Neutral Citation Number: [2025] EWHC 1624 (Ch)

BL-2024-000750

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

27 June 2025

Before:

MR JUSTICE LEECH

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B E T W E E N:

(1) WILLIAM ANDREW TINKLER **(2) STOBART CAPITAL LIMITED**	**Claimants**
- and –	
(10) INVESCO ASSET MANAGEMENT LIMITED **(12) FREDERICK BOUVERAT** **(16) ORBITUS TRUSTEES (GUERNSEY) LIMITED** **(19) STIFEL NICOLAUS EUROPE LIMITED**	**Defendants**

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MR ADAM TEMPLE (instructed by **Simmons & Simmons LLP**) appeared on behalf of the Tenth and Twelfth Defendants.

MR CLEON CATSAMBIS (instructed by **Baker & McKenzie LLP**) appeared on behalf of the Sixteenth Defendant.

MR ANDREAS GLEDHILL KC and **MR TIMOTHY LAU** (instructed by **Ashurst LLP**) appeared on behalf of the Nineteenth Defendant.

MR JONATHAN D KING (instructed by **Direct Access**) appeared on behalf of the Claimant.

Hearing dates: 10, 11 and 12 June 2025

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APPROVED JUDGMENT

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Mr Justice Leech:

I. The Applications

1. By Application Notice dated 20 November 2024 Invesco Asset Management Ltd ("**IAML**"), the Tenth Defendant, and Mr Frederick Bouverat, the Twelfth Defendant, applied to strike out the Particulars of Claim under CPR Part 3.4 or, alternatively, for reverse summary judgment dismissing the claim on the basis that the Particulars of Claim disclose no reasonable grounds for bringing the claim or that it is an abuse of process or that it has no real prospects of success. Mr Bouverat was at the relevant time an employee of IAML and I will refer to the Tenth and Twelfth Defendants together as "**Invesco**". The application was supported by a witness statement also dated 20 November 2024 and made by Ms Jane-Emma Sutcliffe, a partner in Simmons & Simmons LLP ("**Simmons & Simmons**"), Invesco's solicitors.

2. By Application Notice also dated 20 November 2024 Stifel Nicolaus Europe Ltd ("**Stifel**"), the Nineteenth Defendant, also applied to strike out the claim against it on the grounds that the claim was an abuse of process or there were no reasonable grounds for bringing the claim or that the Claimants were bound by an admission. Stifel's application was supported by a witness statement also dated 20 November 2024 and made by Mr Simon Nathan Willmott, a partner in Ashurst LLP ("**Ashurst**"), Stifel's solicitors.

3. Finally, by Application Notice dated 3 December 2024 Orbitus Trustees (Guernsey) Ltd ("**Orbitus**"), the Sixteenth Defendant, applied to strike out the Particulars of Claim or for reverse summary judgment on the same basis as Invesco. Orbitus's application was supported by a witness statement dated 3 December 2024 and made by Ms Oyindamola Gesinde, a partner in Baker & McKenzie LLP ("**B&M**"), Orbitus's solicitors. I will refer to Invesco, Orbitus and Stifel as the "**Active Defendants**" and their three applications as the "**Strike Out Applications**".

4. By Application Notice dated 16 May 2025 (served on 21 May 2025) Mr Andrew Tinkler and Stobart Capital Ltd ("**SCL**") applied to stay the claim and adjourn the hearing of the Strike Out Applications on the basis that the Takeover Panel (the "**Panel**") was carrying out an investigation into potential breaches of the Takeover Code (the "**Code**") and, in particular, whether the Active Defendants together with a number of the other named Defendants were acting in concert in breach of the Code.

5. On 10 June 2025 I heard the Claimants' application to stay the claim and adjourn the hearing of the Strike Out Applications and on 11 June 2025 I delivered an ex tempore judgment dismissing the application: see [2025] EWHC 1596 (Ch). On 11 and 12 June 2025 I heard the Strike Out Applications and in this reserved judgment I now determine them. Mr Andreas Gledhill KC leading Mr Timothy Lau spoke first and made oral submissions on behalf of Stifel. Mr Adam Temple and Mr Cleon Catsambis adopted those submissions on behalf of Invesco and Orbitus respectively and then made oral submissions focussing on the position of their own clients respectively. Mr Jonathan D King then made submissions on behalf of the Claimants answering all of the submissions made on behalf of the Active Defendants before Mr Gledhill, Mr Temple and Mr Catsambis each made a short reply. I am grateful to all counsel for their Skeleton Arguments and oral submissions.

II. Procedural History

6. On 23 May 2024 the Claim Form in the present proceedings was issued and I will refer to it as the "**Present Claim**" to distinguish it from the earlier actions involving the Claimants and other parties who were originally named in the Claim Form. I set out immediately below a brief summary of each action and its outcome. I do so in the order in which the actions were commenced although there was a considerable overlap between many of them.

(1) The Defamation Claim

7. On 8 June 2018 Mr Tinkler issued a claim for defamation against Mr Iain Ferguson CBE, Mr Warwick Brady, Mr John Coombs, Mr Richard Laycock and Mr Andrew Wood (the "**Defamation Claim**"). All five of the Defendants were at the time directors of Esken Ltd, then known as the Stobart Group Ltd. Mr Ferguson was the Chairman, Mr Brady was the CEO and Mr Laycock was the CFO. Mr Tinkler was also a director and employee (although he was shortly to be removed). The subject matter of the Defamation Claim was the publication of an announcement by the Regulatory News Service dated 29 May 2018 (the "**29 May RNS**"). I will refer to Mr Ferguson, Mr Brady, Mr Coombs and Mr Wood as the "**Four Directors**" and the company itself as "**SGL**".

8. Mr Tinkler's claim alleged both libel and malicious falsehood and in a judgment dated 17 December 2018 (the "**Meaning Judgment**") Nicklin J determined a number of

preliminary issues in relation to the meaning and effect of the 29 May RNS: see [2018] EWHC 3563 (QB). The Court of Appeal dismissed his appeal: see [2019] EWCA Civ 819. On 10 September 2019 Nicol J gave permission to Mr Tinkler to withdraw the libel claim leaving only the malicious falsehood claim and the Defendants applied to strike it out. In a judgment dated 8 June 2020 (the "**Malicious Falsehood Judgment**") Nicklin J struck it out as an abuse of process: see [2020] EWHC 1467 (QB). On 1 February 2021 the Court of Appeal upheld his decision: see [2021] EWCA Civ 18. Peter Jackson LJ gave the leading judgment with which Dingemans LJ and Sir Richard McCombe agreed. I will refer to his judgment as the "**Malicious Falsehood Judgment (CA)**".

(2) The 2018 Claim

9. On 15 June 2018 SGL issued a Claim Form (the "**2018 Claim**") against Mr Tinkler for a declaration that he had been lawfully dismissed as an employee and removed as a director of SGL. Mr Tinkler counter-claimed for various relief including an order setting aside the transfer of shares to SGL's employee benefit trust (the "**EBT**") of which Orbitus (which was then known as Jupiter Trustees Ltd) was the trustee. He also counter- claimed for a declaration that Mr Ferguson had not been validly re-elected as a director and the Chairman of SGL at the annual general meeting of SGL which took place on 6 July 2018 (the "**AGM**").

10. The 2018 Claim was expedited and then heard over eleven days by His Honour Judge Russen QC who handed down a reserved judgment on 15 February 2019 (the "**Russen Judgment**"): see [2019] EWHC 258 (Comm). He held that Mr Tinkler's employment had been validly terminated and that he had been validly removed as a director on 14 June 2018 and then again on 7 July 2018 under Article 89(5) of SGL's Articles of Association. He dismissed all of the allegations against SGL apart from one. He held that the Four Directors had authorised the transfer of 5,320,425 ordinary shares of SGL out of treasury to the EBT for an improper purpose although he refused to set aside the transfer and rejected the claim that Mr Ferguson had not been validly re-elected. On 6 June 2019 Flaux LJ (as he then was) refused permission to appeal and on 13 November 2019 Males LJ refused Mr Tinkler permission to re-open that decision.

(3) The Guernsey Applications

11. SGL (which is now in liquidation) was incorporated under the laws of Guernsey. On 28

June 2018 Mr Tinkler applied for an interim injunction in the Royal Court of Guernsey against SGL to prevent the removal of a resolution to re-elect him as a director from the notice for the AGM. On 5 July 2018 Judge Finch OBE dismissed the application. On 6 July 2018 Mr Tinkler applied for an interim injunction to restrain Orbitus from voting at the AGM and the Royal Court dismissed that application *inter alia* because the meeting had already started: see the Russen Judgment, [359]. I will refer to these applications as the "**First Guernsey Application**" and the "**Second Guernsey Application**" and together as the "**Guernsey Applications**".

(4) The ET Claim

12. SCL was originally a joint venture between Mr Tinkler and Mr Ian Soanes, who gave evidence at the trial of the 2018 Claim. Mr Soanes was also an employee and director of the company. On 3 May 2018 Mr Soanes issued a claim for unfair dismissal in the Central London Employment Tribunal (the "**ET Claim**") claiming that he had been dismissed for whistle-blowing and making protected disclosures. On 27 April 2020 the Employment Tribunal dismissed the ET Claim on the basis that Mr Soanes had no automatic right to claim unfair dismissal and that he had not suffered any detriment as a result of making the protected disclosures.

13. On 6 November 2020 Mr Mark Anderson QC (sitting as a judge of the Chancery Division) granted permission to Mr Tinkler to use documents which Mr Soanes had disclosed and produced in the ET Claim for the purpose of a claim to set aside the Russen Judgment and to bring a second claim. That purpose was described in paragraph 2 of the judge's Order in the following terms:

> "The Applicant do have permission to use and rely upon the Disclosed Documents for the purposes of: (i) an intended claim against Stobart Group Ltd ("Stobart Group") to set aside the Judgment of HHJ Russen QC in proceedings brought by Stobart Group against the Applicant in the London Circuit Commercial Court under case number LM-2018-000113 ("the 2018 Proceedings"), including but not limited to any applications for interim relief in support of or in anticipation of those proceedings ("the First Proposed Claim"); and (ii) an intended claim against Stobart Group, Mr Warwick Brady ("Mr Brady"), Mr Iain Ferguson CBE ("Mr Ferguson") and the Respondent in connection with the 2018 Proceedings and the Applicant's dismissal as an employee of Stobart Group and removal as a director, including but not limited to any applications for interim relief in support of or in anticipation of those proceedings ("the Second Proposed Claim")."

14. In his witness statement dated 20 November 2024 Mr Willmott gave evidence that he had read counsel's note of the first hearing on 29 October 2020 and Clyde & Co LLP's note of the second hearing on 6 November 2020. His evidence (which Mr Tinkler did not challenge) was as follows:

> "Prior to the Fraud Claim and Conspiracy Claim, Mr Tinkler sought an order against Mr Soanes (on a without notice basis) for permission for documents disclosed in other proceedings to be used in support of these new claims. Mr Tinkler's counsel's note reads: "*[Mr Tinkler] seeks permission for 3 purposes ... Prospective permission to bring a claim in unlawful means conspiracy against the Claimants in the 2018 Proceedings — Mr Brady, Mr Ferguson and the Respondent, Mr Soanes, - in connection with matters arising out of the 2018 Proceedings. This claim necessarily requires the judgment to be set aside. If it is not, the conspiracy claim can go nowhere.*" Mr Justice Birss (as he then was) adjourned the hearing due to a lack of evidence and allowed Mr Tinkler to return with full evidence.
>
> The restored hearing of the application took place before Deputy Judge Mark Anderson KC. As set out in Clyde & Co LLP's note, Mr Tinkler's counsel said: "*The Conspiracy Claim cannot be pursued until the Judgment Claim has been fought and won. Mr Tinkler will therefore seek to have that claim stayed pending outcome of the Judgment Claim." The Court made the order sought*."

(5) The Esken Payment Claim

15. On 15 May 2020 SCL issued a claim against SGL for payment of £4,601,816.04 in respect of a retainer from SGL and certain success fees payable under an agreement dated 22 September 2017 (the "**Management Agreement**") on the basis that a notice of termination served by SGL on 12 March 2019 was ineffective. The trial of the claim took place over 4 days between 28 March 2022 and 1 April 2022 and on 6 May 2022 His Honour Judge Cawson QC handed down a reserved judgment (the "**Esken Payment Judgment**") in which he held that SGL had validly terminated the Management Agreement but that SCL was entitled to recover retainer fees of £350,000 and a success fee of £172,603 (although SGL was entitled to repayment of expenses of £25,386.30).

(6) The Soanes Claim

16. On 9 September 2020 SCL issued a claim against Mr Soanes in the Manchester District Registry (the "**Soanes Claim**") alleging that he unlawfully colluded with Mr Brady to terminate the Management Agreement. By Order dated 12 April 2021 District Judge

Matharu stayed the action by consent pending the determination of the Esken Payment Claim (above) and the Fraud Claim (below). So far as I am aware, the Soanes Claim remains stayed and none of the parties referred to it in their submissions.

(7) The Fraud Claim

17. On 13 November 2020 Mr Tinkler issued a claim against SGL to set aside the Russen Judgment for fraud (the "**Fraud Claim**"). The trial of that claim was expedited and on 7 June 2022 I handed down a reserved judgment (the "**Fraud Judgment**") in which I dismissed the Fraud Claim in its entirety: see [2022] EWHC 1375 (Ch). On 29 June 2022 I dealt with consequential matters and on 12 July 2022 I dismissed Mr Tinkler's application for permission to appeal and ordered him to pay the costs of the Fraud Claim on the indemnity basis: see [2022] EWHC 1802 (Ch). The Court of Appeal granted Mr Tinkler permission to appeal but on 9 June 2023 Sir Geoffrey Vos MR, Popplewell and Snowden LJJ dismissed the appeal: see [2023] EWCA Civ 655, [2023] Ch 451. On 21 November 2023 Lord Reed, Lord Leggatt and Lord Richards dismissed Mr Tinkler's application for permission to appeal to the Supreme Court: see [2024] 1 WLR 108.

(8) The Conspiracy Claim

18. On 13 November 2020 Mr Tinkler also issued a claim against SGL, Mr Brady, Mr Ferguson and Mr Soanes for unlawful means conspiracy (the "**Conspiracy Claim**"). On 27 November 2020 Chief Master Shuman made an order by consent that all further proceedings in the Conspiracy Claim should be stayed until after the final determination of the Fraud Claim. Following the Fraud Judgment, the Defendants invited Mr Tinkler to withdraw or discontinue the Conspiracy Claim but he declined to do so and they applied to strike it out. By 1 March 2024, when I heard the application, SGL had gone into liquidation. On 17 June 2024 I handed down judgment (the "**Conspiracy Judgment**") striking out the Conspiracy Claim on the basis that it was an abuse of process: see [2024] EWHC 1490 (Ch).

(9) The Present Claim

(i) Pre-action correspondence

19. The evidence before His Honour Judge Russen QC was that Invesco Fund Managers Ltd

held 25% of SGL's shares on behalf of investors and was its largest shareholder and that Stifel was one of its brokers together with Cenkos Securities Ltd ("**Cenkos**"): see the Russen Judgment, [60], [67] and [771]. Mr Paul Hodges of Cenkos gave evidence on behalf of Mr Tinkler and Cenkos was later replaced by Canaccord. By letter dated 4 December 2020 Mr Tinkler wrote to Ms Stephanie Butcher of Invesco stating that he had arranged for a "detailed forensic review" of the disclosure provided to him in both the 2018 Claim and the ET Claim. He then stated:

> "During the review, material emails that should have been disclosed by Invesco under my Data Subject Access Request were found. I specifically refer to but not limited, emails between Matt Brazier and Stobart Group Directors. Frederick Bouverat and the Stobart Group Directors. In order to assist I understand that since 2017 Matt Brazier has been employed by Invesco as a Capital Structure Analyst. It is therefore somewhat surprising and concerning that he was agreeing wording on behalf of Invesco in respect of RNS releases that were being made by the Stobart Group Board. In respect of Frederick Bouverat and in order to assist your investigation, I invite you to consider the language used in emails and also his involvement in the outcome of the Companies AGM. I am also now aware that Mr Bouverat was instrumental in providing Land Registry searches and offering services of Invesco's solicitors Messrs Jones Day to Stobart Group in order to make wholly unfounded allegations to the Take Over Panel that I was acting as a concert party with Neil Woodford and others.
>
> In short, and in order to make my position clear, both the above employees of Invesco along with Mark Barnett stepped into the arena of the boardroom in working with the directors to secure my removal and may have conspired to damage my reputation in the public domain and also with the FCA and Takeover Panel in making unfounded and damaging allegations."

20. By email dated 24 March 2021 Mr Tinkler wrote to Ms Butcher again stating that it was now even clearer that Invesco had been involved in producing the 29 May RNS and in the AGM:

> "Messrs Clyde and Co who act on my behalf have now written to Messrs Rosenblatt (Esken formally Stobart Group's legal advisers) in respect of both the Fraud and Conspiracy claim's that have been issued and served, in order to seek permission to use the documents that were disclosed in the 2018 Proceedings that relate to Invesco. It is now even clearer since I last corresponded, the level of involvement of Mark Barnett, Frederick Bouverat and Matt Brazier in not only 29 May 2018 RNS but also the Company's AGM.
>
> Dependent upon the response received from Messrs Rosenblatt's, it will be at that point that either a formal application is made to the High Court,

> or the Letter Before Action is prepared and issued to Invesco with the documents.
>
> I have been in business for many years and thought it only right that I draw to your attention to these advanced proceedings, before a Letter Before Action is issued, and following further discovery of Invesco's involvement.
>
> I wish to draw to your attention to the history and performance of Invesco's investment in Stobart Group (now Esken) following the Board involvement of Mr Bouverat, Mr Barnett and Mr Brazier during the period May to July 2018 onwards.
>
> 1) Mr Tinklers Involvement in the company 1 September 2017 onwards:
>
> 2) Involvement of Invesco in respect of RNS announcements by Stobart Group 25 and 29 May 18 onwards:
>
> 3) Invesco's involvement in the instruction of Messrs Jones Day to act on behalf of the Board in June 2018 regarding the Takeover Panel. The representations made in order to persuade the Takeover Panel of a concert party or board control seeking position.
>
> 4) Correspondence in respect of the voting before the AGM on the 6 July 2018 and following the AGM."

