Neutral Citation Number: [2020] EWHC 1467 (QB)

Case No: QB-2019-006293

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Date: 8 June 2020

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

William Andrew Tinkler	**Claimant**
- and -	
(1) Iain George Ferguson **(2) Warwick Brady** **(3) John David Francis Coombs** **(4) Richard Laycock** **(5) Andrew Richard Wood**	**Defendants**

- -

The Claimant appeared in person
Andrew Caldecott QC and Jacob Dean (instructed by **Herbert Smith Freehills**) for the **Defendants**

Hearing dates: 31 March and 1 April 2020

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date of hand-down is deemed to be as shown above.

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. When it was commenced, this was a claim for libel and malicious falsehood brought by the Claimant ("Mr Tinkler") against the five defendants. Mr Tinkler has abandoned the libel claim and so it is now solely a claim for malicious falsehood ("the Malicious Falsehood Action"). It concerns an announcement made on the London Stock Exchange's Regulatory News Service ("RNS"), by Stobart Group Limited ("Stobart"), on 29 May 2018 ("the Announcement").

The Parties

2. At the time of the Announcement:

   i) Mr Tinkler was a substantial shareholder in and an executive director of Stobart;

   ii) the First Defendant ("Mr Ferguson") was a director and non-executive chairman of Stobart. He left Stobart on 23 July 2019;

   iii) the Second Defendant ("Mr Brady") was, and remains, Stobart's Chief Executive Officer;

   iv) the Third Defendant ("Mr Coombs") was, and remains, a non-executive director of Stobart;

   v) the Fourth Defendant ("Mr Laycock") was Stobart's Chief Financial Officer. He left that role, and with it his position on the board, on 6 July 2018, and then left the Company on 31 August 2019; and

   vi) the Fifth Defendant ("Mr Wood") was a non-executive director of Stobart, until 23 July 2019.

The overall dispute

3. The litigation between Mr Tinkler, Stobart, and the five Defendants was caused by a dispute that had arisen, within the board of Stobart, about whether Mr Ferguson should continue as Stobart's Chairman. Mr Tinkler believed he should not; the five Defendants believed he should. It was in the context of that dispute that the Announcement was issued by Stobart. It was issued in the name of the "Ongoing Board", which was said in the Announcement to include each of the five Defendants.

4. The Malicious Falsehood Action is not the only litigation to have arisen from the dispute. Separately, Stobart commenced a claim against Mr Tinkler in the Commercial Court on 15 June 2018 and Mr Tinkler brought a counterclaim against Stobart in those proceedings ("the Stobart Action"). The Stobart Action was expedited, and tried before HHJ Russen QC (sitting as a Judge of the High Court) between 12-29 November 2018. Judgment was handed down on 15 February 2019 ([2019] EWHC 258 (Comm)) ("the Stobart Judgment").

5. It suffices for present purposes for me to summarise the overall dispute as follows. Matters came to a head between Mr Tinkler and Stobart (and the five directors sued in the Malicious Falsehood Action) in May 2018, when Mr Tinkler indicated that he was unhappy with the performance of Mr Ferguson. Mr Tinkler wrote to the board of

Stobart, on 25 May 2018, informing it that he intended to vote against the re-election of Mr Ferguson as Chairman of the board of Stobart. The vote was due to take pace at Stobart's Annual General Meeting on 6 July 2018. Stobart made an RNS announcement of Mr Tinkler's decision to oppose the re-election of Mr Ferguson on 17 May 2018. Following that, the Stobart board (without Mr Tinkler and John Garbutt) considered whether a further RNS announcement should be made to give further details of the views of the other members of the board on whether Mr Ferguson should be re-elected. In short, a sub-committee of the board of Stobart was formed. Its members were Mr Brady, Mr Coombs and Mr Wood. Mr Ferguson attended most meetings of the sub-committee although not in a formal capacity. Largely acting upon recommendations made by the sub-committee, Stobart issued the Announcement on 29 May 2018 which is the publication sued upon by Mr Tinkler in the Malicious Falsehood Action.

6. Also, on 9 June 2018, Mr Tinkler sent a letter to the shareholders of Stobart ("the Shareholder Letter"). He expressed himself to be horrified by the "*recent announcements issued and action taken in the name of the Company, and by the public mud-slinging in which some of my fellow directors have seen fit to engage without any regard to the waste of the Company's resources involved or the impact on employees, customers, and suppliers*". His letter urged shareholders to vote against Mr Ferguson and in favour of Philip Day, then the CEO of the Edinburgh Woollen Mill ("Mr Day"), and concluded by saying "*a change of Chairman would help to uphold the agreed company strategy, to stabilise operational management and to deliver the best returns for shareholders*." Mr Tinkler criticised the establishment and composition of the sub-committee and the process which led to, and the contents of, the Announcement. He considered that it was defamatory of him. He referred to his own track record and the fact that the share price of 296 pence, when he had ceased to be CEO, had since fallen 28% to 214 pence per share. He said he was saddened by "*the impact this disagreement amongst directors is having on the Company's operational management*." Mr Tinkler urged shareholders to appoint Mr Day as Chairman of Stobart in place of Mr Ferguson. On 9 June 2018, Mr Tinkler forwarded the Shareholder Letter to all employees of Stobart ("the Communication to Employees").

7. On 10 June 2018, in his capacity as CEO of Stobart, Mr Brady sent an email to the company's employees stating that Stobart had not wanted the internal discussion with Mr Tinkler to become public but that it was Stobart's belief that Mr Ferguson should be allowed to continue as Chairman.

8. On 14 June 2018, Stobart's solicitors sent a letter to Mr Tinkler's solicitors intimating a substantial claim against him and stating that Stobart had decided to terminate Mr Tinkler's employment. A separate letter from Stobart, also dated 14 June 2018, purported to terminate Mr Tinkler's employment, with immediate effect, on the grounds that he had attempted to destabilise Stobart. Mr Tinkler's dismissal was announced to employees of Stobart by email from Mr Brady later on 14 June 2018. He stated that Mr Tinkler had engaged in "*a campaign to attack our Directors with a view to replacing our Chairman with his own choice*".

9. As noted above, the Stobart Action was commenced on 15 June 2018 (but not served apparently until 24 July 2018). Meanwhile, at the AGM on 6 July 2018, Mr Ferguson was re-elected as Chairman of Stobart.

10. Mr Tinkler counterclaimed in the Stobart Action for declaratory relief that his purported removal as a director, and termination of his employment, was invalid and that he remained a director of the Company. He also sought an injunction restraining the Board from purporting to remove him as a director.

The Stobart Judgment

11. HHJ Russen QC handed down the Stobart Judgment on 15 February 2019 (see [4] above). I will need to look at the judgment in more detail shortly (with numbers in square brackets referring to paragraphs of the Stobart Judgment), but the issues in the litigation were set out by HHJ Russen QC in [50]. The Stobart Judgment is long, but, in summary, the Judge held:

    i) Stobart had failed to establish that Mr Tinkler had engaged in an unlawful means conspiracy ([948]) and it had abandoned during the trial a claim that Mr Tinkler had made unjustified claims for expenses;

    ii) Mr Tinkler had acted in serious breach of his fiduciary and contractual duties, including by agitating for the removal of Mr Ferguson, improperly sharing confidential information with a third party and writing the Shareholder Letter and forwarding it to Stobart's employees ([950]);

    iii) the sub-committee had been properly constituted and had the authority to dismiss Mr Tinkler from his employment ([952]);

    iv) the dismissal of Mr Tinkler on 14 June 2018 was a lawful and valid act ([953]);

    v) the removal of Mr Tinkler as a director of Stobart on 14 June 2018 was a lawful and valid act ([955]);

    vi) the resolution to re-elect Mr Ferguson at the AGM on 6 July 2018 was not invalid ([956]).

12. The decision to issue the Announcement, and whether it contained falsehoods about Mr Tinkler published maliciously by the Defendants in the Malicious Falsehood Action, formed part of the wider issue of whether Mr Ferguson, Mr Brady, Mr Coombs and Mr Wood (referred to as "the Four Directors" in the Stobart Judgment) had acted in breach of their fiduciary duties as directors in the steps they took against Mr Tinkler (see Issue 4(c) in [50]; [264]-[275], [312], [667]-[668], [752], [768], and particularly [785]-[794]).

13. The Court of Appeal has twice refused applications by Mr Tinkler for permission to appeal against the Stobart Judgment. On 6 June 2019, Flaux LJ concluded that Mr Tinkler's challenges to HHJ Russen QC's findings that he had acted in breach of his fiduciary duties as a director of Stobart had no real prospect of success. Mr Tinkler asked the Court of Appeal to re-open the application for permission to appeal on the basis of an alleged apparent bias of the trial judge. This further application was refused by Males LJ on 12 November 2019.

History of the Malicious Falsehood Action

14. The Claim Form was issued on 8 June 2018 (but the Particulars of Claim were not served until 26 June 2018). On 17 December 2018, i.e. *after* the Stobart Action had been tried, but before judgment was handed down, I determined issues relating to the meaning of the Announcement for the purposes of the Malicious Falsehood Action ([2018] EWHC 3563 (QB)) ("the Meaning Judgment"). The terms of the Announcement are set out in the Meaning Judgment ([4]).

15. I found (at [39]) that the single meaning of the Announcement for the purposes of the defamation element of the Malicious Falsehood Action was:

    (a) The Claimant had presented a series of challenges to the Board of Stobart which included those set out in [paragraphs 39 to 43 of the Announcement], the most recent of which was his opposition to the re-election of Iain Ferguson as Chairman of Stobart.

    (b) A vote to remove the current Chairman would weaken Stobart's corporate governance, create instability, present a number of serious risks to Stobart, identified in [paragraphs 45 to 49 of the Announcement], and would not be in the best interests of the shareholders.

    (c) The Claimant's behaviour was disruptive; and, in relation to the challenges identified in (a) unreasonable and his opposition to the re-election of the Chairman was regrettable and risked destabilising Stobart.

16. I also held that meaning (a) was factual and not defamatory of Mr Tinkler and that meanings (b) and (c) were expressions of opinion: [40]-[44]. Only meaning (c) was defamatory of Mr Tinkler, but not seriously enough to raise an inference of serious harm to reputation under s.1 Defamation Act 2013: [45]. In consequence, if the defamation element of his claim was to continue, Mr Tinkler would have to take on the burden of establishing, by evidence, that the requirements of s.1 were met: [46].

17. As for the balance of the Malicious Falsehood Action, I held (at [56]) that, based on the Mr Tinkler's originally pleaded meaning, the following was an available meaning for the purposes of malicious falsehood ("the Malicious Falsehood Meaning"):

    (a) Mr Tinkler destabilised the Board at a crucial time for the business; and/or

    (b) Mr Tinkler required the Board to deal with challenges, including:

        i. the settlement of financial issues arising from a previous related party transaction when Mr Tinkler was CEO;

        ii. a proposed selective buy-back of part of Mr Tinkler's stake in Stobart;

        iii. a proposed additional ex-gratia bonus for Mr Tinkler of shares then worth some £8 million;

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

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

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

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

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

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

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

22. On 28 June 2019, Mr Tinkler duly served his Amended Particulars of Claim in the Malicious Falsehood Action pursuant to Nicol J's Order. Then, on 10 September 2019, by consent, Mr Tinkler served Re-Amended Particulars of Claim. The principal effect of these re-amendments was that Mr Tinkler abandoned his defamation claim in respect of the Announcement, leaving only the claim for malicious falsehood in respect of the Malicious Falsehood Meaning.

23. On 8 August 2019, Mr Tinkler answered the Request for Further Information about his claim for damage made by the Defendants on 12 July 2019. In response to their request

for details of occasions on which Mr Tinkler had been unable to attract investments, as pleaded in §11.3.3 of the Amended Particulars of Claim, Mr Tinkler stated:

> "Following 28 May 2018 [the date of the Announcement] the Claimant sought to move on and seek investment from third parties for a new project he was involved with. Throughout early 2019 he participated in a series of confidential meetings with brokers and potential investors, including those with whom he had excellent pre-existing relationships. At each such meeting, [the Announcement] was raised as an issue and the attempt to secure investment was unsuccessful. A number of investors even declined to meet with the Claimant altogether. Given the Claimant's pre-eminent reputation within the industry, it is to be inferred that [the Announcement] was the sole or dominant reason that such investment could not be secured. The meetings that took place were confidential and the Claimant is in the process of taking steps to be able to disclose the identities of those persons and entities involved."

24. On 8 October 2019, the Defendants in the Malicious Falsehood Action filed their Defence. It is a substantial document. For present purposes, it is sufficient to note:

    i) Mr Laycock denies responsibility for publication of the Announcement (§§15-17);

    ii) the other Defendants admit publication (§18);

    iii) the Defendants deny that the Malicious Falsehood Meaning is false (§§21-123);

    iv) the Defendants deny that the Announcement was published by them maliciously (§§124-156); and

    v) the Defendants deny that the Announcement was likely to cause Mr Tinkler pecuniary damage (§§157-176).

25. Mr Tinkler has not served a Reply. Having abandoned his defamation claim, CPR Part 53 PD53B §4.7 does not apply and so, pursuant to CPR Part 15.8, a Reply was optional. Mr Tinkler is therefore treated as not having admitted any of the facts pleaded in the Defence (CPR Part 16.7(1)).

