



Neutral Citation Number: [2021] EWHC 3035 (Ch)

Case No: BL-2020-002022

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

Remotely at:
The Royal Courts of Justice
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL
Date: 17 November 2021

Before :

DEPUTY MASTER RAEBURN

Between :

WILLIAM ANDREW TINKLER

Claimant

- and -

STOBART GROUP LIMITED

Defendant

-and-

~~(1) IAIN FERGUSON CBE~~

(2) IAN DEREK SOANES

~~(3) WILTON PARK~~

Respondents

James McWilliams (instructed by Clyde & Co LLP) for the Claimant
Alice Mayhew (instructed by Taylor Rose TTKW Limited) for the Second Respondent

Hearing date: 20 September 2021

APPROVED JUDGMENT

I direct that this approved judgment, sent to the parties by email on 17 November 2021, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

Deputy Master Raeburn:

Introduction

1. This is the Claimant's application for non-party disclosure pursuant to CPR rule 31.17. Orders have been entered by way of consent disposing of the application as against the First and Third Respondents. The Second Respondent resists the application and in particular, the scope of the disclosure sought.
2. In this action, the Claimant, Mr. William Andrew Tinkler seeks to set aside the judgment of HHJ Russen QC dated 15 February 2019 (the "**Underlying Judgment**") on the basis of fraud (the "**Fraud Claim**"). The proceedings are against the Defendant, Stobart Group Limited.
3. The Claimant was previously a director and employee of the Defendant and is currently the director and shareholder of a separate entity called Stobart Capital Limited ("**Stobart Capital**"). The Second Respondent is Mr. Ian Derek Soanes, a former employee of Stobart Capital.
4. By way of background, the Underlying Judgment was given in proceedings brought by the Defendant in November 2018 against the Claimant for, amongst other things, breach of fiduciary duty (the "**2018 Proceedings**"). It is the Claimant's case in the Fraud Claim that the Underlying Judgment was obtained as a result of:
 - i) the deliberate non-disclosure by the Defendant of highly relevant documents; and
 - ii) the provision of knowingly false evidence by the First Respondent (the Defendant's Chairman), Mr. Brady (the Defendant's CEO) and the Second Respondent.

5. The Claimant alleges that the fraud only came to light after the Underlying Judgment had been handed down and as a result of separate Employment Tribunal proceedings issued by the Second Respondent against the Claimant and Stobart Capital (the "**ET Proceedings**"), which were ultimately dismissed by a decision of the Tribunal dated 27 April 2020.
6. The Claimant says that the ET Proceedings prompted him to "re-review" the disclosure provided by the Second Respondent and that exercise revealed to him that (what are said to be) highly material documents, including a series of emails, text messages, WhatsApp messages and Telegram exchanges between the Second Respondent and Mr. Brady had not been disclosed by the Defendant in the 2018 Proceedings (the "**Undisclosed Documents**").
7. The Claimant says that those Undisclosed Documents are important because they:
 - i) were highly material and ought to have been disclosed by the Defendant;
 - ii) were indicative of broader failures on the part of the Defendant to comply with its disclosure obligations beyond those Undisclosed Documents that have been identified;
 - iii) cast documents which were disclosed in the 2018 Proceedings in a different light, supporting the case that the Claimant made in those proceedings which was rejected in the Underlying Judgment;

- iv) contradicted the evidence given in the 2018 Proceedings by the Defendant and in particular, by Mr. Brady, Mr. Ferguson and the Second Respondent; and
 - v) supported the existence of an alleged conspiracy to injure the Claimant by unlawful means of which the Defendant, Mr. Brady, Mr. Ferguson and the Second Respondent were allegedly a part.
8. In light of the Undisclosed Documents, the Claimant issued the Fraud Claim on 13 November 2020 and issued separate proceedings against the Defendant, Mr. Brady, Mr. Ferguson and the Second Respondent in unlawful means conspiracy, which have been stayed by consent pending the outcome of the Fraud Claim.

