33.1.1 he had argued that the Deed as pleaded was not the document which he had signed on behalf of Northern Energy;

33.1.2 he had claimed, as was held to be false at paragraph 103.5 of my earlier judgment, that he had travelled to London with an amended draft deed;

33.1.3 he had maintained that he *'would never have agreed to the handwritten amendment'* to clause 2 of the Deed;

33.1.4 he had further maintained (incredibly) that '*no document was given over for signature by any party on that day* [19 July 2016]'; and

33.1.5 subsequently, he had believed the Deed to be valid, by his own admission (Transcript, day 3/404-406).

33.2 Assuming that Steven Winspear had made an innocent mistake, Bioconstruct's witnesses (Messrs Von Laun and Roth) had thought it likely that a mistake had occurred, as the section of the Deed for signature by Steven Winspear in his personal capacity had been spread across two printed pages. That reflected the fact, as found at paragraph 108 of my earlier judgment, that the absence of his signature had been overlooked in error.

34. The representations upon which reliance is placed are said to have taken place on or prior to 19 July 2016. At paragraph 4 of the latest draft amendment, the following is pleaded:

> "Before the steps set out above were taken, the First Defendant represented that he would by Deed enter into the personal obligations ('the Personal Security Obligations') contained in clauses 3, 6-8, 18, 23 and referred to in the heading and definitions of the intended Deed."

35. At paragraph 5 of the same draft, Mr Brown pleads:

> "The First Defendant represented by a course of conduct, acquiescence, and by silence that he would enter into and intended to enter into the Personal Security Obligations (the 'False Representation') by:…"

In the eight sub-paragraphs which follow, reliance is placed, variously, upon the following alleged facts and matters:

35.1 Steven Winspear's engaging in and conducting negotiations on the basis that he would be providing the Personal Security Obligations, in particular in the draft deeds circulated on 29 June 2016 and 17 July 2016;

35.2 his failure to have indicated, in any of the pre-contractual e-mails, that he did not intend to assume those obligations;

35.3 his positive assertion that he had ultimate personal liability (in an e-mail dated 17 July 2016);

35.4 his attendance at the meeting of 19 July 2016;

35.5 his deliberate failure to have informed any of the other parties present at that meeting that he did not intend to enter into the Personal Security Obligations;

35.6 his initialling of pages of the Deed, including those which included the Personal Security Obligations;

35.7 his presentation of a pre-signed signature page which, dishonestly, he had not signed in his personal capacity; and

35.8 his having taken advantage of the rush to execute the development finance deal, in the fraudulent expectation that his deliberate failure to sign the Deed in his personal capacity would go unnoticed by the other parties and their lawyers.

36. The first to fourth and sixth of those alleged representations were apparent to Bioconstruct at the outset of proceedings. Only the fifth; the dishonest element of the seventh; and the eighth could be argued not to have been pleadable until my draft judgment had been circulated. It is, therefore, necessary to consider the aspects of that judgment which are said to have rendered that possible (being paragraphs 78 to 93; 103; and 108 to 110):

36.1 Paragraphs 78 to 93 were set out under the heading '*Material, undisputed facts'*, detailing the correspondence exchanged by Bioconstruct and Steven Winspear (and others) between 3 July 2016 and 23 February 2017 and the material provisions of, and initials applied to, the Deed. As the heading suggests, they advance matters no further for current purposes, in reciting undisputed facts which have at all material times been apparent from the documentation to which I referred;

36.2 At paragraph 103, I found (in summary and for the reasons set out over five sub-paragraphs) that, on 18 July 2016, Steven Winspear had travelled to London with the signature pages which were to become pages 15 and 16 of the Deed. He had not had with him, or produced at the meeting of 19 July 2016, an amended version of the 'final' agreement which had been sent to him on 17 July 2016. As the heading to paragraph 103 indicates, my findings in that paragraph related to an issue in the case as framed at trial – whether, as he had claimed, Steven Winspear had travelled to London, on 18 July 2016, with an amended draft deed. The available answers to that question were, inevitably, binary and my conclusions derived from the witness' evidence, coupled with the absence of supporting documentary evidence (of which Mr Brown had himself sought to make capital in the course of trial[11]):

[11] Transcript, day 3, 348:14- 349:18

STEVEN WINSPEAR: Well, it was the document that I took down had red lines in it, like taken out and amendments put in. That is why we took it down for them to look over.

THE DEPUTY JUDGE: Which document is that a reference to?

STEVEN WINSPEAR: This is the document ----

MR. BROWN: What was the question, my Lady, I am sorry?

THE DEPUTY JUDGE: Mr. Winspear has said that he went down with the objective of trying to have himself red-lined, was what my note was, and I asked him to clarify that. He said it was the document that he took down with all the red lines in it, and I am asking where I find that document so that we are sure we are all talking about the same document.

MR. BROWN: Yes, my Lady. To explain, the document that was sent up by Kai Roth on the 17th is the document that Mr. Winspear says he made handwritten amendments to after discussions with Kai Roth and that that was then signed. We have these signature pages only and the resolution only that was sent -- this email that we are just looking at, and ----

THE DEPUTY JUDGE: You do not have any copy of the original document; is that what you are saying?

MR. BROWN: As far as I know ----

THE DEPUTY JUDGE: There is nothing in the bundle?

MR. BROWN: There is nothing in the bundle, there is nothing that has been disclosed and I am going to make the submission that that document does not exist in the physical world.

THE DEPUTY JUDGE: Let us not worry about the submissions that come from it. I want to make sure that it is not a document that I have not seen but need to look at.

MR. BROWN: No, you do not. I can see why you might want to.

It had been Bioconstruct's case throughout that Steven Winspear had not travelled to London with an amended draft deed and that his assertion to the contrary was dishonest.

36.3 At paragraph 108, I found, 'Whilst all those present at the meeting of 19 July understood that pre-signed signature pages bearing Steven Winspear's signature (amongst others) were being affixed to the Deed, everyone other than Steven Winspear himself overlooked the fact that he had not also signed those pages in his personal capacity. On the balance of probabilities, I find that it was for that reason that Steven Winspear was asked only to initial those pages of the Deed (in its final form) which preceded the signature pages. That is consistent with the evidence of Mr Von Laun, under cross examination by Mr Fletcher[12]:

MR FLETCHER: If you had had the chance to review this document, would you have said, "Steve Winspear has not signed it where he is supposed to sign it"?

MR VON LAUN: Yes.

…

MR FLETCHER: You would have checked that his signature was witnessed on page [15] or over the page at page [16 of the Deed]; is that correct?

MR VON LAUN: Yes.';

That finding related to the rationale of others in asking Steven Winspear to initial only certain pages, rather than to any false representation made by Steven Winspear.

36.4 At paragraph 109, I found that, on 19 July 2016, Steven Winspear had been present in the room at the time at which the manuscript amendment to clause 2 of the Deed had been made, which had been prior both to the signature of the Deed, by those who had signed it on that day, and the application of initials to pages 1 to 14 of that document. He had raised no objection to its inclusion. The bases for those findings were set out over seven sub-paragraphs, rooted in specified passages within the witness statements and related oral evidence. None of that material goes to any of the pleaded false representations. In any event, at the latest from the time of service of Steven Winspear's Defence, it was clear that his position was that manuscript amendments had been added to the Deed at a later stage (see paragraphs 4(ii) and 5(ii) and (iii)). So it was that the matter had been canvassed in the relevant parties' witness statements and was in issue at trial[13].

36.5 At paragraph 110, I found, 'On 19 July 2016, keen as he, and everyone else present, was for the deal to go through, I find that Steven Winspear was sufficiently astute to recognise that the fact that he had not also signed the signature pages in his personal capacity was unlikely to be (and had not, in

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[12] Transcript, day 2, 255:4-13

[13] Paragraph 72.1.2 of my earlier judgment refers.

fact, been) picked up by the other parties, at the end of a long day's negotiation, in the 'incredible rush to get the document signed', and that that state of affairs could operate to his advantage in due course. Contrary to his wishes, the final version of the Deed did confer personal obligations upon him, and I am satisfied that he decided that it was not in his interests to alert others to the absence of his signature in a personal capacity. I note the unconvincing answers which he gave to the following questions in cross-examination:

MR BROWN:	Let us assume we agree there was a lawyer's mistake, for the sake of argument. You are an experienced man of business. You know how to sign documents. Did you not say, 'hang on, don't I need to sign this personally, guys'?
STEVEN WINSPEAR:	No.
MR BROWN:	Right. Why?
STEVEN WINSPEAR:	I do not know why. It did not enter my head why.
MR BROWN:	So it was not intentional that you did not sign. It was a mistake by you as well?
STEVEN WINSPEAR:	It was not offered to me. How can that be a mistake from me?'

The only alleged representations to which the above findings could be material are those asserted at paragraphs 5.7 and 5.8 of the draft Amended Particulars of Claim. That Steven Winspear had initialled certain pages of the Deed, but had not signed the signature block relating to his personal capacity has been apparent to Bioconstruct throughout these proceedings. It is the element of dishonesty which Mr Brown asserts that, prior to my earlier judgment, it would have been improper to allege. That is a difficult contention to advance given the line of cross-examination to which I made reference at paragraph 110, from which Mr Brown's scepticism as to the reason for the absence of Steven Winspear's signature in a personal capacity is readily apparent. The answer which he received asserted that it had not been through mistake. That is consistent with the final sentence of paragraph 24 of Mr Morallee's fifth witness statement and, as Mr Kitson submits, with Mr Brown's use of the word 'implausibly' at paragraph 125 of his closing submissions.

37. Knowledge of, or recklessness as to, falsity and reliance are pleaded at paragraphs 10 to 12 of the draft Amended Particulars of Claim. The paragraphs of my earlier judgment upon which reliance is placed are 75; 78 to 93; 94 to 98; 99; 104; and 108 to 110. As to those:

37.1 At paragraph 75, under the heading '*Material, undisputed facts'*, I recorded, *'The Project involved the construction of an anaerobic digestion plant, on land of which SRL is the registered freehold owner. SRL leased that land to Hartlepool. Bioconstruct was the main contractor for the plant's construction. The loan which is the subject of these proceedings was made to Group to provide part of the necessary finance for the Project. The balance of the moneys required was provided by a third party investment manager, SQN Capital Management (UK) Limited ('SQN'). The total sum required to fund the Project was £3,867,665.90. Mr Borgmeyer estimated the value of the Project to Bioconstruct as being between £25M and 30M; a figure which Mr Roth stressed as representing the estimated turnover.'* No part of that is of any relevance to the allegations under consideration or had not been appreciated at the time at which the original claim was pleaded.

37.2 The same may be said of paragraphs 78 to 93 which, as I have noted above, recited undisputed facts which have at all material times been apparent from the documentation to which I referred.

37.3 Paragraphs 94 to 98, also under the heading '*Material, undisputed facts'*, simply recorded the terms of the three UFLs and their combined effect;

37.4 At paragraph 99, I recorded my view of Messrs Colclough; Borgmeyer; Roth; Von Laun; Steven Winspear; and Stuart Winspear as witnesses: I found *'...Messrs Colclough, Borgmeyer, Roth and Von Laun to be straightforward witnesses, each of whom attempted to assist the court, to the best of his ability and recollection, in responding to the questions asked. The same could not be said of Mr Steven or Mr Stuart Winspear. As is apparent from his prior business dealings and the correspondence in this case, Steven Winspear is a sophisticated and shrewd businessman, with a detailed understanding of the matters being negotiated and agreed and their commercial and legal ramifications. In the course of his evidence, he affected a lack of understanding of the consequences of his own actions and inaction and of the absence of Stuart Winspear from the meeting of 19 July 2016. I was not persuaded by such evidence. I formed the view that, regrettably, Steven Winspear would give and withhold such evidence as he considered would best advance his case.'* In so far as that view related to Steven Winspear, it was generically stated and related to the evidence which he gave. It did not contain the specific findings of fact upon which Bioconstruct seeks to rely for current purposes (see below).

37.5 At paragraph 104 I found '*... that Steven Winspear's intention throughout was to avoid incurring personal liability, <u>if and to the extent possible</u>. I, therefore, accept his evidence that he did not sign the signature pages to the agreement as it had stood on 18 July in his personal capacity because, at that stage, he had wanted his personal guarantee to be removed*[14]*. So it was that he consciously signed on behalf of Northrn Energy only, in a section of the document which clearly indicated that he was signing on behalf of that company.'* (emphasis added) That paragraph expressly related to the draft

[14] Transcript, day 3, 395:2-5

deed as it stood on 18 July 2016 and Steven Winspear's then state of mind, and is qualified by the wording emphasised. The relevant finding does not indicate dishonesty on 18 July 2016 and it is difficult to see how it is any more capable of supporting an allegation of dishonesty than was the evidence as it had stood at the outset of the trial, or at the close of Steven Winspear's evidence. Adopting Mr Brown's approach, it was at least equally consistent with Steven Winspear's honest intention to avoid or confine any personal liability. Nothing in paragraph 104 relates to the matters pleaded at paragraphs 11 and 12 of the draft Amended Particulars of Claim, or to the Deed.

37.6 I have recited paragraphs 108 to 110 of my earlier judgment above. The analysis there set out equally applies for immediate purposes. Furthermore, none of those paragraphs related to the matters pleaded at paragraph 11 of the draft Amended Particulars of Claim, or Bioconstruct's alleged reliance upon the representations alleged. In addition, the events and correspondence pleaded at paragraph 11 post-dated signature of the Deed. If and to the extent that it is alleged that moneys had been advanced after 'execution' of the Deed by reason of subsequent representations, that is contrary to the case pleaded at paragraphs 4 and 5 of the draft Amended Particulars of Claim, as well as to the evidence received at trial (see paragraph 54 below). It is also inherently implausible.

38. Allegations as to inducement are pleaded at paragraphs 7 and 8 of the draft Amended Particulars of Claim, in relation to which Mr Brown relies upon paragraphs 86; 105 and 110 of my earlier judgment:

38.1 Paragraph 86, under the heading *'Material, undisputed facts'*, records that Steven Winspear travelled to London on 18 July 2016, in order to attend the meeting of the following day and that the intention of all parties was to sign off on the deal on 19 July, which would enable the execution of further documents on the following day, in accordance with which SQN would advance its share of the funding. That has been known from the outset.