Mr Tinkler's case of malice against the Defendants

26. In Appendix 1 to this judgment, I have set out the paragraphs from Mr Tinkler's Re-Amended Particulars of Claim which contain particulars of his case on falsity, malice and damage. Although there have been periods in the Malicious Falsehood Action when Mr Tinkler has acted in person, including dealing with the current application, his Statements of Case (and amendments to them) have always been settled by experienced Counsel.

27. Mr Tinkler seeks to demonstrate that the Defendants published the Announcement maliciously on two bases. First, that they did not believe the Malicious Falsehood Meaning (see [17] above) to be true. In respect of meaning (a), that requires him to demonstrate that they did not actually hold this opinion. Second, that they had a dominant intention to injure Mr Tinkler.

28. A point made by Mr Laycock, and which forms an independent basis of attack against Mr Tinkler's claim against him, is that the particulars of malice contain no direct allegations against him (see particularly, for example, §§8.6.2, 8.7.1 and 8.8.1). Mr Tinkler's case against Mr Laycock is something of an oddity. No allegations of wrongdoing were made against Mr Laycock in the Stobart Action, hence the reference to the "Four Directors", and it is apparent from the Stobart Judgment that Mr Laycock was actually opposed to the publication of the Announcement in the terms in which it appeared: [264]-[269]. Mr Tinkler has not addressed this difficulty in his Particulars of Claim in the Malicious Falsehood Action. As I have noted, Mr Laycock denies that he published the Announcement (see [24(i)] above). That would be an issue to be resolved if the Malicious Falsehood Action continues. Mr Caldecott QC however objects to Mr Tinkler now making allegations of malice against Mr Laycock in the Malicious Falsehood Action, allegations he clearly deliberately abstained from making against him in the Stobart Action.

The current Application

29. By an Application Notice issued on 3 January 2020, the Defendants seek an order staying (alternatively, striking out) the Malicious Falsehood Action on the grounds that it is an abuse of process. In summary, the Defendants contend that continued litigation of the Malicious Falsehood Action would amount to an abuse of process because it would involve the re-litigation of, or collateral attack upon, the Stobart Action and Judgment.

30. In the alternative, the Defendants contend that, even if the Court finds that the Malicious Falsehood Action is not an abuse of process as a collateral attack on the Stobart Judgment, the claim should be struck out on two further bases:

    i) the Re-Amended Particulars of Claim do not advance a reasonably arguable or properly particularised case under s.3(1) Defamation Act 1952 and contain no claim for special damage and so the statement of case discloses no reasonable grounds for bringing the claim; and

    ii) further, or alternatively, in light of the Stobart Judgment and the parameters of the Malicious Falsehood Action, Mr Tinkler could establish no substantial tort and that his claim should be struck out or dismissed on the grounds that it is an abuse of process within the principle established in ***Dow Jones & Co Inc -v- Jameel*** **[2005] QB 946**.

31. Finally, and in the alternative to his principal grounds of attack, Mr Laycock seeks the dismissal of the Malicious Falsehood Action, or summary judgment against Mr Tinkler, on the grounds that Mr Tinkler has advanced no case of malice against him (or none that has any real prospect of success).

32. The Defendants' Application Notice is supported by the witness statements of Mr Brady, Mr Laycock and the Defendants' Solicitor, Alan Watts, all dated 23 December 2019.

33. In response, Mr Tinkler has filed a witness statement dated 23 March 2020 and a witness statement from Paul Hodges also dated 23 March 2020.

Abuse of process: re-litigation/collateral attack

34. The Court has an inherent power to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute*: **Hunter -v- Chief Constable of the West Midlands*** **[1982] AC 529, 536** *per* Lord Diplock.

35. The Court should not be unduly prescriptive about the circumstances in which abuse of process may be found to arise: ***Kotonou -v- National Westminster Bank plc*** **[2015] EWCA Civ 1106** [44] *per* Gloster LJ.

36. The principle is wider than merely *res judicata* or issue estoppel. Lord Sumption summarised the various categories of abusive subsequent proceedings in ***Virgin Atlantic Airways -v- Zodiac Seats UK Ltd*** **[2014] AC 160** [17]-[26], from which I derive the following principles:

    i) Cause of action estoppel is absolute in relation to all points which had to be, and were, decided in order to establish the existence or non-existence of a cause of action. It also bars the raising, in subsequent proceedings, of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.

    ii) Issue estoppel arises where, although the cause of action is not the same in the subsequent action, an issue which is necessarily common to both actions has been decided in the earlier case and is binding on the parties: [17]. Except in special circumstances, where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (a) were not raised in the earlier proceedings; or (b) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could, with reasonable diligence, and should in all the circumstances have been raised: [22].

    iii) *Henderson* abuse (named after ***Henderson -v- Henderson*** **(1843) 3 Hare 100**) is where a party seeks to raise, in subsequent proceedings, matters which were not, but could and should have been, raised in the earlier proceedings. *Henderson* abuse is separate and distinct from cause of action or issue estoppel, but the underlying public interest is the same: that there should be finality in litigation and that a party should not be vexed twice in the same matter. The public interest is reinforced by needs of efficiency and economy in litigation, in the interests of the parties and the public as a whole. It is not necessary, before *Henderson* abuse can be found, for there to be a collateral attack on a previous decision, but where that element is present, the later proceedings are more likely to be found to be abusive. However, it would be wrong to hold that, because a matter could have been raised in earlier proceedings, necessarily it should have been. That would be to adopt too dogmatic an approach. What is required is a broad, merits-based judgment which takes into account the public and private interests involved. The crucial question is whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could and

should have been raised before: [24] and ***Johnson -v- Gore Wood & Co*** **[2002] 2 AC 1, 31** *per* Lord Bingham.

iv) Estoppel (or *res judicata*) is different from abuse of process. The former is a rule of law, whereas abuse of process is a concept designed to protect the court's process. However, they have a common objective: to avoid duplicative litigation: [25].

37. Duplicative litigation not only causes prejudice to the defendant, in terms of wasted time, costs or effort and the risk of dispersal of evidence, it is also contrary to the public interest generally to allow the risk of inconsistent findings which arise when different courts at different times are required to examine essentially the same factual dispute. The position is to be judged objectively: "*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*": ***Divine-Bortey -v- Brent LBC*** **[1998] ICR 886, 898** *per* Potter LJ.

38. To the extent that it is not subsumed in *Henderson* abuse, a second action which amounts to or involves a collateral attack on a final decision of a court of competent jurisdiction is also liable to be struck out as an abuse of process. It is abusive for a litigant to change the form of the proceedings in order to relitigate the same point: ***Hunter -v- Chief Constable of the West Midlands***, p.541A-542D *per* Lord Diplock.

39. Mr Tinkler cited ***Hollington -v- Hewthorn*** **[1943] KB 587** during the course of his submissions. As Mr Caldecott QC accepted, the principle that, absent some estoppel between the parties, findings of fact in one case are generally not admissible to prove them in another case (whether criminal or civil): ***Three Rivers DC -v- Bank of England (No.3)*** **[2001] 2 All ER 513** [5], [31]-32], [132]; ***Secretary of State for Trade & Industry -v- Bairstow*** **[2004] Ch 1** [26]-[27]. Mr Tinkler submitted that ***Hollington*** prevents me from even considering the Stobart Action and Judgment on this application. That is to misunderstand the authority. ***Hollington*** is a rule of evidence. It prevents a party seeking to prove, usually at trial, some fact or facts by relying on findings of fact in an earlier judgment or decision. I am not dealing with a trial, and Mr Caldecott QC is not relying upon the Stobart Judgment to establish facts upon which the Defendants wish to rely. The rule in ***Hollington*** does not prevent a Court from examining earlier litigation to determine whether, given the issues raised and factual findings, a second set of proceedings is an abuse of process. ***Bairstow*** illustrates the point neatly.

40. Mr Tinkler submits that the Malicious Falsehood Action is not an abuse of process, principally because the Stobart Action was brought against him by the company and the Malicious Falsehood Action is brought by him against five individual directors. Before turning to consider the extent to which this submission has any substance, as a matter of law, the fact that the parties are not identical is no bar to a finding that subsequent proceedings are *Henderson* abusive. What is required is that there is "*a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party*": ***Gleeson -v- J Wippel & Co*** **[1977] 1 WLR 510, 515** *per* Sir Robert Megarry V-C (approved by Lord Bingham in ***Johnson -v- Gore Wood & Co***, p.32E-G). The Court should not adopt a formulaic approach to the broad, merits-based assessment

that is required when considering whether the subsequent proceedings are *Henderson* abusive.

41. In reality, there is nothing in the point that, in the Stobart Action, Mr Tinkler was sued by the company (and he counterclaimed against the company) and in the Malicious Falsehood Action, he has sued five individuals. They were sued as directors, for actions they carried out on behalf of Stobart. Stobart, the company, was a joint tortfeasor with the Defendants for the act of publishing the Announcement complained of in the Malicious Falsehood Action, albeit not one sued by Mr Tinkler. It was an essential part of Mr Tinkler's case in the Stobart Action that, in publishing the Announcement, the Four Directors (as defined in the Stobart Action, i.e. excluding Mr Laycock) had been in breach of their duties as directors of Stobart. Leaving aside the order in which the Claim Forms were issued (which is a matter of no real consequence), it was always practically open to Mr Tinkler to bring the claim that he made in the Malicious Falsehood Action as part of his counterclaim (or Part 20 claim) in the Stobart Action (or to seek consolidation of the two actions). It was a personal (and probably tactical) choice by Mr Tinkler to sue the five directors personally, and separately from Stobart, in the Malicious Falsehood Action. 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.

s.3(1) Defamation Act 1952

42. The second basis of attack advanced by the Defendants is to the adequacy of Mr Tinkler's case on damage he alleges was caused by publication of the Announcement. Although in a defamation claim, at common law, damage is presumed upon proof of the publication of defamatory imputations that refer to the claimant, a claimant in a malicious falsehood action is required, at common law, to demonstrate that the publication caused him pecuniary damage. Since Mr Tinkler has now abandoned his defamation claim, leaving only his claim for malicious falsehood, understandably the Defendants have renewed their focus on Mr Tinkler's case on damage. I say, "renewed" because their complaints have been clearly flagged to Mr Tinkler before even the hearing before Nicol J (see [20]-[21] above).

43. A claimant in a claim for malicious falsehood can be relieved of the obligation to prove pecuniary damage, if he can bring his claim within s.3(1) Defamation Act 1952, which provides:

> "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."

44. As to damages in malicious falsehood:

i) A claimant can recover general damages under s.3(1) Defamation Act 1952 if s/he can show that the alleged false statements were more likely than not to cause him pecuniary damage: ***Cruddas -v- Calvert*** **[2013] EWHC 2298 (QB)** [195] *per* Tugendhat J; ***Niche Products Ltd -v- MacDermid Offshore Solutions LLC*** **[2014] EMLR 9** [14(1)] *per* Birss J.

ii) Pecuniary damage is financial loss or damage capable of being estimated in money (as opposed to compensated in money, e.g. general damages in defamation): ***Niche Products*** [39].

iii) If the claimant's claim falls within s.3(1) Defamation Act 1952, the fact that s/he cannot demonstrate actual financial loss does not mean that the Court must award only nominal damages: ***Joyce -v- Sengupta*** **[1993] 1 WLR 337, 346H-347C** *per* Sir Donald Nicholls V-C; ***Niche Products*** [14(2)]; but the size of the award will necessarily be dependent upon the established impact of the publication of the falsehood and may, in some cases, be only modest: ***Fielding -v- Variety Incorporated*** **[1967] 1 QB 841**.

iv) The Court of Appeal in ***Joyce -v- Sengupta*** (p.349A-B) left open the question of whether damages for hurt feelings could be awarded in a malicious falsehood action, but subsequently in ***Khodaparast -v- Shad*** **[2000] 1 WLR 619** held that, if the claimant establishes an entitlement to damages for malicious falsehood, either on proof of special damage or by reason of s.3(1), then the award of general damages may reflect injury to the claimant's feelings: [42] *per* Stuart-Smith LJ.

v) Harm to the claimant's reputation cannot form part of the basis of an award of damages for malicious falsehood: ***Khodaparast*** p.631H *per* Otton LJ; ***Joyce -v- Sengupta*** p.348F-G *per* Sir Donald Nicholls V-C; and ***Niche Products*** [39].

45. Since the hearing in this case, I have handed down judgment in ***Peck -v- Williams Trade Supplies Limited*** **[2020] EWHC 966 (QB)** in which I considered the tort of malicious falsehood and reviewed the role played by s.3(1) in such actions ([12]-[15]). For present purposes, the important principles are that, even where s.3(1) is relied upon, a claimant must be able to show that the damage suffered by him flowed directly from the untruth of the statements of which he complains, i.e. that the damage complained of is attributable to and caused by the falsehood: [13]. Difficult questions of causation of damage can arise in many cases: see discussion in ***Niche Products*** [48]. At the pleading stage, the claimant must identify (a) the nature of the loss which it is alleged the falsehoods caused; and (b) the mechanism by which s/he contends that loss is likely to have been sustained: ***Tesla Motors Ltd -v- BBC*** **[2013] EWCA Civ 152** [37]; ***Niche Products*** [35], [45].