The Pleadings

9. In light of the submissions below, it is necessary to set out certain extracts from the Claimant's Particulars of Claim. In relation to the Defendant's alleged failure to disclose relevant documents in the 2018 Proceedings the Claimant pleads:

"69. *In circumstances where:*

69.1. the existence of the Critical Undisclosed Documents was only revealed to Mr Tinkler as a result of Mr Soanes' disclosure of the same in the ET Proceedings by reference to the issues in those proceedings;

69.2. the Critical Undisclosed Documents are suggestive of further communications between Mr Soanes and Mr Brady that were not disclosed;

69.3. Mr Brady would, necessarily, have had communications with other individuals in relation to the matters in issue in the 2018 Proceedings to which Mr Soanes was not a party and which he could not therefore have disclosed in the ET Proceedings even if relevant to the issues in those proceedings;

69.4. the Company's Disclosure and its approach to the same in the 2018 Proceedings had been inadequate and had been found to be such pursuant to Mr Tinkler's Specific Disclosure Application; and

69.5. for the reasons set out above, Mr Brady – the individual at the Company whom it is to be inferred was ultimately responsible for the conduct 2018 Proceedings, being the person who verified with a statement of truth the Company's pleadings – was responsible for the destruction on his own mobile telephone of relevant evidence,

it is to be inferred that other relevant documents adverse to the Company's case in the 2018 Proceedings were deliberately not disclosed and/or destroyed by Mr Brady and/or the Company.

70. Mr Tinkler reserves his right to plead further as to such undisclosed documents and their materiality to the 2018 Proceedings following disclosure."

The Legal Principles

10. The Court may make an order for disclosure against a person who is not a party to proceedings pursuant to CPR rule 31.17 which provides (so far as material):

(1) *This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.*

(2) *The application must be supported by evidence.*

(3) *The court may make an order under this rule only where-*

a. *the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and*

b. *disclosure is necessary in order to dispose fairly of the claim or to save costs.*

(4) *An order under this rule must-*

a. *specify the documents or the classes of documents which the respondent must disclose; and*

b. *require the respondent, when making disclosure, to specify any of those documents-*

i. *which are no longer in his control; or*

ii. *in respect of which he claims a right or duty to withhold inspection.*

(5) *Such an order may-*

a. *require the respondent to indicate what has happened to any documents which are no longer on his control; and*

b. *specify the time and place for disclosure and inspection."*

"Likely to" support or adversely affect a parties case

11. The threshold condition in CPR rule 31.17(3)(a) is that the documents are "likely to" support the case of the applicant or adversely affect the case of one of the other parties to the proceedings. In Three Rivers DC v Bank of England (No. 4) [2002] EWCA Civ 1182 Chadwick LJ said at [29]:

"the threshold condition in rule 31.17(3)(a) is lowered by the qualification 'likely to'. It is not necessary that the documents of which disclosure is ordered will support the applicant's own case or that they will adversely affect the case of another party; it is enough that they are likely to do so. The explanation for that difference is also obvious; the rule-making body appreciated that an applicant cannot be expected to specify which documents under the control of another – which [they] may never have seen – will support [their] case or adversely affect that of another party, or to know whether [they] will wish to rely upon them. It is further appreciated that the person against whom disclosure is sought – being a stranger to the dispute - cannot be expected to decide for [themselves] which of the documents under [their] control do support the applicant's case or adversely affect the case of one of the other parties to an action in which [they are] not a party. Nor can the court be expected to decide whether documents which it has not seen will support the applicant's case or adversely affect that of another party. The test has to be one of probability. The question, of course, is what degree of probability does the test require."

12. The degree of probability required on an application of this nature is that the documents "may well" be relevant within the meaning of the rule. This sets the threshold at a level lower than having to prove relevance on the balance of probabilities; Three Rivers No. 4 at [32].
13. It is therefore necessary for this Court to consider the nature of the documents sought in order to determine their potential relevance in order to correctly apply the test under CPR rule 31.17(3)(a); Sparkes v LPFA [2021] EWHC 1265 (QB), per Murray J at [36].
14. In order to determine the bearing that a document or class of documents may have on a party's case, the Court must focus on the pleadings themselves in

order to determine how the issues have been articulated as they stand, as opposed to speculation on how a different case may be pleaded after a new source of documents have been interrogated; per Eady J in Flood v Times Newspapers Limited [2009] EWHC 411 (QB) at [36].