38.2 At paragraph 105, I found, '*I am satisfied that it was, at all material times, equally clear to Steven and Stuart Winspear that the deal could not complete unless SRL executed the Deed in its final form. As Stuart Winspear was never going to be present at the meeting of 19 July, the only basis upon which that could have been achieved on that day was by affixing pre-signed signature pages from an earlier version of the Deed, or through valid authorisation of Steven Winspear to act as SRL's agent for the purposes of execution…'* The remaining sub-paragraphs of paragraph 105 explained the evidential bases for those conclusions. None is material to the issue pleaded at paragraph 7 of the draft Amended Particulars of Claim.

38.3 Paragraph 110 has been discussed above. It is not relevant to the pleaded case on inducement, which itself does not derive from my earlier findings and relies upon facts which have been known to Bioconstruct from the outset.

39. Loss and damage are pleaded at paragraph 14. Unsurprisingly, it is not suggested that anything in my earlier judgment gave rise, for the first time, to an ability to plead such matters.

40. With the exception of loss and damage, in relation to each element of the cause of action which Mr Brown seeks to advance by amendment, he further seeks to rely upon specified passages of the transcripts of evidence given at trial. That takes him no further in relation to the timing of the Application: by definition, that material had been available to him, at the latest, by the close of all parties' evidence.

41. It follows that the timing of the Application cannot be explained or justified by Bioconstruct's need to await my earlier judgment before being in a position to advance the case now pleaded and that, at the latest, such a case could have been advanced within a short period of close of evidence and before closing submissions. There was a week's gap between those events, which would have enabled the making of any application on the date on which closing submissions were made, with the latter deferred, as necessary, pending my ruling on the application. Alternatively, such an application could have been made between closing submissions and the circulation of my draft judgment.

42. Mr Brown's reliance upon *Three Rivers* and/or *Kekhman* does not assist him in the above circumstances: if the relevant evidence had been considered to justify pleading a claim in deceit at the time of the Application, then it must have constituted a reasonable prima facie case for Steven Winspear to answer at the close of evidence and, in any event, before circulation of my draft judgment. Put another way, during the same period there would have been available material which tilted the balance and justified an inference of dishonesty, if a claim in deceit were to be advanced. The corollary must be that, if such material did not justify pleading such a case then, it cannot do so now.

<u>The strength of the proposed claim in deceit</u>

43. I turn to consider the strength of the proposed new claim. In so doing, I shall not repeat the alleged facts and matters, or the aspects of my earlier judgment and the transcript of evidence, on which Bioconstruct relies.

The pleaded false representations

44. I begin with the relevant legal principles:

    44.1 Mr Kitson submits that a statement of intention as to the future cannot constitute a representation which will found a claim in deceit. So far as it goes, that statement is correct, but it is subject to the important qualification that a representation of present fact may be inferred from a statement of intention. If the maker does not honestly hold the intention expressed, he makes a false representation as to his then present state of mind. That, of course, is not the end of the matter: it will be for the representee to establish that it was upon the representation as to intent, and not simply upon the promise of later fulfilment of that intent, that it relied and was intended to rely.

44.2 Relying upon *Vernon v Keys,* Mr Kitson next contends that statements made in the course of negotiation cannot constitute actionable representations. That is too sweeping a statement. Whilst the courts have adopted a realistic view as to the nature of statements made and positions adopted by parties to a negotiation and the parties' expectations in that connection, it cannot be said that no statement made in such a context will be actionable. In *Vernon v Keys*, the alleged false representation was as to a buyer's motive for offering a particular purchase price. That, it was held, *'appear*[ed] *to be a false representation in a matter merely gratis dictum by the bidder, in respect to which the bidder was under no legal pledge or obligation to the seller for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely; and for the consequences of which reliance, therefore he* [could] *maintain no action.'*[15] That is not this case: the false representations here alleged relate to the terms of the agreement which the parties were seeking to reach, though, as will be discussed below, it is important to consider to which draft agreement each alleged representation related.

44.3 Whilst Mr Kitson is right to observe that, absent a duty on the representor to speak, mere silence cannot found a claim in deceit (*Peek v Gurney)*, that principle, too, has its limits. Thus, an actionable representation may be made by conduct. In such cases, it will be important to identify the fact thereby represented, as well as the requisite dishonest intention to mislead. Further, where, in context, a false representation is implicit in a person's silence, liability may be imposed. That is a fact-sensitive question.

44.4 However, Mr Kitson is right to contend that any representation upon which reliance is placed must relate to the agreement pursuant to which the loan moneys were advanced. A representation made in relation to an earlier and materially different draft agreement cannot simply be deemed to relate to subsequent drafts.

45. With those principles in mind, I turn to consider the pleaded false representations:

45.1 Each of the false representations pleaded at paragraphs 5.1 to 5.3 of the draft Amended Particulars of Claim related to earlier drafts of the Deed and not to the Deed itself. That is consistent with the transcript reference upon which reliance is placed at day 3, 345:17 – 346:3. It was clear that, at that point, negotiations were ongoing and that the terms of the proposed agreement could change. In the event, as I recorded at paragraph 88 of my earlier judgment, the differences between the Deed and the 'final' agreement circulated on 17 July 2016 included such fundamental matters as the identity of the borrower; the identity of the 'liable parties'; and the payment obligations of all such persons.

45.2 Steven Winspear's attendance at the meetings of 19 July (paragraph 5.4) could not itself constitute the pleaded representation, not least as he was also the director of Northrn Energy Limited; a party to the Deed. The transcript reference at day 3, 369:14 – 370:1 is to Steven Winspear's

[15] per Lord Ellenborough CJ, giving the opinion of the court, at 638

evidence that, as at 18:13 on 19 July 2016, he did not intend to have himself deleted from the Deed as a liable party. It does not establish any of the alleged representations.

45.3 The representation pleaded at paragraph 5.5 (to which the evidence transcribed at day 3, 370:4 — 371:4 relates) is said to have occurred by deliberate omission. To the extent that any such omission relates to an earlier version of the Deed, it suffers from the same difficulty identified at paragraph 45.1 above. To the extent that it post-dates the Deed, that would be inconsistent with paragraph 4 of the draft Amended Particulars of Claim and, in any event, cannot have been relied upon by Bioconstruct at or before the meeting of 19 July 2016, or in advancing the loan moneys (assuming, for these purposes, that Bioconstruct was the lending party; a live issue at trial which fell away, given the invalidity of the Deed). Thus, the only relevant omission can have taken place during the meeting of 19 July, in relation to the final version of the Deed. Whilst it is difficult to see what this allegation adds to that pleaded at paragraph 5.7, I accept that, in principle, such a deliberate omission could, in context, be argued to constitute a representation, but different difficulties attach to a claim advanced on that basis, discussed below.

45.4 Bioconstruct's reliance upon Steven Winspear's initialling of certain pages of the Deed (paragraph 5.6) and the related evidence at day 3, 377:12 — 379:9 and 385:2-8 is problematic, in the context of my findings at paragraph 126.1 of my earlier judgment. I there found that none of the parties intended that initials should serve as a signature and that the presence of the allocated signature boxes at the end of the document indicated that the intention was that each party would sign in the relevant box at the end of the document. I also found that there was no evidence as to the capacity in which the relevant initials had been applied (i.e. whether on Steven Winspear's own behalf, or on behalf of Northrn Energy). That being the case, it is difficult to construe the application of those initials as making any relevant representation, in particular as they were applied at or around the same time as the pre-signed signature page was affixed to the Deed (a matter also relevant to reliance).

45.5 Bioconstruct next pleads Steven Winspear's presentation of a pre-signed signature page, which, dishonestly, he had not signed in his personal capacity (paragraph 5.7). I have previously rehearsed my finding at paragraph 104 of my earlier judgment. As is clear from that finding, at that stage, the signature page related to an earlier version of the Deed and I did not find there to have been any dishonesty. The point at which dishonesty arose was (as I found at paragraph 110 of my earlier judgment) *'at the end of a long day's negotiation'*, when Steven Winspear *'decided that it was not in his interests to alert others to the absence of his signature in a personal capacity'*. I accept that, at that point, the presentation of the signature page, could be argued to constitute a representation that Steven Winspear would enter, personally, into the obligations set out in the Deed, although its timing gives rise to difficulties for other elements of the proposed claim (see below).

45.6 Finally, Bioconstruct pleads (paragraph 5.8) that Steven Winspear took advantage of the rush to get the deal (defined to include the moneys subsequently to be advanced by SQN) executed, *'in the fraudulent expectation that his deliberate failure to sign the Deed in his personal capacity would go unnoticed by the other parties and their lawyers'*. It is difficult to discern any representation from this assertion and, certainly, any which differs from that pleaded at paragraph 5.7, addressed above.

45.7 For the sake of completeness, the final passage of the transcript on which Bioconstruct relies for current purposes (day 3, 386:18 — 389:22) relates to a dinner which post-dated the meeting of 19 July and, as such, does not go to any of the representations alleged. As I have previously noted, the paragraphs of my earlier judgment on which reliance is placed recount (1) undisputed events and correspondence between 23 June 2016 and 23 February 2017, together with the material provisions of the Deed; (2) my findings as to the material with which Steven Winspear travelled to London on 18 July 2016 and my rationale therefor; and (3) my conclusions as to why Steven Winspear had not been asked to sign the Deed in his personal capacity on 19 July 2016. They do not advance matters any further, for current purposes.

The true position/Steven Winspear's knowledge of falsity or recklessness as to truth

46. The position here is to be assessed at the time at which the representation is made (taking account of any continuing representation). At paragraph 10 of its draft Amended Particulars of Claim, Bioconstruct pleads, *'Contrary to his representation, the First Defendant did not intend to enter into the Personal Security Obligations. The First Defendant well knew that the False Representation was untrue…'*. Given that 'the False Representation' is defined to mean all matters pleaded at paragraph 5, the position is to be addressed at each relevant date. I have indicated, above, which of the alleged representations, in my judgment, are reasonably arguable as such and the difficulties with those which are not. I have also made clear that the only stage at which any representation became dishonest was at the point at which the parties were seeking to execute the Deed, at the end of the meeting on 19 July 2016 (i.e. the representations pleaded at paragraphs 5.5 and 5.7, so far as each refers to that time).

47. The allegation that Steven Winspear *'continued the deceitful pretence after the closing meeting'* (paragraph 11) pleads nothing of relevance to the truth of the arguable representations made, or to Steven Winspear's knowledge/recklessness as at that time. It follows that all related passages of the transcript are similarly irrelevant to those issues.

48. Notwithstanding the heading under which paragraph 12 of the draft Amended Particulars of Claim is pleaded, the averment goes, essentially, to Bioconstruct's alleged reliance upon the representations allegedly made and causation of the loss and damage later pleaded. I shall consider it, below, when addressing such matters.

'Inducement'/intention that Bioconstruct should rely upon the representations

49. The requisite intention is proven not only where it is established that the representor positively intended the representee to act upon the representation, but also where he

appreciated that it was likely that it would so act. Paragraph 7 of the draft Amended Particulars of Claim asserts that Steven Winspear was well aware that the deal would not complete unless he entered into the 'personal security obligations' (as earlier defined). It further asserts that paragraph 105 of my earlier judgment is supportive of that contention. It is not: that paragraph related to Steven and Stuart Winspear's awareness that the deal could not complete unless it was executed in its final form by SRL and their intentions in that connection. Reliance is also placed upon an e-mail dated 3 July 2016, after which date correspondence continued and various earlier drafts of the Deed came into being. Bioconstruct further relies upon the excerpts from the transcript of evidence previously identified. None of those supports the averments made and those relating to the lender's need for security do not refer specifically to the security to be provided by Steven Winspear personally.

50. Nevertheless, I am satisfied that, in principle, at the point at which any reasonably arguable representation was made, it was arguably made with the intention that Bioconstruct would rely upon it and that there is a rebuttable presumption of inducement. After all, it went to the substance of the terms being negotiated. That is to be qualified, however, by the fact that all parties knew and intended that the final agreement should take the form of a deed, hence the need for the 19 July meeting (as I found, respectively, at paragraphs 122 and 126.7.2 of my earlier judgment).

Consequential loss and damage

51. No pleaded reliance is placed upon any part of my earlier judgment, or the transcript, for the matters alleged at paragraphs 14 and 15 of the draft Amended Particulars of Claim, which are linked to those pleaded at paragraph 12. The sum claimed in damages constitutes the principal amount outstanding under the loan, together with contractual interest under clause 4 of the Deed, for which it is said that Steven Winspear would have been liable, had he entered into the personal security obligations.

52. It is for the representee to show that the relevant representations caused or contributed to its having acted, or refrained from acting, in a way which resulted in the loss claimed. The tort of deceit is complete only once the representee has acted to its detriment by reason of the representation. In my judgment, there is a significant difficulty with this element of Bioconstruct's draft amended case. Whilst it is right that a representation need not be the sole cause of the reliance alleged (*Standard Chartered Bank v Pakistan National Shipping*), it must have some causative potency in relation to the act from which the claimed loss and damage is said to result.

53. I have previously found that the need for the meeting on 19 July 2016 had been brought about by the intention of all parties that the final form agreement be concluded by deed. That was a statutory requirement, as I explained in my earlier judgment. Bioconstruct's lawyers; Mr Colclough and Mr Von Laun, had attended that meeting (in Mr Von Laun's case, for part of the time), in order to protect Bioconstruct's interests. Mr Colclough had been instructed to complete the final document. In the course of his cross-examination by Mr Fletcher, the following exchanges took place:

MR FLETCHER:	Mr. Colclough, you were there on that day to assist BioConstruct effect legally binding agreements; yes?
MR COLCLOUGH:	Yes, I was there to assist them.

