Neutral Citation Number: [2021] EWCA Civ 18

Case No: A2/2020/1039

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Nicklin
QB-2018-006293

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 February 2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE DINGEMANS
and
SIR RICHARD McCOMBE

- -

WILLIAM ANDREW TINKLER **Appellant**

v

IAIN GEORGE THOMAS FERGUSON (1)
WARWICK BRADY (2)
JOHN DAVID FRANCIS COOMBS (3)
ANDREW RICHARD WOOD (4) **Respondents**

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John Wardell QC and Kate Wilson (instructed by **Clyde & Co LLP**) for the **Appellant**
Andrew Caldecott QC and Jacob Dean (instructed by **Herbert Smith Freehills**) for the **Respondents**

Hearing dates: 15-16 December 2020
(when Lord Justice McCombe, as he then was, presided)

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Monday, 1 February 2021

Lord Justice Peter Jackson:

Introduction

1. On 8 June 2018 the Appellant Andrew Tinkler began an action against the Respondents for defamation and malicious falsehood ('The Malicious Falsehood Action'). Two years later to the day Nicklin J ('the Judge') struck it out. Mr Tinkler now appeals with the permission of Males LJ.

2. CPR 3.4 (2) provides that the court may strike out a statement of case if (a) it discloses no reasonable grounds for bringing the claim, or (b) it is an abuse of the court's process, or (c) there has been a failure to comply with a rule, practice direction or court order. The Judge's decision was founded both on (b) and on (a). He firstly held that continuation of the claim would be an abuse of process because Mr Tinkler's essential complaint had already been substantially litigated in proceedings between him and Stobart Group Ltd. ('the Company'). That action in the London Circuit Commercial Court ('the Stobart Action') had led to a judgment given by HH Judge Russen QC, sitting as a Judge of the High Court, ('the Russen Judgment') on 15 February 2019. The Judge secondly found that the claim should be struck out because Mr Tinkler did not have a properly arguable case that he had probably been caused pecuniary damage as required by s. 3 (1) Defamation Act 1952. Finally, the Judge noted the court's power to strike out an action on the basis that it does not disclose a substantial tort and that the litigation would be pointless and wasteful, as explained by this court in *Dow Jones & Co Inc v Jameel* [2005] QB 946, but he did not express a conclusion about that in the light of his other findings.

3. On this appeal Mr Tinkler challenges, as he must, both of the Judge's reasons for striking out his claim. I will summarise the background and procedural history, the Judge's decision and the applicable law before turning to the arguments on appeal and my conclusions.

The background and procedural history

4. The Malicious Falsehood Action arises from a boardroom battle that erupted in 2018. At the time, Mr Tinkler was a substantial shareholder and a director of the Company. Of the Respondents, Mr Ferguson was the chairman, Mr Brady the CEO, and Mr Coombs and Mr Wood were non-executive directors. Mr Tinkler believed Mr Ferguson should not continue as chairman. The Respondents disagreed and a power struggle followed, with both camps courting shareholder support. In the end, Mr Tinkler was dismissed as a director and employee on 14 June 2018 and Mr Ferguson was re-elected as chairman at the AGM on 6 July 2018.

5. On 8 June 2018, the Malicious Falsehood Action was launched against the Respondents and one other individual who is no longer concerned with the appeal. Mr Tinkler sought redress for the publication by the Company on 29 May 2018 of an announcement on the London Stock Exchange's Regulatory News Service ('the RNS Announcement'), which he claimed was defamatory of him and published maliciously. It followed an earlier RNS announcement on 25 May 2018 which gave notice that a boardroom battle was in progress. The first announcement was published on a Friday at 16.51, the second at 14.41 on the following Tuesday after a Bank Holiday.

6. On 15 June 2018, a week after the RNS Announcement, the Stobart Action was launched by the Company, seeking declarations vindicating its dismissal of Mr Tinkler. He counter-claimed for declarations that his removal was invalid and sought an order for reinstatement. Each side accused the other of foul play. The Company alleged an unlawful means conspiracy by Mr Tinkler with others to oust the chairman, and breaches by him of his duties as a director and an employee. Mr Tinkler claimed that the Respondents had acted in breach of their fiduciary duties as directors in a number of specific respects.

7. Because it concerned the control of a publicly-quoted company, the Stobart Action was expedited and a trial lasting eleven days took place in November 2018. In his judgment at [2019] EWHC 258 (Comm) HHJ Russen QC ruled on ten issues arising from the activities of the competing factions between November 2017 and July 2018. These issues, with their various sub-issues (some fifty in all), are set out in the Russen Judgment at [50] and the outcomes of each are found at [947] onwards. In summary, Judge Russen QC rejected the Company's claim that Mr Tinkler had engaged in a conspiracy, but found that he had acted in serious breach of his fiduciary and contractual duties and that his dismissal as an employee and removal as a director had been lawful and valid. He found that the re-election of Mr Ferguson was not invalid. He further found that, save in one respect, the Respondents had not acted in breach of their fiduciary duties.

8. Issues 3 and 4 are of particular relevance to the Malicious Falsehood Action:

> "3. Was Mr Tinkler in breach of his fiduciary and/or contractual duties (and if so what is the nature and seriousness of the breach) by reason of any or all of the following? -
>
> a. His proposal in relation to the Flybe transaction.
>
> b. Speaking to the Claimant's significant shareholders and criticising the Board's management and the Group's business and agitating for the removal of Mr Ferguson.
>
> c. Entering into an unlawful means conspiracy with any of Mr Hodges, Mr Woodford, and/or Mr Day.
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> d. Improperly sharing Confidential Information (as specified at paragraphs 21, 22 and 33(c) of the Particulars of Claim).
>
> e. Writing to shareholders and employees on 8 and 9 June 2018 respectively.
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> f. Orchestrating:
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> i. The writing of a letter of support from the Executive Leadership Team.
>
> ii. A petition by group employees.

g. Making comments about the level of his remuneration in comparison to the previous Executive Chairman, who is a woman, and/or using inappropriate language in so doing.

4. Were the Four Directors in breach of their fiduciary duties by reason of any or all of the following? -

a. Attempting to use Article 89(5) to remove Mr Tinkler as a director in February 2018.

b. Establishing the Board Committee.

c. Issuing the 29 May 2018 RNS.

d. Declining to put Mr Day's name forward for the AGM Ballot.

e. Purporting to dismiss Mr Tinkler as an employee on 14 June 2018.

f. Purporting to remove Mr Tinkler as a director on 14 June 2018.

g. Causing the transfer of shares from Treasury to the EBT.

h. Not causing shares which should have been vested in Mr Tinkler and other employees to be transferred to them in advance of the AGM.

i. Not putting Resolution 4 to re-elect Mr Tinkler to a vote at the AGM.

j. Casting proxy votes from shareholders who had indicated that they wished to abstain on Resolution 4, against the A.O.B. resolution to elect Mr Tinkler.

k. Purportedly removing Mr Tinkler as a director again immediately following the AGM on 7 July 2018."