Abuse of process: *Jameel*

46. The Court has jurisdiction to stay or strike out a claim where no real or substantial wrong has been committed and litigating the claim will yield no tangible or legitimate benefit to the claimant proportionate to the likely costs and use of court procedures: in other words, "*the game is not worth the candle*": ***Jameel*** [69]-[70] *per* Lord

Phillips MR; ***Schellenberg -v- BBC* [2000] EMLR 296, 319** *per* Eady J. The jurisdiction is useful where a claim "*is obviously pointless or wasteful*": ***Vidal-Hall -v- Google Inc* [2016] QB 1003** [136] *per* Lord Dyson MR. Although ***Jameel*** was a defamation claim (and defamation claims present particular features) the jurisdiction is of general application: ***Sullivan -v- Bristol Film Studios Limited* [2012] EMLR 27** and has been held to extend to malicious falsehood claims: ***Niche Products*** [63] and c.f. ***Tesla Motors*** [47]-[49].

47. Nevertheless, the *Jameel* jurisdiction to strike out claims as abusive ought to be reserved for exceptional cases: ***Stelios Haji-Ioannou -v- Dixon* [2009] EWHC 178 (QB)** [30] per Sharp J. Courts should not be too ready to conclude that continued litigation of the claim would be disproportionate to what could legitimately be achieved. The conclusion must be that it is impossible "*to fashion any procedure by which that claim can be adjudicated in a proportionate way*": ***Ames -v- Spamhaus Project Ltd* [2015] 1 WLR 3409** [33]-[36] *per* Warby J citing ***Sullivan -v- Bristol Film Studios*** [29]–[32] *per* Lewison LJ.

48. In defamation actions, an important factor in the assessment of the value of what is sought to be achieved by the proceedings is usually the element of vindication that the claimant hopes to obtain: see the discussion in ***Alsaifi -v- Trinity Mirror plc* [2019] EMLR 1** [42]-[43]. But the principle has a more general application beyond "vindication" in the defamation sense. In ***Alsaifi***, I described it as follows [45]:

> "… The Court cannot strike out a claim for a £50 debt simply because, assessed against the costs of the claim, it is not 'worth' pursuing. Inherent in the value of any legitimate claim is the right to have a legal wrong redressed. The value of vindicating legal rights – as part of the rule of law – goes beyond the worth of the claim. The fair resolution of legal disputes benefits not only the individual litigants but society as a whole."

49. A dimension of the *Jameel* jurisdiction that has a potential application in this case is what Lord Phillips said about the public interest in the utilisation of the Court's resources in the conduct of litigation:

> [54] ... An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice…

50. The same principle applies when it comes to the proper management of multi-party litigation. It is not uncommon, in commercial disputes, for parties to wish to proceed to have issues between them resolved by the Court in stages and perhaps in more than one set of proceedings. But to avoid subsequent arguments as to *res judicata*, estoppel and abuse of process – and to ensure that the Court's resources are being used appropriately – the parties need to raise with the Court how the various claims that the parties wish to make are to be tried. The Court of Appeal gave guidance in ***Aldi Stores -v- WSP Group plc* [2008] 1 WLR 748**. Thomas LJ said:

> [30] Parties are sometimes faced with the issue of wishing to pursue other proceedings whilst reserving a right in existing proceedings. Often,

> no problem arises; in this case, Aldi, WSP and Aspinwall each in truth knew at one time or another between August 2003 and the settlement of the original action in January 2004 that there was a potential problem, but it was never raised with the court. I have already expressed the view that it should have been. The court would, at the very least, have been able to express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation. It may have seen if a way could have been found to determine the issues applicable to Aldi in a manner proportionate to the size of Aldi's claim and without the very large expenditure that would have been necessary if Aldi had to participate in the trial of the actions. It may be that the court would have said that it was for Aldi to elect whether it wished to pursue its claim in the proceedings, but if it did not, that would be the end of the matter. It might have inquired whether the action against excess underwriters could have been expedited. Whatever might have happened in this case is a matter of speculation.
>
> [31] However, for the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seised of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future.

51. In ***Clutterbuck -v- Cleghorn* [2017] EWCA Civ 137**, the Court of Appeal considered further the ***Aldi Stores*** guidelines.

> [76] It is clear that Thomas LJ was concerned to ensure that, in future, a party to commercial litigation who wishes to pursue a claim at a later date against the same or other parties in relation to the same commercial matter should put his cards on the table in the first claim so as to give the court an opportunity to consider whether and, if so, how, by appropriate case management directions, the resources of the court may utilised in the most cost effective and efficient way.
>
> [77] The importance of parties putting their cards on the table was emphasised by the Court of Appeal in ***Stuart -v- Goldberg Linde* [2008] 1 WLR 823**, a case in which the claimants sought to pursue a second claim against the same defendant, albeit raising issues which differed from those raised in the first claim. There Sedley LJ said this at [77]:
>
>> "Secondly, as the ***Aldi Stores Ltd*** case again makes clear and as Sir Anthony Clarke MR stresses, a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. Moreover, putting his cards on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides."
>
> [78] Sir Anthony Clarke MR put it this way at [96]:
>
>> "For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that

> no one is taken by surprise and the appropriate course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. On the contrary they should come clean so that the court can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the CPR, namely that of co-operation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated."

[79] He concluded his judgment in these terms at [101]:

> "I only add by way of postscript that litigants and their advisers should heed the points made by this court in the Aldi Stores Ltd case and underlined here that the approach of the CPR is to require cards to be put on the table in cases of this kind or run the risk of a second action being held to be an abuse of the process."

[80] In [***Gladman Commercial Properties -v- Fisher Hargreaves Proctor*** **[2013] EWCA Civ 1466**; **[2014] CP Rep 13**; **[2014] PNLR 11**] the claimants sought to pursue a second claim in which they made essentially the same allegations as those they had made in an earlier claim which they had settled. The defendants to the two claims, though different, were joint tortfeasors. The second claim was struck out on three grounds, namely first, that there was no reservation of rights and consequently the settlement of the first claim released the defendants to the second; secondly, that the second claim constituted a *Henderson -v- Henderson* abuse of process; and thirdly, the claimants had failed to plead in the second claim an intelligible claim for a loss further to that for which they had been compensated in the first action. An appeal against each of these findings was dismissed. In addressing the second, Briggs LJ (with whom Ryder and Longmore LJJ agreed) said this:

> [64] … He [Thomas LJ] plainly regarded the requirement to refer a contemplated future claim for case management directions in the earlier claim as mandatory, and as serving the public interest in the efficient use of court resources. He described a failure to do so as inexcusable. Furthermore, in the ***Stuart*** case, both Sedley LJ and Sir Anthony Clarke MR spelt out in express terms that a failure to follow the ***Aldi*** guidelines involved the claimant running a risk that the pursuit of a second claim would constitute an abuse.
>
> [65] As has been repeatedly stated, the conduct of civil proceedings is a process in which the stakeholders include not merely the parties, but also other litigants waiting for their cases to be tried, and the public at large, who have an interest in the efficient and economic conduct of litigation. I consider that Arnold J was correct to treat a failure by the Appellant to follow guidelines laid down as mandatory future conduct in two successive reported decisions of this court as relevant matters pointing to

a conclusion that the Second Claim constituted an abuse of the process of civil litigation.

[66] The shocking consequence of permitting the Second Claim to continue would be that precisely the same issues would fall to be litigated at two successive trials involving the waste of between four and six working weeks of court time and, no doubt, millions of pounds of wasted costs and lost management time, quite apart from the double jeopardy faced by Mr Bishop and Mr Hargreaves to which I have referred. The judge's conclusion was that compliance with what were by then mandatory guidelines could have entirely avoided that wasteful duplication of time, money and effort. I agree that the failure was, as described in the ***Aldi*** case, inexcusable. An inexcusable failure to do something which would have contributed so substantially to the economy and efficiency with which this dispute might have been resolved seems to me to be a primary candidate for identification as an abuse."

[81] In light of these statements of principle the deputy judge was, in my view, right to say that the ***Aldi Stores*** guidelines are mandatory and that an inexcusable failure to comply with them is a relevant factor to be taken into account in assessing whether, having regard to the relevant private and public rights and in light of all of the facts of the case, a party is abusing the process of the court by seeking to raise before the court an issue that it could have raised in prior proceedings.

Submissions

Abuse of process: re-litigation/collateral attack

52. In relation to the first limb of the argument on abuse of process – that Mr Tinkler is seeking to relitigate issues that have been (or should have been) determined in the Stobart Action – Mr Caldecott QC sought to demonstrate the substantial overlap between the issues in the Stobart and Malicious Falsehood Actions by reference to a helpful table in an Annex to the Application Notice. I have reproduced this as Appendix 2 to this judgment. I have omitted references to the statements of case in the Stobart Action, as these have effectively been superseded by the Stobart Judgment.

53. Unfortunately, the Annex was not served at the same time as the Application Notice. Mr Tinkler raised an objection to this at the hearing, but I was satisfied that its belated service the week before the hearing caused Mr Tinkler no real prejudice. As a document, it simply gathers together, in a convenient table, a list of issues cross-referenced to paragraphs from the statements of case in the Malicious Falsehood Action, the Stobart Action and the Stobart Judgment. All of the underlying documents would have been very familiar to Mr Tinkler. The Annex to the Application Notice was simply a convenient way of presenting and cross-referencing the underlying information from these documents. However, in order to avoid any potential unfairness to Mr Tinkler, I asked Mr Caldecott QC during his submissions to go through the statements of case in the Malicious Falsehood Action and make his submissions as to what he contended were the overlapping issues and the extent to which, he submitted, the Malicious Falsehood Action would represent an attack upon the findings in the Stobart Judgment by Mr Tinkler.

54. Mr Tinkler took as his starting point a submission that, although the Defendants (with the exception of Mr Laycock) were witnesses in the Stobart Action and were (at least at one time) members of the board, it was hopeless to suggest that they were privies of Stobart when the Stobart Judgment was given. He made the following points:

    i) the Defendants were not parties to the Stobart Action;

    ii) the Defendants had no financial interest in the outcome of the Stobart Action;

    iii) the Defendants could not be said to be the real parties behind the Stobart Action (they were not at risk of an order for costs being made against them under s.51 Senior Courts Act 1981);

    iv) by the time the Stobart Action came on for trial, Mr Ferguson (who was a non-executive director) had announced his plan to leave the company and Mr Laycock had ceased to be a director;

    v) Mr Coombs and Mr Wood were only ever non-executive directors; and

    vi) Mr Brady's position as a director was insufficient to make him a privy.

55. The issues decided by Judge Russen QC in the Stobart Action were listed by him in [50]. They do not include the question of whether the Defendants maliciously made false statements in the Announcement. The only issue decided by the Judge in relation to the Announcement was whether the Four Defendants had acted in breach of fiduciary duty when they published the Announcement. That is a different issue from the issues that have to be decided in the Malicious Falsehood Action. Judge Russen QC expressly held that he was not deciding issues that would fall to be determined in the Malicious Falsehood Action. The Judge noted that Mr Tinkler had commenced the Malicious Falsehood Action ([312]) and stated, "*it is not for me to trespass upon matters which are to be decided in [those] proceedings*" [787].

56. Finally, Mr Tinkler submitted that it cannot be an abuse for him to proceed with the Malicious Falsehood Action where:

    i) it was issued before the Stobart Action;

    ii) it raises different issues from the ones decided in the Stobart Action;

    iii) the Judge in the Stobart Action was well aware of the Malicious Falsehood Action and stated that he was not deciding any issue in those proceedings;

    iv) there is no collateral attack on the Stobart Action. Mr Tinkler says that he accepts the Court's decision in the Stobart Action as to the lawfulness of the Claimant's dismissal stands (however strongly he disagrees with it). Success in the Malicious Falsehood Action will not impugn that decision; and

    v) there is no unfairness to the Defendants if he is permitted to pursue the Malicious Falsehood Action and no real argument that this claim should have been tried at the same time as the Stobart Action.

Damage and the adequacy of Mr Tinkler's claim under s.3(1) Defamation Act 1952

57. Mr Caldecott QC's submissions on s.3(1) Defamation Act and *Jameel* have a substantial degree of overlap. The Defendants contend:

    i) Mr Tinkler does not have an arguable claim since (a) he alleges no special damage; and (b) he has not particularised a sufficient case to come within s.3(1) Defamation Act 1952; and

    ii) even if his pleaded case were allowed to continue, Mr Tinkler would, in any event, only be awarded nominal or near nominal damages even if he succeeded in the claim and the claim should in all the circumstances be struck out under the *Jameel* jurisdiction as disclosing no substantial tort.

58. Both submissions centre upon the unreality of Mr Tinkler having suffered any real damage as a result of publication of the Announcement, and certainly no damage that he could demonstrate had been caused by publication of the Announcement, rather than damage caused to him as a result of the wider dispute and, since it was handed down, the adverse findings made against him in the Stobart Judgment.

59. At the outset, Mr Caldecott QC accepted that it is open to Mr Tinkler to bring claims for both defamation and malicious falsehood: ***Joyce -v- Sengupta*** (p.342H) and that a claimant who relies upon s.3(1) Defamation Act 1952 does not need to plead and prove special damage. Nevertheless, he contends that Mr Tinkler's pleaded claim as to the likelihood of publication of the Announcement causing him pecuniary damage, and, particularly, the explanation of the mechanism whereby such damage was likely to be caused, is hopeless. In the language of CPR Part 3.4(2)(a), his statement of case discloses no reasonable grounds for bringing his claim.