…

MR FLETCHER:	And on the evidence we have heard today, I am going to suggest to you that what happened with this deed, the reason this deed has such glaring errors in that you would have spotted, if you had had a chance, the reason why this deed is still being put forward is because you had clients who were simply saying, "This document will do us to get the funding we need to unlock the SQN finance"?
MR COLCLOUGH:	I agree there was an incredible rush to get the document signed, but I do not believe that Kai would have proceeded unless he was satisfied that the parties were bound by the document.
THE DEPUTY JUDGE:	Unless he was satisfied what, sorry?
MR COLCLOUGH:	That he had an agreement agreed -- at least he had an agreement.
THE DEPUTY JUDGE:	So who is the "he" to whom you are referring?
MR COLCLOUGH:	Kai. Mr. Roth, sorry.
THE DEPUTY JUDGE:	Can I just make sure I have got a note of your evidence correctly. You said you agree there was an incredible rush to get documents signed.
MR COLCLOUGH:	Mmm-hmm.
THE DEPUTY JUDGE:	But you do not believe that Mr. Roth ----
MR COLCLOUGH:	Would have proceeded to the next stage, whatever that was, because I was not involved in that, with SQN, unless he felt that the parties had come to an agreement.
THE DEPUTY JUDGE:	And by the parties, who did you mean?
MR COLCLOUGH:	I would say everyone who was a party to what we are calling the deed.

THE DEPUTY JUDGE: Everyone who was a party to the deed?

MR COLCLOUGH: Yes, my Lady.

54. In the event, the Deed was not validly executed, for the reasons set out in my earlier judgment (the absence of Steven Winspear's signature in his personal capacity being only one of them). However, on the evidence received at trial, the moneys the subject of these proceedings had been advanced in the belief and on the basis that it had been validly executed and they would not have been advanced otherwise. That assumption encompassed a belief that all necessary formalities had been adhered to, including each party's signature of the Deed and its attestation, consistent with the notice at page 14 of the Deed, immediately above the signature boxes (paragraph 126.1 of my earlier judgment refers). The loan moneys were not advanced in reliance upon earlier or contemporary representations as to Steven Winspear's intention or willingness to enter into the personal security obligations: unless the Deed, in final form, had been validly executed by all parties to it, no loan would be advanced, by any party. Thus, any prior representation by Steven Winspear had no causative effect upon the decision to advance those moneys and the principle in *Standard Chartered Bank v Pakistan National Shipping*, upon which Mr Brown relies, is not engaged.

55. In summary, in all the circumstances only two of the false representations alleged (pleaded at paragraphs 5.5 and 5.7 of the draft Amended Particulars of Claim) are reasonably arguable as such and, in relation to those, the pleaded case as to reliance and consequential loss and damage is not consistent with the evidence received at trial, including that upon which Bioconstruct itself relied. In those circumstances, the proposed claim in deceit cannot succeed; at best, its prospects of success are very weak.

56. For the sake of completeness, I am satisfied that the case which it is proposed to advance by amendment has been pleaded with sufficient clarity to be comprehensible to the opposing party, although, as appears from the above analysis, it contains a number of immaterial averments.

Prejudice

Prejudice to Steven Winspear

57. I reject Mr Brown's submission that any assertion of prejudice to Steven Winspear had to be supported by a witness statement. The prejudice to each party, and to other court users, in connection with the Application is self-evident and has been comprehensively addressed in the parties' submissions, which I now consider.

58. It is common ground that allowing the new claim to be pleaded would result in the need for a further trial, with all that that would entail. But for that, there would be no independent need for any further hearing in this case. That is to be contrasted with the position in *Macleod*, in which, in the context of his conclusion that the amendment in question asserted a reasonably strong case, Mr Justice Hamblen (as he then was) observed, at paragraphs 30 and 31:

> "30. I accept that the defendant has a reasonable expectation of finality and that in the ordinary course it would have expected that the trial on liability would finally determine all issues of liability. However, this was a case in which there was an order for trial split between liability and quantum. There was therefore always the prospect of there being a further hearing and, whilst the further claim raises issues of liability, it also involves quantum and closely overlaps with the anticipated quantum issues.
>
> 31. I also accept that the amendment will require some further evidence beyond that which will be required purely for a quantum hearing, although I do not consider that such evidence will be substantial…"

59. Nor can it properly be said that there is no prejudice to Steven Winspear which cannot be compensated in costs (a factor which is not, in any event, determinative). Leaving aside the fact that no party is fully compensated for the costs incurred (or for the opportunity cost of the time spent engaged in litigation), as Mr Kitson submits it is finality of litigation, not of particular causes of action, to which Steven Winspear has a reasonable expectation (see *Nesbit*, at paragraph 41). A further trial would run contrary to that expectation. As was observed by Neuberger J (as he then was), in *Charlesworth v Relay Roads*, at 238G-H, '*…it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him…'*. That principle also informed the approach of Birss J in *Vringo* (see paragraphs 27 and 28). It is not undermined or qualified by the fact that the new claim which Bioconstruct seeks to advance in these proceedings alleges fraud and no authority for any such proposition was advanced by Mr Brown.

60. Furthermore, I accept Mr Kitson's submission that the Defendants' case, from the outset of these proceedings, has been that the invalidity of the Deed was fatal to the cause of action originally advanced by Bioconstruct against each of them. Were I to grant the Application, this would be the second occasion on which Steven Winspear will have had to face, at a late stage, an amended case (the first of which having arisen in the course of trial and arising from Bioconstruct's attempt to rely on estoppel by convention; a point which also failed as a matter of law and which could have been pleaded at an earlier stage). A new trial would also necessitate the reopening of at least some of the issues in the original trial which had fallen away as a result of the invalidity of the Deed (see paragraph 72.3 of my earlier judgment, so far as relevant to a claim against Steven Winspear).

61. The prospect that Bioconstruct would simply bring fresh proceedings, were I to refuse the Application, does not serve to undermine the above analysis. In that connection, I cannot improve upon paragraph 87 of *Quah Su-Ling*, equally applicable here:

> "There has been a debate as to whether, in the event that permission to amend were declined, fresh proceedings by Miss Quah… raising the new case would be an abuse of process (see *Henderson v Henderson* [1843] 3 Hare 100). The decision of the Court of Appeal in *Virgin Management Limited and another v De Morgan Group plc and another* [1996] E.G. 16 (C.S.) suggests that they would. But this is speculation, both as to whether or not fresh proceedings would ever be brought but also as to the outcome of any abuse application."

62. Nonetheless, I do not accept all of the elements of prejudice which it is submitted that Steven Winspear would suffer, were the Application to be granted:

62.1 Mr Brown disavows the need for further evidence on his client's part, other than in response to any evidence served by Steven Winspear. Understandably, Steven Winspear would wish to put forward fresh evidence and would have the right to do so. As previously noted, Mr Kitson asserts that, had a claim in deceit been made at the time of trial, Steven Winspear might have been more circumspect in his evidence. It is not clear what is meant by that submission. Certainly, Mr Winspear would have been entitled to give evidence material to the various elements of that cause of action. Certainly, when doing so, he would have been aware that he was facing an allegation of fraudulent conduct. However, the circumstances surrounding the Deed are matters of fact and the relevant correspondence and documents a matter of record. Nonetheless, I accept that, faced with a claim based upon allegedly fraudulent conduct, he and those representing him might have wished to draw my attention, at that stage, to additional documents and/or to explain or emphasise parts of the existing documentation which were not otherwise considered material, or as significant. He would be entitled to do so in any further trial. Were I to allow the Application, all appropriate directions, including those requiring appropriate costs budgeting, would be given, meeting Mr Kitson's concerns in that respect.

62.2 Mr Kitson's submission that *Ladd v Marshall* principles are as applicable to his own client's further evidence in response to the new claim as they are to any further evidence which Bioconstruct might wish to adduce in support of it is misconceived. Had Bioconstruct wished to rely upon further evidence in order to advance its proposed claim (as was the situation in *Vringo*), *Ladd v Marshall* principles would have been of significance. However, to apply a restrictive approach to any evidence which Steven Winspear properly would wish to call in response to a new claim against him would be perverse and prejudicial of itself. As the dictum in *Vringo* on which Mr Kitson relies (paragraph 40) makes clear, *'…the Ladd v Marshall factors are clearly relevant <u>because the application is an attempt to call new evidence after judgment</u>. <u>If those factors</u>, even applied more leniently, <u>are against the applicant</u>, it is likely that powerful factors in the applicant's favour will be needed to justify the application.'* (emphasis added). It follows that, in this case, *Ladd v Marshall* principles are not engaged.

62.3 As to the loss of any right to a jury trial, so far as material section 69 of the Senior Courts Act 1981 provides:

"(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue—

(a) a charge of fraud against that party; or

(b) a claim in respect of malicious prosecution or false imprisonment; or

> (c) any question or issue of a kind prescribed for the purposes of this paragraph,
>
> the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury…'
>
> ….
>
> (4) Nothing in subsections (1) to (3B) shall affect the power of the court to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial; and where any such order is made, subsection (1) shall have effect only as respects questions relating to any such charge, claim, question or issue as is mentioned in that subsection.
>
> …"

I note the proviso in section 69(1) and I further note the fact that the section is only invoked on the application of any party to the action. Recognising that, were I to grant the Application and then to re-open the trial, and were an application under section 69 then to be made, it would be necessary for me to be satisfied that the proviso in sub-section 69(1) applied, alternatively for there to be a jury trial of the deceit claim (with all of the practical difficulties to which that would give rise in relation to the evidence already given), I make the following observations. In practical terms, I regard the prospect that an application under section 69 would have been made, had the claim been pleaded at an earlier stage, or would be made, were I to allow the Application, as exceptionally slim. In the latter event, a full transcript of evidence and my earlier judgment would be available, such that, if I were not to be satisfied of the proviso, the difficulties arising need not be insurmountable. Further, there is no reason why, as the trial judge, I could not determine any application to exclude evidence made under CPR 32.1 (although the nature of the material to which any such application might relate, and/or its likely basis, is not clear and was not specified by Mr Kitson). Adopting a realistic view, I do not consider that Steven Winspear has, in fact, been prejudiced, meaningfully, by the prospective loss of any right to a jury trial.

Prejudice to other court users

63. It is not only Steven Winspear who would suffer prejudice were I to allow the Application. In *Coflexip v Stolt Comex Seaway MS Ltd* [2001] RPC 182, CA, Chadwick LJ held, at paragraphs 25 and 27:

> "25. In deciding whether or not to make an order which would [necessarily lead to a re-trial], the court must have regard to the overriding objective set out in CPR 1.1. In particular, the court must have regard to the need to allot to this case an appropriate share of the court's resources while taking account of the need to allot resources to other cases. Where the court's resources have already been allotted to one trial of the issues between the parties, a party seeking a second trial to raise new issues has a heavy burden to discharge if he is to persuade the court that further resources should be allotted for that purpose. The court is entitled

> to expect that parties will bring before it for trial, at one and the same time, all the issues upon which they wish to have a decision. Two bites at the cherry is wasteful of resources.
>
> …
>
> 27. It is not [sic] answer for the appellants to say that the respondents would not be prejudiced if there were to be [a] retrial. That is to ignore the interests of other court users, who will be prejudiced if time and resources which could be used to hear and dispose of their cases have to be devoted in the re-trial of a case which has already been heard…"

64. That observation resonates in this case, which has already consumed considerable court time and would, if the Application were granted, consume considerably more. I have already noted that the prospect that fresh proceedings would be brought is speculative, as is the outcome of any abuse application in any such proceedings. Their theoretical availability does not dispose of the concerns articulated in *Coflexip*.

Prejudice to Bioconstruct

65. Were I to refuse the Application, Bioconstruct would lose the opportunity to advance a claim in deceit against Steven Winspear, at least in these proceedings. Whether or not fresh proceedings could be brought (as to which see paragraph 61 above), I do not consider that prejudice to be great. That is because, for the reasons explained earlier in this judgment, I consider the proposed claim to be very weak. In truth, the prejudice suffered by Bioconstruct results from its failure to have ensured that the Deed had been validly executed before advancing the loan moneys (assuming it to have been the lender, for these purposes).

66. As will have been clear from paragraph 158 of my earlier judgment, I do not accept Mr Brown's submission that the prejudice suffered by Bioconstruct, were the Application to be refused, necessarily includes its inability to recover its losses. Irrespective of the merit in any satellite litigation, however, the analysis at paragraph 65, above holds good.

Striking the balance

67. In all the circumstances, I find that Bioconstruct has not discharged its heavy burden to show the strength of its proposed claim in deceit and that justice to Bioconstruct, to Steven Winspear and to other court users requires that it be able to pursue that claim. It has not provided a satisfactory explanation for the timing of the Application and the proposed claim is very weak. The prejudice to Bioconstruct in losing the opportunity to advance such a new case is not sufficient to outweigh the prejudice to Steven Winspear and other court users outlined above. I also accept Mr Kitson's submission that the prospect of the Application should have been communicated to Steven Winspear's solicitors earlier than it was in fact communicated, even if the precise terms of the amendment could not then have been provided. In my judgment, at the latest by the time that work began on the witness statement in support of the (then prospective) Application (being 15:00 on 10 January 2020), Steven Winspear's solicitors ought to have been informed of the prospect that an application to amend the Particulars of Claim to plead a claim in deceit would be made. As Mr Brown explained it to me in reply, that work had been carried out in order to advance matters

as much as possible, in order to be in a position to deal with the Application on 17 January 2020. That approach had no regard to the notice which Steven Winspear (or the court) would require in order to deal substantively with the Application on that date. Furthermore, there had been no mention of that work in Mr Morallee's sixth witness statement, or by Mr Brown, until Mr Kitson pointed out that it was evident, from Bioconstruct's costs schedule, that work must have been undertaken at that stage. When Mr Brown wrote to me, on 13 January 2020, in the terms set out at paragraph 4 above, he had already advised his client that an application to amend should be made and work on the supporting witness statement had been underway for over 3 days, in order that an application could be dealt with on 17 January. It was self-evident that Steven Winspear would need to take instructions. Litigation should not be run in this way: it has been the case for many years that pulling rabbits out of a hat is unacceptable and contrary to the overriding objective. As I have already noted, this is the second occasion upon which such an approach has been adopted by Bioconstruct, in these proceedings. As Nugee J observed, in *Bourke* (at paragraph 21), *'The modern approach in litigation is to require parties to be open, above board and co-operative.'* As he further observed (at paragraph 20), *'A party who makes a late amendment must anticipate that it may be opposed…'* Those principles are untrammelled by Steven Winspear's own conduct during the course of the trial.