9. Judge Russen QC found against Mr Tinkler on Issues 3 (b), (d) and (e) and on Issue 4 as a whole, with the exception of Issue 4 (g). For our purposes, the rejected allegation at Issue 4 (c) concerning the RNS announcement is of particular importance. Consistently with his approach to each issue, Judge Russen QC dealt with it in considerable detail. His conclusions at [785 – 794], which must be set out in full, spared neither faction:

"785. The next matter of challenge is their decision to issue the 29 May RNS. This followed the 25 May RNS with its more neutral wording, as revised following Mr Tinkler's objection to certain tendentious statements during the Board earlier that day. I have set out the material terms of the 29 May RNS in section 3 above. Mr Tinkler says that, as the earlier one had fulfilled the

Company's regulatory obligations, the 29 May RNS was unnecessary and misleading. He says that, if anything further needed to be said on the issue of the chairmanship, it should have been said in explanatory statements (reflecting each side's position) in advance of the AGM. As I have noted, Mr Tinkler has commenced libel proceedings against the Four Directors on the back of the 29 May RNS.

786. It is clear that the terms of the 29 May RNS reflected the advice of Mr Arch (of Stifel) on 26 May that a "*hard-hitting announcement*" was required. The RNS was certainly that with its references to the "*challenges*" which Mr Tinkler had posed "*in the recent past*".

787. It is not for me to trespass upon matters which are to be decided in the libel proceedings. I have well in mind Mr Hodges' view about the RNS, which is that it was a "*fundamentally dishonest*" document. At the time, having read it that day, Mr Brown also thought it was "*misleading*" though, as the Company points out, Mr Tinkler may well have encouraged him to express that view. I have to decide, instead, whether the Four Directors acted in breach of fiduciary duty in causing it to be issued.

788. In my judgment, it was unwise and inappropriate for the Four Directors to sanction the 29 May RNS with its bullet point list of allegedly recent challenges. There were certainly some matters of which all shareholders voting at the AGM probably ought to have been made aware, in advance of the AGM, in terms of the recent background to Mr Tinkler's challenge to Mr Ferguson. Having had to consider those at very great length for the purposes of this judgment I can see that it would not have been a straightforward task to summarise them in a circular. But such a summary could certainly have set out the majority's view as to the manner in which Mr Tinkler had gone about securing the shareholder support mentioned in the 25 May RNS and possibly also mentioned his recent claims for additional remuneration, his disappointment on which really seems to have marked the start of him confiding more in his loyal shareholders than in the Board (one of the bullet point "challenges" in the 29 May RNS referred to his proposal for the *ex gratia* distribution of shares from the EBT). The shape of a document that might have been appropriate in the circumstances can be envisaged by contemplating what the Board might wished to have said to counter the impression created by Mr Tinkler's later Letter to Shareholders (that his position stemmed from genuine and considered disagreement within the Board on matters of corporate direction).

789. But the relevant part of the 29 May RNS was more inflammatory than that (and played a large part in prompting Mr Tinkler to write the Letter to Shareholders) and included within

its list of "*challenges*" matters which were not really germane to this key issue for the shareholders' vote. For example, the last bullet referred to his proposal within Project Wright ("*a proposed related party transaction associated with the recent aborted airline transaction*") which, I have decided, involved no wrongdoing on his part. And the first bullet ("*settlement of contractual issues arising from a previous related party transaction when Mr Tinkler was CEO*") related to a contractual claim brought by the Company against Mr Tinkler in respect of a tax indemnity. The Company had brought that claim in 2017 and that it did not relate to something "*in the recent past*" is illustrated by the fact that, on 16 November 2018 and while the trial before me was proceeding, Mr Justice Phillips struck it out, I understand, on limitation grounds (although I gather that limited permission to appeal has since been granted). All that said, Mr Tinkler accepted in evidence that other parts of the RNS (addressing the "*Management's achievements*") could fairly be read as reflecting favourably upon his time as CEO.

790. However, it does not follow from the conclusion that the 29 May RNS was inappropriate that the Four Directors acted in breach of fiduciary duty in causing it to be published. They had obtained external legal advice upon it as well as advice from the brokers. Mr Brady said in an email on 26 May 2018 (and therefore between the two RNS's) that the Chief Executive of the Civil Aviation Authority had been "*asking me what is going on re the founder*." And, although most of the bullet points of "challenge" were of suspect relevance, the point they wished to get across was that "*Mr Tinkler has destabilised the Group at this crucial time for the business by his stated intention to vote against the Chairman*". I cannot criticise them for holding that view, particularly in the light of my other findings, and the real question is whether or not the expression of it in an RNS (with some dubious points in support of it) constituted a breach of fiduciary duty.

791. In my judgment, it does not follow that the inflammatory aspects of the 29 May RNS represented a breach of duty by the Four Directors. The only relevant duty, as I see it, is their duty to act in good faith and in the best interests of the Company. I cannot see that the sufficient information duty has any application. Where it applies, that duty requires the provision of sufficient information but cannot really be sensibly applied so as to prohibit the provision of too much of it. If too much information is provided by the directors, to the detriment of the Company, then (leaving to one side the law of defamation for any actionable untruths within it) that is a matter best addressed by reference to what Arden LJ described in *Item Software v Fassihi* as the strong and flexible duty of loyalty.

> 792. As to that first duty, there are two reasons why I have concluded the Four Directors were not in breach of it. The first is that I find that each of them thought that it was in the best interests of the Company to publish the RNS. I have already referred to Mr Coombs' view about the need for the 29 May RNS in addressing, on the question of an intention to injure within Issue 2, what he perceived to be Mr Tinkler's aims. All four of them considered that his challenge to Mr Ferguson (with its repercussions in respect of Messrs Wood and Coombs) was destabilising the Company.
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> 793. The second reason is that the terms of the RNS, though inappropriate in the respects mentioned above, do not justify the conclusion (by way of an objective check upon their subjective thoughts) that no reasonable director would have agreed to it. This second reason is reinforced by the advice the Four Directors received at the time and by the absence of any evidence that it damaged the Company. In addition to saying it damaged him personally, Mr Tinkler argued, by reference to Mr Grimes' evidence and the "*surprise and regret*" at the RNS expressed in a letter from three executives in the Aviation Division, that it did damage the Company. Mr Grimes referred to unsettlement amongst employees and questions from brokers and customers of the Jet Centre. Mr Tinkler also points to the evidence of Mr Whawell in relation to the general disquiet expressed at the ELT event in Manchester on 5 and 6 June 2018.
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> 794. However, it is difficult to attribute employee disquiet to the 29 May RNS when I find it is just as likely, if not more likely, that such concerns on the part of employees and customers, about what was going on at the head of the Company, would have been generated by the terms of the earlier 25 May RNS. That earlier RNS would have told anyone who read it about the potential for upheaval within the Board and that Mr Tinkler was opposed to Mr Ferguson. It must be remembered that the gravamen of Mr Tinkler's challenge to the 29 May RNS is that it was an unnecessary attack upon, and damaging to him personally."

10. Returning to the wider picture, Mr Tinkler sought permission to appeal from the decision of Judge Russen QC, but his application was refused by Flaux LJ on 6 June 2019 and an application to reopen was refused by Males LJ on 12 November 2019.

11. While the Stobart Action was running its course, the Malicious Falsehood Action continued in the background. It began as a claim for both defamation and for malicious falsehood. On 17 December 2018, the Judge determined the meaning of the RNS Announcement: [2018] EWHC 3563 (QB). He found that only one meaning was defamatory, but that it was not seriously so:

> "The Claimant's behaviour was disruptive; and, in relation to the challenges identified [above] unreasonable and his opposition to

> the re-election of the Chairman was regrettable and risked destabilising Stobart."