Necessity and Discretion

15. As to the requirement under CPR rule 31.17(3)(b) that disclosure be “*necessary in order to fairly dispose of the claim or to save costs*”, the Court has a wide discretion and flexibility to make an order to considering all the circumstances of the case: see Campaign Against Arms Trade v BAE Systems Plc [2007] EWHC 330 (QB).
16. An order for disclosure against non-parties is the exception rather than the rule and the jurisdiction will be exercised with caution: Frankson v Home Office [2003] EWCA Civ 655 at [10] and Re Howglen Ltd [2001] 1 All ER 376 Ch at 382h.
17. Even where the criteria of relevance and necessity in CPR rule 31.17(3) are satisfied, the Court still has a discretion to decide whether it ought to order disclosure; Mitchell v News Group Newspapers [2014] EWHC 1885.
18. In Constantin Medien Ag v Ecclestone and others [2013] EWHC 2674 (Ch) Vos J (as he then was) set out a structured approach to be adopted by the Court. Broadly speaking, that involves a consideration of the following questions in relation to each class of documents sought:
 - i) Question 1: Are the documents and classes of documents sufficiently specified to be permissible under CPR 31.17?

- ii) Question 2: Are those documents likely to support the applicant's case or adversely affect the defendant's case?
- iii) Question 3: Is disclosure necessary to dispose fairly of the claim, or to save costs and should it be ordered as a matter of discretion?

The Relevant Evidence

19. Before turning to a consideration of those questions in relation to the classes of documents sought, I shall refer to the evidence adduced by the parties in support of, and in answer to, this application. The Claimant relies upon his first and second witness statements, dated 23 March 2021 and 14 September 2021, respectively.
20. In his first witness statement, the Claimant's evidence is, in essence, that documents held by the Second Respondent will be highly relevant to the Fraud Claim and would assist this Court to dispose of the case fairly, cost effectively and efficiently.
21. He says that he has already discovered a number of Undisclosed Documents which he believes were deliberately suppressed from disclosure in the 2018 Proceedings. For the sake of brevity, I shall refer only to parts of his evidence which reads as follows:

"74. At trial, under cross-examination Mr Soanes stated that he believed he had given full disclosure of all relevant documents, yet only a two months later he gave disclosure in the ET Proceedings of a number of documents of relevance to issues in the 2018 Proceedings, including:

- (a) an email with a six page presentation attached dated 6 February 2018, produced and sent by Mr Soanes to Mr Brady on his Stobart Group email account and a response to that email from Mr Brady to Mr Soanes and the response to that email dated 8 February 2018;*
- (b) 176 text messages between Mr Brady and Mr Soanes between 16 November 2016 and 27 May 2018;*
- (c) 193 WhatsApp messages between Mr Brady and Mr Soanes between 8 March 2018 and 13 November 2018; and*
- (d) 41 Telegram messages between Mr Brady and Mr Soanes between 1 June 2018 and 7 August 2018."*

75. 15 text messages were disclosed by Stobart Group in the 2018 Proceedings. Since Mr Soanes presumably focused his ET Disclosure to support his case, there is, putting it at its lowest, a substantial risk that there are other relevant documents which should have been produced in the 2018 Proceedings but which were deliberately suppressed. Given we now know, as I set out below, that Mr Brady has deleted his messages with Mr Soanes, and his Telegrams, the only way to understand the extent of the fraud in the 2018 Proceedings is to obtain disclosure of the data from Mr Soanes' devices."

79. 41 Telegram messages were disclosed by Mr Soanes in the ET Disclosure that were relevant to issues in the 2018 Proceedings, yet were not disclosed by Stobart Group. As set out in detail in the

Particulars of Claim, the Telegrams are highly relevant to this Fraud Claim because they demonstrate that the Respondents were working towards the improper purpose of trying to oust me from Stobart Group, and in doing so they consciously moved their communications discussing my removal to a “more secure” and less discoverable platform at the instigation of Mr Soanes"

82. The text message from Mr Soanes to Mr Brady dated 27 May 2018 (which is one of the Undisclosed Documents) which contained a link to the Telegram App said this: “Can you sign up for this please. Its more secure and will make it easier for me to send you things”. Mr Soanes disclosed 41 Telegram messages for the purposes of the ET Proceedings, but I have not yet seen any Telegrams attaching documents from him. Since the purpose of switching to Telegrams was to facilitate the secure exchange of documents, I consider it likely that Mr Soanes will have other relevant Telegrams that have not yet been disclosed".