21. On 6 February 2024 Mr Tinkler sent a Letter of Claim to Ms Butcher stating that he intended to make a claim for unlawful means conspiracy against IAML, Mr Bouverat, Mr Mark Barnett and Mr Matthew Brazier. He also alleged that IAML had committed a breach of Rule 9(a) of the Code. He set out his detailed case by reference to a large number of documents before stating as follows:

> "87. The current position. A Conspiracy Claim has been issued in the High Court, in respect of Warwick Brady and Iain Ferguson. That claim is currently stayed by consent and is due before the High Court on 1 March 2024. It is intended to make a "Joinder Application" in which the Court will be invited to join the executives and [IAML] to those proceedings.
>
> 88. Furthermore, the Claimant intends to make an application for permission of the Court, to use the material referred to above, and other material, the Claimant is now in possession.
>
> 89. The Claimant is confident that there is no defence to the allegations, including the failures to date of [IAML] as set out. In compliance with CPR, the Claimant is prepared to engage in ADR in order to settle this matter."

22. On 7 February 2024 Mr Tinkler also sent Letters of Claim to Mr Nick Tissot and Ms Eithne O'Leary of Stifel stating that he intended to make a claim for unlawful means conspiracy and dishonest assistance against Stifel and Mr David Arch, who is a former

employee. Again, he set out his detailed case by reference to a large number of documents before ending the letter in the same way. Paragraphs 109 to 111 of the Letter of Claim were in the same form (mutatis mutandis) as paragraphs 87 to 89 of the Letter of Claim to Invesco.

23. Finally, on 9 February 2024 Mr Tinkler sent a Letter of Claim to Mr Simon Savident of Orbitus stating that he intended to make a claim for unlawful means conspiracy and dishonest assistance against Mr Savident himself, Mr Chris de Putron, Jupiter Trustees Ltd and Jupiter Fund Services Ltd. As with the other Letters of Claim, Mr Tinkler set out his detailed case and the documents upon which he relied and paragraphs 109 to 111 were in the same form (mutatis mutandis) as paragraphs 87 to 89 of the Letter of Claim to Invesco. There is no suggestion that Mr Tinkler gave notice of the claims against Stifel and Orbitus before sending the Letters of Claim.

(ii) The Panel investigation

24. In a letter dated 18 September 2023 Mr Tinkler wrote to the Panel in relation to the conduct of SGL and suspected breaches of the Code. He alleged that the submissions made to the Panel were misleading (as he has done in the Particulars of Claim in the Present Claim). He stated as follows:

> "What I am doing separately is creating an index of all documents relevant to the points that have been made in my letters of 24 July and 10 August and providing a narrative to explain each document and the context that it has in the current submissions with respect to Stobart Group's alleged breaches. As and when each of these are completed, I will forward to you for review.
>
> Please note that these indexes and the details of the documents referred to are being provided to you on an understanding that, given the restriction in CPR 31.22, no direct action or reliance will be taken by the Panel on the basis of the index alone. They are being provided to enable the Panel to gain a full understanding of what happened to support their investigation and then, should formal action be taken, we can then apply to the court or Stobart Group Limited, for their consent to the use of the full documents, at which point we will then provide these to you. This is assuming that the Panel has not suggested an alternative route following conclusion of their current review of this point. In light of case law on this point, specifically *Marlwood Commercial Inc v Kozeny* [2004] EWCA Civ 798, I am confident that consent would be provided by the court in this instance as the public interest factor, coupled with these documents being requested by a regulatory authority, will outweigh any objections that the other side may submit.

> I will continue to identify the relevant documents and will produce indexes accordingly to the other breaches I have set out in my submissions on the 24 July and 10 August 2023 on Stobart committing frustrating actions when they were aware that an offer may be imminent, in breach of Rule 21 of the Code, these actions being transferring shares out of treasury and entering in to contracts outside of the ordinary course of the business; and purchasing of shares by members suspected of acting in concert in breach of Rule 9.1 of the Code."

25. In a Notice to Admit Facts dated 29 April 2025 Invesco invited Mr Tinkler to make a number of admissions about the use to which he had put documents disclosed in the earlier actions. Annexed to the notice was a table which contained the "index" and "narrative" which accompanied Mr Tinkler's letter dated 18 September 2023 to the Panel. The first column contained a document reference, the second column a summary of the document often quoting key extracts, the third column contained the date and time of the document and the fourth column a reference to the document in the accompanying pdf. The first column containing the bundle reference was also shaded either green or red. Green documents were those described as: "Publicly available or known to be recorded in Court". Red documents were those described as: "In disclosure but may not have been read in open court".

26. Many of the documents shaded red were also identified by a long number with the prefix "ROS". I recognise this notation from both the Fraud Claim and the Conspiracy Claim. It is a reference given to documents which Rosenblatt disclosed in the Fraud Claim. Many other documents were identified by what appeared to me to be a reference to documents in the electronic trial bundles for the Fraud Claim. Mr Tinkler did not address these issues in his answer the Notice to Admit Facts or in any of the three witness statements which he made in the Present Claim. In the absence of any evidence from Mr Tinkler, I find on a balance of probabilities that the documents given a "ROS" reference were all disclosed by SGL in the Fraud Claim and the documents bearing a trial bundle reference were all disclosed by SGL and included in the electronic trial bundle for the Fraud Claim.

27. Mr Tinkler also attached a schedule to his letter dated 18 September 2023 in which he was rather more candid about the contents of the table than in the letter itself. In the schedule he stated in terms that the documents shaded in red did not fall within CPR Part 31.22(1)(a):

> "By extracting these documents relevant to the Panel from the wider

> disclosure documents it also becomes more clear that the submission made to the Panel regards a suspected concert party between myself and others was based on no genuine concern or evidence. Invesco considered that a Panel submission with the goal to ultimately restrict myself and other dissenting shareholders from purchasing more shares to vote at the AGM, was one tactic in their wider campaign. Reviewing the documents chronologically, it is clear that the decision to make a submission to the Panel is made by Invesco and certain of the Stobart directors, and then they subsequently seek to find evidence or grounds on which to make that submission.
>
> Within the index I have highlighted in green those documents that were referred to in court and can be disclosed, and the documents highlighted red were documents not referred to and would require consent of Stobart Group or the court to be disclosed in full (please refer to the understanding in the body of the letter with which I am disclosing the document detail and overview).
>
> The narrative against each document sets out its context and relevant point for this purpose as well as an extract of the text from the document demonstrating the point."

28. Mr Tinkler did not exhibit the complete correspondence between himself and the Panel. However, I was taken to a letter dated 27 February 2025 in which he wrote to the Panel requesting that his complaint be referred to the Hearing Committee and also to the FCA. Again, it is a very long letter and refers to a large number of documents. Mr Tinkler also referred in the letter to further submissions which he had made in December 2023 and an interview on 12 November 2024:

> "4. Following the consultation regarding the proposed changes to Rule 21 of the Code on frustrating actions in July 2023, and the implementation of those changes on 11 December 2023, I revisited the additional materials I obtained in 2022. This allowed me to gain a fuller understanding of the events in this case. Based on this review, I submitted observations to the Panel in July 2023 and further submissions since that date up to December 2023, highlighting the potential risks of relaxing these rules, drawing from my experience. I acknowledge that this is a lengthy and detailed document, which was necessary to comply with Section 9(a) of the Introduction to the Code. It has also been necessary for me to reference numerous documents to support my position. Despite Mr. Evans stating during the interview that 'we have our own evidence,' none of that evidence was shared with me, leaving it unclear what evidence, if any, the Panel Executives had been reviewing other than what I was able to share with them.
>
> 5. During the recorded interview on 12 November 2024, it became apparent from the transcript that the focus of the Panel Executives seemed limited in scope, which did not allow for a full exploration of my concerns. I also note that Mrs. Shah was unable to remain for the entire interview,

> and Mr. Evans and Mr. Crawshay did not elaborate on the evidence they referenced. Given these circumstances, I believe it is inappropriate for the same Panel Executives who made the decision on 28 June 2018 to now be involved in investigating this matter. This raises concerns about impartiality, which I hope will be addressed through referrals to the Hearing Committee and the FCA."

29. Finally, by letter dated 22 April 2025 Mr Tinkler wrote to the Panel complaining that a letter dated 17 April 2025 which it had sent to him had failed to address critical evidence from the submissions which had been made to it on 9 August 2018 and 20 August 2018 (i.e. immediately after the events which are the subject matter of the Present Claim). Mr Tinkler relied on this letter in support of the stay application arguing that its contents alerted him to the need for a stay for the first time.

(ii) The Claim Form

30. On 23 May 2024 the Claimants issued the Claim Form. This was after the hearing of the application to strike out the Conspiracy Claim but before I had handed down the Conspiracy Judgment. In his first witness statement dated 27 February 2025 in answer to the Strike Out Applications ("**Tinkler 1**"), Mr Tinkler gave evidence that he issued the Claim Form on that date to avoid the risk that the claims would be barred by limitation. The Claim Form (as issued) named SGL, the Four Directors, Mr Soanes, Jones Day, Mr Ferera, Mr Brazier, Mr de Putron and Mr Arch and a number of others.

(iii) The Particulars of Claim

31. On 23 September 2024 the Claimants served the Particulars of Claim settled by counsel. All of the Defendants named in the Claim Form had been struck through apart from the Active Defendants, Mr Brazier, Mr Savident, Mr De Putron and Mr Arch (although the claims against those four individuals was later discontinued). None of those four individuals played any part in the hearing before me and Mr King did not suggest that they had been served or properly joined to the Present Claim. In the remainder of this judgment, I will assume that they have not been served and are not parties. Finally, where I refer to paragraphs in the remainder of this judgment, I intend to refer to paragraphs in the Particulars of Claim unless I state otherwise or identify a different document. In discussing the contents of the Particulars of Claim I also adopt the defined terms used in the document itself for the sake of convenience.

III. The Particulars of Claim

(1) Summary

32. The Particulars of Claim begin with a summary of the Present Claim. It is important that I set out that summary given the way in which the argument developed and, in particular, whether it would be possible to cure any defects in the Claim by amendment:

> "1. C1 and C2 claim declaratory relief relating to, and an award of damages sustained by C1 and C2 in consequence of, unlawful means conspiracy which 1.1. had as its objects the removal of the First Claimant C1 as director of the company now known as Esken Limited ("the Company") and the tarnishing of the First Claimant's reputation, and the concealment of the steps taken to achieve the same. 1.2. in fact brought about the frustration and /or termination of the contractual relationship as between the Second Claimant C2 and the Company. 1.3. infringed the rights of C1 as shareholder of and in the Company."

(2) The Facts

33. Paragraphs 2 to 20 describe the Claimants, SGL, the EBT, the Management Agreement and the Active Defendants themselves. In these paragraphs the Claimants plead much of the information which I set out in the Fraud Judgment, [38] to [53] and it is unnecessary for me to repeat it here. The Claimants then set out their case in relation to the conspiracy and its objectives in paragraphs 21 to 27:

> "**The Control Conspiracy**
>
> Control Conspiracy and Control Objectives
>
> 21. At a meeting on 1st May 2018 C1 informed the Company's chairman (Mr Ferguson, the "Chairman") that he had lost confidence in the Chairman's ability to drive the previous agreed strategy approved by shareholders in June 2017, and C1 confirmed that he would be voting against the re-election of the Chairman, and invited him to stand down at the next AGM.
>
> 22. From the facts and matters set out below, it is properly to be inferred that:
>
> 22.1. From 1st May 2018 onwards, Messrs Ferguson, Brady, Coombs and Wood as directors of the Company ("the Four Directors") conspired to take a series of steps, with the common aims of securing the removal of C1 from the Board and maintaining or securing their own positions within the Company for their own financial gain (collectively, the "Control Objectives").
>
> 22.2. From around 7th May 2018, the Four Directors set-up a campaign

> called Project Shelley, to undermine C1 as a director and to secure the re-election of Mr Ferguson ("Chairman") and cause damage to C1 and C2, with the intention of discrediting C1 and persuading shareholders to support the re-election of the Chairman. An aggressive PR campaign was instigated to deliver the Control Objectives as set out.
>
> 22.3. From around 8th May 2018 D19, and D20 came to assist the Four Directors in their pursuit of the Control Objectives, thereby joining the conspiracy to do so.
>
> 22.4. From around 16th May 2018 D10, D11 and D12 came to assist the Four Directors in their pursuit of the Control Objectives, thereby joining the conspiracy to do so.
>
> 22.5. From around 11th June 2018 D16, D17 and D18 came to assist the Four Directors in their pursuit of the Control Objectives, thereby joining the conspiracy to do so.
>
> 23. Each of Ds 10-12 and Ds 16-20 (collectively "the Participants") took steps which were intended to bring about the Control Objectives or to assist others in so doing, as further particularised below.
>
> 24. In seeking to achieve the Control Objectives, the Participants used means which were unlawful and/or improper (as particularised below) and acted so as intentionally to tarnish and/or undermine the reputation, and standing of C1. In order to facilitate or achieve this, the directors admitted they would take all possible avenues with the intention of 'winning' the AGM by having Mr Ferguson re-elected, being what D10, as the largest shareholder wanted.
>
> 25. Further, in seeking to achieve the Control Objectives, the Participants acted in a manner which it was foreseeable would have, and in fact did have, the effect of infringing the shareholder rights of C1, which was an abuse of power, and which offends the constitutional distribution of powers between the different organs of the Company.
>
> 26. It was, in turn, intended that C1 would suffer harm in consequence, and further or in any event foreseeable that he would do so, including by virtue of the envisaged loss of his shareholder value as well as position as executive director and in respect of his standing and reputation.
>
> 27. It was intended or in any event foreseeable that, upon the removal of C1, the C2 Management Agreement would be terminated, in circumstances in which C2 was controlled by C1, who remained as majority shareholder in and of the same."

34. In paragraphs 28 to 67 the Claimants set out the detailed factual basis for the Claim. Given that it is advanced solely against Invesco, Orbitus and Stifel, the Claimants focus on the 29 May RNS, Project Shelley, Mr Laycock's decision to step down from the board, Mr Tinkler's dismissal, the AGM and Mr Tinkler's removal as a director under Article 89(5). These are events which I traversed in some detail in the Fraud Judgment, [144] to [179] and for this reason I do not set out all of those paragraphs in full. However, I do set

out those paragraphs which contain express allegations against the Active Defendants:

> "*Conduct prior to 2018 AGM*
>
> 28. On or around 8th May 2018, the Four Directors agreed to mount a campaign known as Project Shelley in order to pursue, and with the express intention of pursuing, the Control Objectives. The Four Directors subsequently caused or permitted the Company to spend a sum which C1 and C2 understand to be in the region of £3m in doing so.
>
> 29. In order to achieve the removal of C1 as executive director and to secure the re-election of Mr Ferguson as Chairman of the Company, the Four Directors began to investigate how they might seek to control and manipulate the pattern of voting at the forthcoming AGM scheduled for 6th July 2018 in order to achieve the Control Objectives.
>
> 30. Between 17th and 23rd May 2018, the Four Directors met with D10 and D11 following a script and presentation with, it is to be inferred, the express intention of procuring the assistance of D10-D12 with the pursuit of the Control Objectives.
>
> 31. On 24 May 2018, the Four Directors, D19 and D20 realised that over 7 million non-votable shares were held by the Company in treasury, which had a Company capital value of around £18 million, and discussed whether these could be transferred to the EBT so they could be voted in favour of the re-election of the Chairman.
>
> 32. Notwithstanding receipt of legal advice that D16-D18 had an overriding fiduciary obligation to act in the interest of the EBT beneficiaries (of which C1 was one such beneficiary), and that such a transfer on terms requiring D16 to vote the shares in favour of the Chairman would create a conflict, and that the voting of such shares required the approval of the Chairman only, to permit the shares to be voted by the EBT, the Four Directors, acting in pursuit of the Control Objectives and with the assistance of D16-D20 executed the transfer.
>
> 33. The Four Directors enlisted the assistance of D16, D17 and D18 and that of D19 and D20 to permit the transfer of the shares and enter into an agreement with the EBT to vote the shares as directed by the directors of the Committee, who did not possess the authority to make such a recommendation, which also required full board approval to permit such a transfer to take place.
>
> 34. D16, as trustees of EBT would be well aware and should have highlighted the fact that the necessary authority was required from the Company Chairman, as set out within the Trust Deed. Despite never receiving such recommendation, the EBT went onto vote the shares as directed.
>
> 35. On 11th June 2018, the Company received confirmation from D16 that they would accept the transfer of all Treasury Shares and vote in favour of the recommendation of the Chairman, despite no such recommendation ever being received.
>
> 36. The primary purpose in doing so was for the Participants to secure

control of an extra 2.7% voting rights at the AGM. This was an Ultra Vires act done for improper purpose and in breach of the Four Directors' fiduciary duties, and was an abuse of power for collateral purpose and, thus, an unlawful act which neither Ds 16-20 might, in the normal course of business, lend their assistance to.

37. On 26th May 2018, D19 and D20 proposed the release of a RNS announcement for the purposes of seeking to diminish the standing of C1 and, with it, to further the Control Objectives."