For the purpose of the Malicious Falsehood Action, he held that the meaning of the RNS Announcement was that:

> "(a) The Claimant destabilised the Board at a crucial time for the business; and/or
>
> (b) The Claimant required the Board to deal with challenges, including:
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> i. the settlement of financial issues arising from a previous related party transaction when the Claimant was CEO;
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> ii. a proposed selective buy-back of part of the Claimant's stake in [Stobart];
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> iii. a proposed additional ex-gratia bonus for the Claimant of shares then worth some £8 million;
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> iv. a proposed buy-out of Stobart when the share price was in the range of 100p to 120p; and/or
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> v. a proposed related party transaction associated with a recent aborted airline transaction."

To the extent that Meaning (a) contained opinion, the burden was on Mr Tinkler to prove that it was false.

12. Mr Tinkler appealed. His appeal was dismissed on 15 May 2019: [2019] EWCA (Civ) 819. In relation to the single meaning found to be defamatory, which was in substance the same as Meaning (a) in the Malicious Falsehood Action, Longmore LJ said this at [28]:

> "Being said to be disruptive or unreasonable or to be behaving regrettably in the context of a boardroom dispute is part of the give and take of business life. If it is defamatory at all (as to which I would not wish to differ from the judge) it is very much at the lower end of the scale."

13. On 14 June 2019, Nicol J gave permission to Mr Tinkler to make limited amendments to his Particulars of Claim: [2019] EWHC 1501 (QB). The main issue under consideration was the adequacy of the pleading of the claim for harm and damage arising from the RNS Announcement.

14. On 10 September 2019, Mr Tinkler served Re-Amended Particulars of Claim, in the course of which he abandoned his defamation action, leaving only the malicious falsehood action. On 8 October 2019, the Respondents filed their Defence. It denied that Meanings (a) and (b) were false, or that the RNS Announcement had been published maliciously, or that it was likely to cause Mr Tinkler pecuniary loss. No Reply was served by Mr Tinkler.

15. On 23 December 2019, the Respondents applied for the staying or striking out of the Malicious Falsehood Action on the grounds that it was an abuse of process. They contended that it would involve the re-litigation of, or collateral attack upon, the Stobart Action and the Russen Judgment. Alternatively, they argued that Mr Tinkler could establish no substantial tort and that his claim should be struck out under the principle in *Jameel*.

16. In response, on 23 March 2020, Mr Tinkler filed a witness statement of his own and a statement by Paul Hodges, a former broker for the Company.

17. On 25 March 2020, the Respondents applied to amend their application to add a third assertion, namely that the Re-Amended Particulars of Claim disclosed no reasonable grounds for bringing the claim as it contained no reasonably arguable or properly particularised case of pecuniary loss under s. 3 (1) Defamation Act 1952 nor any claim for special damage.

18. The application came before the Judge on 31 March and 1 April 2020. On this occasion Mr Tinkler, who had dipped in and out of being legally represented, represented himself with the assistance of a McKenzie Friend and a professionally-drafted skeleton argument dated 29 March. The amendment to the strike-out application was allowed. The Judge found that, though it would have been better if the application had contained the s. 3 ground from the outset, the complaint about the adequacy of Mr Tinkler's case on damage had been a consistent theme since the hearing before Nicol J and its addition could not come as a surprise to him.

The Judge's decision

19. The Judge handed down his judgment on 8 June 2020: [2020] EWHC 1467 (QB). His decision on abuse of process is set out at [69 – 89] and on damage at [91 – 96].

20. As to abuse of process, the Judge analysed the two sets of proceedings and observed at [41]:

> "How the actions were structured, when they were commenced, and the identities of the parties, have no bearing on the fundamental point: both actions concerned the same essential dispute between directors of Stobart. The Malicious Falsehood Action, concerned with the publication of the Announcement, focused on only a small part of the overall dispute."

21. He returned to this issue at [81], having carried out a detailed comparison of the issues that arose in the two actions with reference to an annexed table:

> "Mr Tinkler submitted that, as the Stobart Action was brought by the company and the Malicious Falsehood Action is brought against the directors personally, the Malicious Falsehood Action is not duplicative. The above analysis shows that this submission must be rejected. It is a distinction without any substance. So far as concerns publication of the Announcement, Mr Tinkler is complaining about precisely the same acts in the Malicious Falsehood Action as he did in the Stobart Action. The only

> difference is that in the Stobart Action, the company was being held vicariously liable for the actions of the Four Directors and in the Malicious Falsehood Action he seeks to establish personal liability of the Four Directors plus Mr Laycock. The fact that the directors had no direct financial interest in the outcome of the Stobart Action and were not themselves likely to be at risk of any third-party costs order is not material. Nor does it matter that the Malicious Falsehood Action was commenced before the Stobart Action (see [41] above)."

22. He referred at [82] to the substantial overlap between the issues in the two actions:

> "I accept that there might be certain limited issues that would arise in the Malicious Falsehood Action which were not resolved in the Stobart Action. Principally, as I have noted, the truth or falsity of Malicious Falsehood Meaning (b) was not an issue in the Stobart Action. Also, there might be scope for subtle differences in the states of mind of the Defendants. In the Stobart Action, the issue was whether, when the Four Directors published the Announcement, they were acting bona fide in the best interests of the company. In the Malicious Falsehood Action, the question would be whether each Defendant published the Announcement maliciously. However, the overlap between these two issues is so substantial that practically there is little difference. I suppose it is conceptually possible to act honestly in what the director believed was in the best interests of Stobart and yet still be found to have a dominant intention to injure Mr Tinkler, but this is wholly speculative and I am doubtful whether that would be sufficient to establish malice if the Court found that the defendant honestly believed what he published to be true."

23. At [83] he concluded:

> "For the reasons I have set out above, permitting Mr Tinkler to proceed with the Malicious Falsehood Action would involve the Court permitting him to relitigate a large number of the issues that were raised (and adjudicated upon) in the Stobart Action and Judgment. In almost all of those instances, Mr Tinkler would be making a collateral attack to findings of fact made in the Stobart Judgment. The case that Mr Tinkler wants to advance in the Malicious Falsehood Action could, and in my judgment, should have been brought in the Stobart Action."

24. As to damage, the Judge said this at [95]:

> "Mr Tinkler's pleaded case is vague and speculative and consists entirely of generalities. Against the very real problems he confronts in relation to causation, it will not do. But even if the causation issue is ignored, Mr Tinkler's pleaded case still does not explain how an allegation that he had destabilised the board

> of Stobart and had presented a series of challenges to the board is more likely than not to cause him pecuniary damage."

He emphasised that the pleading contained no proper case on causation, saying at [94iii]:

> "If the Announcement had been the only thing of significance publicly to affect Mr Tinkler, then an inferential case based on a drop-off of offers of directorships or investment opportunities might have had some prospect of success. But that was not the position. The Announcement was an early incident in the wider battle, played out publicly, between Mr Tinkler and the other directors of the board of Stobart. Objectively judged, the very public sacking of Mr Tinkler on 14 June 2018 is much more likely to have caused pecuniary damage to Mr Tinkler than publication of the Announcement and then, subsequently, even that damage was more likely than not to have been eclipsed by the publicity that the Stobart Judgment received. After the Stobart Judgment, any pecuniary damage that Mr Tinkler says was likely to have been caused to him was, absent a compelling alternative explanation, likely to have occasioned by the Stobart Judgment. In order for his pleaded case on the likelihood of pecuniary damage to disclose reasonable grounds for bringing his claim, Mr Tinkler had to explain a way - or a mechanism - whereby an RNS, in the fairly anodyne terms of the Malicious Falsehood Meaning, retained any real potency to cause pecuniary damage after Mr Tinkler's public dismissal from Stobart and the subsequent adverse findings publicly made against him in the Stobart Judgment, including that he had acted in serious breach of his fiduciary duties as a director of Stobart."