83. I should make it clear that the subject matter of the undisclosed Telegrams was not innocuous. As set out at paragraphs 63 to 65.3 of the Particulars Claim, they indicate that, on 7 June 2018 Mr Soanes was invited to attend a meeting with Mr Brady and a litigator on 12 June 2018, in connection with the dismissal of myself, and that Mr Ferguson, Mr Soanes and Mr Brady had a plan to terminate my employment and remove me from the Board. They also showed that Mr Soanes gave

false evidence during the 2018 Proceedings, in particular when he stated that he had not been involved in the business since 11 February 2018.

84. It is also possible that Mr Brady and Mr Soanes communicated with Mr Ferguson via Telegram and that Mr Brady corresponded with Mr Ferguson by WhatsApp, because in an exchange on 25 May 2018 between Mr Ferguson and Andrew Wood of Stobart Group about building a picture of alleged previous incidents involving myself, Mr Ferguson replied, "Yes, I agree. Strangely enough Ian Soanes just might be the man to do this----". The ET Proceedings disclosure would not have revealed that since Mr Ferguson was not party to them. No messages between Mr Soanes and Mr Ferguson were disclosed in the 2018 Proceedings and yet in a disclosed message sent by Mr Ferguson to Mr Brady he said he "had a good call with Ian today".

107. Given what I have been able to learn from the Undisclosed Documents, I accept that it may well be the case that relevant documents have already been deleted by some or all of the Respondents, in the same way as Mr Brady has to avoid disclosure. That appears to be a particular possibility in the case of Mr Brady. However, I believe that the relief I seek is still important in the circumstances. This is because, without waiving privilege, I have been advised and believe that it can be possible to either recover

deleted documents from the image taken or, at the very least, ascertain that documents have been deleted and on which date."

22. In response to the Claimant's application, the Second Respondent relies upon the first witness statement of Mr. Soanes, dated 31 August 2021 in which he says, in summary:
- i) the search parameters sought by the Claimant are excessively broad and constitute a fishing expedition;
 - ii) that the Underlying Judgment reflects a finding that the Claimant's removal from the Defendant was not as a result of a plan devised by others, but was because he breached his fiduciary duties and because of his wrongdoing; and
 - iii) an order for disclosure in the form sought would be oppressive and would interfere with the equality of arms between the parties in the related conspiracy claim.

The Parties' Submissions

23. At the hearing before me, Counsel clarified the parties' respective positions on the application and a measure of agreement was reached on aspects of the disclosure sought.
24. Counsel for the Second Respondent indicated that (whilst not conceding the application or draft order was justified) the principal dispute between the parties was now on the scope of disclosure. The Second Respondent maintained that the nature of the Claimant's original draft order rendered the

application a fishing expedition, but that the Second Respondent was willing to agree an order in narrower terms.

25. Counsel for the Claimant acknowledged that the terms of original draft order filed with the application notice had changed and in light of the (partial) agreement between the parties, I directed that a revised draft reflecting the terms of the order now sought by the Claimant be filed at Court. The Second Respondent filed brief written submissions clarifying its position on the revised draft non-party disclosure order and the Claimant provided further written submissions by way of reply.
26. The revised order sought by the Claimant now seeks classes of documents within the date ranges of 1 November 2017 to 29 November 2018 (sent or received by a list of specified individuals) which relate to:
 - i) *"the provision of any loan to the Second Respondent for the purpose of funding any and all historic or ongoing legal proceedings against Andrew Tinkler and/or Stobart Capital Limited"*; and
 - ii) *"Andrew Tinkler and the 2018 Proceedings"*; or alternatively,
 - iii) *"the issues for disclosure in these proceedings as between Mr Tinkler and Stobart Group Limited as ordered by Master Pester on 8 June 2021, a copy of which issues are enclosed as Schedule E to this Order."*
27. By its written submissions, the Second Respondent agrees to this Court making an order with reference to the list of issues outlined at (iii) above, but contends that a number of them either require further restriction before they

can be properly ordered as part of this application, or should otherwise be rejected in their entirety.