39. On 29th May 2018, the Director Defendants, with the assistance of D19-D20, issued an RNS announcement at the request of D10-D12:

39.1. Which the Four Directors later accepted was not required for regulatory purposes but which was intended to portray the Claimant in a negative light to influence shareholder voting.

39.2. Which in fact did so.

39.3. Which did so falsely, in that it misrepresented that C1 had inter alia "referring to challenges with C1 which were not germane".

39.4. Which was published despite C1, by his then solicitors, warning the Four Directors and/or the Company that the contents of the same were inaccurate and misleading.

39.5. Which resulted in the share value of the Company dropping by 16.6%, £144 million of which C1 was an 8% shareholder.

40. Such a course of conduct and included the sending of two submissions to the Takeover Panel;

40.1. The first of which was initially drafted (by way of first draft) on or around 4th June 2018 by Leon Ferera, for Jones Day, instructed on behalf of D10 and with (it is to be inferred) the knowledge and approval of D11 and D12 acting at all times for D10. This was subsequently amended by D20 to take into account further input provided by D10 and/or Jones Day acting for D10 on 7th June 2017 and D11 on 8th June 2018.

40.2. The second submission was drafted by D19 with the input of D10.

40.3. Such submissions were placed and issued on D19's letterhead at the request of Leon Ferera acting on behalf of D10, and with the approval of D19 and D20. This was done so as to conceal the involvement of D10 and Jones Day; and instead to give the impression that such a submission originated from D19 acting as the Company broker and, in turn, from the Company.

40.4. Such submissions were misleading. Such submissions were predicated upon the contention that C1 was acting as a concert party with others to seek to exert control over the Company when in fact it was the Participants who sought to do so.

40.5. Such submissions failed to mention the role of D10 and Jones Day in instigating, preparing and assisting in the submissions without the knowledge of the full board of the Company and the Take Over Panel.

40.6. Such submissions failed to state Mr Brady had not confirmed his

intention before the full board, to stand down if the Chairman was not re-elected.

40.7. Such submissions falsely stated that Cenkos had resigned as the Company broker due to a conflict of interest. In fact, the reason for the resignation was following the issuing of the misleading 29th May 2018 RNS. Such was the concern, and with the brokers experience, Cenkos confirmed a regulatory issue arose, as being the requirement to resign, which was known by the Four Directors. Cenkos, communicated the reason directly to D10 before any submission was made to the Takeover Panel.

40.8. Such submissions falsely stated that the Board was required to address a number of challenges posed in the recent past by C1 as set out within 29th May 2018 RNS, which RNS was produced and was relied upon as part of such a submission.

40.9. Such submissions falsely stated that Mr Laycock was on sick leave when in fact he was in the office.

40.10. It is properly to be inferred that such submissions were prepared, approved and drafted with the intention and effect of preventing C1 from purchasing additional shares in the Company, and thus so as to procure or assist in procuring the Control Objectives.

41. On or around 6th June 2018, the Four Directors (or caused to be signed) and D19 and D20 agreed to a side agreement with D19 to pay an extra £10,000 per week back dated to 8th May 2018 and a £100,000 success fee, to secure the re-election of Mr Ferguson at the AGM and, thus, the Control Objectives. C1 and C2 understand and aver that the fact of a success fee was only known to the Four Directors as well as to D19 and D20, but was otherwise intentionally concealed from others, and was not presented to or in any event approved by the Board, or published in the company's annual report, something that would have been known to the Four Directors as well as to D19 and D20."

"45. It is to be inferred that the Four Directors…acting with D10-D12, who had already instructed D19-D20 to make submissions to the Take Over Panel, regarding a concert party, were acting so as to prefer their own interests over those of all shareholders to whom they owed duties, and were intent in achieving the Control Objectives. It is to be inferred that such motives, and the fact that the Four Directors' conduct constituted a breach of their duties owed to the Company and its shareholders, was known to each of the Participants."

46. On 14th June 2018, the Four Directors removed or caused the removal of C1 as an employee and director of the Company on grounds of alleged gross misconduct. The act of so doing and/or the timing of the same was intended by the Four Directors to:… 46.4. Allowing the Four Directors, D10-D12 and D19-D20, to further Project Shelley, and further promote the aggressive PR campaign, causing additional damage to C1 and C2."

"Arrangements for and in respect of voting at the AGM

50. On 19th June 2018, the Four Directors and D19-D20 discussed with

Ms. Brace (as company secretary for the Company) the possibility that Mr Tinkler's LTIPs might be withheld from him following his dismissal. Such discussions were undertaken without the involvement of either Mr Garbutt (as the Chair of the remuneration committee) or Mr Laycock (as the then CFO).

51. On 20th June 2018, the Four Directors authorised and procured the transfer of 1,715,000 Treasury shares to the EBT from the Company's treasury at a value of around £4.4m.

52. On 25th June 2018, the Four Directors authorised and procured the transfer of 5,320,425 Treasury shares to the EBT from the Company's treasury at a value of around £13.6m.

53. The transfer of the shares were authorised by the Four Directors and accepted by D16-D18 even though:

53.1. There was no requirement to transfer more than 180,000 shares in the Company to satisfy the LTIP awards which were due to vest on the 22nd June 2018; and

53.2. In any event those awards could have been satisfied direct from Treasury shares.

54. It is, in turn, to be inferred that each of the Four Directors and each of D16-D18, and D19-D20 in fact knew that there was no requirement for the transfer of such a number of shares and, in turn, that such transfers were being conducted for purposes other than to cover any need for shares to vest within the EBT and, in turn, for improper purposes, namely the pursuit of the Control Objectives.

55. On 26th June 2018, the Four Directors, with the assistance of D18, D19 and D20, who was aware of and asked to participate in the purchase, arranged the sale of 2,700,000 shares from the EBT, to shareholders known to be willing to vote at the AGM in favour of resolutions intended to achieve the Control Objectives, and to Mr Brady (who was known to be similarly willing) at a price of 236 pence per share.

56. Further D19 by D20 confirmed that the sale of the shares had taken place, and the shares had gone into "friendly hands". It is inferred this act was intended and was known to frustrating act which was intended to assist in and in fact assisted in the pursuit of the Control Objectives.

57. By letter sent by email by D17 of 5.22pm 3rd July 2018, D16 and D17 stated that it would abstain from voting in favour of or against the motion for the re-election of Mr Ferguson."

"60. On 5th July 2018, Rosenblatt produced a draft letter to be sent to the EBT in order to threaten litigation against D16 (which would necessarily involve D17 and D18 in addition) with the express intention of influencing Ds 16 to 18, as trustees of the EBT, to cause or permit the shares in the Company held in the EBT to be voted so as to secure the Control Objectives. In light of the subsequent concealment of such a letter, C1 and C2 do not know of the contents of the same nor whether this was in fact sent.

61. It is, however, to be inferred that such correspondence and communication included the threat of litigation against D16. Such correspondence reflected the existence of a course of action which such a course of action was successful, in that D16, D17 and D18 Mr De Putron D18 acceded to such demands, as set out below.

62. As a result of such conduct, Jupiter D16 confirmed on the eve of the AGM that the previous stated intention of abstaining would now change to a vote "FOR" the re-election of the Chairman. It is, in turn, to inferred that following and as a result of the application of pressure as set out above, D's 16-18 failed to exercise their independent mind and bowed to the pressure placed upon them, thereby knowingly assisting in the pursuit of the Control Objectives in circumstances in which they knew or ought to have known that this was itself unlawful.

6th July 2018 AGM

63. At an AGM of the Company held on 6th July 2018:

63.1. Mr Ferguson was re-elected as chairman of the Company's Board as a result of the passing of resolution 2 ("the Ferguson Election Vote"). Such a vote was recorded as having been passed by 154,741,139 (being 51.21% of the votes cast) in favour, with 147,426,975 votes (being 48.79% of the votes cast) against.

63.2. C1 was re-elected as a director of the Company ("The Tinkler Election Vote"). This occurred despite Mr Ferguson exercising his discretion to vote 40,426,908 shares against the resolution providing for the re-election of C1 even where shareholders had submitted proxies stating an intention to abstain from such a resolution.

64. The Ferguson Election Vote was passed at the AGM or otherwise declared to have been passed, as a result of the number of votes in favour of the relevant resolution (being resolution 2) being counted to be 154,741,139 out of 302,168,114 votes cast, and being noted to represent 51.21 % of the overall votes available. Such calculations depended on:

64.1. Counting 658,000 votes in favour of the resolution which ought not to have been counted because they had already vested in beneficiaries of the EBT ("the Overvotes").

64.2. Included in the 'For' count on resolution 2, there were 3,417,891m shares voted by the Chairman which were in fact time barred, and void, the relevant proxy form having been returned only after the deadline of 11am on 4th July 2018 for doing so had passed ("the Time Barred Proxy Votes") as set out below.

64.3. On 4th July 2018, after the deadline for the receipt of proxy votes, the Four Directors, Rosenblatt, D19 and D20 were made aware that 3,417,891m shares to be voted had been lost and not counted after the deadline for receiving proxy votes. D19 and D20 agreed to obtain a letter of representation in order that these votes could be voted by proxy by the Chairman, "FOR" the Chairman, at the AGM. D19 and D20, with this knowledge, permitted such shares to be voted, which achieved the Control Objectives, and gerrymandered the AGM vote. It is inferred that D19 and

> D20 breached their fiduciary duties owed to the Company and all shareholders when acting as the corporate broker to the Company. This share transaction itself provided the winning vote to re-elect the Chairman, without such, and this gerrymandering, the Chairman would not have been re-elected.
>
> 64.4. Included in the "For" count for resolution 2 that 2,703,720m shares that were sold to "friendly hands" from the EBT which were arranged by D19 and D20.
>
> 64.5. The inclusion of the votes from the shares improperly transferred to parties on terms requiring the recipients to vote in favour of the Control Objectives, which gave further 2.37% voting rights in favour of the Chairman, which ultimately resulted in the Chairman being re-elected.
>
> 64.6. The further actions of the Four Directors, D10-D12 and D19-D20, in the making of misleading submissions to the Take Over Panel, which restricted C1 and other dissident shareholders, in purchasing shares and protecting their property and investment.
>
> 64.7. The outcome of the AGM without the gerrymandering of the vote, and the ultra vires acts, would have recorded a different result had all these matters been declared at the time."

(3) Causation

35. The Claimants allege that the result of the AGM would have been different if the relevant facts had come to light at the time: see paragraph 64.7 (above). But they also plead a detailed case on causation. In particular, they allege that the Participants had achieved the Control Objectives by the end of July 2018 and would not have done so but for the unlawful conduct upon which they rely. They also allege that if the Participants had not achieved the Control Objectives, Mr Tinkler would have remained a director and Mr Ferguson would not have been re-elected:

> "69. Without prejudice to the generality of the foregoing, C1 and C2 note and aver that the Control Objectives would not have been achieved but for: 69.1. The termination of C1's employment and role as director with effect from 14th June 2018 and again as director from 7th July 2018. 69.2. At or in connection with the AGM 69.2.1. The transfer of shares from treasury to the EBT in excess of the numbers required. 69.2.2. The sale of 2,703,720 shares to parties who had committed to vote in favour of the re-election of Mr Ferguson. 69.2.3. The overvoting of shares in favour of the re-election of Mr Ferguson. 69.2.4. The voting of the 3,417,891 Time Barred Proxy Shares in favour of the re-election of Mr Ferguson. 69.2.5. The exertion of pressure on D16 and, in consequence, Ds 16-D18 election to permit the EBT shares to be voted in favour of resolutions which had as their aim achievement of the Control Objectives."
>
> "70. Conversely, but for the matters set out above: 70.1. C1 would have

> remained as, or otherwise been re-elected as, a member of the Board 70.2. C1 would have revealed the Control Conspiracy, and the misuse of Company funds, along with the parties involved in the providing of dishonest assistance to secure the re-election of the Chairman. 70.3. Mr Ferguson would not have been re-elected as Chairman. 70.4. Upon Mr Ferguson not being re-elected, the other non-executive directors (being Mr Coombs and Mr Woods would have tendered their resignation). C1 and C2 note, in this respect, upon the announcements made by Mr Coombs and Mr Woods, on 25th May 2018, and prior to the AGM of 6th July 2018, announcing their intention to resign as non-executive directors of the Company in the event that Mr Ferguson was not re-elected as Chairman."

36. The Claimants also allege that the termination of the Management Agreement was a result of the achievement of the Control Objectives. In particular, they allege that the Four Directors were able to support Mr Soanes because they had secured control and the strategic direction of SGL: see paragraph 73.

(4) Unlawful Means

37. The Claimants go on to allege that the Four Directors were not exercising their powers for proper purposes in removing Mr Tinkler, securing their own re-election for personal financial gain and acting without reference to the wishes of dissenting shareholders: see paragraph 74. They then plead as follows:

> "75. The unlawful acts carried out in order to achieve the Control Objectives pursuant to the Control Conspiracy included:
>
> 75.1. The Regulatory News Service (RNS) announcement on 29th May 2018 falsely portrayed the Claimant in a negative light, with the intention of influencing shareholder voting.
>
> 75.2. The submissions to the Takeover Panel which were intended to, and had the effect of, preventing C1 from acquiring further shares in the Company, such as to prevent him from obtaining further voting rights and, in turn, to seek (successfully) to achieve the Control Objectives. The submissions provided purportedly on behalf of the Company to the Takeover Panel were, in any event, misleading and inaccurate.
>
> 75.3. The pattern of the transfer of shares, as set out above, involved withholding rewards due to beneficiaries of the EBT, was done with the illegitimate aim and effect of preventing the beneficiaries instructions from voting against the achievement of the Control Objectives.
>
> 75.4. Further the pattern of the transfer of shares, as set out above, involved the transfer of Treasury shares to the EBT and or with the assistance of D16-D20, with the illegitimate intention of doing so in order that they would be voted in favour of the achievement of the Control Objectives.

> 75.5. The Four Directors together with D19 and D20, conspired to arrange the removal of C1 on 14th June 2018, as an employee and director with the illegitimate aim and effect of enabling the transfer of 1,715,000 Treasury shares on 20th June 2018, and a further transfer of 5,320,425 Treasury shares to the EBT on 25th June 2018, with the instruction they would be voted in favour of resolution 2, the re-election of the Chairman.
>
> 75.6. The transfers of 7,035,425 shares (being the aggregate total of those transferred on 20th and 25th June 2018, including 2,503,527 already held in the EBT resulted in a total number of shares held by the EBT being 9,538,952, which amounted to 2.7% of the Company's issued share capital). The transfer from Treasury to the EBT was carried out for the improper purpose of securing additional votes for the intended re-election of Mr Ferguson at the AGM, and securing the position of the Four Directors for personal financial gain.
>
> 75.7. The sale (as arranged by D19-D20) of 2,700,000 shares from the EBT to friendly related party shareholders and to Mr Brady with the illegitimate purpose of ensuring the re-election of Mr Ferguson at the AGM, and gerrymandered the vote.
>
> 75.8. The manner and deployment of the shares by way of voting at the AGM, as set out above, including by way of the overvoting of the Overvoted Shares and the voting of the Time Barred Proxy Shares was contrary to the requirements of the Guernsey Companies Act and committed with the intention and effect of ensuring the achievement of the Control Objectives. These requirements must have been known to D10-D12 and D16-D20 who all operated in a regulatory environment. D16-D18 operating in Guernsey.
>
> 76. It is to be inferred that, having been engaged and/or their assistance ought for the express purpose of providing assistance to the Four Directors as to their pursuit of the Control Objectives, each of the Participants knew of the Control Objectives, and in turn knew, or would have known, but for consciously or recklessly electing not to consider such a possibility, thereby turning a 'blind eye' to such matters, that means by which these were to be pursued did not represent the exercise by the Company or the directors of the same of their powers for proper purposes and that the means in fact adopted were otherwise unlawful, in each case as set out above."

(5) Overt Acts

38. In paragraphs 77 to 79 the Claimants then split out the particular acts of each Defendant upon which they rely in support of their case that the Active Defendants participated in the alleged conspiracy. As I understood the purpose of this section, it was to set out the overt acts of each of the Active Defendants upon which the Claimants rely to give rise to the inferences which they invite the Court to draw. Because these paragraphs largely replicate the facts and allegations which I have set out above, I set out below only those

additional allegations upon which the Claimants rely.

(i) Invesco

39. In addition to alleging that all of the Active Defendants knew (or turned a blind eye to the fact) that the Four Directors were using their powers for improper purposes and unlawfully, the Claimants also allege that Invesco knew that the contents of the 29 May RNS and the two submissions to the Panel were false:

> "77.7. D10 and Mr Ferera and Jones Day (acting as solicitors for D10) relied upon the 29th May 2018 RNS announcement in making the submission to the Takeover Panel, when it was known that the announcement contained false and misleading information. This was despite the solicitor acting on behalf of C1 speaking directly to D11 on 29th May 2018 (before the release of the RNS) pointing out the false and misleading statements. Furthermore, the company's own in house counsel also set out a document which highlighted the factual inaccuracies. Regardless, D10-D12, continued to rely upon the 29th May 2018 RNS when presenting submissions to the Takeover Panel, which were relied upon to restrict C1."

(ii) Orbitus

40. The Claimants allege that Orbitus accepted receipt of 7,035,000 shares transferred out of Treasury in breach of their statutory and fiduciary duties and the EBT trust deed. In particular, they allege as follows:

> "78.1 D16-D18 accepted receipt and custody of 7,035,000 shares transferred from the Company's Treasury in breach of their statutory and fiduciary duties and the trust deed owed to the beneficiaries, of which Mr Tinkler C1 was one, and not in accordance with the instructions they had received from the beneficiaries."

(iii) Stifel

41. The Claimants plead that Stifel produced the 29 May RNS knowing it to be partially false and with the intention of causing financial and reputational damage to Mr Tinkler. In particular, they allege as follows:

> "79.2. D19-D20 produced the 29th May 2018 RNS announcement, knowing it to be partially false and misleading, with the intention of causing substantial financial and reputational damage to C1."