He considered at [96] whether he should allow Mr Tinkler to re-plead his case on damage, but concluded that there would be no purpose in taking that course because he had already had the fullest opportunity to plead any realistic case.

25. Finally, the Judge stated at [97] that in the light of these conclusions he did not need to consider the argument that the Malicious Falsehood Action was also an abuse of process under the *Jameel* principle.

The law concerning abuse of process

26. The starting point, reflected in common law and in Article 6 of the ECHR, is that everyone has the right to a fair hearing to determine his civil rights.

> "The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court…"

Johnson v. Gore Wood & Co. [2002] 2 AC 1 per Lord Bingham at 22.

27. However, the right is necessarily subject to limitations that are to be found in rules of substantive law concerning *res judicata*, including cause of action estoppel and issue estoppel, and procedural powers (now found in CPR 3.4) to prevent abuse of process. These substantive and procedural limitations have the common purpose of limiting abusive and duplicative litigation: *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd.* [2014] AC 160 per Lord Sumption at [25].

28. The court has the inherent power to prevent misuse of its procedure where the process would be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people: *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529 per Lord Diplock at 536.

29. A review of the power to control abuse of process was given by Simon LJ in *Michael Wilson & Partners Ltd v Sinclair* [2017] 1 WLR 2646 at [39] to [48], ending with this summary:

> "(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in *Hunter's* case [1982] AC 529, Lord Hoffmann in the *Arthur J S Hall* case [2002] 1 AC 615 and Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter's* case. Both or either interest may be engaged.
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> (2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse: see *Bragg v Oceanus* [1982] 2 Lloyd's Rep 132; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the *Arthur J S Hall* case.
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> (3) To determine whether proceedings are abusive the court must engage in a close merits based analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in *Johnson v Gore Wood & Co* and Buxton LJ in *Laing v Taylor Walton* [2008] PNLR 11.
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> (4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within the spirit of the rules, see

> Lord Hoffmann in the *Arthur J S Hall* case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the *Bairstow* case [2004] Ch 1; or, as Lord Hobhouse put it in the *Arthur J S Hall* case, if there is an element of vexation in the use of litigation for an improper purpose.
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> (5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in *In re Norris*.
>
> To which one further point may be added.
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> (6) An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160, para 17 as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of a discretion. Nevertheless, in reviewing the decision the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the *Laing v Taylor Walton* case, para 13."

30. The last point was also made in *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748, a case best known for the guidance given by Thomas LJ that a party to complex commercial multi-party litigation who wishes to reserve the right to pursue other proceedings must make that clear to the court, so that the court can express a view about the proper use of its resources and identify whether a way could be found to determine the reserved issues in the current proceedings.

31. The circumstances in which abuse of process can arise are very varied and are not limited to fixed categories: *Hunter* at 536. Examples can be found in: vexatious proceedings amounting to harassment; attempts to re-litigate issues that were raised in previous proceedings; attempts to litigate issues that should have been raised in previous proceedings (*Henderson v Henderson* (1843) 3 Hare 100); collateral attacks upon earlier decisions (attacks made in new proceedings rather than by way of appeal in the earlier proceedings); pointless and wasteful litigation (*Jameel*).

32. Nor is there any hard and fast rule to determine whether abuse is found or not; the process is not dogmatic, formulaic or mechanical, but requires the court to weigh the overall balance of justice: *Johnson* at 31, 32 and 34. Indeed, the overriding objective of the procedural rules is to enable the court to deal with cases justly, including when it exercises the power under CPR 3.4. Where there is abuse, the court has a duty, not a discretion, to prevent it: *Hunter* at 536.

33. *Jameel* confirms that the court has the power to strike out a claim as abusive where it discloses no real or substantial tort and where, colloquially, the game would not be worth the candle. This calls for an assessment of the value (in the widest sense) to the

claimant of what is properly at stake and of the likely cost (in the widest sense) of the litigation. The jurisdiction is useful where a claim is obviously pointless or wasteful: *Vidal-Hall v Google Inc.* [2016] QB 1003. Such cases are to be distinguished from valid claims of small value or cases where vindication is of importance to the claimant and the court should only conclude that continued litigation would be abusive where a way cannot be found to adjudicate the claim proportionately: *Ames v Spamhaus Project Ltd.* [2015] 1 WLR 3409 [33]-[36] per Warby J citing *Sullivan v Bristol Film Studios Ltd.* [2012] EMLR 27 [29] to [32] per Lewison LJ.

34. For completeness, I would note that following the handing down of our draft judgments in the present case, two very recent decisions of this court concerning abuse of process were coincidentally published: *Allsop v Banner Jones* [2021] EWCA Civ 7 and *Pricewaterhousecoopers LLP v BTI 2014 LLC* [2021] EWCA Civ 9. We received written submissions from the parties about these decisions, which arose from very different circumstances to the present case.

35. In summary, the power to strike out for abuse of process is a flexible power unconfined by narrow rules. It exists to uphold the private interest in finality of litigation and the public interest in the proper administration of justice, and can be deployed for either or both purposes. It is a serious thing to strike out a claim and the power must be used with care with a view to achieving substantial justice in a case where the court considers that its processes are being misused. It will be a rare case where the re-litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse, but where the court finds such a situation abusive, it must act.

s. 3 (1) Defamation Act 1952

36. In a defamation claim there is a common law presumption that a defamatory statement causes damage. By contrast, a claimant in a malicious falsehood action is required to demonstrate that the publication caused him pecuniary damage. However, a claimant in an action for malicious falsehood does not have to prove special damage if he can bring his claim within s. 3 (1) Defamation Act 1952, which provides:

> "3(1) In an action for … malicious falsehood, it shall not be necessary to allege or prove special damage –
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form, or
>
> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication."

37. A claimant can therefore recover general damages by showing that the alleged false statements were calculated (which has been held to mean more likely than not) to cause pecuniary damage. Harm to the claimant's reputation does not of itself amount to pecuniary damage. The pleaded claim must identify (a) the nature of the loss which the falsehoods were calculated to cause; and (b) the mechanism by which the loss is likely to have been sustained: *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152.

38. That is a sufficient framework for consideration of the arguments in this case, to which I now turn.

The appeal

The grounds of appeal

39. The sixteen grounds of appeal can now be conveniently distilled into seven. In summary, Mr Wardell QC, leading Ms Wilson, contends that the Judge's analysis was wrong in these respects:

Abuse of process

1. The Malicious Falsehood Action, which had been brought first, was not a collateral attack on key findings in the Stobart Action.

2. The overlap between the two proceedings was less than the Judge considered it to be.

3. The Malicious Falsehood Action could not have been tried at the same time as the Stobart Action. The parties and the Court had understood that throughout and there was no breach of the *Aldi* guidelines.

4. What makes a second set of proceedings abusive is a litigant attempting to have a second bite of the cherry and not, as the Judge considered, a risk of inconsistent findings.

5. There was no possible unfairness to the Respondents in allowing the Malicious Falsehood Action to proceed to trial, nor would it bring the administration of justice into disrepute.

Damage

6. The evidence and submissions did support an inference that the publication of the Announcement was more likely than not to cause pecuniary damage to Mr Tinkler.

7. The Respondents should not have been allowed to amend their application three working days before the hearing to raise s. 3 Defamation Act 1952; the issue of damage had not been previously considered in that context and Mr Tinkler's complaint that he had been ambushed was justified; he should have been given the chance to amend his pleadings to make the position clear.