60. Mr Caldecott QC highlighted the fact that, when it was commenced, the Malicious Falsehood Action contained a claim for defamation which contended that the Announcement bore seriously defamatory imputations against Mr Tinkler, including that he had acted in breach of his duties as a director of Stobart and was "*so lacking in integrity that he [was] unfit to hold the office of company director*". In paragraph 10 of his original Particulars of Claim, he contended that publication of these defamatory imputations had caused "*serious damage to his reputation*". He pleaded that Announcement was "*self-evidently extremely grave*". In his Re-Amended Particulars of Claim, Mr Tinkler is still alleging that the publication of the Announcement has caused "*loss and damage including serious damage to his reputation*". But having abandoned his defamation claim, Mr Caldecott contends that Mr Tinkler confronts two problems:

    i) first, the principle that damage to reputation cannot be claimed in a malicious falsehood action (see [44(v)] above);

    ii) second, the Court ruled that the Announcement did not convey the seriously defamatory meanings that Mr Tinkler had alleged had caused him harm. The only meaning that the Court found to be defamatory was meaning (c) (see [15] above), but that has been removed from consideration because Mr Tinkler has abandoned his defamation claim.

61. Further, paragraph 10 has been amended by Mr Tinkler now to state that it was the publication of the false statements (see [17] above) (rather than the "*gravely*" defamatory imputations he originally complained about) that was "*likely to cause him pecuniary loss*". Mr Caldecott QC submits that the action, as it now stands, is unrecognisable from its initial form in terms of both seriousness and the potential for what is complained about, now, in the Announcement, to cause pecuniary loss. Perhaps most importantly, the Re-Amended Particulars of Claim contain no proper explanation of the mechanism of how publication of the Announcement was likely to cause pecuniary damage to Mr Tinkler, that is before Mr Tinkler has to confront the difficulties of causation.

62. On that issue of causation, Mr Caldecott QC highlights the chronology of events:

    i) Mr Tinkler's immediate public reaction to the Announcement was to send a vigorous letter of defence to all shareholders on 9 June 2018 (the same day on which he issued the Claim Form in the Malicious Falsehood Action, but it was not served until later) protesting about the "*mud-slinging*" and urging shareholders to vote against Mr Ferguson's election (see [308]-[309] Stobart Judgment).

    ii) On 14 June 2018, Stobart announced publicly (by further RNS) that Mr Tinkler had been dismissed. This was followed, on 15 June 2018, by Stobart issuing the Claim Form in the Stobart Action. Mr Tinkler complains, as part of his case on malice, that these steps were taken by the Defendants "*in order to… publicise (false) allegations of wrongdoing by the Claimant in the press*" (§8.11.7 Re-Amended Particulars of Claim). Mr Caldecott QC submits that any harm caused by the Announcement pales into insignificance when compared to Mr Tinkler's subsequent dismissal and the publicity of it (identified for complaint by Mr Tinkler in §8.11.7.1).

    iii) On 15 February 2019, the Stobart Judgment was handed down. Mr Caldecott QC submitted "*somewhat ironically, most of the more serious elements in [Mr Tinkler's] original defamation claim were subsequently found to be true by HHJ Russen…*" (see [11] above, in particular the finding that Mr Tinkler had acted in serious breach of his fiduciary and contractual duties as a director of Stobart and had been lawfully dismissed). The Stobart Judgment received very significant publicity amongst the business community and more widely. Mr Caldecott QC argues that, since 15 February 2019, any adverse consequences and/or pecuniary damage suffered by Mr Tinkler are likely to have been caused by the Stobart Judgment, not the Announcement.

63. Turning to the particulars of damage set out in the Re-Amended Particulars of Claim, Mr Caldecott QC made the following submissions:

    i) §11.1 merely repeats the particulars of falsity and cannot sensibly assist on the statements' tendency to cause pecuniary damage (or not).

    ii) §11.2 concerns the alleged width of publication, which again cannot of itself establish the requisite tendency.

iii) §11.3 (and its sub-paragraphs) is central to Mr Tinkler's case on establishing that publication of the Announcement was likely to cause him pecuniary damage. As noted above, the Defendants had attacked this part of Mr Tinkler's case at the hearing before Nicol J and Mr Tinkler had been given an opportunity to amend (and provide further information about) his case on damage.

iv) §11.3.1 contains general assertion as to the likelihood of the Announcement jeopardising his future appointment as a director of any UK company. The sub-paragraph contains no suggestion that Mr Tinkler has, in fact, been refused any position, still less any suggestion that such refusal was caused by publication of the Announcement.

v) §11.3.2 contains a similar general assertion that charities or other organisations were unlikely to want to be associated with Mr Tinkler or that Government ministers and senior civil servants would not meet with him. The same objection is taken to the lack of any specific refusals. Mr Caldecott QC suggests that such a reaction to the Announcement would appear to be wholly disproportionate.

vi) §11.3.3 contains no details of the alleged reduction in the Claimant's ability to attract investment for future ventures or investments and has impaired his ability to recruit high calibre individuals to any future board of which Mr Tinkler was part. The same causation points are made on behalf of the Defendants. The response to the Request for Further Information yielded no details (see [23] above). The Defendants' solicitors complained that the lack of particulars had been a matter that had been raised specifically at the hearing before Nicol J. They asked Mr Tinkler to identify with which individuals/entities Mr Tinkler met and when the meetings occurred. No details were provided. Mr Watts, in his witness statement noted that Mr Tinkler had provided no further additional information in respect of his damage claim. Mr Tinkler left this aspect of the case unaddressed in his witness statement dated 23 March 2020. Mr Caldecott QC submits that Mr Tinkler has now had a further 7 months in order to provide details to support his claim that the publication of the Announcement was likely to cause him pecuniary damage. His witness statement, it is argued, does not provide any explanation for the mechanism whereby the publication of the Announcement was likely to cause Mr Tinkler pecuniary damage.

vii) Mr Tinkler confirmed in a response to a Request for Further Information that the articles referred to in §11.3.4 were the articles set out in §11.2 (i.e. articles relied upon as reporting upon and/or repeating the Announcement). Mr Caldecott QC submits that these cannot demonstrate a likelihood of pecuniary damage.

64. More widely, Mr Caldecott QC submitted that if the Court accepts the Defendants' submission that Mr Tinkler is not entitled to re-open the adverse findings against him the Stobart judgment, it would follow that the case on the falsity of Malicious Falsehood Meaning (a) in §8 of the Re-Amended Particulars of Claim (destabilisation at a crucial time for the company's business) is abusive and must fail. That, he submits, renders the case on causation of damage all the more unsustainable since this meaning eclipses the surviving meaning (b) (requiring the board to deal with various challenges) but appears in the same publication.

65. In his submissions in response, Mr Tinkler initially complained that he had been ambushed by amendments to the Application Notice that the Defendants had sought to make in the week before the hearing, specifically to add a further ground on which Mr Tinkler's claim ought to be struck out for failing to disclose a reasonably arguable case under s.3(1) Defamation Act 1952. I do not accept that submission. Whilst it would have been better had the Application Notice contained this ground from the outset, the reality is that the complaint about the adequacy of Mr Tinkler's case on damage has been a consistent theme since the hearing before Nicol J last May (see [20]-[21] above). It has not come as a surprise to Mr Tinkler. The Defendants are simply reprising a familiar theme. s.3(1) Defamation Act 1952 has become the focus of their attack since Mr Tinkler abandoned his defamation claim in the Re-Amended Particulars of Claim. The issue I have to decide is whether Mr Tinkler's current statement of case fails to disclose a proper case under s.3(1) Defamation Act 1952. Even if I upheld the Defendants' submissions, there would be a further separate question, to which the complaint of ambush is more germane: whether Mr Tinkler should be given a further opportunity to replead his case. I deal with this below.

66. Mr Tinkler submitted that striking out his claim would deprive him of the opportunity to demonstrate the role that the Defendants had in damaging him. The Stobart Action did not address whether the Defendants had set out to damage him by publication of the Announcement and HHJ Russen QC expressly stated that he was not trespassing on the Malicious Falsehood Action.

67. In response to the Defendants' complaints about his case on damage, Mr Tinkler told me that he had experienced negative responses from banks which had previously been willing to support him. They had refused to engage with him. He said that he had lost income from his annual salary from Stobart, from lost dividend income and had lost an allocation of shares following his removal as a director. Mr Tinkler estimated that his lost contractual payment from Stobart amounted to some £500,000 per year. Mr Tinkler said that he wanted the opportunity to instruct a financial expert to prepare a report on the damage that he had suffered. He said that his life had changed. He had been publicly humiliated, and that his physical and mental health had been affected. It had also affected his family. He complained that his reputation had been "trashed" and that every news story that remains available represents a stain on his character.

68. In response to my asking him whether he could point to any example of instances where he had lost out on directorships or had problems with future ventures, Mr Tinkler said that he had lost an opportunity in the recapitalisation of Eddie Stobart Limited. Mr Tinkler said that he had nearly got a new investor, but that he had pulled out. This happened in December 2019, he told me.

Decision

Re-litigation/collateral attack

69. Mr Tinkler made the simple point that it cannot be an abuse for him to continue with the Malicious Falsehood Action because HHJ Russen QC expressly stated in the Stobart Judgment that he was not "*trespassing*" upon issues "*which are to be decided in the libel proceedings*": [787]. I accept that this is a powerful point, but, in my judgment, it does not prevent a finding that the Malicious Falsehood Action is now an abuse of process. My task is to assess what the continued litigation of the Malicious Falsehood

Action would entail and whether it is permitted by the principles I have set out above. I shall do this by reference to the table in Appendix 2.

70. Issue A is whether Mr Tinkler had destabilised the board of Stobart at a crucial time for the business and whether the Defendants held the view that he did at the relevant time. This is Malicious Falsehood Meaning (a), which Mr Tinkler contends is false (see §§8.1-8.2 Re-Amended Particulars of Claim): he did not destabilise the board. The Defendants contend that this meaning is objectively true. Separately, even if Mr Tinkler established the falsity of this meaning, he would have also to establish that it was published maliciously. As Malicious Falsehood Meaning (a) has been ruled to be an expression of opinion, Mr Tinkler has to establish that the relevant Defendant, at the time the Announcement was published, did not actually hold the opinion that Mr Tinkler had destabilised the board (see [16] in the Meaning Judgment and [19] above)).

71. Resolving this issue in the Malicious Falsehood Action would involve relitigating a significant part of the Stobart Action and would inevitably lead to a position where Mr Tinkler would be inviting the Court to make findings of fact contrary to the facts found in the Stobart Action. To that extent, it would involve a collateral attack on the decision in the Stobart Action. To take the clearest example, Mr Tinkler's case in the Malicious Falsehood Action on Issue A is that he "*had not destabilised the board at a crucial time for the business*" (§8.1 Re-Amended Particulars of Claim). In the Stobart Judgment, Mr Tinkler was found to have "*foment[ed] shareholder dissatisfaction*" [735] and engaged in "*covert action .... [not] acting in the best interests of [Stobart]*" which "*had a destabilising effect upon [Stobart's] management*" [740] and led to "*a situation of chaotic destabilisation within [Stobart] that Mr Tinkler had brought about*" [777]. To succeed on the issue of falsity in the Malicious Falsehood Action, Mr Tinkler would be asking the Court to make a finding contrary to the finding made by HHJ Russen QC in the Stobart Action. In addition, on the issue of malice (the state of minds of the Defendants), and whether, at the date of publication of the Announcement, they held the opinion that Mr Tinkler had destabilised the board of Stobart at a crucial time for its business, to succeed in the Malicious Falsehood Action, the Court would again have to be invited to make findings contrary to findings in the Stobart Action. HHJ Russen QC found that the Four Directors: "*... were justified in believing they were facing the start of an attempted coup*" [777] and "*considered that [Mr Tinkler's] challenge to Mr Ferguson… was destabilising [Stobart]*" [792].

72. Mr Tinkler – or those amending his Particulars of Claim on his behalf – appear to have recognised the difficulty. The deletion of the words that Mr Tinkler "*had not acted in breach of his duties as a director of [Stobart]*" from §8.1 of the Re-Amended Particulars of Claim appears to be an acknowledgement that this case cannot be maintained in the face of the Stobart Judgment. Instead, what has been inserted, in §8.1.3 is a case that Mr Tinkler "*formed the view that it would be in the best interests of [Stobart] for [Mr Ferguson] to step down from his position as Director and Non-Executive Chairman of [Stobart]*". But, put simply, Mr Tinkler's subjective beliefs are irrelevant to the Malicious Falsehood Claim. The only relevant issues are (1) objectively, did Mr Tinkler's actions destabilise Stobart; and (2) when they published the Announcement, did the Defendants hold the opinion that they did. As I have set out, the Stobart Judgment contains relevant findings of fact adverse to

Mr Tinkler on both of those issues. Litigating them again in the Malicious Falsehood Action would be to permit a collateral attack on the Stobart Judgment.

73. Issues B, C, D and E are relied upon by the Defendants in their Defence to demonstrate, objectively, that Mr Tinkler had destabilised the board of Stobart. Not having served a Reply, Mr Tinkler is taken to dispute all of these facts (see [25] above). The findings of fact that Mr Tinkler would be asking the Court to make in the Malicious Falsehood Action would involve impeaching the relevant findings in the Stobart Judgment identified in Appendix 2; that Mr Tinkler had not set out on a process of briefing against the board of Stobart with selected major shareholders; that he did not improperly share confidential information in the Duranta budget with Mr Day; that his conduct in writing the Shareholder Letter was not a breach of his fiduciary and/or contractual duties owed to Stobart; and that he did not orchestrate the writing of the ELT letter.