(6) Dishonest assistance

42. Finally, the Claimants allege that each of the Active Defendants is individually liable for assisting the Four Directors to pursue the Control Objectives. In particular, they allege as follows:

> "80. In agreeing to act as set out about, whilst doing so in the knowledge that such acts were intended to and would in fact assist in the pursuit of the Control Objectives, which were themselves illegitimate, the assistance provided by Ds 10-12 and Ds 16-20 amounted to dishonest assistance provided to the Four Directors and/or the Company.
>
> 81. Having each joined and actively participated in the Control Conspiracy, as set out above, and having continued to do so until the Control Objectives had been achieved, and/or having provided dishonest assistance to or in support of same as set out above, each of Ds 10-12 and Ds 16-20, is/are jointly liable to C1 and C2 for the loss sustained by C1 and C2 in consequence of the Control Conspiracy."

(7) Loss

43. In paragraphs 82 to 89 the Claimants plead out the subsequent litigation in support of the losses which they claim. They assert that if the Control Conspiracy had not taken place, Mr Tinkler would not have incurred the additional expenses which he incurred on the costs of litigation. But he also makes a claim for the diminution in the value of his shares in SGL and the additional remuneration which SCL would have earned under the Management Agreement if it had not been terminated early:

> "97. Further, as a result of the Control Conspiracy C1 sustained a crystallised loss in the value of his shareholding in C1, in that: 97.1. As of early May 2018: 97.1.1. C1 owned 27,326,811 shares in the Company. 97.1.2. The market value of such shares was approximately 251p per share. 97.1.3. The market value of C1's shareholding was, in turn, approximately £68,560,176. 97.1.4. C1 in fact intended to sell down 10 million shares, having instructed the broker, to sell at a strike price of £2.90, when achievable. C1 did in fact sell shares in September 2017 at over £2.90 per share.
>
> 97.2. As a result of the Control Conspiracy: 97.2.1. C1 was required to and did sell 27,314,811 such shares in the Company, representing substantially his entire shareholding, between July 2018 and January 2020. 97.2.2. C1 was required to and in fact did so because inter alia 97.2.2.1. He required such funds to fund his conduct of the legal proceedings (as referred to above), which would not have eventuated but for the fact of the Control Conspiracy and the fact of the achievement of the Control Objectives. 97.2.2.2. He was, in turn, unable to await the attainment of a target sale

> price for such shares but was, instead, required to sell as dictated by the need for funds. 97.2.3. Further, the value of the shares in the Company decreased as a direct and foreseeable result of the Control Conspiracy and/or the steps taken therein, and/or the adverse publicity and/or market concern which arose as a result of the course of conduct involved in and/or the manner of the pursuit of the Control Objectives. 97.2.4. C1 in fact received the sum of £36,518,015 for so doing."
>
> 97.4. In turn: 97.4.1. But for the fact of the Control Conspiracy and the fact of the achievement of the Control Objectives, C1 would have received at least an additional £31,747,351 for the sale of the same, being the difference between the value of such a shareholding as of 28th May 2018 (£68,560,176) minus anticipated costs for the realisation of such a shareholding (estimated at £290,809) minus the sum of £36,518,015 in fact received; alternatively 97.4.2. In any event C1 sustained loss in the form of a loss to or a series of losses to the value of his shareholding in the Company, to be assessed.
>
> 98. Further, a result of the pursuit of the Control Conspiracy and the achievement of the Control Objectives, C2 suffered the cancellation of the 5-year Management Agreement entered into between the Company and C2 and pursuant to which C2 would otherwise have remained entitled, but for the pursuit of the Control Conspiracy and/or the achievement of the Control Objectives. The Court will be invited to assess the amount of such losses."

IV. The Law

(1) Admissions

44. In the Conspiracy Claim the Defendants relied on CPR Part 14.2(1) and admissions made by Mr Tinkler after the commencement of proceedings. In this action the Active Defendants submitted that the admissions which I found Mr Tinkler to have made in the Conspiracy Claim amounted to pre-action admissions in their favour and they relied on CPR Part 14.1 which provides as follows:

> **"14.1— Admissions made before commencement of proceedings**
>
> 14.1(1) A person may, by notice in writing— (a) admit the whole or any part of another party's case before commencement of proceedings (a "pre-action admission"); (b) withdraw a pre-action admission before commencement of proceedings, if the person to whom the admission was made agrees. (2) After commencement of proceedings— (a) any party may apply to the court for judgment on the pre-action admission; and (b) the maker of the pre-action admission may apply to the court for permission to withdraw it."

45. Mr King submitted that an admission should be clear. He also submitted that CPR Part

14.1 was only engaged where one party had set out their case before the commencement of proceedings and the opposing party had then admitted it. Mr Gledhill submitted that there was no implied limitation on CPR Part 14.1 and that Party A could rely on an admission made by Party B even though B had not set out their case in correspondence and the admission was not made to A. He gave as an example a clear admission in writing given by a claimant to a third party before the action was commenced and submitted that there was no reason why the defendant was not entitled to rely on it.

46. I agree with Mr Gledhill that there is no implied limitation on the kind of admission which falls within CPR Part 14.1. However, I also agree with Mr King to the following extent. It will be much more difficult for a party to rely on an admission of their case where it has not been set out in correspondence. Moreover, where the admission is said to be one of law or of a complex nature, it is unlikely that the Court will find that the relevant communication has sufficient clarity to fall within CPR Part 14.1 if it has not been set out clearly and addressed to a party who relies on it.

(2) Abuse of Process

47. Mr Gledhill relied on the law as I stated it in the Conspiracy Judgment, [32] to [42]. He submitted that it was not necessary to demonstrate a complete identity between the findings in the earlier proceedings and the allegations made in the new proceedings and placed particular reliance on the boxing metaphor used by Peter Jackson LJ in the Defamation Claim at [62]: "In boxing terms, the judges have scored the round and no good private or public interest is served by continuing the argument about a single punch." Mr King did not challenge any of the principles which I set out in the Conspiracy Judgment and I apply them.

48. Mr King submitted, however, that for the Claim to amount to an abuse of process it must be found that Mr Tinkler is "harassing" the Active Defendants: see *Johnson v Gore Wood & Co* [2002] 2 AC 1 at [31] and [32] (Lord Bingham). He also relied on *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748 at [41] (Longmore LJ) that it may amount to harassment to face a second action but not to face a claim for the first time. I accept that it will be rare to characterise as harassment fresh proceedings against new parties who have never faced a claim before. But Peter Jackson LJ clearly contemplated that possibility in the Defamation Judgment at [62] and the Defamation

Claim involved just such proceedings since the Four Directors were not parties to the 2018 Claim.

49. Mr King also submitted (and I accept) that there is no general principle that a party must use reasonable diligence to find out the facts relevant to a particular claim (although the timing of investigation may in some circumstances be relevant). In *Stuart v Goldberg and Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823 Lloyd LJ stated this at [59]:

> "*Failure to use reasonable diligence.* As for the relevance of a claimant's failure to use what the court might consider to be reasonable diligence in finding out facts relevant to whether he has a possible claim, it may be that this could possibly be relevant to the enquiry described by Lord Bingham, depending on the circumstances. On the other hand, it does not seem to me that there can be a general principle that a potential claimant is under a duty to exercise reasonable diligence, not yet having brought proceedings asserting a particular claim, to find out the facts relevant to whether he has or may have such a claim. Moreover, I do not see how it can be relevant at all that the claimant may have failed to use due diligence in attending to his own interests at the time of the transaction or the events giving rise to the claims asserted. Unless, on the merits, that is a complete and inevitable defence to the claim, it seems to me to be entirely irrelevant to the enquiry which is necessary under *Johnson v Gore Wood*. Nothing in Sir James Wigram's observations in *Henderson v Henderson* supports that. That, however, is the context of the Master's comments on lack of reasonable diligence in paragraphs 70 and 72. If relevant at all, an enquiry as to any suggested lack of diligence on the part of the claimant would have to involve considering the circumstances of the particular claimant, including what knowledge he did have of the facts at any relevant stage, in order to decide whether he knew enough to put him on enquiry so as to try to find out more. In this context, as generally, it is also relevant that the onus is always on the defendant to show that the claimant's conduct is an abuse of process."

50. Mr King then made a series of submissions all of which I accept. He submitted that it will not normally be an abuse to bring a new claim where the claimant did not have all of the relevant information at the time of the earlier claim: see *Walbrook Trustees (Jersey) Ltd v Fattal* [2009] EWCA Civ 297, [2010] CP Rep 1 at [29] (Arden LJ). He also submitted that just because the claimant could have pleaded a claim at the same time as the earlier claim it does not follow that they should have done so: see *Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA* [2018] EWCA Civ 2025 at [46] (Sales LJ). Finally, he submitted that a failure to comply with the *Aldi* guidelines does not automatically result in the claim being struck out and the Court should consider whether a less draconian sanction is merited. He cited as an example *Otkritie International*

Investment Management Ltd v Threadneedle Management Services Ltd [2017] EWCA Civ 274.

51. For all of these reasons, therefore, it seems to me that the critical question in the present case is whether the Present Claim amounts to a collateral attack on any of the earlier decisions. If it does not, then it is difficult to see how it can be a *Henderson v Henderson* abuse to pursue the claim against the Active Defendants. Likewise, there is no general principle which required Mr Tinkler to bring his claims against the Active Defendants at the same time as the claims against SGL itself or the Four Directors (even if it involves the Four Directors being required to give evidence about the same matters yet again).

52. On the other hand, Mr Tinkler cannot avoid a finding that the Present Claim is a collateral attack on earlier decisions simply because it is made against different Defendants. Mr Temple cited *Elite Property Holdings Ltd v BDO LLP* [2019] EWHC 1937 (Comm) which provides a very useful illustration of this proposition. In that case, the Court of Appeal struck out a claim for conspiracy against Barclays Bank plc and the claimant brought a second claim against BDO. Nicholas Vineall QC (sitting as a Deputy High Court Judge) accepted that there was no principle of law that required co-conspirators to be sued together and held that there was no breach of the *Aldi* guidelines: see [64] to [74]. However, he struck the claim out as a collateral attack at [79] to [82]:

> "79. The fact that a previous claim was struck out (rather than having the issues decided at trial) is no bar to the second claim being struck out as an abuse (see *Panton & Anor v Vale of White Horse District Council & Anor* [2020] EWHC 167 (Ch)).
>
> 80. The first of Mr Spalton's points was that the Court of Appeal has found there was no unlawful act. I am not persuaded that that is correct. In my view the Court of Appeal did not decide whether Judge Waksman had been correct to decided that there was no prospect of showing the existence of exceptional circumstances: see per Asplin LJ at [68]. I find it hard to see that if a point has been appealed against, and that appeal was not resolved, it can be an abusive collateral attack to take the point in subsequent proceedings.
>
> 81. But I agree with Mr Spalton that the Court of Appeal upheld Judge Waksman's finding that there was no real prospect of making good an allegation that BDO combined with Barclays to use unlawful means: see per Asplin LJ at [60] and Nugee J at [73].
>
> 82. In those circumstances it seems to me that the new claim, insofar as it relies on the same conspiracy as was alleged in the Barclays claim, is quite clearly a collateral attack on that finding. Indeed it is only collateral at all

> because BDO was not a party to the Barclays claim: that aside, the new claim is a full frontal attack on a critical finding made against Elite and Decolace in the earlier Barclays claim. This is therefore in my view a paradigm case of a collateral attack and it clearly renders the new proceedings an abuse of process unless the position can be saved by one or other of Mr Mayes' two points."

53. The two points to which the judge was referring in this passage were, first, that new documents had become available and, secondly, that the new claim was quite different from the earlier claim. The judge rejected both arguments at [83] to [87] and it is also instructive to consider his reasons for rejecting the second point:

> "86. Mr Mayes' second point was that the new claim is materially different to the Barclays claim. He suggests that the unlawful means alleged go beyond those alleged in the Barclays case.
>
> 87. I reject this submission for two reasons. First, I do not accept that the new claim does adequately plead any unlawful means beyond the breach of the undertaking, I have already quoted paragraph 44 of the POC in the instant action, and it seems to me that the only fair reading of the pleading is that that sets out what is being alleged as unlawful means. The only thing it pleads is breach of the undertaking. Secondly, the earlier paragraphs which Mr Mayes says expand the unlawful means are paragraphs which alleged that the BDO report was deliberately inaccurate. (paragraphs 13 to 17 of the POC). Even if that was part of the pleading of unlawful acts, and were true, I do not see that that has any bearing on the question of whether there was in fact a conspiracy or agreement between BDO and Barclays: it is the absence of any such agreement which is the critical feature of the CA decision and also therefore the critical feature in the collateral attack point."

(3) Conspiracy

54. There was no real dispute about the ingredients of the tort of unlawful means conspiracy. Mr Tinkler was required to prove a combination between the Active Defendants to use unlawful means with the intention to injure him and which caused him loss. I add the following observations about each ingredient:

(1) *Combination.* The claimant must prove a combination or understanding between two or more people aimed at another person to use unlawful means. It is unnecessary to establish a binding agreement and a tacit agreement or understanding will be sufficient: see *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 404b-c (Buckley LJ).

(2) *Intention to injure*. The claimant must prove that the defendant had the relevant intention although it is not necessary to prove that it was the sole or predominant intention and it is sufficient that the defendant intends to advance their economic interests at the expense of the claimant's interests: see *Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300, [2021] Ch 233 at [154] (Arnold LJ).

(3) *Unlawful means*. The claimant must prove that one or more defendants committed unlawful conduct pursuant to the combination. The concept of unlawful means is wide and extends to common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations and also breaches of confidence. Indeed, it embraces all acts which a defendant is not permitted to do by the civil or criminal law: see *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at [150] and [162] (Lord Hoffmann). Moreover, it is not necessary to show that the unlawful acts or conduct is actionable by the claimant: see *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174.

(4) *Causation*. The unlawful act must be "indeed the means" by which the claimant suffers loss and damage. In *Total Network* (above) Lord Walker stated that the concept of unlawful means includes both crimes and torts "provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it)." See also *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19, [2020] AC 727 (SC) at [14] (Lords Sumption and Lloyd-Jones).

(4) Amendment

55. Mr King submitted (and I accept) that where a statement of case is found to be defective, the Court should normally give the relevant party an opportunity to cure the defect by amendment rather than striking it out. In *Alton v Powszechny Zaklad Ubezpieczen* [2024] EWCA Civ 1435 Popplewell LJ stated as follows at [25]:

> "The question whether the defect in the pleading could be cured was simply whether a pleading could properly be formulated to advance a claim against PZU which had a real prospect of success. That would not require it to be shown that there was a cause of action which was bound to succeed, but merely one which was arguable in the sense that it had a real, as opposed to fanciful, prospect of success. This is the merits test for striking out a statement of case under CPR 3.4(2)(a), for reverse summary

> judgment, and on an application to amend: see *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd*. [2021] EWCA Civ 33 [2021] 3 All E.R. 978 at [16]-[18]."

56. The critical question, however, which arises out of this passage (at least for present purposes) is whether a pleading could be properly formulated which had a real prospect of success. In *Alton* (itself) counsel had not put a draft of an amended pleading before the Court. However, this was a personal injury claim and counsel had identified the proposed amendments with sufficient clarity: see [11]. Moreover, it is clear from his judgment that Popplewell LJ considered the only real objection was that the claimant had not identified the relevant provision of Polish law which would govern the cause of action: see [25] to [34].

(5) CPR Part 31.22

57. CPR Part 31.22 provides that a party to whom a document has been disclosed may use that document only for the purposes of the proceedings in which it is disclosed subject to three clear exceptions:

> "31.22— **Subsequent use of disclosed documents and completed Electronic Documents Questionnaires**
>
> 31. 22 (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.
>
> (3) An application for such an order may be made—
>
> (a) by a party; or
>
> (b) by any person to whom the document belongs."

58. Mr King submitted that the burden of proving misuse of information rested on the Active Defendants and he cited *Barings plc v Coopers & Lybrand* [2000] 1 WLR 2353 for that

proposition. I do not accept Mr King's submission. In my judgment, where a party has commenced new and unrelated proceedings in breach of the collateral use restriction in CPR Part 31.22, the party disclosing them ought to be entitled to an injunction restraining any further misuse unless the party to whom they were disclosed can prove that they come within any of the three exceptions. This is a normal application of the principle that he who asserts must prove: see *Phipson on Evidence* 20th ed (2022) at 6—06.

59. This conclusion is also consistent with authority. In *Lakatamia Shipping Co Ltd v Su* [2020] EWHC 3201 (Comm), [2021] 1 WLR 1097 Cockerill J set out a number of principles which are relevant to the application of the rule. She explained at [47] that there is a public interest behind the prohibition on the collateral use of documents. She continued at [52] to [54] and [59] to [61]:

> "52. There are a few further principles which were not in issue in that case, but which are material for the purposes of the case before me.
>
> 53. The first is that the burden is on the party making the application to demonstrate cogent and persuasive reasons for allowing the collateral use sought. In *Crest Homes plc v Marks* [1987] AC 829, 860 Lord Oliver of Aylmerton stated that the court would not permit the use of disclosed documents for a collateral purpose "save in special circumstances and where the release or modification would not occasion injustice to the person giving discovery".
>
> 54 Secondly, what constitutes "use" of a document for the purpose of CPR 31.22 is very broad – perhaps more so than most litigators might think. On one view the court's permission is required even to review the documents. In truth this is an aspect of the drafting which is difficult. However the courts have not reacted to that difficulty by adopting a laissez faire attitude. In *IG Index plc v Cloete* [2015] ICR 254, Christopher Clarke LJ emphasised that the restriction extended not only to the documents but to the information contained therein, and (at para 40) that the restriction extended to: "(a) use of the document itself e.g. by reading it, copying it, showing it to somebody else (such as the judge); and (b) use of the information contained in it. I would also regard "use" as extending to referring to the documents and any of the characteristics of the document, which include its provenance."
>
> "59. On the basis of these authorities it seems that:
>
> (i) Absent some provision in the relevant order, doing anything other than realising, in the course of review for the purposes of the proceedings in which documents are disclosed, that a document or documents would be relevant to other proceedings actual or contemplated, may constitute a collateral use.
>
> (ii) The best course is therefore to seek permission for collateral use to review as soon as the issue is identified.