The Respondent's Notice

40. The Respondents seek to uphold the Judge's order on the additional basis that the Malicious Falsehood Action in relation to Meaning (b) discloses no substantial tort having regard to a number of matters, including: the scope and gravity of the Russen

Judgment as to Mr Tinkler's conduct; the relative insignificance of the RNS Announcement a week before his justified dismissal; delay in pursuing the claim; the weakness of the case on damage; and the disproportionate expenditure of time and costs, having regard to the very modest damages that could be recovered and the time and costs already spent on this action and the Stobart Action.

Application to admit fresh evidence

41. Mr Tinkler seeks leave to file a further witness statement on this appeal, dealing with two matters. The first is an account of further legal steps that he has recently taken in relation to the Stobart Action. On 13 November 2020, he issued two more sets of proceedings: first, a claim seeking to set aside the decision of Judge Russen QC on the ground that it was obtained by fraud, and secondly a claim for unlawful means conspiracy against the Stobart Group, Mr Brady, Mr Ferguson and Mr Soanes, a shareholder and advisor of the Company. The Respondents raised no objection to us receiving this information, which has no bearing on the merits of this appeal, though it may be relevant to any consequential orders.

42. The second element of the witness statement contains evidence that is said to be relevant to Grounds 6 and 7 (damage). It was agreed that we would receive this evidence for the purpose of hearing the arguments, and would rule on whether to admit it thereafter.

43. I now address the grounds of appeal and Respondent's Notice in relation to the question of abuse.

Ground 1: The Malicious Falsehood Action, which had been brought first, was not a collateral attack on key findings in the Stobart Action.

44. Mr Wardell relies on these matters:

(1) The Malicious Falsehood Action was issued with no improper purpose, but to seek redress for a malicious publication that the Respondents knew to be untrue. It is not a collateral attack upon the decision about Mr Tinkler's dismissal, which was the central focus of the Russen Judgment. It is of particular significance that Judge Russen QC was at pains not to trespass on matters that were to be decided in the defamation proceedings.

(2) The Judge was wrong to find that the timing of the action was immaterial. There is no precedent for the striking out of an action brought first. All the decided cases concern the striking out of later proceedings and there is no authority that an action properly brought can become abusive because of a later decision. Mr Wardell points to observations of Lord Millett in *Johnson* at 59F and Clarke LJ in *Dexter Ltd. v Vlieland-Boddy* [2003] EWCA (Civ) 14 at [49-50], to show that the question has to be decided at the point where the abusive proceedings are brought. He does not suggest that it is impossible for the continuation of earlier proceedings to become abusive, but submits that this would be wholly exceptional.

(3) The Judge was wrong to regard the difference in parties as immaterial. The claim is against different parties, namely the Directors, not the Company. It is not a case of estoppel *per rem judicatem* and the Directors are not privies of the company.

The principle in *Re Norris* (that it is rarely abusive for there to be litigation of an issue not previously decided between the same parties or their privies) applies, but the Judge did not engage with it.

Ground 2: The overlap between the two proceedings was less than the Judge considered it to be.

45. The Judge's finding of substantial overlap is challenged in these ways:

(1) The fact that there was some overlap between the issues in the two actions did not amount to abuse.

(2) The Russen Judgment contains no finding either way about whether the RNS Announcement was a malicious falsehood. There is a conceptual difference between the Respondents acting other than in the best interests of the company and acting with the dominant motive of injuring Mr Tinkler.

(3) Likewise, the Russen Judgment contains no finding about the truth or falsity of Meaning (b), though its findings about those matters are consistent with Mr Tinkler's case.

(4) The Judge recognised these matters but he gave them insufficient weight. He should have concluded that the RNS Announcement was peripheral to the key issues in the Stobart Action.

(5) Similarly, the Judge should have found that the majority of the issues in the Stobart Action were of peripheral relevance to the Malicious Falsehood Action. His analysis of the table of issues said to be common to both actions was insufficiently careful. He did not appreciate that one issue related to an earlier event in January 2018 or that a number of other issues post-dated the RNS Announcement and could not inform the Respondents' state of mind at the time of publication, though they could go to the issue of truth or falsity; he did not give weight to the fact that a number of the issues had been raised by the Respondents and not by Mr Tinkler; he should not have relied upon inadvertent errors made in the re-amendment of the pleadings as showing that Mr Tinkler was seeking to re-litigate issues, when those errors could easily have been corrected.

Ground 3: The Malicious Falsehood Action could not have been tried at the same time as the Stobart Action. The parties and the court had understood that throughout and there was no breach of the *Aldi* guidelines.

46. The Judge's conclusion that the malicious falsehood claim could and should have been brought in the Stobart Action, and that the *Aldi* guidelines had therefore been breached, was wrong for these reasons:

(1) The Stobart Action had rightly been expedited and the Malicious Falsehood Action (which required a hearing to identify the meaning of the RNS Announcement) could not have been ready for trial at the same time.

(2) There was no breach of the *Aldi* guidelines. Mr Tinkler had, as the Judge acknowledged, placed his cards on the table and been transparent about his intentions. There were two case management hearings in the Stobart Action and on

each occasion the co-existence of the Malicious Falsehood Action was noted. On neither occasion did the Respondents or the Court suggest that the actions could or should be heard together.

(3) The suggestion that the *Aldi* guidelines had been breached came from the Judge. The Respondents had not suggested it, indeed Mr Caldecott QC fairly accepted that it would be "wholly impractical" for the matters to be tried together and the Judge appeared to agree that a speedy trial of both would not have been possible. Mr Tinkler could not have anticipated this argument.

Ground 4: What makes a second set of proceedings abusive is a litigant attempting to have a second bite of the cherry and not, as the Judge considered, a risk of inconsistent findings.

47. Mr Wardell characterises the Judge's decision as being founded on the risk of inconsistent findings as well as on breach of the *Aldi* guidelines. The Judge's emphasis on inconsistency of findings was, he says, misplaced. He cites *Arthur J S Hall & Co. v Simons* [2002] 1 AC 615 per Lord Hobhouse at 743 and 751:

> "The "collateral attack" point is a species (or "sub-set") of abuse of process. There is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived at in another case. The law of estoppel per rem judicatem (and issue estoppel) defines when a party is entitled to do this. Generally there must be an identification of the parties in the instant case with those in the previous case and there are exceptions. So far as questions of law are concerned, absent a decision specifically binding upon the relevant litigant, the doctrine of precedent governs when an earlier legal decision may be challenged in a later case."

> "… the law does tolerate the possibility of apparently inconsistent decisions. The element of vexation is an aspect of abuse, the use of litigation for an improper purpose, trying to have repeated bites at the same cherry. The objectionable element is not the risk of inconsistency."

Mr Wardell also relied on *Divine-Bortey v Brent LBC* [1998] ICR 886 per Potter LJ at 898:

> "The basis of the rule in *Henderson* is the avoidance of multiplicity of litigation in relation to a particular subject or set of circumstances in order to avoid the prejudice to a defendant which inevitably results in terms of wasted time and cost, duplication of effort, dispersal of evidence and risk of inconsistent findings which are involved if different courts at different times are obliged to examine the same substratum of fact which gives rise to the subject of litigation. The rule is justifiable and justified as a matter both of common sense and common justice between the parties and it is the aspects of prejudice which I have mentioned which will usually render a

> second bite of the cherry worthy of the description "abuse of process." They are essentially objective considerations to which the particular circumstances of the parties will generally be irrelevant; hence the need for special circumstances if the full rigour of the rule is to be alleviated."