74. Again, the Stobart Judgment contains relevant findings of fact adverse to Mr Tinkler on all of these issues. Permitting them to be litigated again, in the Malicious Falsehood Action, would be to allow a collateral attack on the Stobart Judgment.

75. Issue G directly concerns the state of mind of the Four Directors at the time they published the Announcement. Mr Tinkler's case in the Malicious Falsehood Action is set out in §§8.6-8.11. §8.12 conveniently summarises the case Mr Tinkler wishes to advance against the Defendants:

> "Each of the Defendants, being directors of the Company, knew the matters referred to at paragraph 8.1-8.4 above and, accordingly, knew that the Claimant (a) had not destabilised the Board at a crucial time for the company's business and (b) had not required (or forced) the Board to deal with the challenges listed in [39]-[43] of the Announcement (whether in the recent past or at all); the Defendants knew (as set out above) that none of the matters listed could properly be regarded as a "challenge" which the Claimant had required (or forced) the Board to address."

76. The contention that the Defendants knew that the Claimant had not destabilised the board of Stobart at a crucial time for the business is essentially linked to Issue A and I have dealt with it above. Permitting Mr Tinkler to relitigate this issue in the Malicious Falsehood Action would be to allow a collateral attack on HHJ Russen QC's contrary conclusion in the Stobart Action. Whether Mr Tinkler had presented the challenges to the board of Stobart identified in the Announcement was not an issue that required to be determined in the Stobart Action. To that extent, therefore, whether objectively Mr Tinkler had presented the identified challenges had not been the subject of any judicial finding.

77. Further in Mr Tinkler's favour, it is right to note that HHJ Russen QC did hold that the Four Directors, in publishing the Announcement, had been "*unwise and inappropriate*" to include some of the bullet points identified as "*recent challenges*" that the Announcement stated had been presented by Mr Tinkler [788], and that the inclusion of matters "*which were not really germane to [the] key issue for the shareholders' vote*" had been "*inflammatory*" [789]. These findings are consistent with Mr Tinkler's case on the falsity of Malicious Falsehood Meaning (b) and so would not face any collateral challenge if he were permitted to continue with the Malicious Falsehood Action.

78. However, the Judge also found that publication of the Announcement – including as it did the alleged "*recent challenges*" presented by Mr Tinkler – did not represent a breach by the Four Directors of their fiduciary duties to act in good faith in the best interests of Stobart [790]-[791]. The key finding on this issue was in [792]-[793]:

> [792] As to that… 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 Announcement]. I have already referred to Mr Coombs' view about the need for [the Announcement] 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.
>
> [793] The second reason is that the terms of [the Announcement], 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...

79. This was a clear finding by the Judge in the Stobart Judgment as to the state of mind of the Four Directors when they published the Announcement. It was not an incidental finding. It was a finding made, against Mr Tinkler's submissions, on a component part of Issue 4 in the Stobart Claim. On the issue of honesty of belief and/or whether, by publishing the Announcement, the Defendants had a dominant intention to injure Mr Tinkler, he would again have to invite the Court in the Malicious Falsehood Action to make findings of fact that would be inconsistent with the findings made in the Stobart Action.

80. The remaining issues (H to N) in Appendix 2, I can deal with more shortly, as they are really subsidiary to the main issues that I have already addressed.

    i) Issue H and Issue K: Mr Tinkler alleges that the termination of his employment and his removal as a director on 14 June 2018 was "*invalid*" (§8.11.6.1 Re-Amended Particulars of Claim). HHJ Russen QC found that it was valid and lawful (as was his removal as a director of Stobart): [953] and [955] (see also the cross-referenced paragraphs of the Stobart Judgment identified in Appendix 2). Permitting this issue to be re-litigated in the Malicious Falsehood Action would amount to a direct challenge to this finding in the Stobart Action.

    ii) Issue I: Mr Tinkler alleges that the transfer of approximately 5.3 million shares into the Employee Benefit Trust so that their voting rights could be utilised in order to secure the re-election of Mr Ferguson as Chairman at the 2018 AGM was improper (§8.11.11 Re-Amended Particulars of Claim). Further he alleges that these actions were in breach of the Defendants' duties to act in the best interests of Stobart (§8.7.3). In relation to the former, HHJ Russen QC found that the transfer was improper, but that it was done by them in what they believed to be in the best interests of Stobart ([874]). Permitting this latter issue to be re-litigated in the Malicious Falsehood Action would amount to a direct challenge to this finding in the Stobart Action.

iii) Issue J: Mr Tinkler alleges that Mr Ferguson acted improperly in using discretionary proxies which he held at the 2018 AGM of Stobart to vote against Mr Tinkler's appointment as a director (§8.11.12.2 Re-Amended Particulars of Claim). This issue is perhaps of peripheral relevance as, as Mr Tinkler expressly pleads, Mr Tinkler was elected despite Mr Ferguson's use of the proxies. The same complaint was made in the Stobart Action, but rejected by HHJ Russen QC: [885]-[886]. Permitting this issue to be re-litigated in the Malicious Falsehood Action would amount to a direct challenge to this finding in the Stobart Action.

iv) Issue L: Mr Tinkler contends that his efforts to remove Mr Ferguson as Chairman of Stobart were motivated by what he believed to be the best interests of Stobart (§§8.1.3, 8.2 and 8.7 Re-Amended Particulars of Claim). I have already noted that this is not a relevant issue in the Malicious Falsehood Action (see [72] above), but even if it were, it was an issue that was decided adversely to Mr Tinkler in the Stobart Action. HHJ Russen QC found that Mr Tinkler's "*grievance over remuneration was really the spark for Mr Tinkler going on the offensive in pressing for change within the boardroom*" [694] and that the Judge had "*no difficulty in drawing the inference that it was [his] grievance about remuneration which caused him to target Mr Ferguson*" [704]. Permitting this issue (to the extent that it is relevant) to be re-litigated in the Malicious Falsehood Action would amount to a direct challenge to the identified findings in the Stobart Action.

v) Issue M and N are two very minor factual issues, relied upon by Mr Tinkler in the Malicious Falsehood Action (§§8.11.2 and 8.11.4), but which were decided against him in the Stobart Action ([588]-[602]). Permitting these issues to be re-litigated in the Malicious Falsehood Action would amount to a direct challenge to the identified findings in the Stobart Action.

81. 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).

82. 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.

83. 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.

84. I am conscious that this may strike Mr Tinkler as unfair, particularly as HHJ Russen QC purported to leave this claim untouched by the Stobart Judgment. Nevertheless, HHJ Russen QC's observation that he was not trespassing upon matters which were to be decided in the Malicious Falsehood Action ([787]) was not a considered conclusion on the impact of the Stobart Judgment on the Malicious Falsehood Action. It has fallen to me to have to make that assessment after detailed submissions. At no earlier stage has the Court been asked to address what was going to happen with the Malicious Falsehood Action after the Stobart Action had been tried. In particular, the Court was never asked, by any party, to decide whether the two Actions should be consolidated, or the Actions tried together. By the time I heard the preliminary issue of meaning in the Malicious Falsehood Claim on 17 December 2018, the Stobart Action had already been tried and judgment had been reserved. Perhaps understandably, and possibly a reflection of which Action they considered to be more important, the parties concentrated their efforts and resources on securing an expedited trial for the Stobart Action. But, throughout this period, all parties were represented by experienced firms of solicitors and Counsel and the ***Aldi*** guidelines are very clear.

85. For the reasons I have explained, the Stobart Judgment does trespass upon matters that would fall to be determined in the Malicious Falsehood Action. Given that the propriety of publishing the Announcement was squarely in issue in the Stobart Action, it is perhaps surprising that the issue went unaddressed by the parties. HHJ Russen QC can hardly have been expected to have identified the potential issues that have now come into sharp focus, particularly given, as I have already noted, the Stobart Action had already been tried by the time of the first hearing in the Malicious Falsehood Action. The Defence in the Malicious Falsehood Action was not served until 8 October 2019. Further, the Malicious Falsehood Action has shifted from being, principally, a claim for libel with an additional claim for malicious falsehood, to being solely a claim for malicious falsehood.

86. In fairness to Mr Tinkler, it cannot be said that he did not lay his cards clearly on the table. He had commenced the Malicious Falsehood Action a week before the Stobart Action. All parties were aware of the two Actions. The Court was also aware of both Actions. However so far as concerned Mr Tinkler, as noted in the passage from a judgment of Sedley LJ quoted in ***Clutterbuck*** [77], "*putting his cards on the table does not simply mean warning the [other side] that another action is or may be in the*

pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides." Likewise, the observations of Sir Anthony Clarke MR [78] that "*the time for such a decision to be taken is before there is a trial of any of the issues*". For whatever reason, it was not.

87. Whatever can be said about the history, it is plain the parties were content to seek, and to commit their (and the Court's) resources to, an expedited trial in the Stobart Action and to allow the Malicious Falsehood Action to trail along, at some distance, in its wake. Given what was objectively in issue and at stake in the two Actions, the analogy is perhaps one of a dinghy, being towed on a long rope behind a super tanker. I do not, by that analogy, intend to belittle Mr Tinkler's claim in the Malicious Falsehood Action, but if it was as important to him as he now contends, it should have received rather more attention than it received and it certainly needed to be addressed before the Stobart Action was tried if the position which now confronts Mr Tinkler was to be avoided. The fact that the Defendants, themselves, did not seek the Court's direction about what should happen to the Malicious Falsehood Action is a factor, but it is not determinative. It does not, in this case, outweigh the public interest in the efficient use of court resources and avoiding duplicative litigation.

88. My conclusion is that continued litigation of the Malicious Falsehood Action would be an abuse of process. It would now represent a collateral attack on key findings in the Stobart Action. Given the overlap in issues in relation to publication of the Announcement between the two Actions, the Malicious Falsehood Action could, and should, either have been brought by Mr Tinkler either as part of his counterclaim in the Stobart Action or the two Actions ought to have been tried together.

89. The public interest also required that all issues that related to publication of the Announcement be tried, so far as possible, in one set of proceedings. Permitting the Malicious Falsehood Action to proceed would also risk producing conflicting judgments. I do not know the scale of the costs incurred by the parties in the Stobart Action, but they must have been substantial. Allowing the Malicious Falsehood Action to proceed all the way to a contested trial (and objectively judged there would appear to be little prospect of any earlier settlement) raises the spectre of precisely the duplication of substantial costs and effort that the doctrine of abuse of process exists to prevent. The five defendants, three of whom have long since left Stobart, would face having to go through another trial, which in all probability would not take place until 2021. But it is not only the parties' resources, it is the scarce resources of the Court that would also be taxed twice. That is one of the reasons why the ***Aldi*** guidelines exist. Parties who do not follow them risk subsequent litigation being struck out as an abuse of process. The warnings, for example in ***Clutterbuck***, could not be clearer. They were not followed in this case. The Malicious Falsehood Action will be struck out.

90. Given my finding, it is not strictly necessary for me to consider the other bases on which the Defendants sought the dismissal or stay of the Malicious Falsehood Action. However, as I have heard full argument on the points, and in case I were wrong to strike out the Malicious Falsehood Action on the basis I have, I will shortly set out my decision on the other grounds.

Damage and Jameel abuse of process

91. I will deal with these together given the substantial common issue is Mr Tinkler's case on damage.

92. I am persuaded that Mr Tinkler's pleaded case on the publication of the Announcement being likely to cause him pecuniary damage should be struck out on the grounds that it does not disclose a properly arguable case.

93. The starting point is that the Court must not, in setting the requirements for a plea relying upon s.3(1) Defamation Act 1952, effectively compel a claimant to provide evidence of special damage. As made clear in ***Joyce -v- Sengupta***, s.3(1) was specifically enacted because it was recognised that claimants may struggle to prove special damage arising from a publication. I consider that the Defendants' attempts to obtain from Mr Tinkler details of specific investment opportunities he claims to have lost as a result of publication of the Announcement are effectively seeking details of a claim for special damages.

94. Nevertheless, Mr Tinkler's pleaded case for how the publication of the Announcement was more likely than not to cause him pecuniary damage has several flaws:

    i) First, his claims for reputational damage cannot be claimed as damage in a malicious falsehood action.

    ii) Second, none of the matters he identified during his oral submissions could be relied upon (even if I were willing to allow him an opportunity to re-plead his case). The loss of salary (or other remuneration) and loss of share options were not caused by publication of the Announcement, they were caused by the termination of his employment and directorship by Stobart. Both have been held to be lawful in the Stobart Judgment.

    iii) Third, and almost certainly the largest obstacle, Mr Tinkler's pleaded case discloses no proper case on causation. Mr Caldecott QC's submissions are compelling. 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.

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. In a case like ***Joyce -v- Sengupta*** it is obvious how an allegation that an employee had stolen her employer's confidential correspondence and handed it to a national newspaper is likely to cause the claimant pecuniary damage: the claimant would be likely to be unemployable in consequence. The less obvious is the statement's capacity to cause pecuniary damage, the greater the practical obligation to set out a clear explanation in the statement of case as to how it is likely to have done so.