28. The Claimant's alternative formulations at paragraph 26 above are clearly framed with reference to the issues in the case (an approach cautioned against in Constantin Medien AG at [67]). However, in light of the Second Respondent's position it does not appear that there is any objection to a form of order which is made with reference to classes of documents in this manner. There is no broad objection that the Second Respondent (as a non-party) is unfamiliar with the issues in the litigation.
29. Nevertheless, if this Court makes an order against the Second Respondent, it is of paramount importance that it is clear to the non-party what he has to disclose and that the non-party is not compelled to familiarise himself with the issues in the litigation as a consequence of the wording of the order. The Court has an obligation to ensure (if necessary of its own motion) that orders which compel non-parties to provide disclosure are not inappropriately used, even if that is by the consent of the parties; Flood v Times Newspapers Limited at [29].
30. In light of the foregoing, I shall briefly summarise the parties' general submissions as to the application of the questions above, before turning to consideration of the particular classes of documents sought.

Question 1: Are the Documents and Classes of Documents sufficiently specified to be permissible under CPR 31.17?

31. Counsel for the Second Respondent accepts that the classes of documents specified by the Claimant (which I will consider in turn below) are sufficiently specified so as to meet the requirement in CPR rule 31.17(4)(a).

Question 2: Are those documents likely to support the applicant's case or adversely affect the defendant's case?

32. Counsel for the Claimant submits that the documents for which disclosure is sought are, on any view, likely to support the Claimant's case in the Fraud Claim or adversely affect the case of the Defendant as required by CPR rule 31.17(3)(a).

33. He contends that either of the formulations for disclosure sought are appropriate and will support the Claimant's case because, amongst other things, there was no good reason for the Second Respondent - an individual (who was neither a director nor employee of the Defendant) to be discussing the Claimant and the 2018 Proceedings with senior individuals at the Defendant. It is accepted, however, that an exception to this position might be in relation to the provision by the Second Respondent of a witness statement to the Defendant for the 2018 Proceedings.

34. The Second Respondent's primary submission is that the disclosure sought is speculative and is not based on the Claimant's pleaded case. It is said that the Claimant's pleadings (at paragraph 9 above) expressly indicate that there (might) be further documents and that the Claimant (might) plead a different case on those documents in due course. On this basis, it is said that the application is impermissible in that it is not for disclosure based on the pleadings.

Question 3: Is Disclosure Necessary to dispose fairly of the claim, or to save costs and should an order be made as a matter of discretion?

35. Counsel for the Claimant submits that the documents sought are necessary to dispose of the Fraud Claim fairly and/or to save costs as required by CPR rule 31.17(3)(b) because:

- i) it is the Claimant's case that the Defendant deliberately failed to give disclosure in the 2018 Proceedings;
- ii) the Claimant cannot simply look to disclosure from the Defendant in the Fraud Claim because the Defendant's Disclosure Certificate dated 13 September 2019 indicates that it cannot produce, amongst other things: (i) WhatsApp messages between Mr. Brady and the Second Respondent; (ii) Telegram messages between Mr. Brady and the Second Respondent; (iii) emails from the personal accounts of Mr. Ferguson, Mr. Coombs (a non-executive director of the Defendant), Mr. Wood (a non-executive director of the Defendant) and Ms. Brace (the Defendant's Company Secretary). It is said that the only way that the Claimant can obtain disclosure of these relevant documents is by obtaining the "other side" of the conversation, which the Second Respondent can provide in the case of (i) and (ii) and may well be able to give in the case of (iii) and Mr. Coombs' emails.

36. Counsel for the Second Respondent submits that complying with an order for disclosure will require the Second Respondent to search and catalogue a large volume of evidence which has potential to be of no relevance to the Fraud Claim and that the costs of the exercise may not necessarily be recoverable. It

is also said that the order is effectively seeking early disclosure of what would likely be disclosable by the Second Respondent in the stayed conspiracy claim and it would be inappropriate to make an order now.