Ground 5: There was no possible unfairness to the Respondents in allowing the Malicious Falsehood Action to proceed to trial, nor would it bring the administration of justice into disrepute.

48. Contrary to the conditions laid down by Sir Andrew Morritt V-C in *Secretary of State for Trade v Bairstow* [2004] Ch 1 at 17, the Judge neither found that continuation of the proceedings would be unfair to the Respondents, let alone manifestly unfair, nor did he identify any respect in which the administration of justice would be brought into disrepute.

The Respondents' response on abuse

49. Mr Caldecott QC, leading Mr Dean, initially argued that the Judge had held that an estoppel arose in relation to Meaning (a), and that the Respondents were privies of the Company, but on reflection he abandoned that contention, which had not appeared in his skeleton argument. Instead he submitted that the Judge had heard argument about estoppel and that, arising from it, had decided that Mr Tinkler was seeking a second bite of the cherry and that there was sufficient proximity, not privity, between the Respondents and the Company to underpin his conclusion about abuse. Mr Caldecott also now conceded that breach of the *Aldi* guidelines did form part of the Judge's reasoning.

50. Mr Caldecott accepted that the Russen Judgment did not directly address Meaning (b), but noted that even Meaning (a) had been found to be at the lowest end of the scale of significance. Further, the finding that Meaning (a) was true provides a substantial answer to Meaning (b), and it is very difficult to see how malice could be found when the Respondents were acting in the best interests of the Company. The Stobart Action was not just about Mr Tinkler's dismissal but about a number of significant issues identified in the Russen Judgement. These all bear on the truth or falsity of the Meanings, and even though those postdating the RNS Announcement are not directly relevant to the Respondents' state of mind, they are relevant to truth and falsity and to limiting any damage arising from continued publication.

51. Mr Caldecott did not accept that passages in the amended pleadings were accidental. There remained what he described as a frontal attack on the Russen Judgment's finding that Mr Tinkler had destabilised the Company. He further pointed out that in a solicitor's letter dated 5 September 2018 Mr Tinkler clearly considered that the outcome of the Stobart Action would in effect determine the outcome of the Malicious Falsehood Action:

> "Of course, our client remains keen to clear his name. As matters now stand… , there is to be a trial in the Stobart Claim which will result in findings by the court on a range of issues. Moreover, the judgment is likely to show that your clients would not be able to seek to defend their publication on the grounds of

> alleged truth or qualified privilege (an action in breach of the fiduciary duties cannot be the subject of a defence of privilege). Plainly, the parties to this claim would wish to consider their positions in the light of the determination of the issues at that expedited trial. An outcome in our client's favour in that trial will show that he was not in breach of his duties."

52. If it is accepted that it would be abusive to relitigate Meaning (a), Mr Caldecott submits by Respondent's Notice that for Meaning (b) to be litigated would give rise to abuse in the *Jameel* sense. As to the value of the claim to Mr Tinkler, Meaning (b) is not defamatory and any loss caused by the RNS Announcement would have been dwarfed by loss resulting from his justified dismissal. It in any event relates to damage to his reputation, which is not a recoverable loss. If the RNS Announcement had any effect it was historic and academic. Mr Tinkler's delay in driving the Malicious Falsehood Action forward shows that in truth he wants to keep it alive for as long as possible as a means of casting doubt on his dismissal. By the end of 2019, the legal costs of the Stobart Action had exceeded £6 million, of which £2.3 million was borne by the Company, and the calls upon the Respondents' time had been very significant. The Respondents' costs of the Malicious Falsehood Action had by then amounted to some £650,000. Moreover, it is now sought to relitigate an issue concerning the Respondents' honesty, which the Court should be particularly reluctant to sanction.

53. In response to the *Jameel* submission, Mr Wardell asserts that it cannot possibly succeed in relation to Meaning (a) and that it would not be right to split up the two Meanings. Neither the wrong nor the value of the action can be considered to be trivial. He relies on *Ames*, where Warby J stated at [36] that if a libel claimant has a real prospect of establishing a tort that is real and substantial, the court should be very reluctant to conclude that it is unable to fashion any procedure by which that claim can be adjudicated in a proportionate way. As to delay, he noted that the Judge did not give this as a reason for striking out the claim. Dishonesty, he maintained, was not the issue in the Stobart Action. The costs of the Malicious Falsehood Action can be contained by case management.

54. I next turn to the grounds of appeal in relation to the question of damage.

Ground 6: The evidence and submissions did support an inference that the publication of the Announcement was more likely than not to cause pecuniary damage to Mr Tinkler.

55. Mr Wardell submits that Mr Tinkler's claim satisfied both limbs of section 3 and that he has a right to general damages when he cannot prove actual loss. That right is not cut down by later events. Nor would the award necessarily be limited to nominal damages: *Joyce v Sengupta* [1993] 1 WLR 337 per Sir Donald Nicholls V-C at 347. However, he accepted that the likely scale of an award might be relevant to a *Jameel* analysis.

56. In Mr Tinkler's pleaded case, most recently amended in October 2019, and in his witness statement of 23 March 2020, he relied on the consequences of damage to his reputation in the business community leading to a lack of offers to act as a director or CEO of a UK listed company and reduced ability to attract investors. This satisfies the mechanism required by s. 3. Further, in his skeleton argument and submissions before

the Judge, Mr Tinkler alleged loss to his substantial shareholding. In the week following publication of the RNS Announcement the Company's share price dropped significantly (although it more than recovered a week later). The Judge was therefore wrong to hold that these matters could not support an inference that the publication of the Announcement was more likely than not to cause pecuniary damage. He also overlooked the experienced opinion of Mr Hodges that the publication of the RNS Announcement was an attempt to cause maximum damage to Mr Tinkler.

57. Mr Wardell submits that these matters satisfy s. 3 in themselves, but in addition he seeks permission to file further evidence on this appeal in the form of documentary evidence showing that Mr Tinkler had a settled intention to sell his shares at the time of the RNS Announcement and that the Respondents were aware of his plan. The shares were placed beyond Mr Tinkler's control and sales would be triggered when the share price rose to a certain level. This evidence, he says, counteracts the Respondents' argument that share depreciation is not a recognisable head of loss. The evidence should be admitted – it satisfies the second and third criteria in *Ladd v Marshall* [1954] 1 W.L.R. 1489 and the first criterion (unavailability at time of trial) should not be an obstacle, given the situation Mr Tinkler found himself in with the late amendment to the application.

Ground 7: The Respondents should not have been allowed to amend their application three working days before the hearing to raise s. 3 Defamation Act 1952; the issue of damage had not been previously considered in that context and Mr Tinkler's complaint that he had been ambushed was justified; he asked for and should have been given the chance to amend his pleadings to make the position clear.

58. Mr Wardell argues that the discussion of the pleading of damage before Nicol J had been in relation to serious harm and the special damage claim in the defamation action and not the conceptually different general damage claim in the Malicious Falsehood Action. When considering whether to allow the amendment to the application and how to respond to Mr Tinkler's request for more time to plead his case, the Judge should have appreciated this. Mr Tinkler's position as an unrepresented litigant should have commanded more sympathy.