68. Taking account of all of the above, in my judgment it would not be just and proportionate, or in accordance with the overriding objective, to allow the Application and I, therefore, dismiss it. It follows that I now formally dismiss the existing claim against Steven Winspear.

Costs

69. I turn to address costs in relation to all extant matters, being:

69.1 the applications made at the outset of the trial;

69.2 the outcome of the substantive proceedings; and

69.3 the Application.

70. Both Defendants seek orders that Bioconstruct pay their costs of the action, to be subject to detailed assessment on the standard basis, if not agreed; that the costs of the applications made at the outset of trial be costs in the case; and for specified payments on account. Steven Winspear additionally seeks his costs of the Application, irrespective of its outcome, such costs to be summarily assessed, on an indemnity basis, in the sum of £17,295 (excluding VAT). In the alternative, he seeks a payment of 60% of those costs on account.

71. Bioconstruct accepts the general principle that costs should follow the event. However, it invites me to make certain costs orders in its favour, or to discount the costs payable to each Defendant, exercising my discretion under CPR Part 44. It seeks an order in the following terms:

71.1 the Defendants pay Bioconstruct's costs of the application for leave to rely upon further evidence;

71.2 there be no order as to the costs of the Defendants' application that Bioconstruct serve a Reply;

71.3 any costs award in favour of SRL be reduced by 50%;

71.4 (as I have dismissed the Application), any costs awarded in favour of Steven Winspear be reduced by 65%; and

71.5 the costs of the hearing of 17 January 2020 be costs in the case.

The parties' submissions

Bioconstruct

72. Mr Brown submits that the two applications made at the outset of the trial resulted in delay *'and may have contributed to the non-attendance of one of the Claimant's witnesses'*, as a result of the approach adopted by the Defendants and, particularly, by SRL's lawyers. Bioconstruct's application to admit additional witness statements should not have been opposed and the costs of the application should therefore be borne jointly and severally by the Defendants, having, in large part, arisen from their unreasonable opposition, he submits — more time was taken in resisting Bioconstruct's application, particularly in so far as it related to Mr Roth's second witness statement, than was warranted. Further, it was clear from the principles set out in *The Coal Hunter* [2014] EWHC 4406 (QB) that Mr O'Donnell's witness statement would be admitted, irrespective of the need for Bioconstruct to apply for relief from sanction.

73. Mr Brown further submits that the Defendants' application had been made orally, without an application notice, skeleton argument or evidence in support, and absent identification of the power which the court was being asked to exercise, or the remedy sought. Both Defendants had argued that, without a formal Reply, they were unable to address the estoppel by convention point, yet I made the findings set out at paragraph 32 of my earlier judgment and, in any event, the Reply had added no greater detail than had been provided in the skeleton argument. As such, the prejudice of which the Defendants had complained was entirely illusory. In any event, the fact that the application was dealt with at length certainly delayed the start of the trial and extended its length by one day. It would otherwise have been possible to complete submissions, as well as the evidence, within the original timetable. Costs consequences should follow from the affected stance which the Defendants had adopted/costs should remain in the case.

74. As to the costs of trial, Mr Brown submits that both Defendants argue that Bioconstruct's case should not have been run to trial, as the outcome should have been obvious to it at an early stage. Nevertheless, neither Defendant had made an application for summary judgment or strike out. Had the matter been so obvious, judgment could have been delivered orally. It had not been so delivered because the law on estoppel by convention is not a model of clarity. The parties had engaged in correspondence after completion of the deal which had assumed the Deed to be valid.

75. Mr Brown contends that both Defendants take points relating to conduct to argue that they should have their costs, albeit that SRL fails to particularise such matters,

particularly when alleging that counsel addressed legally irrelevant matters in cross-examination (none is mentioned) and submitted *'inadmissible witness statements'* (whatever that means).

76. Both Steven and Stuart Winspear were unsatisfactory witnesses, says Mr Brown. In so submitting, he relies upon my findings regarding Steven Winspear as a witness, at paragraph 108 of my earlier judgment, and further contends that he was evasive; unable to explain why he had behaved as he had done; combative with counsel; fundamentally incredible, giving implausible evidence, as referred to at paragraphs 105.4 and 107 of my earlier judgment; and selective in his disclosure. In relation to Stuart Winspear, Mr Brown relies on my assessment of him as a witness, at paragraph 100 of my earlier judgment, and contends that he gave incomplete evidence and acknowledged that his witness statement had the character of technical legal argument.

77. The effect of such matters, so Mr Brown contends, was not merely to make the trial process unnecessarily difficult, but to extend its duration. Of the five material disputed factual issues identified by the court, the only finding in favour of either Defendant was as to whether Steven Winspear had intended to sign the Deed (paragraph 104 of my earlier judgment), itself a finding of dishonesty. Thus, his only success was to have been found dishonest. By contrast, Bioconstruct had been successful regarding whether: Steven Winspear had travelled to London with an amended draft deed; SRL had intended to sign the Deed by affixing signature pages, and had authorised Steven Winspear to act on its behalf; those present had understood that Steven Winspear had been authorised by SRL to act on its behalf; and the manuscript amendment had been made to clause 2 of the Deed in Steven Winspear's presence. If the court were to make an issue-based costs order (which was not being sought), it would be a costs order in favour of Bioconstruct.

78. Mr Brown contends that, at paragraph 159 of my earlier judgment, I found that both Steven Winspear and Stuart Winspear (SRL's sole director) had been involved in the former's breach of the standard direction to witnesses. He further contends that Mr Blagojevic, who had yet to give evidence, had also been involved in that breach. It is said that, when cross-examined on the point, Steven Winspear had given fundamentally implausible answers and been forced to admit that, in a four-minute recording, he had discussed three separate aspects of the case: the loan; the telephone records discussed in court; and the actions of his solicitor, Henry Cave. Whilst the Defendants point to my further finding that such conduct had no impact on the integrity of the trial, that is beside the point, submits Mr Brown. It necessitated the use of precious court time to deal with the issue; was a clear breach of a clear judicial direction; and, thus, was manifestly serious; and had been initially denied (absurdly) until the position had become patently untenable under cross-examination. All breaches of the direction to avoid discussing evidence are a serious issue. Both Steven and Stuart Winspear had been in court to hear the direction, and Stuart Winspear had been specifically mentioned in the direction given. That conduct should be reflected in costs. If a court does not punish this type of conduct, it positively encourages cheating and disrespect for the court.

79. As to the costs of the hearing on 17 January 2020, Mr Brown submits that that hearing had been required in any event, as there had been no agreement as to costs. Bioconstruct had acted entirely reasonably: the Application had been made as quickly

as possible; Bioconstruct had accepted that service was short; and, through Mr Brown, that it did not wish to rush Steven Winspear into dealing with it, if he were not ready to do so. It had been incumbent on Steven Winspear to apply for an adjournment. That said, it was not accepted that Steven Winspear had not been ready to proceed on 17 January: Mr Kitson had prepared 14 pages of submissions relating to applications to amend and deceit, from which it was clear that he had had time to analyse the proposed amendment in detail. His stance had been that the Application should be summarily dismissed, or adjourned so that Steven Winspear's lawyers could have time to think about it. Steven Winspear had been invited to consent to the Application but had declined to do so: it was Steven Winspear who had wasted time.

80. Mr Brown further submits that there is a distinction to be drawn between the circumstances giving rise to the Application and those in which lawyers have realised that they ought to have pleaded a matter and then apply to amend. In the latter case, the usual order is for costs to be paid by the party seeking to amend. This case is different because the Application arises from facts arising at trial and crystallising in the court's earlier judgment, enabling Bioconstruct to advance an entirely new claim. If the Application were to succeed, the costs of Steven Winspear's statement of case should not be paid by Bioconstruct: if the proceedings had only advanced a claim in deceit, his costs would not have been payable by Bioconstruct. If the Application were to fail, the usual costs order should apply. However, the energy poured into resisting the Application could have been spent more fruitfully in pleading a Defence. Mr Kitson's composite submissions extended to 22 pages, but added nothing material to his original submissions. Thus, Bioconstruct invites a conclusion that, as a matter of fact, Mr Kitson had been ready to deal with the Application on 17 January. A day of solicitors' time and of Mr Kitson's time should be disallowed, together with the marginal additional costs of settling the composite written submissions.

81. In any event, submits Mr Brown, there is no basis for awarding Steven Winspear's costs of the Application on an indemnity basis: nothing about it was outside the norm and there was no basis upon which an allegation of ambush properly could be made. That allegation ought to have been retracted upon receipt of Mr Morallee's sixth witness statement.

Steven Winspear

82. Mr Kitson submits that the general rule under CPR 44.2(2)(a) should apply, taking account of the factors to which CPR 44.2(4) refers. As to those:

Offers to settle

82.1 Bioconstruct had made no offers to settle the proceedings;

Success in part

82.2 Bioconstruct's case against Steven Winspear had failed in its entirety, in a number of ways: Steven Winspear had not been bound by the Deed, having chosen not to sign it; his initials could not constitute execution of the Deed and had not been attested; the allocated signature boxes indicated the intention that each party would sign in the relevant box; and as a matter of law, neither of the Defendants could be estopped by convention from

denying the validity of the Deed. In the language of CPR Part 44, as between Bioconstruct and Steven Winspear the former is unequivocally the unsuccessful party and the latter the successful party. Bioconstruct had not succeeded on any part of its pleaded case, which had failed for the reasons set out at paragraph 4 of Steven Winspear's Defence. Furthermore, the authorities on estoppel by convention were clear and had been there to be seen by Bioconstruct. The position ought to have been clear to Bioconstruct when it issued proceedings in August 2017 and at various key stages in the litigation thereafter. Much time had been wasted through its determination to run a case which was untenable, as a matter of law;

The parties' conduct

82.3 In light of my observation, at paragraph 104 of my earlier judgment, that *'the defects in the execution of the Deed were readily apparent and Bioconstruct was at all material times advised by lawyers'*, it cannot have been unreasonable for Steven Winspear to assert that he was not bound by the Deed;

82.4 As to Steven Winspear's conduct during the trial, in *Hutchinson v Neale* [2012] EWCA Civ 345, the Court of Appeal had stated (at paragraph 28, per Pitchford LJ) that there is no general rule that a finding of misconduct or dishonest conduct by the successful party will replace the usual starting point, that costs should follow the event. Rather, '*what is required is an evaluation of the nature and degree of the misconduct, its relevance to and effect upon the issues arising in the trial, and its tendency to create an unwarranted increase in the costs of the action to either or both of the parties.'*. Without excusing the conduct impugned, it did not create any '*unwarranted increase in the costs of the action'*. Rather, as the court observed at paragraph 105 of its earlier judgment, the breach of the standard direction has '*had no effect upon the integrity of the trial process'*. Equally, Steven Winspear had not run a 'dishonest case'. Rather, his case at trial was (and has always been) that he did not sign the Deed because he did not wish to be bound by it. The court found that he was telling the truth in this regard;

82.5 As CPR 44.2(4) makes clear, the conduct of *all parties* is relevant to the question of costs. The true engine behind the accrual of unnecessary costs in this case had been Bioconstruct's determination to run an untenable case to trial; a case which had been doomed to failure from its inception. The case has been decided (as it was always going to have been) on a relatively narrow set of largely agreed facts and the application of well-settled law to those points. Rather than acknowledge that, Bioconstruct had sought to obfuscate and introduce irrelevant arguments, in an effort to overcomplicate what was – at its core – a relatively simple case. It continually refused to plead its estoppel case until the second day of trial and had only done so when compelled by the court, at the application of SRL (supported by Steven Winspear). Bioconstruct had refused to engage with SRL's CPR Part 18 request, despite the fact that many of the issues raised by the request were central to the ultimate determination of the claims. Large tracts of the evidence adduced by Bioconstruct (i.e. those which went to estoppel) were

irrelevant, given the clear legal position as regards the application of estoppel by convention to a deed which is invalid on its face. It is worth reiterating that the signature of the *borrowing party* had not been witnessed and that no party had disputed that. In short: on no tenable interpretation could the Deed be said to have been valid on its face. That being the case, Bioconstruct ought to have known that any estoppel by convention argument was doomed to fail. Had it acted reasonably by accepting that at an earlier stage, much wasted time at trial could have been avoided;

82.6 In summary, submits Mr Kitson, Bioconstruct ought to bear Steven Winspear's costs of the action, for all of the reasons set out above, but first and foremost because of the abject and inevitable failure of its pleaded case.

83. The appropriate order for the applications made at the outset of trial, submits Mr Kitson is that costs be in the case. Bioconstruct would ordinarily bear the costs of its application for relief from sanction to allow the late introduction of additional witness evidence, in any event. Whilst it had been resisted by Steven Winspear, this had been in the context of a case in which, at the relevant time, no estoppel had been pleaded (as it ought to have been) by way of Reply. SRL's preliminary argument (as supported by Steven Winspear) that Bioconstruct had failed to set out any pleaded estoppel argument had succeeded in ensuring that Bioconstruct was forced to tie its colours to the mast and identify the conduct which it contended gave rise to the estoppel. Rather than consider the minutiae of both applications, Mr Kitson submits, the approach which best furthers the overriding objective and avoids disproportionate satellite arguments is to order that the costs of both applications be in the case.

84. Finally, Mr Kitson submits that Bioconstruct ought to bear Steven Winspear's costs of the Application, irrespective of its outcome. It had been unreasonably delayed, necessitating a further hearing. Had it been served earlier, at worst the hearing on 17 January 2020 could have been adjourned to consider *both* the question of costs and the Application. At no stage prior to 17 January had Bioconstruct approached Steven Winspear to seek his consent to adjourning the costs hearing. Moreover, it was clear that, had the Application been brought during the trial, additional costs could have been avoided and, arguably, would have fallen into the 'rough and tumble' of trial. (As I have refused the Application, I do not here set out Mr Kitson's alternative submissions as to the further bases upon which Bioconstruct ought to bear Steven Winspear's costs of and caused by the amendment, alternatively should have a proportion of its own costs disallowed, in the event that the Application were to succeed and I were minded to make a costs order in its favour.)