> (iii) It would then be necessary to apply for permission for collateral use to deploy the documents if a (permitted) review concluded that it was desirable to use them.
>
> 60. Moving on from the more difficult aspects of this area, it seems to be quite clear (were it not self-evident) that using information and/or documents from one set of proceedings to threaten a third party falls squarely within the scope of the restriction on collateral use (see, for example, Birss J in *Grosvenor Chemicals Ltd v UPL Europe Ltd* [2017] EWHC 1893 (Ch) at [162]).
>
> 61. What happens if this proper course is not taken? The answer is that the court has a jurisdiction to grant retrospective permission, but will exercise it only in limited circumstances."

60. *Lakatamia* (above) is authority for the proposition that CPR Part 31.22 prohibits a party from doing anything other than realising, in the course of review for the purposes of the proceedings in which documents are disclosed, that a document or documents would be relevant to other proceedings actual or contemplated: see [59](ii). Given the wide scope of the restriction, only the party to whom the relevant documents have been disclosed will know whether they have committed a breach of the restriction and the extent of the misuse. It would undermine both the reach and the effect of the rule if the disclosing party had the burden of proving that misuse.

61. Further, it is clear from *Lakatamia* that if there is any doubt whether the use of documents would amount to a breach of the collateral use restriction, then it is incumbent upon the party relying on the documents to apply to the Court. Indeed, if that party does commit a breach of the collateral use restriction and does not make such an application, there is a real risk that the Court will not grant retrospective permission (whether or not permission might have been granted prospectively). In those circumstances, it is simply not open to a party whose use of documents has been challenged to give a forensic shrug of the shoulders and put the burden on opposing parties to prove a breach of the restriction.

62. Finally, *Barings* (above) does not provide authority for the proposition which Mr King advanced. In that case Lord Woolf MR stated that once it is clear that documents have been put before the Court, the burden then shifts to the opposing party to prove that they have not been read by the judge or referred to at a hearing: see [53]. Buxton LJ helpfully explained the rationale for the shift in the burden of proof in *Lily Icos Ltd v Pfizer Ltd (No 2)* [2002] EWCA Civ 2, [2002] 1 WLR 2253 at [8]:

> "First, there are taken to fall under the rule certain categories of document, in particular those coming within the pre-reading of the judge. It does not have to be established that the judge has actually read the documents: once the category is established, it is for a party alleging that they have not in fact been read to establish that fact, something that has to be achieved without inquiry of the judge: see *Barings v Coopers & Lybrands* [2000] 1 WLR 2353, 2367, para 53. Second, it therefore follows that not everything that is disclosed or copied in court bundles falls under this rule: the *Connaught* approach is restricted to documents to which the judge has been specifically alerted, whether by reference in a skeleton argument or by mention in the "reading guide" with which judges are now provided at least in patent cases. Third, since the *Connaught* approach is based upon the assumed orality of a trial, documents, however much pre-read by the judge, remain confidential if no trial takes place, but the application is, for instance, dismissed by consent, albeit by a decision announced in open court: see *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498."

63. I hold, therefore, that in a case where a party deploys disclosed documents in later and unrelated proceedings, the burden is on that party (if challenged) to prove that those documents fall within one of the exceptions set out in CPR Part 31.22(1)(a), (b) or (c). If the party deploying the documents can establish that the documents were referred to in the judge's reading list or included in other Court documents or bundles but not read out in Court, then the burden shifts to the party challenging the use of the documents to prove that the judge did not read or rely on them.

64. Mr Gledhill also submitted that an action based on a document used in breach of the collateral use restriction will ordinarily be struck out and he cited Matthews & Malek Disclosure 6th ed (2023) at 19—61. Mr King challenged that proposition and relied on the general proposition that the Court may decline to strike out a claim even if it is or involves an abuse of process. For reasons which I briefly explain, I prefer Mr King's submission on this issue and I hold that it does not follow automatically that a breach of the collateral use restriction should lead to the subsequent proceedings being struck out and that the Court must weigh up the competing considerations (including the public interest in the preservation of confidentiality and ensuring compliance with the Court rules).

65. Matthews & Malek (above) cite a number of authorities for the proposition that an action based on a breach of CPR Part 31.22(1) should ordinarily be struck out including *Miller v Scorey* [1996] 1 WLR 1122. That case was decided before the introduction of the Civil

Procedure Rules and the question was whether the Court should strike out the action because the plaintiff had used documents in breach of the implied undertaking to the Court. Although Rimer J held that there had been a breach of the undertaking and struck out the action as a contempt of court, he did not consider that this followed necessarily and went on to carry out a balancing exercise. He stated as follows at 1133C-H:

> "I do not find it necessary to decide whether I have a jurisdiction to grant the plaintiffs a retrospective leave. It may be that the court does have some such jurisdiction but, if so, it seems to me that the circumstances in which it would be proper to exercise it would be rare. It is one thing to release a party from an undertaking to the court so as to permit him to do in the future that which he has been prevented from doing in the past. It is another thing for the court to find, as I have, that a party has abused the process of the court by his breaches of an undertaking to it and for it then to give that party a retrospective release from the undertaking so as to wipe away the abuse of the process which he has committed.
>
> If I do have the jurisdiction, I can anyway see no good reason to grant any such retrospective leave. Undertakings of the present sort are important ones. They have been the subject of considerable discussion in the reported cases over recent years and their nature and effect are, or should be, well known to practitioners. It seems to me that if, as I have found, the prosecution of the 1995 action to date has involved an abuse of the process then, in a sense, that finding by itself suggests that the action should be struck out.
>
> I do not, however, consider that that result must inevitably follow. If, in principle, I considered it just to allow the plaintiffs to use the discovered documents for the purposes of a separate action raising the same claims as the 1995 action, then, absent any special considerations pointing in a different direction, there would in my view be much to be said for declining to strike out that action and for giving leave to the plaintiffs to make use of the documents for its further prosecution. Such an order would, no doubt, amount to a de facto validation of what had happened to date, although the court could perhaps reflect its disapproval of that by the making of appropriate costs orders. The alternative course would be to strike the action out, with the usual orders as to costs, but to give leave to the plaintiffs to start a new like action. The latter course is one which would no doubt visit a greater penalty on them and it may be that, in appropriate cases, it would be the right type of order to make. In the circumstances of the present case, however, I would, in principle, subject to the special consideration to which I shall come, favour the former alternative, which would be likely to achieve both an overall saving of costs and the prospect of an earlier trial of a proper claim."

66. In my judgment, the approach which Rimer J adopted in *Miller v Scorey* should also be applied to breaches of the collateral use restriction in CPR Part 31.22. Thus, where a party issues a Claim Form and advances a case in their Particulars of Claim by relying

on documents disclosed in earlier proceedings which do not fall within any of the exceptions, then it is open to the Court to strike out the claim. But in deciding whether to do so, the Court should carry out a balancing exercise weighing up the prejudice to each party and considering whether an alternative sanction is appropriate.

V. CPR Part 14.1

67. In the Conspiracy Judgment, I held that Mr Tinkler had made a clear and unequivocal admission that it was an abuse of process to pursue the Conspiracy Claim, that he was bound by that admission and that he was not permitted to withdraw it: see [45] to [59]. I set out the admissions themselves at [11] to [16]. Mr Gledhill submitted that those admissions extended to the Present Claim. He submitted that they could not have been literally limited to the Conspiracy Claim and that if Mr Tinkler had discontinued the Conspiracy Claim and issued a Claim Form against the same Defendants in exactly the same terms, then his admissions would have extended to that new claim. By parity of reasoning, so he argued, the admissions extended to the Present Claim. He also relied on the Letters of Claim as evidence that Mr Tinkler intended to join the Active Defendants to the Conspiracy Claim and would have done so if it had not been struck out.

68. Attractively though Mr Gledhill advanced these submissions, I do not accept them. The admissions were made in the context of the Fraud Claim and expressly limited to the Conspiracy Claim. I held that the purpose of that claim was to preserve Mr Tinkler's ability to recover costs and consequential losses from SGL, the Four Directors and Mr Soanes if the Fraud Claim was successful and the Russen Judgment was set aside: see [48]. In substance, Mr Tinkler promised not to pursue the Conspiracy Claim to recover those costs and losses if the Fraud Claim was successful. In my judgment, he did not make a similar promise to the Active Defendants and there was no rationale for him to do so in the context of the Fraud Claim. I dismiss Stifel's application to strike out the Claim Form on the basis of admissions.

VI. Abuse of Process

(1) Combination

(i) The pleaded case

69. Paragraph 22.1 alleges a combination between the Four Directors to secure the Control Objectives and paragraph 22.2 alleges that they instigated Project Shelley to "deliver" them. In my judgment, this amounts to a collateral attack on the Russen Judgment for the reasons which I gave in the Conspiracy Judgment, at [101], [102] and [104]. It is correct to say that Mr Tinkler did not allege an unlawful means conspiracy against the Four Directors at the trial of the 2018 Claim. But His Honour Judge Russen QC recorded Mr Tinkler's case that there was "an orchestrated plan, described as "Project Shelley", by which the Four Directors aimed to secure Mr Ferguson's appointment": see [769]. He also rejected Mr Tinkler's case that "they acted for the improper purpose of retaining their control of the Company and making it more likely that Mr Ferguson would be elected": see [904].

70. Paragraphs 22.3 to 22.5 allege that each of the Active Defendants joined the Control Conspiracy between 8 May 2018 and 11 June 2018. There is no separate allegation that the Active Defendants conspired with each other to use unlawful means to achieve the Control Objectives and, in my judgment, these allegations are parasitic upon paragraphs 22.1 and 22.2. It follows that if those paragraphs are struck out, then the following three paragraphs fall away. In this context, it is important to note that paragraphs 22.3 to 22.5 are pleaded as a matter of inference. If there was no Control Conspiracy to join, then no inference can be drawn that the Active Defendants joined it. For this reason, therefore, I strike out the entirety of paragraph 22.

71. Mr King advanced two ways in which Mr Tinkler might save the allegation of combination. The first way was as follows. In an exchange with the Court, he argued that the facts underlying paragraphs 22.1 and 22.2 were true (or, at the very least, arguable). The Four Directors had the Control Objectives whether or not they used unlawful means to achieve them. He argued, therefore, that it was unnecessary for Mr Tinkler to challenge His Honour Judge Russen QC's findings that the Four Directors themselves had not acted unlawfully and in breach of the proper purpose rule (save to a limited extent). He submitted that it was only necessary for Mr Tinkler to allege an agreement between the Four Directors in order to pursue his case against the Active Defendants on the basis that they themselves acted with unlawful means.

72. Mr Temple argued that this would be a very odd conspiracy indeed. On this hypothesis, Mr Tinkler's case was that the Four Directors agreed to pursue lawful objectives but that

the Active Defendants used unlawful means to assist them. Both Mr Temple and Mr Gledhill also argued that such an allegation had no real prospect of success because it would be impossible for Mr Tinkler to demonstrate that the isolated unlawful acts could be "indeed the means" by which harm was inflicted upon him. Again, on this hypothesis, Mr Tinkler suffered damage as a consequence of the lawful acts of the Four Directors in removing him and any unlawful conduct which the Active Defendants committed (and which they denied) was purely incidental.

73. After some reflection, I reject Mr King's submission. In my judgment, paragraphs 22.1 and 22.2 amount not just to a collateral attack on the findings of His Honour Judge Russen QC in relation to the lawfulness of the Four Directors' conduct but also his findings of primary fact. The judge found that Mr Tinkler had committed breaches of his own fiduciary duties and that the Four Directors regarded his actions as an attempted coup and responded to Mr Tinkler's conduct by removing him. He also made the following findings in the Russen Judgment, [772] to [773] and [777]:

> "772. It was argued on behalf of Mr Tinkler (picking up phrases that had been used by one or more of the Four Directors in evidence) that the majority had seriously mischaracterised what had been his perfectly constitutional and proper proposal that shareholders should vote on Mr Ferguson's directorship as an "*attack on the Company*" and a "*coup*". His counsel submitted that the suggested justification of their actions involved, on that basis, wrongly equating the re-election of Mr Ferguson with "*the survival of the Company*" and wrongly adopting the position that they were duty bound or at least entitled to "*fight like tigers*" to ensure his re-election.
>
> 773. In the light of my findings under Issue 3, I cannot accept Mr Tinkler's argument that the Four Directors' characterisations of his actions were misconceived. Contrary to his counsel's protest that "*there was no attack on the Company, or indeed on the Board*", he had set about trying to undermine the Board from the outside. He did so without even properly airing with any of his co-directors such concerns as he may have had, beyond that of his personal under-remuneration, and which might have been germane to the question of whether or not Mr Ferguson should remain in office. Once he had been talked out of his earlier idea of stepping down from the Board, most obviously by Mr Jenkinson, he appears to have been more willing to discuss any strategic plans he might have had for the Company with one or more of Messrs Jenkinson, Whawell, Woodford and Day, rather than his co-directors on the Board."
>
> "777. In these circumstances, where Mr Tinkler had led Mr Ferguson to believe in January 2018 that he was going to discuss with shareholders the timing of his stepping down from the Board but instead had set about breaching his duties in the way established under Issue 3 above, I think the

> Four Directors were justified in believing they were facing the start of an attempted coup. And, as Mr Coombs put it, they were addressing a situation of chaotic destabilisation within the Company that Mr Tinkler had brought about."

74. I accept that the conclusions which the judge set out at [777] were not expressed as findings of primary fact. But this is because they were intended to be general comments which framed the specific findings which he made in relation to Trial Issue 4 (i.e. whether the Four Directors were acting in breach of their fiduciary duties). I did not deal with Project Shelley at the Fraud trial because Mr Tinkler was refused permission to amend to rely on them: see the Conspiracy Judgment, [58]. But in refusing him permission, Bacon J held that "the involvement of Stifel was squarely addressed in the 2018 proceedings and referred to at numerous points in the judgment". She, therefore, reached the same conclusion which I have reached, namely, that His Honour Judge Russen QC addressed and dealt with Project Shelley in the Russen Judgment.

75. Furthermore, at the trial of the Fraud Claim I was also asked to find that by the start of 2018 Mr Brady had begun to devise a plan to remove or otherwise neutralise Mr Tinkler and I found against Mr Tinkler on this issue after a detailed assessment of the witnesses and an examination of the facts: see [222] to [229] and [255]. In my judgment, paragraphs 22.1 and 22.2 also involve a collateral attack on my finding of primary fact. Mr Tinkler will be unable to plead and prove that the Four Directors combined together to achieve the Control Objectives without challenging my assessment of the witnesses and that finding of fact. As Mr Gledhill pointed out Mr Brady has already given evidence about the events of January 2018 to July 2018 four times and he would have to do so again (especially if the Four Directors would be joined as third parties to a contribution claim).

76. Finally, it is impossible in my judgment to divorce the allegations in paragraphs 22.1 and 22.2 from the allegations of unlawful conduct by the Four Directors because they are so closely bound up together. Even if I were prepared to allow the Claim to proceed, it would need substantial amendment to excise the following allegations of wrongdoing against the Four Directors (or to limit them significantly so that they are consistent with the findings of wrongdoing made by the judge):

    (1) Paragraphs 32 to 36 contain the allegation that the transfer of the Treasury Shares (as defined) was ultra vires and that the Four Directors authorised the transfer for

an improper purpose and in breach of their fiduciary duties.

(2) Paragraph 45 contains the allegation that the Four Directors preferred their own interests to their duties to shareholders in relation to the submissions to the Panel and that the fact that this constituted a breach of their duties was known to each of the Active Defendants.

(3) Paragraphs 50 to 54 contain the allegation that the Four Directors authorised the two transfers of shares to the EBT on 20 and 25 June 2018 for improper purposes and that Orbitus and Stifel knew that there was no requirement for the transfer of those shares.

(4) In paragraph 74 Mr Tinkler pleads that the unlawful means by which the Four Directors themselves achieved the Control Objectives was by exercising their powers for improper purposes.

(5) In paragraph 75 Mr Tinkler pleads that the Active Defendants knew or turned a blind eye to the fact that the means by which the Control Objectives were pursued did not represent the exercise by the Four Directors of their powers for proper purpose and that the means which they adopted were unlawful.

(ii) Amendment

77. The second way in which Mr King submitted that Mr Tinkler could save the Claim was by amending to plead that the Active Defendants conspired with each other to achieve the Control Objectives rather than joined a conspiracy in which the Four Directors were the leading players. He submitted that Mr Tinkler had trailed this case in paragraph 40.4 by alleging that the Active Defendants were members of a concert party who committed breaches of the Code and misled the Panel.

78. Mr Gledhill submitted that it was far too late to give Mr Tinkler permission to amend. Mr Temple also argued that it would not assist Mr Tinkler to advance such an allegation because the remedy for the breach of Rule 9 was to make an offer to purchase Mr Tinkler's shares and this was the very last thing which Mr Tinkler would have wanted because it would have given him less, and the Four Directors more, influence over the outcome of the AGM. I accept those submissions and, in my judgment, it is not

appropriate to give Mr Tinkler an opportunity to amend at this late stage for the following reasons:

(1) On 20 November 2024 Invesco and Stifel issued and served their Strike Out Applications to strike out and on 3 December 2024 Orbitus issued and served its Strike Out Application. Mr Tinkler has had over six months to consider and, if necessary, formulate the necessary amendments to the Particulars of Claim. Moreover, there is no reason why he could not have done so on a protective basis. But he chose not to and before the hearing of the Strike Out Applications, he gave no indication that he intended to make such an application.