96. Ordinarily, where the Court strike out part of a party's statement of case, the Court will consider whether the party ought to be given a further opportunity to replead his case. I have considered whether Mr Tinkler should be given such an opportunity, but I have concluded that he should not. As I have set out above, the damage claim that he advanced has been under sustained attack by the Defendants since May 2019. Mr Tinkler has had it made clear to him – even now that he is acting in person – what is required. I am satisfied that, if he did have a case with a realistic prospect of demonstrating a likelihood that publication of the Announcement has caused him pecuniary damage, he has had the fullest opportunity to present it. There is no real prospect, if the Court were to give him further time and another opportunity, that the position would improve. Mr Tinkler cannot demonstrate that publication of the Announcement either caused him special damage or that it was likely to cause him pecuniary damage. Without that, he does not have an arguable claim for malicious falsehood. The time has come for the Court, and Mr Tinkler, to recognise that. I would have struck out the Malicious Falsehood Action on this ground as well.

97. In light of my finding these two separate bases on which the Malicious Falsehood Action should be struck out, it is not necessary for me to deal with the argument that the Malicious Falsehood Action is also an abuse of process under the *Jameel* principle. In this case, the argument why the claim is now *Jameel* abusive is so bound up with the overlap with the Stobart Action, that it is not likely to be helpful for me to express a concluded view, which would necessarily be obiter. If I am wrong about the Malicious Falsehood Action being an abuse of process on the grounds that it represents re-litigation of, or a collateral attack on, the Stobart Action and Judgment, then that would have a significant impact on the Court's assessment of whether the game would be worth the candle.

98. It is also not necessary for me to determine the discrete challenge by Mr Laycock to the case of malice made against him, but given the seriousness of a plea of malice it is right for me to record that, in my judgment, Mr Tinkler's case of malice against Mr Laycock was inadequate and speculative. This is, perhaps, a reflection of the fact that Mr Tinkler never really had Mr Laycock in his sights as one of those who had wronged him (see [28] above) . Mr Tinkler appears to have advanced a case of malice against Mr Laycock opportunistically and because it was expedient. After he abandoned the defamation claim, he had to do so to maintain any claim against Mr Laycock.

Appendix 1 – Extracts from the Re-Amended Particulars of Claim in the Malicious Falsehood Action

[Amendments made in the Amended Particulars of Claim, dated 14 June 2019, shown with single underlining or ~~single strike through~~

Amendments made in the Re-Amended Particulars of Claim, dated 10 September 2019, shown with double underlining or ~~double strike-through~~]

Particulars of Falsity

8.1 The Claimant ~~has not acted in breach of his duties as a director of the Stobart Group nor has he deliberately~~ had not destabilised the board at a crucial time for the business, whether as alleged in the Announcement or at all. ~~In fact, the Company's continuing success has always been at the forefront of the Claimant's actions as evidenced by (among other things):~~

~~8.1.1. The Claimant's decision to step down as CEO of the Company in 2017 in order to focus his talents on finding new deals for the Company through Stobart Capital and so that he could realise some of his shareholding without having a negative effect on the share price of the Company.~~

~~8.1.2. The Claimant's continued provision of more than 50% of his time on dealing with operational issues for the Company following his resignation as CEO, despite the fact that these issues were supposed to be dealt with by the Second Defendant when he took over as CEO so that the Claimant could focus on pursuing investment opportunities for the Company. As the Second Defendant preferred to spend his time in London the Claimant was required to visit all of the Company's regional sites in order to provide the requisite operational oversight.~~

8.1.3. The Claimant formed the view that it would be in the best interests of the Company for the First Defendant to step down from his position as Director and Non-Executive Chairman of the Company and, having failed to persuade the First Defendant to step down voluntarily, the Claimant gave notice that he would vote against his re-election at the AGM. In those circumstances, it was for the shareholders to decide (by vote at the AGM) whether or not to re-elect the First Defendant. As the Defendants knew:

8.1.3.1 a change in the identity of the Non-Executive Chairman (of itself) would neither destabilise the Company nor adversely affect its operational management. Both the First and Fifth Defendants have admitted (in their evidence in the Stobart claim) that this was the case. The Second Defendant (as CEO) would have been prepared to work with another Chairman.

8.1.4. The facts and matters set out at ~~8.3 and~~ 8.4 below.

8.2 Further, the Claimant's opposition to the First Defendant continuing as Chairman of the Company was based on his view of what was in the best interests of the Company. ~~The Claimant has not acted selfishly or for self-interested reasons nor is he seeking to protect his own position. Paragraph 8.1 above is repeated. In fact:~~

~~8.2.1. The origin of the current dispute is predominantly the Claimant's opposition, as a shareholder, to the First Defendant's re-election as Chairman. This opposition is~~

~~founded upon the Claimant's serious concerns about to the First Defendant's poor corporate governance style, which the Claimant believes has had a detrimental effect on the Company.~~

~~8.2.2. The Defendants have repeatedly tried to force the Claimant's resignation as a Director in response to the Claimant's criticisms.~~

~~8.2.3. The Claimant could not be ousted from his role involuntarily (other than by way of the mechanism at Article 89(5) of the Company's Articles of Incorporation) is, and has always been, an effective and experienced company director who has delivered value to shareholders and is popular both with the Company staff and its shareholders. Paragraph 8.3 below is repeated.~~

~~8.2.4. Paragraphs 8.6 to 8.12 below are repeated.~~

~~8.3 The Claimant has been a successful manager of both the Company and Stobart Capital and was not guilty of any improper conduct whilst CEO of the Company. In fact, under the Claimant's leadership as CEO of the Company (among other things):~~

~~8.3.1. the share price rose from 130p in 2008 to 296p in June 2017, a 128 per cent increase;~~

~~8.3.2. dividends of over £240 million were paid to shareholders;~~

~~8.3.3. over £800 million of appreciation value after funds was raised;~~

~~8.3.4. he created a platform for a multimodal logistics business;~~

~~8.3.5. he purchased Stobart Energy, which has now become the leading supplier of biomass in the UK;~~

~~8.3.6. he purchased the Moneypenny property portfolio, which subsequently delivered a 22.5 per cent IRR;~~

~~8.3.7. he acquired Autologic for £12 million and since realised a 6x multiple;~~

~~8.3.8. in 2014, the Company sold 51 per cent of Eddie Stobart Logistics ("ESL") when the Stobart Group had a market capitalisation of c.£475 million, realising £195 million of cash to reduce debt levels and strengthen the Company's balance sheet.~~

8.4 Further, the Claimant had~~s~~ not required (nor had he forced) the Board to address ~~unwarranted~~ challenges whether as alleged or at all. In fact, as the Defendants knew, none of the bullet points listed under the heading "Mr Tinkler" can or could properly be described as "challenges" posed by the Claimant and/or as matters the Board had been required or "forced" by him to address. Further, although not included specifically in the Judge's formulation of the available meanings (see paragraph 8 above), as the Defendants knew, it was false to describe the matters referred to in [39-43] of the Announcement as being ~~and/or to be~~ "in the recent past" (see [38] of the Announcement). Using the same sub-headings as in the Announcement under the section headed "Mr Tinkler":

8.4.1. *Settlement of contractual issues arising from a previous related party transaction when [the Claimant] was CEO*:

8.4.1.1. The Company acquired W A Developments Limited ("WADL"), at the then Board's request, to expand its railway maintenance and infrastructure activities. The sellers in that transaction were William Stobart ("Mr Stobart") and the Claimant (together "Sellers").

8.4.1.2. The Sellers were Executive Directors of the Company at the time, so the Company engaged third party advisers to do due diligence and prepare a fair valuation. The Sellers separately instructed Eversheds LLP.

8.4.1.3. As is standard, limitations were agreed to the Sellers' liability. The agreed apportionment of that risk and responsibility was reflected in the price paid.

8.4.1.4. The Sellers agreed with the Company that the Sellers would only have liability under the Tax Indemnity and Tax Covenant for a fixed period of seven years, namely until 4 April 2015.

8.4.1.5. More than nine years after Completion, the Sellers received a letter dated 15 August 2017 from the Company asserting a claim. The Claimant replied explaining that the time limit for notifying a Tax Claim against them had expired on 4 April 2015, as was the case. The Claimant (prior to 29 May 2018) provided the Board with a copy of the advice he had received from a QC to that effect.

8.4.1.6. The Defendants and each of them authorised a claim to be made against the Claimant and the Company issued proceedings on 7 June 2018. On 16 November 2018, Phillips J gave summary judgment in the Claimant's favour and summarily assessed costs in the sum of £258,000 against the Company.

8.4.1.7. Accordingly, as was confirmed by the High Court in the judgment referred to at 8.4.1.6 above, the Claimant was at all times entitled to, and did, rely upon the expiry of the limitation. Paragraph 8.11.2 below is repeated.

8.4.1.8. In any event, this matter was a claim raised by the Company in 2017 (belatedly and wrongly), arising from a sale that had taken place in 2008 and said to be based on an indemnity that had expired in 2015. It was not, nor could it reasonably be described as, a "challenge" that had been "posed" by the Claimant, "in the recent past" (or at all).

8.4.2. *A proposed selective buyback of part of [the Claimant's] stake in the Company*

8.4.2.1. On 15 September 2017, the Claimant emailed the First Defendant regarding a buy-back scheme that the Claimant had investigated for the Second Defendant and the Board arising out of the Second Defendant's own strategy paper.

8.4.2.2. The Company at the time had received a large injection of cash from the listing of its 49% stake in Eddie Stobart Logistics Limited (now Eddie Stobart Logistics PLC). The cash was generating no interest whereas the Company was paying approximately a 6 per cent yield on dividends. In that situation, a company buy-back would have reduced the Company's

outgoings and accordingly, the material impact would be positive for the Company. Further, as the Company is an acquisitive one, it is a good strategy for it to hold issued shares in the Treasury until a later date when it can realise them for cash without having to increase borrowings.

8.4.2.3. In the event, this proposal was never discussed with the Board, only the First and the Second Defendants, who although they ultimately did not agree to the proposal, had initially expressed their "full support" for it. As the First Defendant has admitted (in his evidence in the Stobart Claim) the Claimant's email of 15 September 2017 was "perfectly fair"; the First Defendant "thought it was an option we should look at"; and, when the brokers had advised against it, the Claimant did not press the proposal.

8.4.2.4. The Claimant's proposal was manifestly legitimate as there was more than enough cash in the Company for the buy-back scheme and it would not have materially impacted the Company's cash reserves. It was not, nor could it be reasonably described as, a "challenge" posed by the Claimant.

8.4.3. *A proposed additional ex-gratia bonus for [the Claimant] of shares then worth some £8m*

8.4.3.1. At a meeting on 10 January 2018, the Claimant met with the First Defendant and Richard Butcher, Chief Executive of the Company's Infrastructure Division. The Claimant stated that in light of his role and the value he had delivered that he was under-rewarded, as were other managers under the Long-Term Incentive Plans ("LTIPs"). He suggested that the Company's Remuneration Committee could make a distribution from the Employee Benefit Trust ("EBT"), a trust set up by the Company in 2007 for the purpose of rewarding high performance. The EBT had only made two distributions since its establishment.

8.4.3.2. The First Defendant informed the Claimant that he did not feel that the Remuneration Committee alone could make such a decision and that the matter should be put to shareholders.

8.4.3.3. In the event, although the Claimant did have subsequent meetings with shareholders (as the First Defendant had agreed he could do), this subject was barely discussed. The Claimant's proposal was only ever discussed in substance with the First Defendant, and was never presented to the Board. In the circumstances, it was not, nor could it be reasonably described as, a "challenge" posed by the Claimant.

8.4.4. *A proposed buy-out of the Company when the share price was in the range of 100p to 120p*

8.4.4.1. Around 2015, the Company was considering a management buy-out and becoming private, under the code-name "Project Kent". This was supported by a large number of shareholders, and engaged with by the independent members of the Board, particularly as the management proposal was an offer amounting to 140p per share, significantly above the market value. Ultimately, no buy-out was agreed as the Company

wanted about 5p more per share ~~it was decided not to put the proposal into effect~~.

8.4.4.2. The proposal was manifestly legitimate, conducted according to good corporate governance procedures, and with the benefit of independent advice for both the Board teams considering the proposal. It was not in the "recent past"; nor was it properly described as a "challenge" posed by the Claimant but would have represented a good outcome for all shareholders had the proposed buy-out taken place, as the First Defendant admitted in his evidence in the Stobart Claim.

8.4.5. *A proposed related party transaction associated with the recent aborted airline transaction*

8.4.5.1. Since June 2017, the Company had been considering possible structures to remove Stobart Air from the Company's balance sheet and to create a consolidated vehicle for the regional airline market.

8.4.5.2. Accordingly, the Claimant (requested by the Board as part of his remit through Stobart Capital) proposed that the Company could transfer part of its aviation business into a private consortium which would then be the catalyst for future acquisitions of regional airlines including Flybe. The Company would retain up to 49% of any value created and the subsequent value generated by the business on an ongoing basis. In so doing, the acquisition of regional airlines including Flybe could be treated as an investment and their profit and loss figures would not affect the Company's balance sheet.

8.4.5.3. The Second Defendant was enthusiastically supportive of the Claimant's proposal (which was code-named Project Blue) stating (among other things) in an email dated 12 November 2017 "we need to stop the debates and get on with it". As the Second Defendant admitted in his evidence in the Stobart Claim: he "liked the proposal" and "was convinced it was the right thing to do for the business"; further, he agreed that there was "no breach of duty in putting proposals forward".

8.4.5.4. In the event, the consolidation did not occur. The First and Second Defendant chose to follow a different structure to acquire Flybe which was ultimately aborted. The Claimant was not personally involved in the aborted transaction other than through Board discussions. The Claimant's proposal in 8.4.5.2 above was manifestly legitimate, as evidenced by the Second Defendant's response at 8.4.5.3 above. In the circumstances, it was not, nor could it be reasonably described as, a "challenge" posed by the Claimant.