The Respondents' response on damage

59. Mr Caldecott responds that the pleaded case impermissibly relied upon damage to reputation as the mechanism for loss, despite the abandonment of the defamation claim. The absence of any claim for financial loss and the lack of particularity had been specifically instanced in the Respondents' unamended application, but it had not been cured. A drop in share value had not been pleaded, nor did it feature in Mr Tinkler's witness statement on 23 March. It only emerged in the skeleton argument of 29 March and in oral submissions. Such losses cannot be said to have been directly caused by the RNS Announcement. Mr Hodges' opinion about the Respondents' motives was irrelevant and apparently based on defamatory meanings that are no longer available. The Judge rightly found, when refusing permission to appeal, that it could not support a claim for damage.

60. As to the allegation of ambush, the Respondents' case on this issue was set out in full at paragraphs 45 to 55 of their skeleton argument, served on the Thursday before the Tuesday/Wednesday of the hearing, and was responded to at paragraphs 44 to 51 in Mr

Tinkler's skeleton argument in reply. The onus was on him to plead a sustainable claim on damage from the start and he had not done so despite repeated complaints. It was not for the Respondents or the Court to make good this failure.

61. The fresh evidence has always been available and it should not be admitted. In any case it does not assist Mr Tinkler as the share price was too low to have triggered share sales at the material time.

Conclusion on abuse of process

62. After this broad review of the extensive submissions it is necessary to step back and recall the crucial question: in all the circumstances was Mr Tinkler abusing or misusing the court's process by continuing the Malicious Falsehood Action? Despite Mr Wardell's spirited presentation, which hits the mark in one respect (Ground 3 – *Aldi*) and gives food for thought in others, the Malicious Falsehood Action was in my view, formed independently of the Judge's reasoning, rightly struck out. It is the rump of the original defamation action and concerns just one element in a sequence of many interconnected elements, all of which (not least the RNS Announcement itself) were exhaustively examined in the Russen Judgment, whose findings have been effectively recognised by both parties in their pleadings as binding. In both sets of proceedings Mr Tinkler is making the same essential complaint about the same individuals. On the specific facts of this case, that amounts to a collateral attack on the previous findings. These features bring the case into the rare group where litigation is abusive although it is not formally between the same parties or their privies. I would reach this conclusion in relation to both Meanings, as (b) is so interconnected to (a) but adds so little to it; but were it necessary I would hold that any residual issues under Meaning (b) that are not directly covered by the Russen Judgment are of such small significance that they do not begin to justify the resources that would be necessary to resolve them, and I would despatch them under *Jameel*. Those residual issues are quintessentially part of "the give and take of business life" and there is no proportionate way in which they could be determined. The RNS Announcement cannot be separated from earlier and later events and the Court would have to rehear a great deal of similar evidence from the same witnesses. That would be manifestly unfair to the Respondents and an improper use of the court process. 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.

63. These are my responses to the individual grounds of appeal.

(1) Collateral attack

64. It is artificial to seek to distinguish the Stobart Action as being about Mr Tinkler's dismissal. The Russen Judgment contains a thorough report card on the actions and reactions of both factions. As matters then stood, it is understandable that Judge Russen did not want to trespass on proceedings that were not before him, but his proper caution did not amount to an endorsement of those proceedings and, significantly, he did not abstain from considering any aspect of the history. The issue of abuse was a judgment for the Judge to make, and insofar as he thought (at [84]) that Mr Tinkler might feel hard done by in the light of Judge Russen's observation, the September 2018 letter from his solicitors shows that Mr Tinkler in practice expected a favourable decision in the Stobart Action to be determinative of his defamation action.

65. This was an unusual set of circumstances. One action was a commercial action and the other began as a defamation action. The Judge of course noted that what became the Malicious Falsehood Action was issued first and that the parties were not identical. However, he rightly found that neither of those features provided the answer. It is not in fact unprecedented for continuation of an action started first to be struck out as an abuse (see *Hays v Hartley* [2010] EWHC 1068 (QB) at [64]), but even if it is rare there is no reason why the principle should be different. The dicta in *Johnson* and *Dexter* are clearly rooted in the facts of those cases.

66. Similarly, this was not a case of estoppel *per rem judicatem* and when assessing abuse there is no absolute requirement for identity or even sufficient identity (privity) of parties. The essence of a broad merits-based judgment is that it is not arrived at mechanically. The fact that the parties are different is a powerful factor in the application of the broad merits-based judgment but it does not operate as a bar to the application of the principle: see *Aldi* at [10]. It is true that the Judge did not cite *Re Norris* for the proposition that abuse without identity of parties in such circumstances is rare, but in practice he gave careful consideration to the question at [81] and he had to consider the circumstances of the case before him, regardless of their prevalence.

(2) Overlap

67. The underlying acts are the same and the overlap between the subject-matter of the two actions was rightly considered by the Judge to be substantial and not peripheral, both as to its significance and reach. As to significance, Judge Russen QC stated in terms at [790] that he could not criticise the Respondents for holding the view that Mr Tinkler has destabilised the Group at a crucial time for the business by his stated intention to vote against the Chairman. I therefore agree with the Judge that there was no more than a conceptual possibility that malice could be established at another trial on the evidence of the same witnesses.

68. As to reach, the Judge identified after a full analysis that the Russen Judgment had not determined the truth or falsity of the non-defamatory Meaning (b). However, that matter ('requiring the Board to deal with challenges') was trivial against a background where Mr Tinkler had himself abandoned his libel claim in respect of the mildly defamatory Meaning (a) and the Judge was entitled to treat it as insignificant in the overall scheme of things. More than that, Mr Tinkler's complaint had to some extent been vindicated by Judge Russen QC's findings at [788 – 789], which makes a revisiting of the issue doubly disproportionate.

69. The strictures about the Judge's detailed analysis of the issues are not well-founded. The fact that some individual issues determined by Judge Russen arose before or after the RNS Announcement, or that they were raised by one party rather than the other, does not alter the fact that they were part of a sequence of events that speaks directly to the truth or falsity of matters in the RNS Announcement and they were in my view capable of casting or reflecting light on the state of mind of the Respondents at the time of publication. These were all matters to go into the balance.

(3) Aldi guidelines

70. As noted above, the question of compliance with the *Aldi* guidelines did not feature in the case until it was raised by the Judge. Mr Wardell took us to its evolution in the

transcript. It would be fair to say that the Judge queried why the two actions had not been tried together but it was not until judgment was given that it emerged as a reason for striking out the claim. In this respect, the Judge erred. For the reasons given by Mr Wardell, there had been no breach of the *Aldi* guidelines. It was, for reasons that then seemed good to the parties and the court, not considered practical to try the defamation proceedings alongside the Stobart Action. That was a position openly taken and there was no basis for holding it against Mr Tinkler.

71. I do not accept the original submission that the Judge did not rely on *Aldi*: [83 – 84] and [88 – 89] show that it was very much part of his thinking. However, it was a superfluous addition and not a necessary underpinning for his decision or my own conclusion in relation to abuse of process.

(4) Inconsistent verdicts

72. It is said that what makes a second set of proceedings abusive is a litigant attempting to have a second bite of the cherry and not a risk of inconsistent findings. Neither assertion is strictly true. A careful reading of the authorities shows that having a second bite of the cherry is a common form of abuse, but it is not the only one. Similarly, inconsistency of verdicts does not of itself amount to abuse, but where the risk exists it may be a factor among others. In any case, the Judge did not treat inconsistency of verdicts as his yardstick. He only mentioned it twice: at [37] when giving a brief summary of a reported decision, and at [79] where he uses inconsistency in the sense of overlap. He was fundamentally troubled by the prospect of duplicative litigation, not inconsistent findings.