(2) There is no application or draft of the Amended Particulars of Claim before the Court. Given that Mr Tinkler issued and served the Claim Form at the very last possible date before the limitation period expired, this is by any standards a stale claim. He has not put any evidence before the Court to justify granting him further time or indulgence to reconsider his case.

(3) But in any event, it would be necessary for Mr Tinkler to demonstrate on any application for permission to amend that the amendments have a real prospect of success. In the absence of properly formulated amendments and my further conclusions (below), I am not satisfied that he can do so. Moreover, I am not prepared to take it on trust in the same way as Popplewell LJ was prepared to do in *Alton v PZU* (above). That was a relatively simple case and this is a complex one involving serious allegations of wrongdoing.

(4) I give two important examples of the hurdles which Mr Tinkler will have to overcome. First, there is no suggestion that Orbitus had any direct communication with Invesco or Stifel or any involvement in the submissions to the Panel. Secondly, Mr King did not explain how Mr Tinkler would meet Mr Temple's point that if the Active Defendants conspired to commit a breach of Rule 9, this was not indeed the means by which Mr Tinkler suffered a loss and was purely incidental.

(5) Moreover, it was common ground that the limitation period has now expired. It will be necessary, therefore, for Mr Tinkler to apply to substitute a new claim against the Active Defendants under CPR Part 17.4(2) for the claim against the Four Directors and to satisfy the Court that it arises out of the same or substantially

the same facts as are already in issue. In *Alton v PZU* the Court at first instance accepted that it was arguable that this test was met. But I am not satisfied that Mr Tinkler has any real prospect of obtaining permission given that the only current allegation of a separate combination between the Active Defendants is the passing reference in paragraph 40.4.

(6) Finally, Mr Tinkler made no application under CPR Part 31.22(b) for permission to use any documents disclosed in the Fraud Claim for the purposes of considering whether to apply for permission to amend. For the reasons which I set out below, I consider that he will require permission before he can do so. Moreover, given that I have found the existing Claim to be abusive and I am satisfied that Mr Tinkler's decision not to apply for permission under CPR Part 31.22(1)(b) was a considered one, I consider it unlikely that I would be prepared to grant permission.

(iii) Consequences

79. Mr Gledhill submitted that if the Court struck out the combination allegation, then the whole Claim fell away. He confirmed in oral submissions that this was not a question of pleading. What I understood him to mean by this submission was that once the Court had decided that it was not open to Mr Tinkler to pursue the Control Conspiracy allegations against the Four Directors and the references to the Control Conspiracy were struck out or excised from the Particulars of Claim, then the Claim was incoherent and could not proceed.

80. I accept that submission. Indeed, it can be tested very simply. In paragraph 1 the Claimants summarise the Claim by stating that they claim declaratory relief and damages as a consequence of an unlawful means conspiracy which had as its object Mr Tinkler's removal and the concealment of the steps taken to achieve it. If that is what the Claim is about, then it makes no sense at all once the allegations of conspiracy against the Four Defendants are struck out. As I have stated, no separate conspiracy is alleged against the Active Defendants and the Claimants' case against them is that they assisted the Four Directors to achieve that object by committing unlawful acts and knowing that object and with the intention of bringing it about.

81. Furthermore, the Claimants' case against the Active Defendants is based on a series of inferences that they acted for the purpose of achieving the Control Objectives. The

Claimants allege that this inference should be drawn about the submissions to the Panel and about the transfer of shares: see paragraphs 40.10, 54 and 61. They also allege that it must be inferred that the Active Defendants were engaged for the "express purpose" of assisting the Four Directors to achieve the Control Objectives and either knew that they were acting unlawfully or turned a blind eye to this fact: see paragraph 76. Again, once the Control Conspiracy allegation against the Four Directors is struck out, there is no basis for drawing any of those inferences against the Active Defendants.

82. Finally, the Claimants allege that the Active Defendants are liable for dishonest assistance: see paragraphs 77.15, 78.7 and 80. But if it is not open to Mr Tinkler to advance a claim that the Four Directors conspired together to achieve the Control Objectives, the allegation that the Active Defendants assisted them to achieve those objectives makes no sense at all. For these reasons, therefore, I am satisfied that it is appropriate to strike out the Claim as an abuse of process because it is a collateral attack on the findings of the Court in both the Russen Judgment and the Fraud Judgment. However, if I am wrong, I go on to consider the remaining elements of the unlawful means conspiracy and whether they are also abusive or have any real prospect of success.

(2) Intention to injure

83. I turn to the second element of the cause of action. The Claimants do not advance a separate allegation that the Active Defendants intended to injure either Mr Tinkler or SCL and the second element of the cause of action is contained in paragraph 76. Again, this makes sense if the Claimants are permitted to advance the claim that the Four Directors combined together in the Control Conspiracy. The Claimants would have an actionable claim against the Active Defendants because they were aware of – and intended to bring about – the Control Objectives in assisting the Four Directors. But once the Control Conspiracy allegation against the Four Directors is struck out, there is no pleaded basis for drawing the inference that the Active Defendants had the relevant intention. In my judgment, therefore, an analysis of the second element of the cause of action reinforces my conclusion that the Claim is incoherent once the Control Conspiracy allegation is struck out.

84. Furthermore, and as Mr Gledhill submitted, there is no allegation that the Active Defendants were aware of SCL or the Management Agreement or intended to injure SCL.

Mr King did not address this point at all in his Skeleton Argument or in his oral submissions. The Claimants allege that it was foreseeable that the Management Agreement would be terminated if Mr Tinkler was removed and that SGL, the Four Directors and Mr Soanes were motivated to terminate it once they had secured the strategic direction of the company: see paragraphs 27 and 73.1. But neither of those allegations is made against the Active Defendants and, in my judgment, it is fatal to SCL's claim against them. Even if I am wrong to strike out the entirety of the Present Claim on the basis that the Control Conspiracy allegation is abusive, I will strike out SCL's claim against the Active Defendants on the basis that it has no real prospects of success.

(3) Unlawful Means

(i) Improper purpose

85. Paragraph 74 contains the allegation that the Four Directors acted for improper purposes. I summarised His Honour Judge Russen QC's findings and quoted them extensively in the Conspiracy Judgment, [103] to [105]. The judge found that the Four Directors did not act for the improper purpose of retaining control of SGL or to make it more likely that Mr Ferguson would be re-elected. The judge "overwhelmingly" rejected this case: see [904]. He found that the Four Directors acted for an improper purpose in transferring 5.3 million shares to Orbitus, namely, to secure a favourable vote. However, he expressly found that the Four Directors made no attempt to fetter its discretion: see [929]. In my judgment, paragraph 74 amounts to a collateral attack on these findings.

(ii) The 29 May RNS

86. Paragraphs 39.1 and 39.2 allege that the Four Directors issued the 29 May RNS with the assistance of Invesco, that they knew it was not required for regulatory purposes but was intended to portray Mr Tinkler in a negative light and that it did so. Paragraphs 39.3 and 39.4 also allege that it was false and misleading and paragraph 79.2 alleges that Stifel produced it knowing that it was false and misleading. Finally, paragraph 75.1 contains the allegation that the 29 May RNS was carried out to achieve the Control Objectives and repeats the allegation that it falsely portrayed Mr Tinkler in a negative light.

87. His Honour Judge Russen QC did not address the question whether the 29 May RNS was

false because this was the subject matter of the Defamation Claim: see [787]. Nicklin J dealt with its meaning in the Meaning Judgment and summarised the procedural history of the claim itself at [14] to [22]. In doing so he referred to what I have called the 2018 Claim as the "**Stobart Action**":

> "14. The Claim Form was issued on 8 June 2018 (but the Particulars of Claim were not served until 26 June 2018). On 17 December 2018, i.e. after the Stobart Action had been tried, but before judgment was handed down, I determined issues relating to the meaning of the Announcement for the purposes of the Malicious Falsehood Action ([2018] EWHC 3563 (QB)) ("the Meaning Judgment"). The terms of the Announcement are set out in the Meaning Judgment ([4]).
>
> 15. I found (at [39]) that the single meaning of the Announcement for the purposes of the defamation element of the Malicious Falsehood Action was:
>
> (a) The Claimant had presented a series of challenges to the Board of Stobart which included those set out in [paragraphs 39 to 43 of the Announcement], the most recent of which was his opposition to the re-election of Iain Ferguson as Chairman of Stobart.
>
> (b) A vote to remove the current Chairman would weaken Stobart's corporate governance, create instability, present a number of serious risks to Stobart, identified in [paragraphs 45 to 49 of the Announcement], and would not be in the best interests of the shareholders.
>
> (c) The Claimant's behaviour was disruptive; and, in relation to the challenges identified in (a) unreasonable and his opposition to the re-election of the Chairman was regrettable and risked destabilising Stobart.
>
> 16. I also held that meaning (a) was factual and not defamatory of Mr Tinkler and that meanings (b) and (c) were expressions of opinion: [40]-[44]. Only meaning (c) was defamatory of Mr Tinkler, but not seriously enough to raise an inference of serious harm to reputation under s.1 Defamation Act 2013: [45]. In consequence, if the defamation element of his claim was to continue, Mr Tinkler would have to take on the burden of establishing, by evidence, that the requirements of s.1 were met: [46].
>
> 17. As for the balance of the Malicious Falsehood Action, I held (at [56]) that, based on the Mr Tinkler's originally pleaded meaning, the following was an available meaning for the purposes of malicious falsehood ("the Malicious Falsehood Meaning"):
>
> (a) Mr Tinkler destabilised the Board at a crucial time for the business; and/or (b) Mr Tinkler required the Board to deal with challenges, including:
>
> i. the settlement of financial issues arising from a previous related party transaction when Mr Tinkler was CEO;
>
> ii. a proposed selective buy-back of part of Mr Tinkler's stake in Stobart;
>
> iii. a proposed additional ex-gratia bonus for Mr Tinkler of shares then

worth some £8 million;

iv. a proposed buy-out of Stobart when the share price was in the range of 100p to 120p; and/or

v. a proposed related party transaction associated with a recent aborted airline transaction.

To the extent that Malicious Falsehood Meaning (a) contained opinion, as I had found, then Mr Tinkler would have to take on the burden of proving that it was false and published by the Defendants maliciously (see [16] in the Meaning Judgment).

18. Mr Tinkler's appeal against the Meaning Judgment was dismissed by the Court of Appeal on 15 May 2019 ([2019] EWCA Civ 819). Longmore LJ held that meaning (c) for the defamation claim, was "very much at the lower end of the scale" and one from which no inference of serious harm to reputation could be drawn [28].

19. Little happened in the Malicious Falsehood Action between the Meaning Judgment on 17 December 2018 and the appeal hearing on 3 April 2019. Importantly, however, it was during this period that the Stobart Judgment was handed down, on 15 February 2019.

20. A week prior to the Court of Appeal handing down its judgment on 15 May 2019, a hearing took place before Nicol J to deal with disputed amendments that the Claimant wished to make to his Particulars of Claim consequent upon the Meaning Judgment. One of the issues raised at the hearing was the adequacy of Mr Tinkler's pleaded case on harm to reputation. As noted above (see [16]), one consequence of the Meaning Judgment was that Mr Tinkler was now required, as part of his defamation claim, to demonstrate serious harm to his reputation caused by publication of the Announcement.

21. In his reserved judgment, handed down on 14 June 2019, Nicol J gave Mr Tinkler permission to make limited amendments to his Particulars of Claim ([2019] EWHC 1501 (QB)). The Judge held that Mr Tinkler was required to give full details of the facts and matters on which he relied on the issue of serious harm ([17]) and noted that his existing Particulars of Claim did not include any plea of special damage ([21]). It is very clear from Nicol J's judgment that a central issue had been the adequacy of Mr Tinkler's claim for damage caused by the publication of the Announcement (see [34]). Of particular importance is the fact that Nicol J's order gave Mr Tinkler the opportunity to revise §§11.3.3 and/or 11.3.4 of his Particulars of Claim to make clear his case on harm/damage. The Judge ordered him to give Further Information about his case that had been sought by the Defendants on this issue. In light of this, I am satisfied that, since at least 8 May 2019, Mr Tinkler has been well aware that the Defendants have been challenging the adequacy of his case on the harm or damage caused by the publication of the Announcement. I am also satisfied that the Court has given Mr Tinkler the fullest opportunity to advance his best case.

22. On 28 June 2019, Mr Tinkler duly served his Amended Particulars of Claim in the Malicious Falsehood Action pursuant to Nicol J's Order.

> Then, on 10 September 2019, by consent, Mr Tinkler served Re-Amended Particulars of Claim. The principal effect of these re-amendments was that Mr Tinkler abandoned his defamation claim in respect of the Announcement, leaving only the claim for malicious falsehood in respect of the Malicious Falsehood Meaning."

88. The Four Directors and Mr Laycock applied to strike out the remainder of the Defamation Claim on the basis that it was a collateral attack on the Russen Judgment. Their argument was that Mr Tinkler had to prove malice and that in order to do so, he would have to mount a collateral attack on His Honour Judge Russen QC's findings. Nicklin J held that malicious falsehood meaning (a) was a collateral attack on the Russen Judgment and he stated this at [70] and [71]:

> "70. Issue A is whether Mr Tinkler had destabilised the board of Stobart at a crucial time for the business and whether the Defendants held the view that he did at the relevant time. This is Malicious Falsehood Meaning (a), which Mr Tinkler contends is false (see §§8.1-8.2 Re-Amended Particulars of Claim): he did not destabilise the board. The Defendants contend that this meaning is objectively true. Separately, even if Mr Tinkler established the falsity of this meaning, he would have also to establish that it was published maliciously. As Malicious Falsehood Meaning (a) has been ruled to be an expression of opinion, Mr Tinkler has to establish that the relevant Defendant, at the time the Announcement was published, did not actually hold the opinion that Mr Tinkler had destabilised the board (see [16] in the Meaning Judgment and [19] above)).
>
> 71. Resolving this issue in the Malicious Falsehood Action would involve relitigating a significant part of the Stobart Action and would inevitably lead to a position where Mr Tinkler would be inviting the Court to make findings of fact contrary to the facts found in the Stobart Action. To that extent, it would involve a collateral attack on the decision in the Stobart Action. To take the clearest example, Mr Tinkler's case in the Malicious Falsehood Action on Issue A is that he "*had not destabilised the board at a crucial time for the business*" (§8.1 Re-Amended Particulars of Claim). In the Stobart Judgment, Mr Tinkler was found to have "*foment[ed] shareholder dissatisfaction*" [735] and engaged in "*covert action .... [not] acting in the best interests of [Stobart*]" which "*had a destabilising effect upon [Stobart's] management*" [740] and led to "*a situation of chaotic destabilisation within [Stobart] that Mr Tinkler had brought about*" [777]. To succeed on the issue of falsity in the Malicious Falsehood Action, Mr Tinkler would be asking the Court to make a finding contrary to the finding made by HHJ Russen QC in the Stobart Action. In addition, on the issue of malice (the state of minds of the Defendants), and whether, at the date of publication of the Announcement, they held the opinion that Mr Tinkler had destabilised the board of Stobart at a crucial time for its business, to succeed in the Malicious Falsehood Action, the Court would again have to be invited to make findings contrary to findings in the Stobart Action. HHJ

> Russen QC found that the Four Directors: "*… were justified in believing they were facing the start of an attempted coup*" [777] and "c*onsidered that [Mr Tinkler's] challenge to Mr Ferguson… was destabilising [Stobart]*" [792]."

89. Nicklin J considered that the amendments proposed or made by Mr Tinkler made no difference to his conclusion: see [72]. He did not address malicious falsehood meaning (b) because it was not an issue in the 2018 Claim and he accepted that there was not a precise overlap between the two claims. But he considered that the overlap was so substantial that there was practically no difference between them: see [82]. The Court of Appeal upheld his decision in the Malicious Falsehood (CA) Judgment and I cited the key passages from it in the Conspiracy Judgment at [34] to [36].

90. In my judgment, the allegation that the 29 May RNS contained false or misleading statements either has no real prospect of success or is an abuse of process and should be struck out as a collateral attack on the findings made by His Honour Judge Russen QC and Nicklin J. I have reached that conclusion for the following reasons:

(1) The Claimants allege that the 29 May RNS falsely portrayed Mr Tinkler in a negative light and that Stifel produced it knowing that it was "partially false and misleading": see paragraphs 39.1 to 39.3 and 79.2. But the only particulars of this allegation are that the announcement was "referring to challenges with C1 which were not germane": see paragraph 39.3. The Claimants do not plead the specific words in the 29 May RNS which were intended to portray Mr Tinkler in a negative light. Nor do they plead why the relevant words were untrue.

(2) In my judgment, this is not a proper pleading of an allegation of fraud. The specific words upon which the Claimants rely should have been pleaded and particulars of falsity given. Further, if the words relied upon are statements of opinion, then the particulars of falsity must include proper particulars of the allegation that Stifel did not honestly hold the relevant belief. The absence of proper particulars of an allegation of fraud would be sufficient to justify striking out the allegation. But in the present context, the difficulty in making sense of the allegation is compounded by the fact that the 29 May RNS has been the subject of a number of earlier judicial decisions.

(3) The source of the words quoted in paragraph 39.3 is not identified and they appear

to have been lifted from the Russen Judgment itself. The judge set out the relevant challenges and the way in which they were presented at [270] to [273]. He reached the conclusion that the 29 May RNS was inflammatory because it set out a list of challenges which Mr Tinkler posed but "which were not really germane to this key issue for the shareholders' vote": see [789]. But he did not find that Stifel had made up or concocted any of those challenges or that Stifel had presented them in a way which involved statements of fact which were false. He simply held that it was gratuitous and unnecessary to refer to them.