Discussion and analysis

37. I shall now deal with each of the classes of documents sought. For the sake of concision, I have not set out the answers to each of the three questions above but I have considered them (and the parties' submissions on each of them above) in relation to each class in coming to my decision.

The provision of any loan to the Second Respondent for the purpose of funding any and all historic or ongoing legal proceedings against Andrew Tinkler and/or Stobart Capital Limited

38. Counsel for the Claimant submits that documents relating to the loan received by the Second Respondent in order to fund his legal fees in the ET Proceedings should be disclosed. The Second Respondent gave evidence in the ET Proceedings to the effect that he received the loan in October 2018, which was shortly before the November trial in the 2018 Proceedings (at which the Second Respondent also gave evidence for the Defendant).

39. The Claimant refers to evidence in the Undisclosed Documents in the form of WhatsApp exchanges between the Second Respondent and Mr. Brady on 2 October 2018 as supporting the assertion that the loan came from the Defendant:

[Mr. Brady to the Second Respondent]: *“Hi Warwick. I sent you a draft agreement for comments on Friday. Once I have your comments I can get*

it off to Ian. Thanks” That’s from Anthony”. Mr. Soanes responded, “*I guessed”*. Mr Brady “*Going through it was JC”*”.

40. The Second Respondent now agrees to provide disclosure of the loan documents but only "*if they fall to be disclosed within any of the issues agreed by the Second Respondent*" on the basis that the test must be whether the loan relates to the issues in the Fraud Claim.
41. In my judgment, the threshold test and questions to which I refer above are clearly satisfied. It is part of the Claimant's case in the Fraud Claim that the Second Respondent gave knowingly and deliberately false evidence in the 2018 Proceedings. Documents relating to a loan received by the Second Respondent prior to giving evidence as a witness for the Defendant in the 2018 Proceedings is clearly potentially relevant, satisfying the "may well" test in Three Rivers (No 4), particularly as there is at least *prima facie* evidence that the loan may well have been from the Defendant to the Second Respondent.
42. I therefore reject the approach proposed by the Second Respondent. In the circumstances, it would be inappropriate to leave the decision of whether or not to disclose such documents to the legal judgment of the Second Respondent in determining whether or not these documents relate to the issues in the Fraud Claim.

Andrew Tinkler and the 2018 Proceedings

43. This formulation is one of two alternative approaches advanced by the Claimant, the alternative being the particular classes listed below. Clearly,

disclosure by reference to "Andrew Tinkler and the 2018 Proceedings" is very broad and unspecific. The evidence relied upon by the Claimant does not support the contention that every document in this class could be shown to support the Claimant's case or adversely affect the Defendant's case. I therefore reject this class of documents.

Class 1: Did Stobart Group Limited fail to disclose documents in the 2018 Proceedings that it was under a duty to disclose by reference to the issues in those proceedings and, if so, what were those documents?

44. Counsel for Second Respondent says that it is not possible for the Second Respondent to provide disclosure on this issue as it concerns the Defendant alone, in relation to which the Second Respondent had no involvement or knowledge.
45. Counsel for the Claimant contends that disclosure with reference to this issue is appropriate as it says, *inter alia* that the Second Respondent was heavily involved in the 2018 Proceedings and acted as a consultant for the Defendant a number of weeks prior to the commencement of the trial in the 2018 Proceedings. Counsel for the Claimant also submits that the Second Respondent's lack of knowledge is irrelevant and that what is sought is disclosure of documents by reference to this issue which does not require knowledge of the matters with which that issue is concerned, *per se*.
46. I reject this class. Although the class itself describes a key issue in the case, in my judgment it does not meet the threshold condition in Part 31.17. It fails to make clear to the non-party what he must produce.

47. An order for disclosure on this basis would require the Second Respondent to familiarise himself not only with the issues in the Fraud Claim but much more. The Second Respondent would need to go further and determine the relevance of documents in his possession custody or control by reference to the Defendant's disclosure duty in the 2018 proceedings, which is inappropriate.
48. In any event, there is very limited support for the case that this documentation, let alone each and every document within this broad class, could be shown to support the Claimant's case.