85. Finally, Mr Kitson observes that his client's costs schedule in relation to the Application had not claimed for his solicitors' costs of attendance on 17 January, because the view had been taken that they would have had to attend in any event. The total sum claimed in costs is reasonable, proportionate and properly incurred; no part of it ought to be disallowed. The need for a composite skeleton had, in part, arisen from the court's referral of the parties, on 17 January 2020, to *L v B* (given the parties' reference on that date to earlier caselaw, which had been superseded by that case). Related authorities, such as *Vringo*, had also been addressed. As far as the hearing on 17 January was concerned, Mr Brown need only have said that he was awaiting instructions on a matter not related to costs, and asked whether the Defendants would agree to an adjournment. That would have been the appropriate

approach, consistent with the overriding objective. The costs of the Application are, therefore, sought on an indemnity basis – where there is a doubt, resolving it in favour of Steven Winspear.

SRL

86. Mr Fletcher submits that the right and proportionate order to make on the preliminary applications is that costs be in the case. SRL had succeeded on the preliminary ruling regarding the Reply and would clearly have been entitled to an order for costs if it had been heard as a free-standing application, which would have included those costs consequential and incidental upon the filing of a Reply on day two of a three day trial. Bioconstruct had obtained relief from sanction in respect of very late witness statements, but would normally be expected to pay the costs of obtaining that relief, had it been a free-standing application. In any event, SRL's primary position in that application had been one which had had to be adopted, given that the estoppel point had not been pleaded. Both applications had formed an inherent part of the trial process and the issues therein.

87. As for the costs of the action, the starting point under CPR 44.2 is that the successful party receives its costs. SRL had entirely succeeded on its case, as pleaded from the outset, and Bioconstruct should pay its costs. There is no other factor pointing to a different order. SRL has not 'lost' (and Bioconstruct has not won) any issue, such that split orders are not open to the court. There are no offers from Bioconstruct for the court to consider, let alone admissible and relevant offers. Conduct cannot be a factor against the application of the general rule:

87.1 Given that SRL won, it cannot have been unreasonable for it to have contested the allegation that the Deed was binding upon it;

87.2 SRL had not pursued its case that the Deed was not binding in an unreasonable manner;

87.3 There had been no exaggeration of SRL's case: there had been a binary issue; was the Deed valid, or not?

88. Conversely, Bioconstruct's conduct of proceedings had been disruptive and pointed against any order other than one which required it to pay the Defendants' costs in full. In particular, it had:

88.1 as refused to engage with a reasonably made CPR Part 18 request;

88.2 sustained its refusal to plead its case on estoppel by convention until day two of trial;

88.3 failed to sort witnesses and their statements out in good time;

88.4 led irrelevant and inadmissible witness evidence;

88.5 explored legally irrelevant matters in cross-examination; and

88.6 withdrawn a witness statement, only to re-introduce it at a later stage.

89. As the court's earlier judgment acknowledged (at paragraph 74), this case had been decided, and was always going to have been decided, upon a basic and narrow set of facts none of which had been in contest between Bioconstruct and SRL. Bioconstruct could and should have appreciated that its case turned on the law applicable to that narrow set of facts and limited itself accordingly. Its failure to have done so cannot merit any indulgence in costs. It is Bioconstruct's conduct, not that of SRL, which has caused the costs of this case and there is no legitimate and principled argument as to why it should not now bear SRL's costs. It is for Bioconstruct to argue against the application of the general rule.

90. Mr Fletcher submits that Bioconstruct ran a claim which it was bound to lose, and the court should conclude that it had always been aware of that fact. As paragraph 104 of the court's earlier judgment made clear, the defects in the Deed were readily apparent; Bioconstruct's solicitor had stated, in evidence, that, *'the fact the Deed was not executed was an oversight'*; and Bioconstruct had been aware that SRL knew that it was destined to lose on that point because that had been SRL's position at a hearing in the Companies Court, not long before the current proceedings had been commenced. If any witness was had been evasive on a point which was irrelevant as a matter of law, that point ought not to have been the subject of cross-examination by Bioconstruct, such that the evasiveness upon which reliance is placed had been 'cross-examined in' by Mr Brown.

91. As to the applications made at the outset of trial, if a claimant raises an estoppel by convention point for the first time in a skeleton argument, served shortly before the trial commences, stating (in four paragraphs of a 94-paragraph document) that the first defendant is estopped by convention and then, in a single paragraph, simply that the same estoppel applies to the second defendant; and at about the same time, discloses and applies to adduce evidence from a new witness, it cannot complain, or profess surprise at the fact, that the application is not consented to and its ramifications have to be aired before the court. There had been, inevitably, two interrelated rulings for the court to consider. It cannot be said that it was unreasonable for SRL to have adopted the position that, until it knew what facts and matters were identified as going to the estoppel by convention, it could not decide whether to 'enter the fray'.

92. Bioconstruct had been informed, on the afternoon before trial, that a pleading point would be raised. It could have circulated its Reply in advance of day one. The costs argument now advanced would not, in that event, have been necessary. As the court is now aware, seeking a ruling on the need for a Reply was highly important to the case and to SRL, in particular. It enabled the court to see that none of the acts relied upon as establishing the alleged 'convention' had taken place on or before 19 July 2016. That had meant that the estoppel had been said to arise from matters after that date. It followed that cross-examination of any witness regarding the authority which he had possessed, or the pages which he had had with him, had been irrelevant. Per *R (Mercury Tax Group Ltd) v HMRC* [2008] EWHC 2721 (Admin), it was clear that events up to and including 19 July 2016 had not resulted in a validly executed deed. It would be wrong, in principle, for a claimant to rely on the fruits of irrelevant cross-examination to achieve a windfall in costs. Once Bioconstruct had made clear the acts upon which it relied, the defendants had been able to complete their cross-examination of all claimant witnesses by mid-afternoon on day two of the trial.

93. Nor had it been inappropriate for SRL to have opposed Bioconstruct's application for relief from sanctions. The court had made no finding that it had unreasonably taken advantage of a minor error. The White Book, Volume 1, at paragraph 3.9.7, and R (*Idira) v The Secretary of State for the Home Department* [2015] EWCA Civ 1187 (at paragraphs 80 to 83) make clear that lack of prejudice does not make opposition unreasonable. Here, the opposition raised cannot be viewed in isolation; at the same time as it had sought to introduce a new witness of fact, Bioconstruct had been raising a new claim by way of a skeleton argument, served that same afternoon. The second witness statement of Kai Roth is said to have contained nothing which had not already been in play and yet paragraphs 12 to 17 formed particulars of the estoppel claim pleaded in the Reply.

94. As to Bioconstruct's contentions that the trial had been delayed and that Mr O'Donnell's non-attendance might have been caused by the Defendants' approach, the court would have guillotined submissions, had that been necessary; it had to consider the authorities to which all parties referred; there had been active discussion with the court, including in relation to case law which it would have been useful for the court to have had in mind from the outset; counsel had had a professional duty to seek a ruling and pursue it fearlessly. Even now, there was no evidence as to the reason for Mr O'Donnell's non-attendance.

95. In response to Bioconstruct's contention that the Defendants ought to have applied for summary judgment, the CPR envisage that the latter will be a rare beast; it is not for a defendant to do the claimant's job; and SRL, in fact, adopted a much more reasonable course by pointing out the flaws in Bioconstruct's case in correspondence (file G, pages 83-85) and inviting it to explain its position, and make any intended amendment to its pleaded case quickly.

96. Bioconstruct's own conduct was worthy of criticism:

96.1 Litigation had started in the Companies Court and, when that court had been unimpressed, Bioconstruct proceeded to issue the instant proceedings;

96.2 The case had been based on valid execution; with estoppel being raised only at trial;

96.3 In Bioconstruct's CPR Part 18 response, it had threatened indemnity costs, yet that application, for reasons not explained, had not been pursued at this stage;

96.4 It had failed properly to have engaged with the correspondence at file G, pages 83-85 (see its response at page 81 of the same file), or to have acted appropriately following its receipt;

96.5 It had known of the existence of a witness since 18 February 2019, but had given no advance notice of its application to call him before approximately 13:00, on exchange of skeleton arguments (and without relaying that intention directly to counsel for the Defendants);

96.6 Having told the court to disregard Mr O'Donnell's evidence, it had sought to resurrect its significance in closing submissions, without prior notification to counsel for the Defendants;

96.7 It had disregarded directions as to the handing down of the court's earlier judgment, seeking an extension of time until the day before the hearing on 17 January 2020, knowing the prejudice that this would cause;

96.8 Until 11:41 — at best, one clear day before that hearing, no prior indication had been given that the Application would be made. The Defendants had been told that Bioconstruct would make brief submissions, if the appropriate costs order could not be agreed; and

96.9 It had cross-examined on matters which had been irrelevant, as a matter of law: 'authority' and estoppel.

97. Stuart Winspear had given evidence for an hour only. If and to the extent that SRL's witnesses had given unsatisfactory evidence, that had gone to matters which were of no relevance to Bioconstruct's claim, as a matter of law (authority to negotiate for SRL) and had not constituted a fundamental part of SRL's defence to that claim, including its witness statements and skeleton argument.

98. As to the contention that Bioconstruct had succeeded in relation to four out of five material disputed facts, none had, in fact, been 'material': it had been irrelevant to the case. In any event, all such issues had been introduced to proceedings by Bioconstruct, rather than SRL.

99. Generally, the principle by reference to which a proportion of a successful party's costs can be disallowed arises from a situation in which an element of its claim has failed and is found to have been dishonest. That is to ensure that the winner does not gain from its dishonesty and the loser does not lose out because of it. That is not this case: SRL's success is outright. It is not possible to identify any cost attributable to Stuart Winspear's answers, as recounted at paragraph 105.3 of the court's earlier judgment, whereby SRL had gained at Bioconstruct's expense.

100. As to Steven Winspear's breach of the court's direction that he not discuss his evidence, including with his son, it was not SRL (a company) which had acted in breach of that direction; there is no evidence that the relevant conduct took the form of a discussion; and the court had not made and cannot make a finding of wrongdoing on the part of SRL. The integrity of the trial had been unaffected. Even if there had been a hint of 'wrongdoing', what is it that SRL has gained? Ultimately, the starting point is that SRL should have its costs and, per *Hutchinson v Neale*, at paragraph 33, any adjustment to that order must ensure/reflect *'..the need to deprive the defendant of its costs of pursuing the dishonest aspects of its case…*[and then]*..turn to the need to compensate the claimant for its costs of responding to the dishonest aspects of the defendants' case'.*

Discussion and conclusions

General principles

101. As all parties agree, under CPR 44.2(2) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. Under CPR 44.2(4), in deciding what order (if any) to make, the court will have regard to all the circumstances, including the conduct of the parties; whether a party has succeeded on part of its case, even if that party has not been wholly successful; and any admissible offer to settle made by a party which is drawn to the court's attention and which is not an offer to which costs consequences under CPR Part 36 apply. CPR 44.2(5) provides that the conduct of the parties includes conduct before, as well as during, the proceedings; whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; the manner in which a party has pursued or defended its case, or a particular allegation or issue; and whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

102. Amongst the orders which it is open to a court to make, CPR 44.2(6) provides for a proportion of another party's costs; a stated amount in respect of another party's costs; costs relating to particular steps taken in the proceedings; and costs relating only to a distinct part of the proceedings. Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so (CPR 44.2(8)). Under CPR 44.11, where it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings, or in the assessment proceedings, was unreasonable or improper, the court may make an order disallowing all or part of the costs which are being assessed; or that the party at fault, or that party's legal representative, pay costs which that party or legal representative has caused any other party to incur. The appropriate order in any case will turn on its particular facts.

103. At paragraph 28 of *Hutchinson v Neale*, Pitchford LJ held:

> "28. …The starting point for the consideration of any order for costs of an action is (CPR 44.3(2)(a)) that costs should follow the event. It is from this point that the court will, in an appropriate case, consider the conduct of the parties (rule 44.3(2)(b)). There is no general rule that a finding of dishonest conduct by the successful party will replace the usual starting point. What is required is an evaluation of the nature and degree of the misconduct, its relevance to and effect upon the issues arising in the trial, and its tendency to create an unwarranted increase in the costs of the action to either or both of the parties. As Briggs J observed at para 19 of his judgment in *Bank of Tokyo*[16] the full range of measures is available to ensure that the dishonest but successful party does not gain, and the honest but unsuccessful party does not lose, in consequence of the wrongdoing established."

104. At paragraphs 30 to 32, he went on to hold:

[16] *Bank of Tokyo-Mitsubishi UFJ Ltd and Another v Baskan Gida Sanayi v. Pazarlama AS and Others* [2009] EWHC 1696, per Briggs J (as he then was).

"30. In my judgment, the judge erred in his unreserved acceptance of the sweeping proposition that the defendants should not expect to be able to fabricate documents and lie under oath in support of their case and still recover their costs if they succeed at trial. While it may be a proposition which is literally true, it is a proposition which obscures the proper starting point and the process required by the rules, which is careful analysis before reaching the conclusion that the justice of the case requires an order other than the usual order and, if it does, a conclusion as to what that order should be. The fact that the claimants acted "reasonably" in pursuing the claim was, in my opinion, not a factor of any significant weight. The fact is that they launched an action on grounds which failed. Furthermore, the judge's use of the adverb "reasonably" in his costs judgment must be viewed in the context of his description in his judgment on liability that the practical consequences for the basis of the claim advanced were "absurd", and his observation that the claimants had failed to ask themselves the correct legal question ... Those conclusions suggest that the claimants' claim was doomed from the start. The judge does not seem to have brought into account the fact that, by the time the claimants instituted proceedings, the defendants' misconduct was entirely isolated from the issue upon which the claim was founded. True it is that the parties' credibility was material to the issue of informal boundary agreements raised in the alternative by the defendants, but the claim had failed at the first hurdle. While there is no doubt that the defendants abused the proceedings in which they were engaged, this is not a case in which the grounds upon which the claim was brought, and failed, were infected by that abuse.