(5) Unfairness and disrepute

73. This ground is built upon the formulations found in *Hunter* and *Bairstow*. It is true that the Judge did not explicitly label the continuation of the Malicious Falsehood Action as 'manifestly unfair'. However, at [89] and elsewhere he clearly identified the seriousness for the Respondents personally in having to go through another trial in terms that amounted in substance to manifest unfairness. In the same way, he was clearly troubled at the propriety of duplicative litigation. Indeed, an impartial bystander who had observed the trial of the Stobart Action and then wandered into a trial of the Malicious Falsehood Action would surely wonder what public interest was being served by the repetition. In saying this, I accept that re-litigation of an issue is not without more an abuse: what makes it so in this case is that (as I have said) the litigant is making the same essential complaint about the same individuals, in contrast to the situations in *Allsop* and *PWC*, which concerned different complaints about different actors.

74. For these slightly different reasons I would therefore uphold the Judge's decision to strike out the Malicious Falsehood Action on the basis that it constitutes a collateral attack on the Russen Judgment; alternatively that any residual issues disclose no substantial tort and cannot proportionately be tried. The overlap is so substantial, the proper value of the action to Mr Tinkler so scant, and the financial and opportunity costs of a trial so high as to make the proceedings abusive.

75. I next consider the additional basis upon which the claim was struck out, namely the question of whether it disclosed a reasonable cause of action. In taking matters in this

order, I note and agree with the proposition in *Allsop* at [47(iii)] that, where both issues arise, it is generally preferable to consider whether there is a reasonably arguable claim before addressing the question of abuse. In some situations, that course might save a great deal of time and trouble. In the present case I have dealt with the issues in the same order as they were argued before us, reflecting the order in which they were argued before the Judge, no doubt because of the way in which the Respondents' application evolved. In the end, it makes no difference to the outcome.

Conclusion on reasonable cause of action

(6) s. 3 Defamation Act 1952

76. This issue gives rise to two questions. First, are the sorts of losses claimed by Mr Tinkler recoverable in principle, and second, is there an arguable case that they were caused by the publication of the RNS Announcement? Behind these questions lies the further issue of whether the value of the claim is likely to justify continued litigation.

77. Mr Tinkler's case on his losses evolved by stages:

(1) The amended pleaded case alleged serious damage to his reputation causing reduced employment and investment opportunities (AMPOC 10 and 11.3).

(2) In the skeleton argument and written submissions he alleged loss to the value of his shareholding.

(3) In the fresh evidence filed on this appeal he relies on his intention to sell shares.

78. Dealing first with the fresh evidence about Mr Tinkler's settled intention to sell shares, the prevailing share price in the summer of 2018 meant that the conditions for a sale were not met. The evidence is irrelevant. It fails the second *Ladd v Marshall* condition, and I would not to admit it.

79. As to the pleaded case, the Judge found that it was vague and speculative and did not explain how the RNS Announcement was more likely than not to have caused pecuniary damage, as opposed to unrecoverable damage to reputation. The Judge reminded himself of *Joyce v Sengupta*, which explains that s. 3 (1) exists to help claimants who may struggle to prove special damage, but he was entitled to reach this conclusion, in particular because he linked it with the issue of causation.

80. The un-pleaded case on loss of share value raises the question of whether such a loss is recoverable in principle. That is not an easy question and it does not need to be answered on this appeal. It was debated before the Judge and when refusing permission to appeal he referred to *Collins Stewart v Financial Times* Ltd. [2004] EWHC 2337 (QB). Mr Wardell challenges the relevance of that decision, which does not relate to a loss of share value. I say no more about the issue because of the greater problem of causation, and for that purpose, I treat the case on loss of share value as if it had been pleaded.

81. As to causation, it will be recalled that the Judge found that subsequent events in the form of Mr Tinkler's sacking and the Russen Judgment were objectively much more likely to have caused pecuniary damage to Mr Tinkler than the publication of the "fairly anodyne" meaning of the RNS Announcement, a conclusion further fortified if the only

issue in play was Meaning (b). Mr Wardell objects that later losses do not exclude earlier losses. I would accept that as a matter of logic, but the Judge was entitled to conclude that in this case any short-term loss of share value was notional in pecuniary terms and swiftly eclipsed by losses arising from the dismissal. It seems to me that the case that Mr Tinkler was in reality making was that the RNS Announcement was a key event in the struggle leading to his dismissal, with all the resulting losses that followed, as this extract from the transcript at [SB 735] shows:

> "MR TINKLER: I understand that, my Lord, and I think it is probably because, going back to originally we were focused, when we put this claim in on the particulars of claim, nine days after the RNS, so it was mostly focused on the RNS, and at the time - right? - you could not quantify the damage at that time, due to the fact that at that time I was still working for the company and it is the likely loss that that statement has caused me and the causation of that has caused me -- or the Stobart Group to sack me on the 14th June. That is what I say."

The difficulty for Mr Tinkler is that as the dismissal has been held to be justified he is not entitled to recover for losses arising from it. Further, it is apparent that, no matter how it was pleaded, he has no prospect of succeeding on any case on causation for loss of the value of his shareholding. The first RNS announcement was considered by Judge Russen QC to have had a significant impact (see [794] at paragraph 9 above) and it would in any case be almost impossible to separate out the effect of the two RNS announcements, issued immediately before and after a period of market closure. Finally, were it necessary, I would hold that even if a transient drop in share price could amount to pecuniary damage, the almost immediate market recovery means that no substantial tort had been committed and therefore that the value of the claim to Mr Tinkler (in all senses) is completely disproportionate to the effort required to determine it.

82. The general observations of Mr Hodges had no bearing on the issue of damage and the Judge was not obliged to refer to them.

83. For these reasons, which are essentially those given by the Judge, the Malicious Falsehood Claim was in my view rightly struck out on the additional basis that it did not disclose a reasonable cause of action.

(7) Fairness

84. In the light of the above, this ground of appeal falls away. The decision to allow the amendment of the Respondents' application was a case management decision that was well within the Judge's remit. Further, it did not amount to an ambush. Sufficient notice was given to Mr Tinkler to allow him to be advised on s. 3. His skeleton argument dealt directly with the issue and he made oral submissions about it. The Judge considered whether to allow him to amend and rejected that course because there was no arguable case that could be pleaded. That was a conclusion that he was entitled to reach.

85. Finally, Mr Tinkler's case received an entirely fair hearing. I do not accept that his position as an unrepresented litigant should have received more sympathy. In reality

what is being said is that, because he was unrepresented, the Respondents should not have been allowed to amend and that he should have been allowed to amend yet again. I disagree. Mr Tinkler represented himself by choice. He had specialist legal advice in the preparation of his case and he had previous experience of self-representation, having appeared against Mr Caldecott and Mr Dean before Nicol J in May 2019. He was an able litigant in person who was treated in the same way as a represented litigant would have been, and that is how it should be. As it is, his arguments have with one exception fared no better in the skilful hands of Mr Wardell and Ms Wilson.

86. I would therefore additionally uphold the Judge's decision that Mr Tinkler has not satisfied the requirements of s. 3 (1) Defamation Act 1952.

Disposal

87. If My Lords agree, the appeal will be dismissed. Had we upheld the Judge only on the issue of abuse, we would have had to consider the appropriate order in the light of the further proceedings recently issued by Mr Tinkler, but as the claim also fails for absence of reasonable grounds that question does not arise.

Lord Justice Dingemans

88. I agree.

Sir Richard McCombe

89. I also agree.