~~8.4.6. The Claimant personally has at all material times properly managed Stobart Capital. In any event, the Claimant's management of Stobart Capital has no impact upon the Company.~~

~~8.5 The Claimant has not repeatedly shown himself to be so lacking in integrity that he is unfit to hold the office of company director. The Claimant repeats and relies upon the matters set out above.~~

Particulars of Malice

8.6 Paragraphs 8.1, 8.2 ~~to~~ and 8.4 above are repeated. The Announcement was published by the Defendants and each of them as part of a concerted ~~unlawful~~ campaign against the Claimant ("the Campaign"), the dominant improper purposes of which were ~~(among other things)~~ to:

8.6.1. secure the re-election of the First Defendant as Chairman at the forthcoming Annual General Meeting on 6 July 2018 ("the AGM") by whatever means necessary; and/or

8.6.2. as a result, protect the position of the Second, Third and Fifth Defendants who had aligned themselves publicly with the First Defendant, including the Third and Fifth Defendants who had made clear that they would resign if the First Defendant was not re-elected; and/or

8.6.3. counter the Claimant's letter to the Board stating his intention to vote against the re-election of the First Defendant (which had been the subject of an RNS Announcement on 25 May 2018), and silence the Claimant's ~~legitimate~~ criticisms of the First Defendant by damaging the Claimant's reputation so that shareholders, stakeholders and prospective investors in the Company would not follow his lead and would not vote for him at the AGM.

As set out below, the Campaign against the Claimant, which the Defendants code-named "Project Shelley", is ongoing and he reserves his right to add to the particulars of malice set out below.

8.7 The Claimant ~~has~~ publicly stated his opposition to the re-election of the First Defendant who he believed was ~~s is~~ unfit to continue as Chairman of the Company. The vote ~~is due to take~~ took place at the AGM on 6 July 2018. In contrast, the Defendants and each of them ~~are~~ were all in favour of the First Defendant's re-election and the Third and Fifth Defendants ~~have~~ publicly stated (not least in the Announcement itself) that they ~~will~~ would resign from the Board if the First Defendant ~~is~~ was not re-elected.

8.7.1. On 28 May 2018 (Bank Holiday Monday) the Defendants formed an improperly constituted (and therefore invalid) Committee of the Board consisting of the Second, Third and Fifth Defendants ("the Committee").

8.7.1.1. The Committee was meant to be (but was not) an independent and impartial decision-making Committee comprised only of directors who were "non-interested" in the outcome of the First Defendant's re-election, and which, as the Fifth Defendant made clear, "would obviously…not include Iain and Andrew Tinkler".

8.7.1.2. The Third and Fifth Defendants were both personally interested in the outcome, having pledged that they would stand down if the First Defendant was not re-elected. As the Fifth Defendant admitted in evidence in the Stobart Claim: he had already "taken sides". By standing down themselves, they would suffer financially.

8.7.1.3. Further, the First Defendant (contrary to his purported exclusion from the Committee) attended meetings of the Committee and provided it with his (non-independent) advice, views and "input".

8.7.2. In a letter dated 14 June 2018 from Rosenblatt ("Rosenblatt"), the new solicitors appointed by the Committee on or about 14 June 2018, it was stated that the Committee was established purportedly to exercise "all powers of the Board…in connection with the Company's handling, action or other response to the actions of [the Claimant] in relation to his attempts to block the re-election of [the First Defendant] as Chairman of the Board…" (as referred to at Paragraph 8.11.6 below). Paragraph 8.2 above is repeated.

8.7.3. Accordingly, the Claimant and the Defendants were and are on opposite sides of a fiercely contested, personal Boardroom power-struggle. In that situation, the Defendants acted together to "fight like tigers" to influence the shareholders into voting for the outcome they wanted (as the Third Defendant admitted in his evidence in the Stobart Claim). This was directly contrary to the Defendants' duty as directors.

8.8 As is evident from the terms of the Announcement and the manner of its publication, it was deliberately designed by the Defendants and each of them to cause damage to the Claimant's reputation, as was the case.

8.8.1. There was no need for the Announcement at all. The RNS issued on Friday 25 May 2018 contained sufficient information and satisfied all legal and regulatory requirements: this was admitted by each of the First, Second and Third and Fifth Defendants in their evidence in the Stobart Claim (the Fourth Defendant did not give evidence). There was no need (whether by legal or regulatory requirement) for the Company to provide further information on the next working day (Tuesday 29 May 2018) in a further RNS.

8.8.2. The Announcement was devised as a tactical move as part of the Defendants' "*war*" strategy to "*win*" the re-election of the First Defendant by using all means they chose, by denigrating the Claimant publicly and damaging his name and reputation.

8.8.2.1. In an email exchange late on Friday 25 May 2018, the Fifth Defendant claimed to the First Defendant that the Claimant had "*previous*" and suggested that it would be "*worthwhile*" to "*build up a picture of previous incidents*"; the First Defendant responded that Ian Soanes "*just might be the man*".

8.8.2.2. On Saturday 26 May 2018, David Arch, one of the company's brokers, emailed the Defendants saying that he had been "*thinking further about how we might play this matter*" and that "*If we really want to win…we should go out hard on Tuesday morning to seize the moral high ground and the initiative. This would involve serving notice to AT* [a reference to the Claimant] *on Monday evening and issuing a hard hitting announcement first thing Tuesday*".

8.8.2.3. On the same day, the Second Defendant emailed the First Defendant to similar effect, stating: "*We're all thinking about the strategy for ensuring we win this very difficult battle and get on the front foot.*" He referred to "*information*" that "*can be released*" (setting the direction for the 29 May 2018 RNS and leaks of Company information to the media).

8.8.2.4. The Defendants arranged to speak by telephone on Sunday 27 May 2018 (during that Bank Holiday weekend) at 6.30pm. Prior to the call, the Second Defendant circulated by email points for discussion and potential draft wording to be included in an RNS.

8.8.3. There was (as the Defendants knew) no proper reason for making an attack on the Claimant through a further RNS issued on the next working day after the RNS issued on 25 May 2018; they were not providing necessary information to the shareholders or the market.

8.9 By email at 23.32 on 28 May 2018 (a Bank Holiday), the Fourth Defendant sent a copy of the draft Announcement to the Claimant (and other members of the Board), stating that "it will be released to RNS at 7am tomorrow morning".

8.9.1. Notwithstanding that the Defendants deliberately intended to leave the Claimant no time to respond to the proposed Announcement (despite the fact that it contained defamatory allegations against the Claimant as determined by Mr Justice Nicklin ("the Judge") on 17 December 2018 ~~it contained the Defamatory Statements in relation to~~ ~~it made seriously defamatory allegations against the Claimant~~ as the Defendants knew and intended) the Claimant's solicitors nonetheless managed to respond to the Defendants by email at 2.29am, informing them that "without limitation the section headed "Mr Tinkler" contains material regarding our client that is false and highly defamatory. In addition, there are some misleading statements in relation to the Company which need to be corrected to ensure that the market is not misled". The email asked the Defendants to confirm that they would not proceed with the publication of the Announcement until rectified.

8.9.2. No response was received from the Defendants' solicitors and so the Claimant's solicitors sent a further chasing email at 14.11 on 29 May 2018 stating (among other things) that the Claimant did not accept that the appointment of the Committee was valid.

8.9.3. The Defendants ignored the Claimant's request and failed to make any further enquiries as to the specifics of the defamatory material referred to, instead choosing to publish the Announcement "in materially the same form" as confirmed by the Defendants' solicitors in their email at 4.53pm on 29 May 2018.

8.9.4. In an email dated 29 May 2018 at 15.10 to the Board the Fourth Defendant stated that: "This Announcement has been released by Redleaf recently. To be clear it did not have my approval and I believe it should be amended so that the Ongoing Board does not include me in the definition in a number of places. I suggest an amendment urgently".

8.9.5. Despite the Fourth Defendant privately resiling from the publication of the Announcement and calling for its urgent amendment, and the remaining Director, John Garbutt not being "entirely convinced", the Defendants and each of them have made no changes to the Announcement which is still widely available online as set out in Paragraph [4] above.

8.10 By letter dated 30 May 2018 the Claimant asked (among other things) that the Defendants release a further Announcement apologising for and withdrawing the statements made. No such apology or withdrawal has been forthcoming and the Announcement still remains

publicly available (unamended) on the RNS website and on the Company's website as set out at Paragraph 4 above. A hyperlink to the Announcement ~~has also been~~ was also included in the letter from the Fifth Defendant to the shareholders as part of the AGM documents provided on 25 June 2018.

8.11 Further, the Claimant will rely upon the following facts and matters as yet further evidence of the Campaign against him as set out at 8.~~5~~6 above. The Defendants were, in January and February 2018, extremely keen "to get [the Claimant] off the Board" of the Company, as shown by the following:

8.11.1. the First Defendant's instruction on or about 17 January 2018, to the Company Secretary, Louise Brace, to draft an unsolicited resignation letter for the Company to give to the Claimant;

8.11.2. on 25 January 2018 the First Defendant ambushed the Claimant with a draft RNS to announce his (untendered) resignation;

8.11.3. the First Defendant on 5 February 2018 sought a recommendation from Jonathan Brown, the Company's then in-house solicitor (former partner and now Chairman of Hill Dickinson), on the appointment of a new "aggressive" firm of solicitors to advise the Company, on 5 February 2018, to prepare for litigation against the Claimant;

8.11.4. the First Defendant proposed amendments to draft Board minutes for the 25 January 2018 meeting indicating (falsely) that the Claimant had said he would step down on 16 February 2018 (the amendments proposed were not accepted); and

8.11.5. the Defendants on 26 February 2018 drafted a resolution under Article 89(5) of the Company's Articles of Association for the removal of the Claimant (this attempt was aborted: it required the consent and signatures of all the directors, other than the Claimant; John Garbutt, a director, refused to sign).

8.11.6. By letter dated 14 June 2018, the Fifth Defendant purported to terminate the Claimant's employment with the company "with immediate effect" for the (spurious) reasons set out in Rosenblatt's letter of the same date ("the purported termination").

8.11.6.1. For the avoidance of doubt, the Claimant avers that the purported termination (which was made with no warning at all) is invalid. Rosenblatt claim to represent the Company on the instructions of the Committee (which for the reasons set out above is improperly constituted).

8.11.6.2. The Claimant first learnt of the purported termination when he was informed by an employee of Stobart Capital, who had been copied into an email from the Second Defendant stating that he had been dismissed; at the same time the Claimant became aware of material circulating online, such as "*Former Stobart CEO Andrew Tinkler gets the sack*" (https://www.hl.co.uk/shares/stock-market-news/company-news/former-stobart-ceo-andrew-tinkler-gets-the-sack).

8.11.7. On 15 June 2018, the Claimant was served with ~~a~~ the Claim Form by the Defendants in the Stobart Claim (purporting to act on behalf of the Company) alleging (among

other things) breach of fiduciary duties and breach of the Claimant's Service Agreement. No particulars of claim were served, and no explanation ~~has been~~ was provided to the Claimant as to the alleged substance of these allegations. It is to be inferred that the Defendants issued the Claim Form in order to safely publicise (false) allegations of wrongdoing by the Claimant in the press, as they had similarly done when they issued and served an unparticularised Claim Form dated 7 June 2018 against the Claimant for payment of sums due and/or payable arising out of the matters pleaded at 8.4.1 above ("the Tax Claim").

8.11.7.1. Before the Stobart Claim was even served on the Claimant, the allegations made in it were (as the Defendants knew and intended) reported in:

(a) The Guardian on 14 June 2018 under the heading "*Stobart fires former boss Andrew Tinkler from its board*";
(b) The Times on 15 June 2018 under the headings "*Stobart fireworks*", "*Five minute digest*" and "*Need to know*";
(c) City Am on 15 June 2018 under the heading "*Stobart Group's crisis ignites the governance tinderbox*" and "*Former Chief Andrew Tinkler fired from Stobart Group board*";
(d) The Sunday Times on 1 July 2018 under the heading "*Bumpy ride for Stobart's Warwick Brady*"; and
(e) The Telegraph on 2 July 2018 under the heading "*Stobart non-exec backs Tinkler as board fracture ahead of vote*";

8.11.7.2. Allegations contained in the Tax Claim were reported in The Times on 9 June 2018.

8.11.8. The Defendants, or some of them unlawfully leaked to the Daily Telegraph, or authorised the unlawful leaking of the following documents (most likely via its communications firm, Redleaf), as part of their improper strategy to use the press to damage the Claimant:

8.11.8.1. The purported termination letter informing the Claimant of his (purported) dismissal dated 14 June 2018, extracts of which were republished in the articles at 8.11.7.1 above; and

8.11.8.2. a number of the Claimant's personal and private emails, resulting in an article in the Telegraph dated 20 June 2018 headed "*Leaked emails reveals Stobart's ex-chief's sexist rant about female boss*" and an article dated 21 June 2018 entitled *"Ex-Stobart chief 's sexist tirade about female boss"*. The emails referred to in the article were specifically referenced in an email sent by Rosenblatt, to the Claimant's solicitors, received on 20 June 2018, shortly before the said article was published; and

8.11.8.3. Emails passing between the Claimant and Philip Day resulting in an article in City AM dated 24 June 2018 headed *"Former Stobart Boss at heart of boardroom battle suggested reuniting group*" and The Financial Times dated 25 June 2018 entitled "*Yellow Cards at Petropavlovsk and Stobart*".