31. At issue is whether the defendants' dishonesty so infected the action that justice requires that they should recover no costs at all in successfully defending the action. For the reasons I have given, it cannot be said that the defendants brought the action on themselves or conducted the proceedings as a whole as an abuse of the process of the court... In my view, the judge's starting point should have been an order for costs in the defendants' favour subject to adjustments to ensure that they did not recover any costs which may have been incurred in advancing a dishonest case.

32. Those costs included the costs of pursuing in pre-action correspondence and in witness statements their denial of wrongdoing, their accusation against Mr Neale and their making of Calderbank offers implicitly advanced on the basis that their accusations were honestly made. They included also court time engaged in advancing the false case. In my view, that objective can properly be achieved by awarding the defendants only a proportion of their costs on the standard basis... My objective is to deprive the defendants of the costs of pursuing the dishonest aspect of their claim... I would achieve that by deleting para 6 of the judge's order and replacing it with the following:

"Subject to the following paragraphs of this order, the claimants shall pay 70% of the defendants' costs of the action, such costs to be subject to a detailed assessment on the standard basis if not agreed."

…"

105. In *Widlake v BAA Ltd* [2009] EWCA Civ 1256, at paragraph 41, Ward LJ held:

> "41. In addition to looking at it in terms of costs consequences, the court is entitled in an appropriate case to say that the misconduct is so egregious that a penalty should be imposed upon the offending party. One can, therefore, deprive a party of costs by way of punitive sanction… I sound a word of caution: lies are told in litigation every day up and down the country and quite rightly do not lead to a penalty being imposed in respect of them. There is a considerable difference between a concocted claim and an exaggerated claim and judges must be astute to measure how reprehensible the conduct is."

106. In *Walsh v Singh (Costs)* [2011] EWCA Civ 80, at paragraph 25, Arden LJ (as she then was) held:

> "25. Mr Roberts' submission is that a judge must balance the factors on either side. I accept that this must be so, in relation, that is, to factors relevant to the issue of costs. In the main this will be conduct which is causative of a waste of costs (such as a failure to make proper disclosure) but there are occasions when it may be appropriate for the court to mark its disapproval of a party's conduct by making a particular order as to costs, relevantly for the purpose of this case by disallowing costs, even if the conduct was not causative of any or any significant waste of costs. I would, however, accept that any such disallowance must be proportionate to the conduct in question…"

The principles applied to the facts

The costs of the claim

107. In so far as Mr Brown's submissions relate to the costs of the action, he seeks a reduction in any costs otherwise payable to Steven Winspear of 65%; and to SRL of 50%. I now consider whether it is appropriate to depart from the general rule set out in CPR 44.2(2), by reference to all the circumstances, including those to which CPR 44.2(4) refers, so far as material to this case.

Has Bioconstruct succeeded on part of its case?

108. Until day two of the trial, these proceedings had alleged a straightforward breach of contract; the contract in question being the Deed. Each Defendant was said to be a 'liable party' under that Deed and, thus, following the borrower's default, to be liable to repay outstanding loan moneys, together with the interest and fees for which the Deed provided.

109. The case as originally pleaded by each party is summarised at paragraphs 6 to 13 of my earlier judgment. Steven Winspear's Defence was served on 22 September 2017 and SRL's was dated 5 September 2017. SRL's Part 18 Request of Bioconstruct was served on 2 October 2017 and responded to on 20 October 2017. I recounted the material content of those documents in my first judgment, which I shall not repeat here. At the latest, upon receipt of SRL's Part 18 Request, it was clear to Bioconstruct that both Defendants were relying upon an asserted invalidity of the Deed, as a matter of law. Bioconstruct's response to that request, in my judgment characteristic of its approach throughout the trial and all applications, was to assert that it was SRL whose

approach was *'designed to introduce irrelevant questions of land law into a money claim on a contract'* and *'…vexatious and misconceived'*, such that *'whatever the outcome of the case, the Claimant seeks the costs of the response on the indemnity basis'* (an application, sensibly, not advanced on 17 January or 11 February 2020). In evidence, Messrs Colclough and von Laun, each a lawyer who gave evidence on behalf of Bioconstruct, stated their respective opinions that the Deed had not been validly executed — the transcript references appear at footnote 21 to my earlier judgment. As I found, the invalidity of the Deed was apparent on its face and, separately, resulted from the affixing of signature pages from a materially different agreement. Given the nature of the agreement, it was not contended that it could take effect as a simple contract in such circumstances.

110. No doubt recognising the force in the Defendants' arguments as to validity, at trial Mr Brown sought to advance an argument based upon estoppel by convention, without first having pleaded such a case, or the particulars upon which it was to be based. That, too, ultimately failed as a matter of law because (1) the statutory requirements for valid execution could not be circumvented by estoppel where the invalidity of the Deed was apparent on its face; and, in any event, (2) estoppel could not be used to create a cause of action where none would otherwise exist. Whilst my conclusions as to the validity of the Deed and the availability of the Claimant's estoppel argument followed prior findings of fact, they afforded a complete answer, as a matter of law, to Bioconstruct's claim against both Defendants.

111. Thus, Bioconstruct advanced and pursued a claim which failed as a matter of law and which was flawed in a manner which had been pointed out by the Defendants (albeit together with other lines of defence) from the outset and was independently apparent, including (regarding the validity of the Deed) to the lawyers whom it had called to give evidence on its behalf. By letter dated 16 May 2018 (file G, pages 83-85), those acting for SRL, had written to Bioconstruct's solicitors in the following terms (so far as material):

> "… We have considered case management in the light of your pleaded case and your refusal to reply to Part 18 requests.
>
> Our counsel is of the view that Bioconstruct's claim stands or falls on whether the contractual document pleaded i.e. a deed dated 19th July 2016 ("the deed") is binding upon the defendant company (i.e. was it present at the end of 19/7/16 when the agreement was concluded; did it agree to its terms (and if so how) and did it validly execute it in accordance with the requirements of the Companies Act 2006). We have pleaded why it cannot be binding upon the defendant company and that is the issue the parties are taking to trial.
>
> That is the central question. We have for instance pleaded in addition that your client must also lose because it did not lend any money or enter into any loan arrangements with BPG (Bioconstruct Asset did) but that is a separate matter.
>
> Subject to that do you agree therefore that your client's case stands or falls on the question whether the deed and its terms are binding upon the company because it was agreed to and executed by the defendant company on 19/7/16?

> It seems to us that this is the incontrovertible consequence of your pleaded case. As such our counsel has noted that disclosure and witness statements have already been exchanged in the Companies Court application. As far as we can see on your pleaded case, there is no need for more and this matter is ready for trial on the basis of what has already been done in those earlier proceedings. If you disagree please be as specific as you can about why the evidence already filed in the previous proceedings is deficient. If you want to disclose additional documents to us then no doubt you can tell us now what they are.
>
> …
>
> If it is the case that you want to rely on a case that the money is repayable by D2 even if the deed fails, then you have not pleaded any such case. We asked you about that in our Part 18 request and you replied that it was irrelevant and vexatious. If your position on this has now changed and you want to replead your claim then you had better let us know quickly.
>
> To be absolutely clear, witness statements and disclosure need only go to the agreement made and the consequent deed executed on 19th July 2016 (that is your pleaded case). We have already carried out that exercise and this case should be case managed on that basis.
>
> If you disagree with any of the above then we expect you to provide a detailed response and a fully explained narrative of why you think any directions you seek are going to be proportionate to the question/s disclosed and facts relied upon in the pleadings.
>
> …"

112. In their response of the same date (file G, pages 81-82), Bioconstruct's solicitors had stated:

> "1. It is not in dispute that the claim stands or falls on whether the Deed is binding upon Stevenson Renewables Limited. Our client relies on its pleaded case as set out in the particulars of claim and does not limit it in any way.
>
> 2. You cannot limit our client's ability to find evidence to support its pleaded case following the exchange of disclosure documents that are relevant to this action. In any event the witness statements that were filed previously were in the context of the Part 8 claim and our client will not be confined by them.
>
> …"

The position adopted in the opening sentence of numbered paragraph 1 was no less true of the claim against Steven Winspear.

113. The absence of an application by the Defendants for summary judgment, or to strike out the claim, does not displace the general rule as to costs and, whether or not the law on estoppel by convention is a model of clarity, it was (at least) clear that the Deed was invalid on its face and that estoppel could not be advanced as a sword, rather than a shield. As in any trial which engages a number of issues, advanced in the alternative, evidence was led in relation to those which ultimately fell away. Nonetheless, given that (see paragraphs 146 and 150 of my earlier judgment):

113.1 it was common ground that the shared intention of all parties had been that the final agreement should take the form of a deed;

113.2 in any event, statute required that the agreement take such a form, as it provided (amongst other matters) for a legal charge over land;

113.3 yet, the Deed was invalid on its face because:

113.3.1 it had not been signed, in the dedicated signature box, by Steven Winspear, acting in his personal capacity;

113.3.2 even if his initials had been assumed to serve as such a signature, they had not been applied to every page of the Deed and, in any event, had not been attested; and

113.3.3 in any event, Kevin O'Donnell's signature on behalf of the borrower, Group, had not been attested;

113.4 as clause 26 of the Deed served to indicate, it was necessary for all parties to enter into and execute the Deed,

Bioconstruct's claim could never have succeeded, against either Defendant. The fact that some of my findings of fact were consistent with Bioconstruct's case as to those matters, does not detract from that fundamental point. Bioconstruct is wrong to contend that Steven Winspear's only success was to have been found to have been dishonest: he succeeded, as did SRL, in defeating Bioconstruct's claim, as a matter of law.

The conduct of the parties

114. Bioconstruct's main objection to the order for costs which it accepts ordinarily to flow from that state of affairs is that it would not reflect the conduct of Steven or Stuart Winspear of which I was critical in my earlier judgment, or the opprobrium which ought to attach to such conduct; my assessment of them as witnesses; and their approach to their evidence.

115. The conduct of the Defendants on which Bioconstruct relies is summarised at paragraphs 78 to 80 above. As to that, and having regard to the principles set out above:

My assessment of the Defendants as witnesses

115.1 My assessment of Steven Winspear as a witness is set out at paragraph 99 of my earlier judgment. I do not accept that he was combative with counsel, though he was, at times, evasive, implausible and unable to provide a satisfactory answer to the question posed.

115.2 I set out my assessment of Stuart Winspear as a witness at paragraph 100 of my earlier judgment. In support of his submission that Stuart Winspear was forced to acknowledge that he had given incomplete evidence, Mr Brown relies upon the transcript for day 3, 486:6-17. I do not consider that that passage of evidence is probative of either contention, nor do I consider that

the inclusion of technical argument in his witness statement can itself serve to make Stuart Winspear an unsatisfactory witness.

115.3 In any event, the way in which Steven and/or Stuart Winspear presented as a witness, was not, per se, causative of wasted costs. Mindful of the note of caution sounded in *Widlake*, I do not consider that it independently warrants the imposition of any punitive sanction in costs against either of the Defendants.

Breach of the standard direction

115.4 Steven Winspear's conduct in disregarding the standard direction was improper and is, rightly, not defended by Mr Kitson. Given the bases upon which I determined the relevant issues in this case, it had no effect upon the integrity of the trial process, as I found at paragraph 158 of my earlier judgment. Furthermore, the additional time taken in addressing the matter, when it arose, did not add to the costs of the action. Put another way, the costs of that day would have been incurred by all parties, in any event.

115.5 Nonetheless, Mr Brown invites me to reflect the opprobrium which undoubtedly attaches to Steven Winspear's disregard of the standard direction by reducing the costs which he would otherwise recover. I am satisfied that it is appropriate to make such a reduction and will address below the proportionate percentage, having first considered all other conduct upon which reliance is placed by Bioconstruct. In this respect, I do not consider that *Hutchinson v Neale* is on point — I am not, here, addressing dishonest conduct and the costs generated thereby; rather the proportionate sanction for Steven Winspear's breach of an important and standard direction, intended to avoid the contamination of evidence.

115.6 Mr Fletcher is right to emphasise that Stuart Winspear is neither himself a party to proceedings nor was he personally subject, at the relevant time, to the direction which I had given to Steven Winspear. He was not the speaker in any of the extracts of the conversation on which Bioconstruct relied (set out at paragraph 58 of my first judgment); he was not cross-examined regarding his part in the discussion at any length[17] and maintained that he had not discussed his father's evidence with him. None of the conduct relating to the breach of the standard direction on which Mr Brown relies was that of SRL and, even if I were to accept that Stuart Winspear's conduct could be attributed to SRL for those purposes, there is insufficient evidence of misconduct by him. In those circumstances, I am satisfied that it is not appropriate to reduce the costs payable to SRL by reason of a breach of the standard direction.

Advancing a dishonest case/dishonest conduct

115.7 In relation to Steven Winspear, Mr Brown here relies upon my earlier findings to the effect that, at the end of the meeting on 19 July 2016, he had deliberately not signed the signature pages in his personal capacity; and

[17] Transcript, day 3, 486:3-22.

that, as a question of fact, he had been authorised by SRL to act as its agent for all relevant purposes. He further relies upon the fact that Steven Winspear had maintained a contrary case in these proceedings, in both respects.

115.8 In relation to Stuart Winspear, Mr Brown relies upon my rejection of his evidence as to the limits of his father's authority on behalf of SRL.

115.9 Such matters having been advanced as dishonest conduct, the principles in *Hutchinson v Neale* are engaged. I bear in mind that mere preference by the court of the evidence of one witness over that of another, or others, would not warrant a reduction in costs. I also bear in mind, once again, the warning given in *Widlake*.

115.10 Although Steven Winspear's dishonesty, taken in the round, was serious, it did not have the effect for which Mr Brown contends, and certainly when viewed in the context of his own client's conduct, to which the Defendants point and which I address, so far as material to my costs order, below. It had no relevance to, or effect upon, the issues upon which the claim fell to be decided as a matter of law. The trial was no more prolonged or complicated by Steven Winspear's conduct or evidence than it was by the evidence adduced by Bioconstruct, as to matters which could not operate to surmount or circumvent the fundamental legal difficulties with its claim. In short, the conduct upon which Bioconstruct relies cannot be said to have created an unwarranted increase in the costs of the action and none has been demonstrated by Mr Brown.