(4) Furthermore, in the Meaning Judgment, Nicklin J decided that defamation meaning (a) was factual and not defamatory, that defamation meanings (b) and (c) were expressions of opinion and only defamation meaning (c) was defamatory of Mr Tinkler but was not sufficiently serious to be harmful to his reputation. Nicklin J also decided that malicious falsehood meaning (a) was a matter of opinion and that the burden was upon Mr Tinkler to prove that the Four Directors and Mr Laycock did not genuinely hold the opinion that "he had destabilised the board of Stobart at a crucial time for the business" and also that they had published these words maliciously. In substance, therefore, Nicklin J held that the only defamatory words in the 29 May RNS were expressions of opinion rather than fact.

(5) It is unclear from the Particulars of Claim whether the Claimants accept that they are bound by Nicklin J's judgment in relation to the meaning of the 29 May RNS because they do not plead the words upon which they rely or why they are false. But if they had intended to argue that the announcement was untrue because it went wider than defamation meaning (c) or malicious falsehood meanings (a) and (b), then this would be a collateral attack on Nicklin J's findings. Mr Tinkler appealed those findings and the Court of Appeal dismissed his appeal.

(6) However, if the Claimants accept those meanings but intend to argue that the Four Directors did not honestly believe that Mr Tinkler had destabilised the board of SGL at a crucial time for its business, then in my judgment, that is a collateral attack on the Russen Judgment for the reasons which both Nicklin J and the Court of Appeal have given. It is in substance an attack on His Honour Judge Russen QC's findings of fact (i) that Mr Tinkler had a destabilising effect on SGL's management, (ii) that the Four Directors genuinely believed so and (iii) that they

acted in good faith and in the belief that they were acting in the interests of SGL when they issued it: see [740] and [792].

(7) Finally, both Nicklin J and the Court of Appeal were concerned that the overlap between the Defamation Claim and the 2018 Claim was not complete because of meaning (b). But that issue does not arise in the present case because the Claimants have not pleaded and do not rely on malicious falsehood meaning (b) in the Particulars of Claim. Nor do they allege that the relevant words were false.

(ii) The Panel submissions

91. Paragraphs 40.1 to 40.3 allege that Invesco and Stifel made two submissions to the Panel on Stifel letterhead but the first was drafted by Jones Day on Invesco's instructions and the second was drafted by Stifel but with input from Invesco. Paragraphs 40.3 to 40.10 allege that the submissions contained a number of false representations or, perhaps, half-truths:

(1) The submissions gave the impression that Stifel made them acting as SGL's broker rather than on behalf of Invesco and failed to mention this fact or concealed the involvement of Invesco and Jones Day: see paragraphs 40.3 and 40.5.

(2) Mr Tinkler was acting as a member of a concert party to exert control over SGL: see paragraph 40.4.

(3) Cenkos had resigned as SGL's broker because of a conflict of interest when it had resigned over the terms of the 29 May RNS: see paragraph 40.7.

(4) The board was required to address a number of challenges posed by Mr Tinkler in the recent past as set out in the 29 May RNS: see paragraph 40.8.

(5) Mr Laycock was on sick leave: see paragraph 40.9.

92. Mr Tinkler's evidence in Tinkler 1 was that he did not uncover the evidence to support the Present Claim during the 2018 Claim and not until the later stages of the Fraud Claim. He stated that he only became aware of the particular roles played by the Active Defendants between July and December 2023 when he revisited the disclosure given in the Fraud Claim:

> "71. In July 2023, a consultation took place regarding the proposed changes to Rule 21 of the Takeover Code on frustrating actions, and certain changes were implemented on 11 December 2023. When considering what representations to make as part of the consultation process in mid 2023, I revisited the additional materials which I had obtained in 2022. This allowed me to gain a fuller understanding of the events in this case. Based on this review, I submitted observations to the Panel in July 2023 and further submissions since that date up to December 2023 and indeed have since been interviewed by the Takeover Panel in November 2024, and have provided further written submissions on 27th February 2025.
>
> 72. Although I had indicated the possibility of a claim against IAML in correspondence in December 2020 and March 2021, this correspondence indicated that IAML's role ought to be investigated further. As Ms. Sutcliffe's statement indicates, I did not send a letter of claim at this stage. The reason for this was that I was not yet in a position to do so. Rather, I was not in a position to do so until after the Fraud Claim had concluded, and indeed after undertaking the further review of additional documentation in 2023, as I set out above."

93. I accept that neither His Honour Judge Russen QC nor I made findings of fact about the Panel submissions. However, His Honour Judge Russen QC described the submissions themselves and the response from the Panel in the Russen Judgment, [304] and [349] and at the Fraud trial Mr Wardell QC cross-examined Mr Ferguson about an email dated 6 June 2018 in which Ms Brace stated that she was preparing a submission to the Panel with the assistance of Mr Ferera of Jones Day. Mr Wardell put it to Mr Ferguson that it was inappropriate to involve Invesco in the submissions to the Panel and I recorded this exchange: see the Fraud Judgment, [150] to [151]. The Panel submissions and reply, therefore, provided important context at both trials and in both judgments.

94. Moreover, the content of the Panel submissions (as opposed to the identity of its authors) was the subject matter of detailed investigation at both the trial of the 2018 Claim and the Fraud Claim. I have already dealt with the meaning and effect of the 29 May RNS. His Honour Judge Russen QC heard evidence about the position of Cenkos and relied on Mr Hodges' evidence in reaching the conclusion that the 29 May RNS was inflammatory: see, e.g., the Russen Judgment, [787]. I myself heard detailed evidence about Mr Laycock's health in deciding whether the Four Directors bribed him to step down and reached the conclusion that Mr Laycock had a genuine concern about his medical condition: see the Fraud Judgment, [343] to [352].

95. Finally, I am satisfied that Mr Tinkler was fully aware of Invesco's involvement by the

trial of the 2018 Claim whatever additional material he may have looked at in 2022. Mr Temple referred to a number of documents in his Skeleton Argument which SGL had disclosed in the 2018 Claim and they showed that Mr Bouverat introduced Mr Ferera to Mr Brady, that Mr Bouverat wrote to Mr Arch of Stifel about the Code and that Invesco received the Panel's provisional findings. It is also clear from his cross-examination at the trial of the 2018 Claim that Mr Tinkler had looked at SGL's disclosure and had understood by then the roles of both Invesco and Jones Day:

> "Q. Well, I'm going to come on and look at what you did as well, but let me just conclude this. You brought in Mr Woodford into this idea of getting rid of Mr Ferguson for this benefit, you brought in Mr Wood and Mr Day as presenting a credible front for your planned coup. A. Definitely not. It was Mr Wood and Mr Coombs decided to put their name forward in the press on the 25 May RNS to say that if Mr Ferguson were not re-elected they would stand down, and that was supported by Invesco, and Invesco had hands all over this. The involvement -- they've been involved with David Arch, the emails that I've seen through disclosure discuss me -- an investor like Invesco would even offer support with lawyers to go to the takeover panel to actually get the takeover panel to go to the takeover panel to actually get the takeover panel to say that we were going to be a concert party was ridiculous, I thought."

96. In my judgment, the question whether the Panel submissions were false and misleading is a good example of the kind of residual issue which Peter Jackson LJ described in the Defamation Judgment (CA) at [62]. It is the rump of the 2018 Claim and the Fraud Claim and concerns just one element in a sequence of many interconnected elements which the Court considered in both judgments. Mr Tinkler does not allege that he suffered any separate losses as a result of the Panel submissions. He relies on the Panel submissions to support the inference that the Active Defendants conspired with the Four Directors to remove him. To use Peter Jackson LJ's boxing metaphor, His Honour Judge Russen QC and I fully scored the rounds and no private or public interest is served by continuing the argument about this single punch or combination of punches. My conclusion is reinforced by the fact that I reached the very same conclusion in the Conspiracy Judgment when the same allegations were levelled against the Four Directors and Mr Soanes: see [101] to [106].

97. It is unnecessary, therefore, for me to decide whether Mr Tinkler could or should have advanced this allegation either in the 2018 Claim or in the Fraud Claim and, if not, whether he should have complied with the *Aldi* guidelines at the hearing of the

applications to strike out the Conspiracy Claim itself when he focussed on the Panel submissions in great detail and indicated that he intended to join the Active Defendants (if the claim had continued): see [24]. But I should record that if I had not been satisfied that this allegation should be struck out as a collateral attack on the Russen Judgment and the Fraud Judgment, I would not have held that it was a *Henderson v Henderson* abuse to pursue a new claim against the Active Defendants or for failure to comply with the *Aldi* guidelines.

(iii) The share transfers

98. Paragraphs 75.3 and 75.4 allege that the Four Directors made the two transfers of shares to the EBT with the assistance of Orbitus and Stifel "with the illegitimate aim and effect of preventing the beneficiaries instructions [sic] from voting against the achievement of the Control Objectives" and "with the illegitimate intention of doing so in order that they would be voted in favour of the achievement of the Control Objectives". Paragraph 75.6 alleges that these transfers were carried out "for the improper purpose of securing additional votes for the intended re-election of Mr Ferguson at the AGM, and securing the position of the Four Directors for personal financial gain".

99. In my judgment, all of these allegations amount to a direct attack on His Honour Judge Russen QC's findings that the Four Directors did not transfer the first tranche of shares for the improper purpose of influencing the vote at the AGM: see the Russen Judgment, [841] to [848]. Indeed, paragraph 75.6 would require the Court to decide exactly the same issue again. As Nicholas Vineall QC put it in *Elite Property Holdings Ltd v BDO LLP* at [82], this attack is only a collateral one because the Active Defendants were not joined as parties to the 2018 Claim.

100. I accept that the judge held that the Four Directors transferred the second tranche of shares for the primary purpose of influencing the vote: see [855]. But he also held that they transferred the second tranche of shares in the belief that they were acting in the best interests of SGL (see [872] and [873]) and that this breach of duty did not render Mr Ferguson's re-election invalid (see [923] to [934]). In my judgment, paragraphs 75.3, 75.4 and 75.6 go well beyond the judge's single finding of breach of duty and amount to a collateral attack on his finding that the Four Directors were acting in good faith and that Mr Ferguson was validly re-elected. I have no doubt that if Mr Tinkler were

permitted to take this allegation to trial, he would seek to challenge both of these findings and to re-argue the case.

(v) The removal of Mr Tinkler

101. Paragraph 75.5 alleges that the Four Directors conspired with Stifel to remove Mr Tinkler by instructing the EBT to vote in favour of resolution 2. Again, in my judgment, this is a direct attack on the judge's findings that Mr Tinkler's removal as an employee and a director were lawful and valid acts and that the resolution to re-elect Mr Ferguson was also valid: see [952] to [957]. Again, the attack on those findings is only a collateral one because the Active Defendants were not joined as parties to the 2018 Claim.

(vi) The sale of shares

102. Paragraph 64.4 alleges that 2,703,720 shares were included in the "for" count for the re-election of Mr Ferguson at the AGM and that Stifel had arranged the sale of these shares out of the EBT and into "friendly hands". Paragraph 75.7 alleges that the sale of these shares was unlawful because it was arranged "with the illegitimate purpose of ensuring the re-election of Mr Ferguson at the AGM, and gerrymandered the vote". Finally, in paragraphs 69.2 and 70 the Claimants plead that but for this conduct the Control Objectives would not have been achieved, Mr Tinkler would have remained a member of the board and Mr Ferguson would not have been re-elected as Chairman.

103. Mr Tinkler did not advance the allegation in paragraph 64.2 at the trial of the 2018 Claim or at the Fraud trial and it surfaced for the first time at the hearing of the application to strike out the Conspiracy Claim. Mr Tinkler addressed the issue briefly in his oral submissions, I did not address it in the Conspiracy Judgment and Mr Tinkler really addressed it for the first time in his speaking note for his application for permission to appeal:

> "67. I understood at the hearing that you fully understood the importance of these emails and My Lord even referred to the 2 million shares been sold to friendly hands. Reference (CB4 Tab 4 Pl05B-Pl06E] 68. I am disappointed that My Lord, did not even refer to this evidence which I say clearly demonstrated the Dishonest Assistance of Rosenblatt, when I now know that the spreadsheet that Mr Leiper handed to Judge Russen to persuade the judge that the voting was correct, was simply untrue, and known to be untrue by Rosenblatt. This My Lord is clear evidence of Conspiracy, which undermined the credibility of both Mr Ferguson and

Mr Brady."

104. In my judgment, this is another example of a single punch when all three rounds have been fully scored. It is clear from this extract that the purpose of this allegation is to support Mr Tinkler's attempt to reopen the findings of His Honour Judge Russen QC in relation to the conduct of the Four Directors. More to the point, it is a clear attempt to reopen the judge's rejection of Mr Tinkler's case that the shares transferred to the EBT should not have been voted or counted at the AGM and that Mr Ferguson should not have been re-elected. The judge recorded the relevant evidence and submissions at [925] to [927] and dismissed this argument at [928] to [931]. He did so primarily because he considered that Orbitus had exercised its independent judgment in voting the EBT shares and that it would be "wrong" and "an affront" to Orbitus based on the premise that "it did not apply its independent mind as to how to do so": see [931]. In my judgment, paragraphs 64.2, 75.7 and 69.2.2 are a collateral attack on those findings and should be struck out.

(vii) The AGM vote

105. Paragraph 64.1 alleges that 658,000 votes, which were cast in favour of Mr Ferguson's re-election, ought not to have been counted because they had already vested in the relevant beneficiaries. Paragraph 64.2 also alleges that 3,417,891 shares which Mr Ferguson cast by proxy, should not have been cast either because the relevant proxy form was returned after the relevant deadline. Paragraph 75.8 alleges that these actions were unlawful because they were "contrary to the requirements of the Guernsey Companies Act and committed with the intention and effect of ensuring the achievement of the Control Objectives". In paragraphs 69.2 and 70 the Claimants plead that but for this conduct the Control Objectives would not have been achieved, Mr Tinkler would have remained a member of the board and Mr Ferguson would not have been re-elected as Chairman.

106. Paragraphs 78.4 to 78.7 contain the principal allegations of breach of duty against Orbitus. The Claimants allege that it committed breaches of its fiduciary duties by failing to vest the 658,000 shares in the relevant beneficiaries and by voting them in favour of Mr Ferguson. They also allege that Orbitus bowed to pressure from the Four Directors or Rosenblatt. Paragraph 79.7 also pleads that Stifel was "involved in….the voting of

time-barred proxy votes". There is no allegation that either Invesco or Orbitus were involved in the decision to count the proxy votes returned after the deadline.

107. In my judgment, the first allegation relating to 658,000 shares is a direct attack on His Honour Judge Russen QC's finding that the Four Directors were not responsible for the delay in the vesting of those shares and his emphatic finding that Orbitus exercised its independent judgment in voting for Mr Ferguson's re-election: see the Russen Judgment, [883] and [931]. Again, the only reason why this attack on those findings is a collateral one is that Orbitus was not a party to the 2018 Claim. Paragraphs 64.1, 69.2.3, 78.4 to 78.7 and the relevant part of 75.8 should be struck out as an abuse of process.

108. Mr Tinkler did not advance the second allegation that Mr Ferguson counted invalid proxy votes in the 2018 Claim and the judge did not decide it. However, the judge described the procedure at the AGM in considerable detail and he decided a closely related issue, namely, whether Mr Ferguson had authority to count proxy votes in favour of Resolution 14 and, if not, whether he committed a deliberate breach of duty by doing so: see [355] to [367] and [885]. Furthermore, not only did the judge reject Mr Tinkler's case, he held affirmatively that Mr Ferguson acted in good faith and in reliance upon legal advice when he chose to exercise proxy votes. The judge stated as follows at [66]:

> "In relation to the transfer of shares to the EBT and the manner in which he chose to exercise proxy votes at the AGM, he clearly relied upon legal advice which he believed supported his position. Whether or not good faith on the part of a director and a belief that he is acting in the best interests of the company are by themselves sufficient to put the relevant action beyond the scrutiny of the court is a legal question to be explored further, but it was clear to me from Mr Ferguson's evidence that he genuinely believed he had the Company's best interests at heart."

109. Mr Tinkler took the point that Mr Ferguson had counted proxy votes returned after the deadline for the first time in the Conspiracy Claim. His evidence in Tinkler 1 was that the disclosure in the Fraud Claim had revealed that Stifel were involved in obtaining and submitting a representation letter for 3 million votes out of time. In an earlier witness statement dated 16 February 2024 in answer to the application to strike out the Conspiracy Claim, he also gave the following evidence about this issue:

> "It is now revealed from the disclosure, emails from the Second Defendant, confirms this is what our largest shareholder wanted. In evidence, both the Second and Third Defendant confirmed this is what our largest shareholder

> wanted. Furthermore, had disclosure been provided, it would have identified the frustrating actions being undertaken, and the misuse of the powers of the directors for improper purpose. It would also have identified the issues in respect of the "Over Votes" and voting Proxy votes contrary to the provisions set out under Section 327 of The Companies Act 2006, and The Companies (Guernsey) Law 2008. This would have rendered the votes as being void, and the outcome, being the Chairman not validly re-elected at the AGM [P,216]."

110. Mr Tinkler was represented by leading and junior counsel and K&L Gates at the trial of the 2018 Claim and, in my judgment, he could and should have taken this point then. It is clear from the Russen Judgment that the question whether Mr Ferguson counted proxy votes correctly was a matter of dispute and the subject matter of disclosure. The judge stated that the deadline for lodging proxies was 4 July 2018: see [355]. It is unclear to me whether the proxy forms were themselves in evidence. But even if they were not, it would have been a simple matter to call for them and check that they were submitted before the deadline. It is also unclear to me whether the representation letter upon which Mr Tinkler relied involved a change of instructions from the relevant shareholders rather than a new authority granted to Mr Ferguson to vote the shares. But either way, it should have been very simple to establish the position.