Class 2: In respect of any document that was disclosable by Stobart Group in the 2018 Proceedings and that was not disclosed, was the failure to disclose the document deliberate or inadvertent.

Class 3: Were documents disclosable the 2018 Proceedings deleted were those documents? (sic)

Class 4: In respect of any document that was disclosable by the Stobart Group in the 2018 Proceedings but was deleted: (i) when was the document deleted; (ii) by whom was it deleted; (iii) why was the document deleted; (iv) was the person responsible for deleting the document aware that it was disclosable in the 2018 Proceedings; and (v) was the Stobart Group (including but not limited to its officers or its agents) aware that the document had been deleted, the reasons for its deletion or the fact it was disclosable in the 2018 Proceedings.

49. Taking these classes 2 to 4 together, I would reject each of them for the same reasons given at paragraphs 46 to 48 above.

Class 5: Did Mr Brady and Mr Soanes confer and collude as to the evidence they would give as to the reasons Mr Tinkler's plan for Project Wright fell out of favour?

50. It is now agreed that documents in this class should be disclosed.

Class 6: Did Mr Brady provide false or misleading witness evidence in the 2018 Proceedings in respect of the following facts and matters: (i) the meaning of his reference to "AT being sorted as well" in his 29 January 2018 email; (ii) his involvement in initiating and maintaining the expenses claim and his presentation of this; (iii) his note of the 7 February 2018 meeting and, in particular, the date it was created and amended; (iv) the meaning of his 10 February 2018 text message to Mr Soanes; (v) the extent to which it was his goal to remove Mr Tinkler or the extent to which he had a plan to achieve the same; (vi) his knowledge and or understanding of Mr Tinkler's meetings with shareholders in January/February 2018; (vii) the extent to which Mr Tinkler's pursuit of Project Blue/Wright gave rise to an irreconcilable conflict of interest as a result of which the project would not be supported by Stobart Group's broker; and (viii) the extent to which Mr Soanes was involved with Project Wright/Cyrus and Mr Tinkler's knowledge of the same.

51. It is now agreed that this class of documents should be disclosed.

Class 7: Did Mr Ferguson provide false or misleading witness evidence in the 2018 Proceedings in respect of the following facts and matters: (i) what had been discussed at his meeting with Mr Tinkler on 10 January 2018; (ii) the reasons for the production of the draft RNS; (iii) his conversation with Mr Tinkler on or about 24 January 2018; (iv) his note of the meeting with Mr Tinkler on or about 24 January 2018; (v) the first point at which he and Mr Brady had considered removing Mr

Tinkler; and (vi) the extent to which and for how long he regarded Mr Tinkler as “an asset

52. The Second Respondent resists disclosure with reference to this issue on the basis that it relates to Mr. Ferguson only and his knowledge and understanding when giving evidence. It is said that the Second Respondent has no knowledge whatsoever of the subject matter and as such it is not possible for him to provide disclosure on this issue.

53. The Claimant takes the position that disclosure should be ordered on the basis that Mr. Ferguson and the Second Respondent were in regular correspondence and *"to the extent that [the Second Respondent] has any documents that would demonstrate that Mr Ferguson gave false or misleading evidence he should disclose them"*.

54. I reject this class of documents. In my judgment, this class is also insufficiently focussed to form the basis of an order pursuant to CPR 31.17. Even if it were, I do not regard disclosure as necessary to dispose fairly of the claim. The nature of the issue posed is akin to a question for cross-examination and it would be inappropriate to make an order on this basis.

55. In applications of this nature, the Court must be satisfied that the documents do in fact exist; it is not appropriate to *"send the non-party off on a search before it can satisfy itself that no such documents do in fact exist"*; see Re Howglen Ltd [2001] 1 All E.R. 376.