115.11 The dishonest conduct upon which reliance is placed in relation to Stuart Winspear is of lesser gravity (reflected in the lower discount to his costs sought by Mr Brown). The analysis of the additional considerations set out immediately above also applies, with greater force, in his case.

Inadequate disclosure by Steven Winspear

115.12 Little information has been provided in connection with this submission, which appears principally to relate to Steven Winspear's non-disclosure of the signature pages which were affixed to the Deed[18]. There is no evidence to the effect that he retained a copy of those pages to disclose at the relevant time, or, in any event, that any non-disclosure was with mala fides. In any event, the conduct in question has not been shown to have resulted in any increase in costs and, in my judgment, affords insufficient justification for imposing, or increasing, any punitive sanction.

Bioconstruct's conduct

116. Having regard to the non-exhaustive matters to which CPR 44.2(5) refers, I bear in mind the following features of Bioconstruct's conduct in these proceedings:

[18] At paragraph 20.1.5 of his skeleton argument for the hearing of 17 January 2020, Mr Brown asserted that Steven Winspear *'gave selective disclosure, including failing to disclose the signature pages appended to the Deed, which were essential not just to the progress of the trial but to the success of his own case, despite three requests from the Claimants'* (emphasis added). No other example was provided, including in oral submissions.

116.1 Notwithstanding the apparent flaws in its claim, which the Defendants had flagged in their statements of case and (in SRL's case) in correspondence, Bioconstruct continued to advance that case on the basis of facts (and to call related evidence) which provided no answer to those legal issues and having acknowledged to SRL's solicitors that its claim would depend upon the validity of the Deed.

116.2 It failed substantively to engage with the legitimate questions posed in SRL's CPR Part 18 Request and adopted a high-handed tone in response. In that context, it then failed to provide the detailed response or narrative legitimately sought by SRL's solicitors, in their letter of 16 May 2018. The validity of the Deed was equally pertinent to Bioconstruct's claim against Steven Winspear.

116.3 Notwithstanding the period over which the flaws in its case had been known, and SRL's reasonably adopted position, in May 2018, that, if Bioconstruct wished to amend its case, it should do so quickly, it was not until the first day of trial that Bioconstruct sought to run an alternative case (trailed in its skeleton argument) and, then, in the absence of a pleaded case to that effect. That resulted in court time being absorbed by consideration of the parties' respective submissions on the issue, rather than making immediate progress with the trial.

116.4 Having stated that, in Kevin O'Donnell's absence (for reasons unknown), the court should not rely upon his witness statement, Bioconstruct adopted a contrary stance in its written and oral closing submissions. As I found at paragraph 71.2 of my earlier judgment, its original stance had been adopted at a time when it might well have informed the Defendants' approach to the evidence of Messrs Blagojevic, Relton and/or Stuart Winspear.

116.5 Accepting that my directions regarding hand down of my first judgment had not been passed to Mr Brown by those instructing him, his proposal that his submissions regarding costs and any consequential orders be delayed until the day before the hearing was unsatisfactory: that proposal was put forward at 20:00 on 13 January 2020, at a time when work on the Application had been well underway and it must have been appreciated that the likelihood was that such an application would be made, on short notice, and in the hope that it would, nonetheless, be addressed on 17 January. As I indicated earlier in this judgment, the idea that Steven Winspear would not resist it was fanciful, as was the later assertion (in the application notice) that it would occupy no more than an hour of court time. The existence of a bundle for the hearing was only communicated to the Defendants when I replied to an e-mail from Bioconstruct's solicitors, sent to me at 10:36 on 16 January 2020, which had not itself been copied to the Defendants, informing me that a bundle for the following day's hearing would shortly be delivered to my chambers. No attempt to agree that bundle with the Defendants had previously been made and, at midday, I received a further e-mail informing me that, *'The contents of bundle is not agreed but as it contains all of the relevant documents, it should not be controversial. Copies have now been sent to all parties.* I *shall notify you when the other side has agreed the contents of the bundle.'* (sic)

117. In my judgment, the above conduct falls to be weighed in the balance with that which Bioconstruct criticises in support of its contention that I should make a reduction in the costs which it accepts that it would otherwise be obliged to pay. The matters summarised at paragraphs 116.1 to 116.4 above operated unnecessarily to prolong proceedings and the trial. Put at its lowest, they were at least as responsible for the incurrence of unnecessary costs as was any conduct of either Defendant. In the language of *Hutchinson*, the Defendants have not gained, and Bioconstruct does not lose, in consequence of the wrongdoing established.

Admissible offers to settle

118. No offer of settlement has been made.

The appropriate costs order

119. Taking into account and balancing all of the above matters, I have concluded that the appropriate order is that Bioconstruct should pay:

119.1 SRL's costs of the action (without discount);

119.2 90% of Steven Winspear's costs of the action,

in each case such costs to be subject to detailed assessment on the standard basis, if not agreed. In accordance with the guidance in *Walsh v Singh*, I consider 10% to be the proportionate disallowance, by way of sanction for Steven Winspear's disregard of the standard direction.

The preliminary applications

120. I can deal with these shortly, taking account both of the parties' submissions and the findings in my earlier judgment.

The Defendants' application

121. At paragraph 31 of my first judgment, I found that the Defendants had been entitled to formal notice of the case which each was obliged to meet and, further, that Mr Brown's stated concern at the absence of an application notice had been misplaced – if Bioconstruct were to rely on estoppel by convention, it had an obligation first to plead it and to identify comprehensively the facts and matters upon which it relied against each Defendant. The Defendants had been entitled to object to Bioconstruct's proposal, expressly indicated for the first time in its opening skeleton argument for trial, to proceed contrary to that approach. Mr Brown's complaint at the absence of an application notice, renewed in connection with the appropriate costs order, is a collateral attack on that finding and, as such, is impermissible, as well as being misconceived. Whilst he is right to observe that the start of the trial proper was delayed as a result of this and his own preliminary application, his submissions fail to recognise my clear finding that he ought to have sought permission to amend if he wished to advance such a case. Furthermore, at no point was it explained why that case was only being raised at the outset of trial. Mr Fletcher is right, as my earlier judgment indicated, that he was entitled to notice of the case that his client was obliged to meet. Amongst other matters, that enabled him (and Mr Kitson) to frame

the nature and extent of his cross-examination. The absence of prejudice to the Defendants in permitting the late service of a Reply does not assist Mr Brown for current purposes: whilst the facts and matters which he pleaded had been referred to, variously, in Bioconstruct's witness statements, they had not previously related to a formally pleaded case, leaving it open to one or both of the Defendants, at that stage, to consider that there was no need to cross-examine, or lead evidence, on such matters.

122. I have no doubt that the appropriate order on this application is costs in the case, to be the subject of detailed assessment on the standard basis, if not agreed.

Bioconstruct's application

123. Mr Roth's second witness statement was admitted under CPR 32.5, such that no question of relief from sanction arises. At paragraph 40 of my first judgment, I found the Defendants' objection to its admission to have been unmeritorious.

124. As Bioconstruct acknowledged, the need for relief from sanction did arise in relation to Mr O'Donnell's witness statement. I admitted that statement, for the reasons set out at paragraphs 41 to 53 of my earlier judgment.

125. There is no evidence to substantiate Mr Brown's submission that either of the preliminary applications *'may have contributed to the non-attendance of one of the Claimant's witnesses'*. Whilst it is right that Bioconstruct had been obliged formally to apply for relief from sanction, and, thus, to have incurred the costs of doing so, the hearing of that application could have been truncated, had the defendants raised no objection, or adopted a neutral stance, in relation to it. That said, I did not find the Defendants' opposition to have been unreasonable, and I do not accept Mr Brown's submission that its, inevitably fact-sensitive, outcome was a foregone conclusion.

126. In the event, as I noted at paragraph 50 of my first judgment, all parties' evidence had been completed within the original three-day listing for trial and, given the nature and number of the issues between the parties, it was inevitable that they would need time to consider their closing submissions and that judgment would be reserved. Further, as was held at paragraph 80 of *Idira, 'A party is not required to agree to an extension of time in every case where the extension will not disrupt the time-table ... or will not cause him to suffer prejudice. If the position were otherwise, the court would lose control of the management of the litigation.'* That analysis is equally applicable to the instant circumstances. My observation, also at paragraph 50 of my first judgment, that *'...the bulk of the delay to the trial timetable was caused by the lengthy and, it must be said, somewhat diffuse, arguments advanced in resistance of the parties' respective applications'*, was, on its face, critical of all parties.

127. In the end, I have come to the conclusion that Messrs Kitson and Fletcher are right to submit that this application should be viewed as part and parcel of the 'rough and tumble' of trial and that Mr Kitson is right to point to the inter-relationship between the two preliminary applications and the fact that there had been no pleaded case on estoppel at the time at which Bioconstruct's application to admit additional witness statements had been advanced. In all the circumstances, it seems to me that, here again, the appropriate order is costs in case, to be the subject of detailed assessment on the standard basis, if not agreed.

Payments on account of costs

128. Each of the Defendants seeks a payment on account of his/its costs. Mr Brown accepts that such a payment is appropriate, as a matter of principle, subject to a reservation in relation to Steven Winspear's costs which has fallen away following my dismissal of the Application.

129. As set out in SRL's draft minute of order, dated 8 January 2020 (with which Steven Winspear agrees), Mr Kitson seeks 70% on account of Steven Winspear's incurred costs. Mr Fletcher seeks 90% of SRL's adjusted budgeted costs; 70% of its incurred budgeted costs; and 80% of certain additional, then estimated, costs falling outside the budget orders. In accordance with CPR 44.2(8), it is appropriate to award a reasonable sum on account to each Defendant, there being no good reason, advanced or apparent, not to do so.

Steven Winspear

130. At the time at which his costs budget was submitted to the court (30 April 2018), Steven Winspear had been acting in person, such that it was not approved. His incurred and estimated costs totalled £208,204, of which £184,920 constituted estimated costs. On 28 February 2019, Kingswalk Law wrote to Bioconstruct's solicitors, stating that they had now been instructed to act for Steven Winspear and enclosing (so far as material for current purposes) a copy of Steven Winspear's first costs budget, together with a second budget estimating the costs going forward, in the sum of £38,650 (a figure which, I am informed, has since proven to be broadly accurate). Agreement to both budgets was sought by return. Mr Kitson informs me that it was not forthcoming. Since then, Mr Kitson tells me, Steven Winspear has incurred the costs of preparing and delivering written submissions (£8,608) and estimated costs of attendance on 17 January 2020 (excluding those of considering the Application) in the sum of £10,408, yielding a total of £57,666 and bringing the total costs, incurred or estimated, to £265,870. He tells me that the total costs incurred (including at a time when a different firm of solicitors had been instructed), are £117,299.29, excluding VAT, of which he seeks 70% (£82,109.50) on account.

131. As none of the costs set out in Steven Winspear's budgets has been approved or agreed, it is appropriate to adopt a conservative approach to the costs incurred, which might be reduced on detailed assessment. In my judgment, the appropriate percentage is 60%, but, following my earlier order, that is of 90% of the costs incurred. Thus, I consider it appropriate to order that a payment on account be made to Steven Winspear, in the sum of £63,500 (being 60% of £105,569.36, rounded up), within 21 days of the date of this judgment.

SRL

132. SRL's costs budget, dated 25 May 2018, was approved in the total sum of £124,668.04, of which £49,023.04 constituted incurred costs. Mr Brown does not argue against the specific payments on account which SRL seeks. Consistent with the approach adopted in *MacInnes v Gross* [2017] EWHC 127 (QB), approved in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] 1 WLR 4456, CA, the starting point is the approved costs budget figure, from which the maximum deduction which is appropriate is 10%. That is because, on detailed

assessment, the court will not depart from an agreed or approved costs budget unless satisfied that there is good reason to do so (CPR 3.18(b)). I am satisfied that 10% is the appropriate deduction in this case and I, therefore, order that Bioconstruct pay 90% of SRL's adjusted budgeted costs, on account, requiring a payment in the sum of £62,560 (rounded up).

133. However, as was observed in *Cleveland Bridge UK Limited v Sarens (UK) Limited* [2018] EWHC 827 (TCC), incurred costs are not approved costs. Thus, as was held at paragraph 21 of that case, *'..the court must determine in every case, a reasonable sum by reference to an estimate which will be dependent upon the circumstances, including the fact that there has as yet been no detailed assessment and thus there remains an element of uncertainty, the extent of which may differ widely from case to case, as to what will be allowed on detailed assessment (see the notes at 44.2.12 of Volume 1 of the White Book 2018*[19]*). Accordingly, in my judgment, a reasonable sum in respect of incurred costs will often be one that is an estimate of the likely level of recovery subject to an appropriate margin to allow for error.'* It seems to me that that is the appropriate approach to adopt and, in the exercise of my discretion to arrive at a reasonable sum in this case, I consider that a payment on account representing 70% of SRL's incurred costs is appropriate. A similar percentage is, in my judgment, appropriate in relation to those of SRL's estimated costs which fall outside the budget orders, there being no reason, obvious or explained, to adopt a different approach or percentage in relation to those costs. I therefore order that a payment on account of such costs be made to SRL in the sum of £49,500, being (70% of £70,728.04, slightly rounded down).

134. All payments on account due to SRL (in the aggregate sum of £112,060) are to be paid within 21 days of the date of this judgment.

<u>*The costs of the Application*</u>

135. Bioconstruct has failed in the Application and there is no basis for displacing the usual order which would follow from that. Accordingly, Steven Winspear is entitled to his costs. In my judgment, the nature of the Application, coupled with the short notice on which it had been served, made it self-evident that it could not be dealt with on 17 January 2020. In those circumstances, Bioconstruct ought to have applied for the adjournment of that hearing, to a date on which the Application, together with all costs submissions, could be addressed. With suitable case management and stripped of the time engaged in considering whether it would be possible to address the Application substantively and, if not, the orders to be made pending its substantive hearing, that could have been achieved in a single court day. I am satisfied that, in all the circumstances to which I have referred in connection with the Application, Bioconstruct's failure to have sought an adjournment of the 17 January hearing was contrary to the overriding objective and unreasonable so as to take the situation 'out of the norm' and to justify the assessment of Steven Winspear's costs of attendance on that day on the indemnity basis.