111. It does not necessarily follow from this that it is an abuse of process to permit Mr Tinkler to pursue this argument against the Active Defendants. But in my judgment, this is yet another example of a single punch when all three rounds have been fully scored. It was a matter for Mr Ferguson whether to count the proxy votes given to the Chairman for the AGM. Even if he had discussed the question whether to count the proxies with Mr Brazier or Mr Bouverat, the decision was one for him alone. For this reason, I do not consider that the Claimants have any real prospect of succeeding in a claim against Stifel unless they are able to challenge the judge's conclusion that Mr Ferguson acted in good faith and on legal advice in deciding whether to exercise the proxy votes given to the Chairman of the AGM. Again, I have no doubt that if I permitted Mr Tinkler to take this allegation to trial, that is precisely what he would attempt to do. Paragraphs 64.2 and the relevant parts of 75.8 and 79.7 must be struck out.

(viii) Dishonest assistance

112. In paragraphs 77.15, 78.7 and 79.9 the Claimants allege that each of the Active Defendants dishonestly assisted the Four Directors in their pursuit of the Control

Objectives. In my judgment, those allegations have no real prospect of success once paragraph 74 is struck out as an abuse of process. If the Four Directors cannot be held liable for breach of their duties as directors, the Active Defendants cannot be held liable as accessories. Each of these paragraphs must be struck out.

(4) Causation

113. Paragraphs 69 to 71 allege that the Control Conspiracy caused Mr Tinkler damage. Mr King submitted (and I accept) that as a matter of pleading those paragraphs satisfy the test for unlawful means conspiracy. My difficulty is that they are inconsistent with His Honour Judge Russen QC's findings that Orbitus exercised its own independent judgment, that Mr Tinkler's dismissal and his removal as a director were lawful and valid acts and that the resolution to re-elect Mr Ferguson is not to be treated as invalid. It is also inconsistent with the judge's emphatic finding that Orbitus exercised its own independent judgment in exercising its voting rights as holder of the EBT shares: see [931] and [952] to [957]. In my judgment, paragraphs 69 and 70 are a collateral attack on the Russen Judgment and must be struck out.

114. Paragraph 73 also alleges that the Control Conspiracy caused SCL damage and, in particular, that it caused the termination of the Management Agreement. In my judgment, this is a collateral attack on His Honour Judge Cawson QC's findings in the Esken Payment Judgment. He found that Mr Brady and Mr Coombs had a plan or strategy to terminate the Management Agreement but that this was irrelevant because Esken was lawfully entitled to terminate it:

> "190. Ultimately, as referred to in paragraph 127(iii) above, having originally denied that there was any such plan or strategy, under cross examination Mr Brady accepted that what he had said to this effect in paragraph 57(k) of his witness statement was not correct. I am satisfied that the evidence is to the effect that, following Mr Soanes's resignation, Esken did determine that it should seek to get out of, or disentangle itself from, the Management Agreement if it could do so given the obligation to pay an ongoing Retainer Fee for a considerable period of time. However, the evidence is to the effect that, at that time, it was unable to satisfy itself that it had the grounds to terminate the Management Agreement, and so embarked on a plan or strategy of effectively sitting back and seeing whether or not SCL was capable of performing its obligations under the Management Agreement, with a view to terminating the Management Agreement when and if circumstances permitted.
>
> 191. Further, as I have concluded in paragraph 130 et seq above, Mr

> Coombs' position, following Mr Soanes's departure, was that he did not, in reality, want the Management Agreement to work, and wished to "untangle", as he put it, Esken therefrom, such that he did not thereafter do anything to help to make the Management Agreement work, and sought to make SCL's life more difficult."
>
> "194. However, I agree with a submission made by Mr Leiper that Esken's motives are, as such, irrelevant if, in fact, circumstances arose in which Esken was entitled validly to terminate the Management Agreement."
>
> "201. Thus, in short, I do not consider that the plan or strategy that I have found was adopted by Esken, of itself, provides an answer to Esken's claim that there were breaches of the Management Agreement that entitled it to terminate the latter pursuant to clause 8.2.3, or that it was open to Esken to terminate pursuant to clause 8.2.2 on the ground that SCL had ceased to carry on its business or substantially the whole of its business, if the facts established that to be the case. However, it might explain why more was not done or achieved by SCL, and thus might potentially excuse certain conduct that might otherwise been regarded as amounting to a breach of the Management Agreement."
>
> "207. I am satisfied that, in these circumstances, Esken was entitled to serve the Termination Notice pursuant to clause 8.2.2 thereof, and that the effect thereof was to terminate the Management Agreement as at 12 March 2019."

115. If I were to permit the Claimants to take the Claim to trial, it is inevitable that they would have to challenge these findings in order to succeed. If SGL had a contractual right to terminate the Management Agreement whatever plan or strategy the Four Directors had for dealing with SCL, then the Court is bound to find that their plan or strategy (or, indeed, any other unlawful conduct) was not "indeed the means" by which SCL suffered loss or damage but incidental to its losses. SCL suffered those losses because SGL exercised its lawful contractual right to terminate the Management Agreement. Given this conclusion, it is unnecessary for me to consider the more difficult question whether SCL's claim should be struck out because it offends against the "no reflective loss" principle.

(5) Conclusions

116. The Present Claim is an abuse of process and, in my judgment, should be struck out as a collateral attack on a number of previous judicial decisions. I have reached that conclusion both because the Present Claim is incoherent once the central Control Conspiracy allegation against the Four Directors is struck out or because the other elements of the cause of action involve a collateral attack on those decisions when

considered individually. I have indicated that I would not have been prepared to strike out the allegations relating to the Panel submissions as a *Henderson v Henderson* abuse or for breach of the *Aldi* guidelines but it is unnecessary for me to consider those issues further.

VIII. CPR Part 31.22

117. I have held that the burden is on Mr Tinkler to satisfy the Court that any disclosure from the Fraud Claim, which he has used for the purpose of issuing or pleading the Present Claim, falls within CPR Part 31.22(2)(a) and were read out to or by the Court or referred to at a hearing in public. Mr Tinkler made no attempt to discharge that burden. His evidence in answer to the Applications was that he had been careful to base the "pleaded claim" only on documents which had been referred to in public and he objected to the Active Defendants placing the burden on him to prove that he had complied with CPR Part 31.22:

> "78. When preparing my Particulars of Claim, I was careful to base my pleaded claim only on documents that have been referred to in public.
>
> 79. Despite having access to my initial disclosure, I note that the Applicants have not identified a single document which they suggest has not been referred to in Court before, but instead the Applicants appear to seek to reverse the burden on me to show otherwise, in a way which I consider to be inappropriate.
>
> 80. It is difficult to address the points which the Applicants seek to raise when the Applicants have not listed particular documents which they suggest I have used when I ought not to have done. If the Applicants later identify particular documents, I am happy to respond further.
>
> 81. However, for the purposes of this statement I note that a large number of documents were either read to or reviewed by the Court or referred to at hearings held in public both during the course of the Fraud Trial and also, more pertinently, in the hearing of the strike-out application in the Conspiracy Claim. I am not aware of having used documents for the purpose of bringing the Current Claim which have not been either read to or by the Court, or referred to, at a hearing which has been held in public."

118. I must, therefore, consider the source of the documents upon which Mr Tinkler relied and the position at each stage of the Present Claim (both before and after the issue of proceedings) in order to determine the extent to which Mr Tinkler acted in breach of CPR Part 31.22 bearing in mind that he made no application for permission to use any documents even at this late stage and no effort to discharge the burden on him or to assist

the Court.

(1) The ET Claim

119. Mr Tinkler applied for and obtained an order permitting him to use documents which Mr Soanes had disclosed in the ET Claim for the purposes of the Fraud Claim and the Conspiracy Claim. His counsel gave an express assurance to the Court that he would only pursue the Conspiracy Claim if the Fraud Claim succeeded and that he would seek to have it stayed if it did not. Mr Gledhill submitted that it was an abuse of process for him to pursue the Claim against the Active Defendants in breach of that assurance. This was not a point which the Four Directors and Mr Soanes took on their own application to strike out the Conspiracy Claim and I must therefore consider it now.

120. I agree with Mr Gledhill that Mr Tinkler has broken his assurance to the Court to the extent that he has deployed documents which were disclosed to him in the ET Claim for the purpose of pursuing the Conspiracy Claim after the Fraud Claim had been dismissed, and Mr Tinkler's rights of appeal had been exhausted. I also agree with Mr Gledhill that he can no longer rely on the Order dated 6 November 2020 as giving him permission to use the documents disclosed to him in the ET Claim in either the Conspiracy Claim or the Present Claim. In simple terms, that Order was spent as soon as the Supreme Court refused Mr Tinkler's application for permission to appeal. But on any view the Order dated 6 November 2020 did not extend to bringing a claim against Invesco.

121. I am also satisfied that Mr Tinkler committed a breach of the collateral use restriction by carrying out a review of the documents disclosed to him in the ET Claim for the purpose of investigating a claim against Invesco and sending the letter dated 4 December 2020 and the email dated 24 March 2021. The burden was on Mr Tinkler to establish whether any of the documents upon which he relied fell within CPR Part 31.22(2)(a) and he did not attempt to discharge that burden.

122. But even if I am wrong and the burden is on the Active Defendants to prove that they did not fall within CPR Part 31.22(2)(a), I draw the inference from the letter and the email that most (if not all) of the documents were not read out or referred to in open court during the ET Claim or the 2018 Claim. If they had been, it would have been unnecessary to carry out a detailed forensic review or to write to Rosenblatt asking for SGL's consent. Further, it is quite clear that Mr Tinkler was represented by solicitors and that he was

fully aware of the collateral use restriction. Finally, there is no suggestion that Rosenblatt ever gave consent to the use of the documents.

(2) The Fraud Claim

123. Mr Tinkler did not apply for a further order under CPR Part 31.22(1)(b) giving him permission to use any documents disclosed to him in the Fraud Claim for the purpose of initiating the Panel investigation. I am satisfied, therefore, that he committed a breach of the collateral use restriction by using those documents for the purpose of writing to the Panel on 18 September 2023 and for the purpose of his subsequent correspondence with the Panel. The burden was on Mr Tinkler to establish whether any of the documents upon which he relied fell within CPR Part 31.22(2)(a) and he did not attempt to discharge that burden.

124. But in any event, I find that none of the documents shaded red in the table which Mr Tinkler sent to the Panel on 18 September 2023 fell within CPR Part 31.22(2)(a). Mr Tinkler stated in terms in the schedule to that letter that "the documents highlighted red were documents not referred to and would require consent of Stobart Group or the court to be disclosed in full". Again, I am satisfied that Mr Tinkler was fully aware of his obligations under CPR Part 31.22 and there is no suggestion that SGL ever gave its consent to him using the documents for the purposes of the Panel investigation.

(3) The Conspiracy Claim

125. Mr Tinkler did not apply for a further order under CPR Part 31.22(1)(b) giving him permission to use any documents disclosed to him in the Fraud Claim for the purpose of pursuing the Conspiracy Claim. However, at the hearing on 1 March 2024 he produced an A3 file which contained either the same table which he had originally sent to the Panel under cover of his letter dated 18 September 2023 or a modified version of that table. He then handed it in to the Court and took me through a small selection of the entries. Furthermore, I looked at those entries again and at a few more entries in the table when I was preparing the Conspiracy Judgment.

126. Mr Leiper KC, who appeared for the Four Directors at the hearing on 1 March 2024 did not object to Mr Tinkler handing the file in or, indeed, to him referring to it or its contents in his submissions. I did not decide, therefore, whether Mr Tinkler was committing a

breach of the collateral use restriction by deploying the table or its contents at the hearing. I did, however, attribute significant weight to the fact that Mr Tinkler had misused documents disclosed to him in the ET Claim for the purposes of his claim as a shareholder: see the Conspiracy Judgment, [54].

127. Mr Gledhill submitted that on 1 March 2024 Mr Tinkler was committing a further breach of the collateral use restriction by handing in and then reading out extracts from the table (or an updated version of it) and that he could not now contend that the table or its contents fell within CPR Part 31.22(2)(a) as a result. I agree with Mr Gledhill that Mr Tinkler committed a breach of the collateral use restriction by deploying the table and its contents at the hearing. I also agree with him that the fact that some of the documents have been read or referred to in open Court does not absolve Mr Tinkler from his breach of the collateral use restriction or prevent the Court from striking out the Present Claim if that is a suitable sanction.

128. However, I take the view that because Mr Tinkler read out extracts from the underlying documents in open court or referred to them individually, the table itself and the underlying documents (which he quoted or to which he referred) now fall within CPR Part 31.22(2)(a) and the collateral use restriction no longer applies to them. But that consequence makes Mr Tinkler's breach of the collateral use restriction at the hearing on 1 March 2024 all the more serious because he has destroyed the confidentiality of documents which SGL was compelled to disclose to him under Court rules.

(4) The Present Claim

129. I am satisfied that Mr Tinkler relied on the same or substantially the same documents in the table which he sent to the Panel in preparing and advancing the Present Claim. In Tinkler 1, paragraphs 71 and 72 (above), Mr Tinkler stated in terms that in 2023 he revisited the documents disclosed to him in the Fraud Claim for the purpose of responding to the Panel consultation and that he was not in a position to pursue his claim against IAML until after he had carried out that review.

130. Moreover, in the Letter of Claim to Stifel, Mr Tinkler quoted extensively from many of the documents in the table originally sent to the Panel. For example, he referred to an email dated 7 June 2018 from Mr Ferera to Mr Arch copied to Invesco in which Mr Ferera stated as follows: "I attach a revised submission to the Panel, which is intended to

address the points raised by Dipika Shah when I spoke to her on Tuesday, As discussed with David yesterday, I have changed the emphasis of our approach." This email was also included in the table sent to the Panel and quoted extensively. It is shaded red in the left-hand column and has a "ROS" number rather than a bundle number.

131. Mr Tinkler did not apply for a further order under CPR Part 31.22(1)(b) giving him permission to use any documents disclosed to him in the Fraud Claim before sending the Letters of Claim. In my judgment, he committed a breach of the collateral use restriction by using the documents disclosed in the Fraud Claim for the purpose of sending those letters. Moreover, since he sent them over three weeks before the hearing on 1 March 2024, it is not open to him to argue that they fell within CPR Part 31.22(2)(a) when he did so.

(5) Conclusions

132. I am prepared to assume in Mr Tinkler's favour that he committed no further breaches of the collateral use restriction in the Present Claim after the hearing on 1 March 2024. However, I have found that he committed multiple breaches of the collateral use restriction between 2020 and 2024. Mr King relied on the fact that Mr Tinkler is a litigant in person. But he was represented by Clyde & Co when he wrote to Invesco in 2020 and 2021 and he was still represented by them when he wrote to the Panel in 2023. Moreover, I am satisfied that Mr Tinkler was fully aware of his obligations under CPR Part 31.22 and should have appreciated (if he did not) that it was necessary to make an application to Court for permission before sending the Letters of Claim and issuing the Claim Form in the Present Claim.

133. I therefore turn to the balancing exercise which I have identified above. I consider Mr Tinkler's multiple breaches of CPR Part 31.22 serious and I attribute significant weight to the fact that he made no retrospective application for permission and gave no assistance to the Court on this issue. I attribute some weight to the fact that Mr Tinkler obtained the retrospective consent of SGL's administrators to use the documents for the purpose of the Panel investigation after the company had gone into administration but little or no weight to Mr Tinkler's status as a litigant in person.

134. In my judgment, this is an appropriate case for striking out the Claim Form for breach of the collateral use restriction. Mr Tinkler committed multiple breaches of the collateral

use restriction in pursuing the Conspiracy Claim, the Present Claim and the Panel submissions which were all closely related. But I consider it to be of decisive weight that the Active Defendants may be deprived of a limitation defence if I give retrospective permission to Mr Tinkler to use the documents disclosed in the Fraud Claim to prosecute the Present Claim. He could and should have applied for and obtained the permission of the Court to use them in February 2024 before sending the Letters of Claim and he failed to do so. If I am wrong to strike out the Present Claim as an abuse of process, I strike it out for failure to comply with CPR Part 31.22.

IX. Disposal

135. For the reasons which I have set out in sections V to VIII I refuse to strike out the Claim Form and Particulars of Claim in the Present Claim on the basis of admissions. I do, however, strike them out as a collateral attack on a number of judicial decisions or, alternatively, because of Mr Tinkler's multiple breaches of CPR Part 31.22. I will deal with the issue of costs and permission to appeal either on paper or at a short consequential hearing. If the parties require an oral hearing, I will direct that they inform the Court and my clerk within 7 days of the hand down of this judgment.

136. I will extend time for Mr Tinkler to apply for permission to appeal until any final order is sealed. However, because Mr Tinkler filed extremely lengthy submissions and sought to reargue the case at the consequential hearing after I handed down the Conspiracy Judgment, I remind the parties of the guidance given by Foxton J in *Royal & Sun Alliance Ltd v Tughans* [2022] EWHC 2825 (Comm), [2022] 4 WLR 110 at [19]. I will, therefore, list any consequential hearing for 1 hour and I will limit the length of Mr Tinkler's Skeleton Argument to 15 pages for both costs and permission to appeal including the draft Grounds of Appeal. I will also direct that he serve his draft Grounds of Appeal and Skeleton Argument 7 days before the date listed for the hearing and that the Active Defendants file their Skeleton Arguments 2 days before the hearing. Finally, I will limit the length of Skeleton Arguments for each of the Active Defendants to 10 pages each.