Class 8: Did Mr Soanes provide false or misleading witness evidence in the 2018 Proceedings in respect of the following facts and matters: (i) his understanding of Mr

Brady's reference to "AT being sorted as well" in his 29 January 2018 email to him;
(ii) his involvement in assisting Mr Brady with making plans involving Mr Tinkler's
future in Stobart Group and Stobart Capital; (iii) the reasons why Mr Brady had
forwarded the 5 February 2018 email to him; (iv) whether, when and to what extent
he had been discussing with Mr Brady how Mr Tinkler might be removed as a
director of Stobart Group; (v) the extent to which he was planning to change the
relationship and/or exclude Stobart Capital and/or Mr Tinker from doing business
with Stobart Group under the existing structure and the management agreement
between Stobart Capital and Stobart Group; and (vi) his involvement with Stobart
Group or Stobart Capital after his removal on 11 February 2018 and/or his ability to
comment on matters pertaining to Stobart Group or Stobart Capital that took place
after that date.

56. This class of documents has been agreed.

Class 9: Did Mr Brady, Mr Ferguson or Mr Soanes knowingly give false or
misleading evidence?

57. This class has also been agreed.

Class 10: Was Stobart Group (including its officers or its agents) aware that false
written or oral evidence had been given by its witnesses in the 2018 Proceedings?

58. For the reasons given at paragraphs 54 and 55 above, I reject this class.

Class 11: What is the natural and/or relevant meaning of: (i) the 19 January Text
Message Exchange; (ii) the 8 February Email; and (iii) the 2 May Whatsapp
Exchange

59. This class has now been agreed.

Telegram Messages

60. The order for disclosure sought by the Claimant refers to "*all electronic documents (including e-mail, SMS text, WhatsApp and Telegram messages)*" within the Second Respondent's control from the sources specified in the schedule to the order.

61. The Second Respondent resists the inclusion of the reference to the electronic messaging service "Telegram" on the basis that he has given evidence that he no longer has any such messages in his possession or control, save in printed form already in the Claimant's possession as part of an earlier disclosure process. He says that he cannot disclose against this and no order should therefore be made.

62. The tenor of the Second Respondent's evidence on this issue in his witness statement dated 31 August 2021 states that he chose to use Telegram as he was concerned about the likelihood of the Claimant attempting to access his messages and because he understood it to be a more secure method of messaging that cannot be easily hacked.

63. In support of the Claimant's position, he relies on the evidence in his second witness statement dated 14 September 2021, which states that Mr. Brady indicated that his Telegram messages are no longer available, which means that these may only exist on the Second Respondent's phones. He refers to correspondence from the Second Respondent's solicitors to the effect that the Second Respondent lost access to or deleted the Telegram application when he

switched phones in or around December 2018. The Claimant goes on to state that:

"As the Telegram App stores all data on a cloud server so the data is not or lost if a user simply resets or changes devices, Clyde & Co recommended in their letter of 24 August 2021 that Mr Soanes should redownload the App in his solicitors' presence in order to reacquire and preserve any Telegram messages. However, to date no satisfactory response has been received in this regard".

64. The power of this Court to order a non-party to disclose documents in his or her possession, custody or power is contained within section 34 of the Senior Courts Act 1981 which is to be read in combination with CPR rule 31.17.

65. The meaning of "document" for the purposes of Part 31 is defined in CPR rule 31.4 which refers to *"anything in which information of any description is recorded"*. Paragraph 1 of Practice Direction 31B makes it clear that the broad definition of a document extends to "Electronic Documents". Electronic Documents are in turn defined in paragraph 5(3) of the Practice Direction as including:

"...documents that are stored on servers and back-up systems and documents that have been deleted. It also includes metadata and other embedded data which is not typically visible on screen or a print out".
(my emphasis).

66. In my judgment, it is therefore clear that this Court has the power to make an order that the Second Respondent disclose the deleted Telegram messages or

those which may otherwise be available in back-up storage when re-activating the relevant Telegram account.

67. In all the circumstances, I also regard it as appropriate in light of the evidence to which the Claimant refers, to include reference to Telegram messages within the ambit of the order for disclosure, provided any such documents fall within the classes indicated above.

Conclusion

68. For the reasons given, I will therefore make an order for disclosure of various classes of documents as described above against the Second Respondent.
69. I will hear counsel on the form of order and submissions on costs.