8.11.9. The said disclosure of such emails, containing the Claimant's personal data, is in clear contravention of the General Data Protection Regulation and its implementing legislation in the UK, the Data Protection Act 2018 which state, among other things,

that all personal data be processed by the Company "lawfully, fairly and in a transparent manner in relation to the data subject" (Article 5.1(a)) and "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes" (Article 5.1(b)).

8.11.10. The Defendants have further published the Announcement in a letter from the Fifth Defendant, as Senior Independent Director, dated 8 June 2018 in the Company's Notice of Annual General Meeting at http://www.stobartgroup.co.uk/images/2018-investors/28916_Stobart-NoM_AW-4.pdf.

8.11.11. The Defendants improperly transferred approximately 5.3 million shares, worth approximately £12 million, from corporate treasury (where they had no voting rights) into the Employee Benefit Trust (where voting and dividend rights attached) so that their voting rights could be utilised (by Jupiter Trustees) in order to secure the re-election of the First Defendant.

8.11.12. The Company's AGM took place on 6 July 2018.

8.11.12.1 At the AGM, the First Defendant was re-elected as Chairman by 51.21% of the vote. Asked at the AGM whether he would be standing down, the First Defendant said that he would not. On 9 July 2018, the First Defendant announced his intention to stand down as Chairman within the year.

8.11.12.2 Also at the AGM, a resolution was proposed from the floor to appoint the Claimant as a director. A poll was held on that resolution and it was passed with 51.44% of the vote. This vote would have been higher had the First Defendant not chosen to use the proxy he held for approximately 40 million votes ("the proxies") to vote against the Claimant's election when, as he well knew, the proxies had indicated their intention to abstain on the Claimant's re-election and therefore he should have "withheld" those proxies.

8.11.12.3 Although the Claimant had been appointed at the AGM, through a legitimate and lawful vote by the shareholders, the First, Second, Third and Fifth Defendants immediately resolved to remove him as a director (the Fourth Defendant had ceased to be a director of the Company from 5 July 2018). Further:

(a) Those Defendants authorised the release of a public statement that the Board of the Company had decided again to dismiss the Claimant following his appointment at the AGM; and that it maintained the view that (despite the support of "certain shareholders" for the Claimant), the Claimant should not act as a director "given the seriousness of his breach of fiduciary duty and the impending court cases against him";

(b) Those Defendants included that statement in an RNS, dated 7 July 2018; and

(c) As those Defendants knew and intended, that statement about the Claimant was reported in the media, including in The Telegraph (on

7 July 2018), the Mail Online (on 8 July 2018) and the Daily Mail (on 9 July 2018).

8.11.13. In the Stobart Claim, it was falsely alleged that the Claimant was guilty of dishonestly claiming £4.9 million in expenses from the Company. This serious allegation was highly publicised (as the Defendants knew and intended it to be). Yet there was no proper basis for it and it should never have been made. Belatedly, buried in paragraph 348 of the written closing submissions on behalf of the Company in the Stobart Claim, it was abandoned. Yet the Defendants have not apologised for making the allegation or for the damaging publicity they secured for it.

8.12 Each of the Defendants, being directors of the Company, knew the matters referred to at paragraph 8.1-8.4 above and, accordingly, knew that the Claimant (a) had not destabilised the Board at a crucial time for the Company's business and (b) had not required (or forced) the Board to deal with the challenges listed in [39-43] of the Announcement (whether in the recent past or at all); the Defendants knew (as set out above) that none of the matters listed could properly be described as a "challenge" which the Claimant had required (or forced) the Board to address.

8.13 In the premises, the Defendants and each of them published the False Statements ~~said words~~ knowing they were false or recklessly not caring whether they were true or false and/or with the dominant improper motive of causing harm to the Claimant's reputation (as has been the case) and/or otherwise furthering the improper purposes of the Campaign.

9. The publication of the False Statements in the Announcement was calculated to cause pecuniary damage to the Claimant in respect of his office, profession, calling and/or trade as a company director and businessman.

PARTICULARS

9.1. Paragraphs 8 above and 10 and 11 below are repeated.

9.2. The ~~contents of~~ publication of the False Statements in the Announcement was ~~were~~ likely to cause shareholders to lose confidence in the Claimant as an Executive Director of the Company and vote against him at the AGM ~~and were likely to cause the Claimant's other business associates to believe him to be so lacking in integrity that he was an unfit person to be a company director~~. It is to be inferred that the publication of those False Statements did, in fact, have that effect since the percentage of the Claimant's share of the vote at the AGM dropped to 51% as against the previous year when it had been significantly higher at 99%.

Damage

10. As a result of the publication set out above, the Claimant has suffered loss and damage including serious damage to his reputation ~~and substantial embarrassment and distress~~. ~~The publication is self-evidently extremely grave and of the Defamatory Statements has caused and/or is likely to cause serious harm to the Claimant's reputation; the~~ The publication of the False Statements was intended and/or likely to cause him pecuniary loss. ~~If and insofar as necessary, t~~ The Claimant will rely upon the facts and matters set out below.

11. The Claimant will rely in particular upon the following facts and matters in support of his claim for general and/or aggravated damages:

11.1. Paragraphs ~~4, 5~~ and 8 above are repeated.

11.2. By publishing the Announcement in the form and manner in which they did, with the (apparent) imprimatur of being an RNS required by the legal and/or regulatory obligations of the Company, the Defendants ensured that the words complained of reached the widest possible audience. As the Defendants knew and intended, the words set out at Paragraph 3 above, or their gist, were republished elsewhere in the media, and/or the Defendants authorised their repetition, and/or their repetition was reasonably foreseeable, as a result of which the following publications which are ~~defamatory and/or~~ maliciously false of the Claimant appeared elsewhere on the internet including but not limited to at the following sites:

11.2.1. http://www.stobartgroup.co.uk/images/2018-investors/28916_Stobart-NoM_AW-4.pdf

11.2.2. https://www.telegraph.co.uk/business/2018/05/29/stobart-claims-rejected-8m-bonus-request-former-boss-battles

11.2.3. https://www.telegraph.co.uk/business/2018/05/30/cenkos-quits-stobarts-broker-untenable-position-boardroom-battle/

11.2.4. https://www.ft.com/content/00bae232-6351-11e8-a39d-4df188287fff

11.2.5. https://www.ft.com/content/f3857e6a-665c-11e8-8cf3-0c230fa67aec

11.2.6. https://www.ft.com/content/c549f306-63e5-11e8-a39d-4df188287fff

11.2.7. https://www.ft.com/content/f06d0f74-65ba-11e8-90c2-9563a0613e56

11.2.8. https://www.logisticsmanager.com/tinkler-launches-bid-oust-stobart-group-chairman/

11.2.9. https://uk.webfg.com/news/news-and-announcements/former-stobart-chief-executive-looks-to-oust-chairman--3318388.html

11.2.10. https://www.thetimes.co.uk/article/stobart-fires-fresh-broadside-in-fight-with-former-boss-mdkv0kdhs

11.2.11. https://www.thetimes.co.uk/article/stobart-ex-chief-andrew-tinkler-faces-employment-tribunal-q7ct6d8jn

11.2.12. https://www.thetimes.co.uk/article/stobarts-andrew-tinkler-in-battle-to-get-back-in-saddle-66jbtc2xg

11.2.13. the Financial Times dated 30 May 2018 under the heading “Stobart Board hits back at executive director”

11.2.14. the Financial Times dated 30 May 2018 under the heading “Stobart spitting tacks”

11.2.15. City AM dated 30 May 2018 under the heading “What the papers say this morning”

11.2.16. The Financial Times dated 4 June 2018 under the heading "Sell-by dates would help contain erratic behaviour of founders"

11.2.17. The Financial Times dated 8 June 2018 under the heading "City Insider".

The Claimant reserves his right to add to this list of republications for which the Defendants are liable if necessary.

11.3. It must have been plain to the Defendants that by giving these allegations (the ~~Defamatory Statements and the~~ False Statements) such widespread publicity they could not but cause the Claimant's reputation substantial damage (not least, the republications set out above) and cause considerable distress and hurt to the Claimant's feelings, as has been the case and as was the intention. Paragraph 8 is repeated. The Claimant will rely in particular upon the following adverse effects:

11.3.1. It is highly unlikely that the Claimant would be asked to become a Director of any UK listed business and almost certain that he would be unable to obtain another role as Chief Executive Officer of a UK Listed Company;

11.3.2. It is very unlikely that charities or other organisations would want to be associated with the Claimant in any formal capacity or that Government ministers or senior civil servants would readily agree to meet (or be seen to meet) him.

11.3.3. It has significantly reduced the Claimant's ability to attract investment for his future ventures from new investors and reduced his ability to recruit high-profile/high-quality business figures to any future company board of which the Claimant is a part; and

11.3.4. It has led journalists approaching stories about the Claimant to adopt a negative view of him and his reputation.

11.4. The Defendants' contemptuous treatment of the Claimant's complaint ~~including but not limited to their refusal~~ in refusing to take down the Announcement and/or publish an apology to the Claimant, which has meant that the Claimant has been unable to mitigate at least some of the harm done to his reputation by the widespread dissemination of ~~the Defamatory Statements and~~ the False Statements contained in the Announcement. The Claimant will rely upon the Defendants refusal to take down, amend or apologise for the Announcement despite the cogent terms of a letter from over 80% of the Company's Executive Leadership Team ~~(referred to in paragraph 7.2.2 above.~~ That letter (which had to be sent anonymously given the concern that anyone seen to be supporting the Claimant would be penalised by the Defendants) sent shortly after the publication of the Announcement which stated (among other things) that the Announcement contained "misleading and highly selective and incomplete" statements and showed "a lack of care and foresight as to the impact" on the business.

11.5. In all the circumstances, the Claimant has suffered increased upset and distress and injury to his feelings.

Appendix 2: Annex to the Application Notice

	Malicious Falsehood Action		Stobart Judgment
Issue	**Re-Amended Particulars of Claim**	**Defence**	
A. Had Mr Tinkler destabilised the board of Stobart ("the Board") at a crucial time for the business and did the Defendants hold that view at the relevant time.	§§8.1 and 8.12	§§21, 24, 26-27, 57 and 67	[740]-[741], [749], [777] and [792]
B. Had Mr Tinkler set out on a process of briefing against the Board with selected major shareholders, including falsely suggesting that Mr Ferguson had tried to get rid of him, in breach of fiduciary and/or contractual duties owed to Stobart.		§§32 and 47-49	[124]-[129], [587]-[588], [734]-[735], [738]-[741], [775] and [950]
C. Did Mr Tinkler improperly share confidential information in the form of the Duranta budget with Mr Day, in breach of fiduciary and/or contractual duties owed to Stobart.		§§62-62	[697], [745]-[749] and [950]
D. Was Mr Tinkler's conduct in writing a misleading Shareholder Letter and the Communication to Employees in breach of fiduciary and/or contractual duties owed to Stobart.		§§68-69 and 71	[750]-[761], [773] and [950]
E. Did Mr Tinkler orchestrate the writing of the ELT letter, in breach of fiduciary and/or contractual duties owed to Stobart.		§§70-71	[764], [895], [908]-[909], [952] and [957]
F. Was the Defendants' decision to set up the sub-committee lawful and did the sub-committee have the authority to dismiss Mr Tinkler.	§§8.7.1-8.7.1.3	§126	[784], [895], [908]-[909], [952] and [957]
G. Did the Four Directors believe it was in the best interests of the company to issue the Announcement and were they, in publishing it, in breach of their duty as directors of Stobart.	§§8.6-8.6.3, 8.7.3, 8.8-8.8.3, 8.12, 8.13, 11.2 and 11.3	§§124 and 153	[790]-[793]
H. Was Stobart justified in dismissing Mr Tinkler as an employee of Stobart and terminating his directorship, by reason of his breach of fiduciary duty to Stobart, his service agreement and implied duties of trust, confidence and fidelity.	§8.11.6.1	§142	[740]-[741], [749], [766], [913], [921], [950], [953]-[955]

I.	Were the Defendants acting in what they regarded, with good cause, as the best interests of Stobart in transferring shares to the Employee Benefit Trust	§§8.7.3 and 8.11.11	§146	[872]-[874]
J.	Did Mr Ferguson act improperly in using discretionary proxies which he held at the 2018 AGM of Stobart to vote against Mr Tinkler's appointment as a director.	§8.11.12.2	§§148-149	[365]-[367] and [885]-[886]
K.	Was Mr Tinkler lawfully and validly dismissed as a director of Stobart on 14 June 2018 and lawfully and validly removed as a director on 7 July 2018	§8.11.6.1	§142	[922], [946] and [953]-[955]
L.	Was Mr Tinkler's targeting of Mr Ferguson motivated by his own self-interest and his perceived grievance over past remuneration or what he believed was in the best interests of Stobart	§§8.1.3, 8.2 and 8.7	§§22, 30-31, 33, 39, 40 and 42	[607]-[608], [694], [704] and [712]
M.	Did Mr Ferguson present Mr Tinkler with a draft RNS announcing that he was retiring from the Board with the intention of removing him from the Board.	§8.11.2	§45	[588]-[602]
N.	Did Mr Ferguson approve Board minutes which he did not believe to be true	§8.11.4	§140.3	[588]-[602]