136. I reject Mr Brown's submission that Mr Kitson was, in fact, fully ready to proceed on 17 January. I also reject his submission that the marginal costs of preparing a composite skeleton argument for use at the 11 February hearing ought to be

[19] to be found in the same paragraph of Volume 1 of the 2020 White Book

disallowed. There is a reason why applications are to be made on appropriate notice. Mr Kitson is to be commended for preparing submissions to assist the court on 17 January 2020 at short notice, but he was entitled to object to being bounced into addressing a matter of considerable significance to his client in greater detail and to reflect upon and augment the arguments which he wished to advance in resistance of the Application. Mr Brown's submission that it was Steven Winspear who had wasted court time, by failing to consent to the Application, is wholly without merit. Indeed, it is a striking feature of this case that Bioconstruct seeks to criticise the Defendants for alleged procedural failings, whilst accepting no (or no adequate) responsibility for its own.

137. Accordingly, the order which I make is that Bioconstruct should pay Steven Winspear's costs of the Application, such costs to be summarily assessed on the standard basis, save that Steven Winspear's costs of attendance at court on 17 January 2020 are to be the subject of detailed assessment on the indemnity basis. The total VAT-exclusive sum claimed in Steven Winspear's costs schedule is £17,295. As I have noted above, that sum excludes the cost of attendance on 17 January 2020. No issue has been raised by Mr Brown in connection with the particular sum claimed, or its constituent elements. I am independently satisfied that it is proportionate and reasonable and that there is no basis for disallowing any part of it under CPR 44.3 and 44.4 and paragraph 6.2 of the Part 44 Practice Direction. I order that the sum of £17,295 be paid to Steven Winspear within 21 days of the date of this judgment. I further order that his costs of attendance at court on 17 January 2020 be subject to detailed assessment, on the indemnity basis, if not agreed. I make no separate order for payment on account of that latter order, as I am not in a position to do so and, in any event, it may well be incorporated in the payment on account which I have ordered at paragraph 131 above.

Minute of the Order

138. Within 7 days, Counsel are asked to draw up and submit an agreed minute of order, reflecting all orders made in this judgment, and, separately in respect of each sum specified to be payable to each Defendant, also recording the sum payable in VAT.

APPENDIX
BIOCONSTRUCT'S DRAFT AMENDED PARTICULARS OF CLAIM

IN THE HIGH COURT OF JUSTICE **Claim No. HQ17X02903**

QUEEN'S BENCH DIVISION

BETWEEN

BIOCONSTRUCT GMBH

(Claimant)

AND

(1) MR STEVEN WINSPEAR

(2) STEVENSON RENEWABLES LIMITED

(Defendants)

[DRAFT] AMENDED PARTICULARS OF CLAIM

PARTIES

1. The Claimant is a German GmbH, and plans, constructs and provides financial support in respect of a variety of projects in the renewable energies sector.

2. The First Defendant, Steven Winspear is former Director of the Second Defendant and a current director of ("**Northrn Energy**"), a limited Company incorporated under the laws of England and Wales.

3. The Second Defendant is a limited company incorporated under the laws of England and Wales.

THE CONTRACT

4. The Claimant loaned the sum of £3,867,655.90 to a third party (Biopower Group Limited, "**Group**") to support the construction of a biogas energy plan near Hartlepool, England, of which the sum of £2,367,665.90 (the "**Loan**") was secured against various financial instruments and property owned by the First and Second Defendant.
5. The Claimant and the First and Second Defendant (along with other third parties) entered into a contractual relationship under a Deed of Security ("**Deed**") on 19 July 2016 to secure the Loan and to place an obligation on each of the First and Second Defendants to repay the Loan to the Claimant. Each of the First and Second Defendant are defined as "Liable Parties" pursuant to the Deed.

PAYMENT DUE DATE

6. Clause 3 of the Deed stated*: "the Borrower and the Liable Parties shall pay the Sum Due to the Lender* [the Claimant] *on or before the Loan Repayment Date"***.** The date for repayment of the Loan under the Deed was on or around November 2016 (the "**Loan Repayment Date**").

7. The Claimant agreed to extend the Loan Repayment Date from November 2016 to on or around 10 February 2017 (the "**Extended Loan Repayment Date**").

FIRST AND SECOND DEFENDANTS' FAILURE TO PAY

8. Group failed to make payment of the Loan by the Extended Loan Repayment Date. Therefore, the Claimant has sought to enforce its rights to repayment from the First and Second Defendants.

9. Despite multiple written demands for repayment of the Loan, and in breach of contract, the First and Second Defendant failed to repay the Loan to the Claimant.

10. On 2 February 2017, the Sum of £300,000.00 was repaid to Claimant.

11. On 3 February 2017, the Sum of £750,000.00 was repaid to the Claimant.

12. The principal amount outstanding under the Loan and owed by the First and Second Defendant is: £1,317,655.90.

CLAIM FOR INTEREST & FEES

13. Pursuant to clause 4 of the Deed, the Claimant claims contractual interest on the sum unpaid at the rate of 8.25% from 9 February 2017 on a compound basis totalling £55,483.52.
14. Pursuant to clause 18 of the Deed, the Claimant is entitled to be paid its costs incurred to date in enforcing the Sum Due, currently amounting to £65,000.00.

AND THE CLAIMANT CLAIMS:

(1) The sum of £1,317,655.90;
(2) (a) Contractual interest as set out in paragraph 13 above in the sum of £55,483.52 and, (b) such additional interest calculated up until the full satisfaction of the Loan and

or (to the extent applicable) satisfaction of the relevant judgment debt (whichever date is the earliest), and or (c) such other interest as ordered by the Court;

(3) Costs pursuant to clause 18 of the Deed as set out in paragraph 14 in the sum of £65,000.00 (to date);

(4) Further or other relief; and

(5) Costs.

BRANDSMITHS

ALTERNATIVE CLAIM IN DECEIT AGAINST FIRST DEFENDANT

Introductory matters

1. This alternative claim has been pleaded after trial and after circulation of the draft judgment. It has been updated following handing down of the judgment on 17 January 2020 and to incorporate references to particular passages of the transcript on which reliance is placed. In support of the facts and matters pleaded herein, the Claimant relies generally on the judgment, the written evidence (including documentary evidence) and oral testimony of the witnesses at trial. References herein

   1.1. in the format [J:page:¶paragraph] are to paragraphs of the judgment; and

   1.2. in the format [T:day:page:line] are to the transcript of the evidence at trial.

The Development Finance Deal

2. By contractual arrangements in writing dated on or around 19/20 July 2019 and made between the Claimant and Biopower Group Limited, ('**Group**'), the Claimant agreed to loan and Group agreed to borrow £3,867,655.90 in order to finance the construction of anaerobic digestion plant ('**the Plant**'). A copy of the contracts forming the contractual arrangements are attached hereto. They are referred to together as the Development Finance Deal.

3. On 20 July 2016, pursuant to the contracts:

   3.1. The Claimant loaned the sum of £3,867,655.90 to Group;

   3.2. £24,000,000 was released by SQN Capital Management (UK) Limited ('SQN') to Group.

The false representation

4. Before the steps set out above were taken, the First Defendant represented that he would by Deed enter into the personal obligations (the '**Personal Security Obligations**') contained in clauses 3, 6-8, 18, 23, and referred to in the heading and definitions of the intended Deed.
5. The First Defendant represented by a course of conduct, acquiescence, and by silence that he would enter into and intended to enter into the Personal Security Obligations (the '**False Representation**') by:
   5.1. Engaging in and conducting negotiations on the basis that he would be providing the Personal Security Obligations in particular in the draft deeds circulated on 29 June 2016 and 17 July 2016;
   5.2. Failing to indicate in any of the pre-contractual emails in particular in June and July of 2016 that he did not intend to take on the Personal Security Obligations;
   5.3. Positively asserting he had ultimate personal liability by email dated 17 July 2016;
   5.4. attending a meeting in London on 19 July 2016 with Messrs Colclough, Roth Borgmeyer, Von Laun, Blagojevic, Stephen, and O'Donnell at the offices of Pennington Manches and then Stephenson Harwood ('**the Closing Meeting'**)
   5.5. failing deliberately to inform any of the other parties at any time that he did not intend to enter into the Personal Security Obligations;
   5.6. initialling pages of the Deed which was intended to be executed by C and other parties, including the pages that included the Personal Security Obligations listed at paragraph 4 above;
   5.7. presenting for affixing a pre-signed signature page which, dishonestly, he had not signed in the signature block referring to his personal capacity;
   5.8. taking advantage of the rush to get the Development Finance Deal executed in the fraudulent expectation that his deliberate failure to sign the Deed in his personal capacity would go unnoticed by the other parties and their lawyers.
6. In support of the averments made in the foregoing paragraph, the Claimant relies on
   6.1. [J:40:¶78-93]; [J:58:¶103]; [J:66:¶108-110]; and
   6.2. [T:3:345:17-346:3]; [T:3:369:14-370:1]; [T:3:370:4-371:4]; [T:3:377:12-379:9]; [T:3:385:2-8]; [T:3:386:18-389:22].

Inducement

7. The Claimant told the First Defendant that it required him to enter into Personal Security Obligations by email dated 3 July 2016 without which obligations the Loan would not be made, nor as a result would the Development Finance Deal complete. The First Defendant was well aware of this. In support of this averment, the Claimant relies on paragraph 105 of the draft judgment.

8. The False Representation set out at paragraph 5 above was made in order to induce the Claimant into entering into the contract and taking the steps set out at paragraph 3 above. In support of the allegation that the First Defendant intended to induce the Claimant into entering into the contractual arrangements, the Claimant relies upon the fact that the First Defendant stood to gain from the Development Finance Deal and was desirous of the same concluding in that:
   8.1. he would profit indirectly from profits earned by his Companies: Northrn Energy, Group and Hartlepool;
   8.2. the Second Defendant, the First Defendant's son would profit as the lessor of the land on which the Plant was to be constructed.

9. In support of the averments in paragraphs 7-8 above, the Claimant relies on
   9.1. [T:2:286:9-12]; [T:2:287:5-9]; [T:3:343:25-344:4]; [T:3:392:8-10]; [T:3:418:14-422:8]; [T:3:431:24-432:19]; and
   9.2. [J:44:¶86]; [J:70:¶110].

The true position

10. Contrary to his representation, the First Defendant did not intend to enter into the Personal Security Obligations. The First Defendant well knew that the False Representation was untrue. It was therefore made fraudulently or was made recklessly as to its truth or falsity, the First Defendant not caring whether or not it was true or false.

11. The First Defendant continued the deceitful pretence that he intended to enter into the Personal Security Obligations after the conclusion of the Closing Meeting by

11.1. Attending a dinner with Messrs Borgmeyer, O'Donnell, von Laun and Blagojevic to celebrate the conclusion of the Development Finance Deal;

11.2. Failing to point out by response to emails and letters sent to him or his company Northrn Energy or Group between the dates of 10 August 2016 and 23 February 2017, that he did not intend to enter into and had not entered into the Personal Security Obligations;

11.3. Failing to point out in the responses dated 20 November 2016 he did send that he did not intend to take on the Personal Security Obligations.

12. Had the First Defendant informed the Claimant on 19 July 2016 or before that he did not intend to enter into the Personal Security Obligations, as he well knew, the Claimant would not have advanced money, the Development Finance Deal would not have proceeded, and the Claimant would not have suffered the loss and damage set out below.

13. In support of the facts and matters alleged in paragraphs 10-12 above, the Claimant will rely on

13.1. [T:2:294:9-295:3]; [T:2:296:7-297:5]; [T:2:311:10-312:18]; [T:2:313:9-24]; [J:56:¶99]; [T:2:317:13-16]; [T:3:366:17-25]; [T:3:393:24-397:9]; [T:3:414:3-418:4]; [T:3:418:14-422:8]; [T:3:431:24-432:19] and

13.2. [J:40-54:¶78-93]; [J:61:¶104, 108-110]. [J:44:¶86, J:46:¶91, esp. 91.1], [J:54:¶94-98]; [J:39:¶75].

Loss and damage

14. The Claimant has as a result of the First Defendant's False Representation suffered loss and damage. In particular, it has not been able to recover from the First Defendant:

14.1. The principal amount outstanding under the Loan of £1,317,655.90;

14.2. Pursuant to clause 4 of the Deed, (which had the First Defendant entered into the Personal Security Obligations, the Claimant would be able to seek from him) contractual interest on the sum unpaid at the rate of 8.25% from 9 February 2017 on a compound basis totalling £114,303.32 and increasing at a daily rate of £2.57, alternatively, at such rate and for such period as the court thinks fit;

14.3. Solicitor's costs to be assessed.

15. By reason of the foregoing, the First Defendant is liable in deceit and the Claimant seeks and is entitled to damages compensating the Claimant for the loss it has suffered as set out in the foregoing paragraph.

Interest

16. Further, the Claimant seeks and is entitled to interest pursuant to s35 Senior Courts Act 1981 on the amount found to be due to the Claimant at such rate and for such period (and if compounded at such intervals) as the court thinks fit.

AND THE CLAIMANT CLAIMS

1. Damages
2. Interest
3. Costs on the indemnity alternatively standard basis

RORY BROWN

9 Stone Buildings

Served this 9 of August by Brandsmiths, solicitors for the Claimant.

STATEMENT OF TRUTH

The Claimant believes that the facts stated in these Particulars of Claim are true. I am duly authorised by the Claimant to sign this statement.

Full name ………………………….. Position or office held……………………………………

Signed ………………………….. (if signed on behalf of firm, company or corporation)

IN THE HIGH COURT OF JUSTICE **Claim No.**
HQ17X02903
QUEEN'S BENCH DIVISION

BETWEEN:

BIOCONSTRUCT GMBH
Claimant

- and –

(1) MR STEVEN WINSPEAR
(2) STEVENSON RENEWABLES LIMITED
Defendants

PARTICULARS OF CLAIM

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Solicitors for the Claimant