Neutral Citation Number: [2022] EWHC 1375 (Ch)

BL-2020-002022

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

7 June 2022

Before:

MR JUSTICE LEECH

- -

B E T W E E N:

WILLIAM ANDREW TINKLER	**Claimant**
- and –	
ESKEN LIMITED (formerly STOBART GROUP LIMITED)	**Defendant**

- -

MR JOHN WARDELL QC and **MR JAMES McWILLIAMS** (instructed by **Clyde & Co LLP**) appeared on behalf of the Claimant.

MR RICHARD LEIPER QC and **MR DANIEL ISENBERG** (instructed by **Rosenblatt**) appeared on behalf of the Defendant.

Hearing dates: 7-10, 14, 15 and 18 February 2022

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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.

Table of Contents

I. Preliminary Matters

1. This is my judgment following the trial of a claim by Mr Andrew Tinkler to set aside the judgment of His Honour Judge Russen QC (sitting as a Judge of the High Court) (the "**Judge**") dated 15 February 2019 (the "**Judgment**") in a claim brought by Esken Ltd (the "**2018 Claim**") after an expedited trial lasting 11 days (the "**Trial**"). In this judgment I will adopt the convention of referring to paragraphs in a court or tribunal judgment by using square brackets. Where I cite paragraphs in square brackets below, I intend to refer to paragraphs in the Judgment unless I identify another decision or authority from which the citation is taken.

2. Throughout the 2018 Claim Esken Ltd was called Stobart Group Ltd and the short title of the 2018 Claim was *Stobart Group Ltd v Tinkler*. On 3 February 2021 it changed its name to Esken Ltd but to avoid any confusion, I will refer to the company as "**SGL**" throughout this judgment. Indeed, the statements of case in this action (which have been through a number of amendments in a short time) still refer to the company as Stobart Group Ltd.

3. In the 2018 Claim SGL claimed a declaration that Mr Tinkler had been lawfully dismissed as an employee and removed as a director, a claim for unlawful means conspiracy and a claim that he had incurred excessive and unjustified expenses (which was withdrawn at the Trial). Mr Tinkler counter-claimed for a declaration that he had not been validly dismissed and that members of the board of directors had authorised two transfers of shares for improper purposes.

4. The Judge dismissed the conspiracy claim. But he held that Mr Tinkler had committed breaches of his fiduciary and contractual duties to SGL and that his dismissal as an executive director and employee of SGL was valid. He also held that Mr Tinkler's subsequent removal as a director was valid. Finally, he also found that four of SGL's directors had failed to act for proper purposes in authorising one transfer of shares.

5. Mr Tinkler now invokes the court's jurisdiction to set aside the Judgment for fraud on the grounds that individual witnesses (whose conduct can be attributed to SGL) deliberately failed to disclose documents (or destroyed them) and that they gave false evidence at the Trial. Miles J also expedited the trial of this action and I heard it over 8 days between 7 and 18 February 2022. Mr John Wardell QC and Mr James McWilliams

(who did not appear at the Trial) represented Mr Tinkler. Mr Richard Leiper QC and Mr Daniel Isenberg (who had appeared at the Trial) represented SGL.

6. I am grateful to both counsel and their teams for their assistance and the quality of their written and oral submissions. Where I refer to the submissions of Mr Wardell and Mr Leiper (below), I do so in the knowledge that those submissions were the product of an extensive team effort by all members of their individual teams (as leading counsel themselves would no doubt be the first to acknowledge).

7. In section II (below) I address the relevant legal principles. But it is important that I record at the outset that the function of the Court in this action was not to try again the issues which the Judge determined but to decide whether the Judgment should be set aside. As Mr Wardell acknowledged in opening, the bar is a high one. Indeed, the bar is set even higher than the tort of deceit where recklessness is a sufficient state of mind to found liability.

8. In section III I set out the facts, evidence and findings from the 2018 Claim. Rather than produce a purely factual summary of those events followed by a discussion or analysis of the evidence, I have adopted the less conventional approach of incorporating into the narrative the relevant parts of the Judgment and any evidence given by the witnesses which was not directly relevant to the issues which I had to decide. As I have indicated, it was not my function to decide the substantive issues or between the differing accounts given by the witnesses. However, I record the oral evidence of the witnesses on the substantive issues served to inform my evaluation of their evidence more generally.

9. In section IV I briefly deal with the employment claim (the "**ET Claim**") issued in the Central London Employment Tribunal (the "**Tribunal**") by Mr Ian Soanes. It is Mr Tinkler's case that the disclosure which Mr Soanes made to him in the ET Claim led to his realisation that SGL had deliberately failed to comply with its disclosure obligations and its witnesses had given false evidence in the 2018 Claim. I add that Mr Tinkler also brought a claim for libel and malicious falsehood defamation against individual board members arising out of the same facts (the "**Defamation Claim**"). On 1 February 2021 the Court of Appeal dismissed an appeal by Mr Tinkler against the decision of Nicklin J striking out the claim: see [2021] 4 WLR 27; and on 30 March 2022 Mr Tinkler's application for permission to appeal to the Supreme Court was refused. The Defamation

Claim was relevant to disclosure but apart from this, it had no relevance to the proceedings before me.

10. In section V I identify the key pleaded issues and the findings which I was asked to make at trial. In section VI I set out my assessment of the witnesses, my findings of fact (and my detailed reasons for making them) and a summary of those findings. In section VII set out my formal disposal of the claim.

II. The Law

A. The Test

11. It was common ground that one party is entitled to have a judgment set aside for fraud if three limbs or conditions are satisfied: first, the successful party (or someone for whom it must take responsibility) committed conscious and deliberate dishonesty ("**Limb 1**"); secondly, the dishonest conduct was material to the original decision ("**Limb 2**"); and, thirdly, there was new evidence before the Court (which was either not given or not disclosed in the earlier proceedings) ("**Limb 3**"). The principal issues between the parties were the test for materiality under the Limb 2 and the way in which the Court should approach new evidence deployed under Limb 3.

12. The leading authority in this field is *Takhar v Gracefield Developments Ltd* [2020] AC 450 (in which Mr Wardell appeared for the successful party). In *Takhar* the Supreme Court held that Limb 3 did not require the party applying to set aside a judgment to prove that he or she could not have discovered the fraud even with the exercise of reasonable diligence. Lord Kerr (with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agreed) stated that the relevant principles were set out in the judgment of Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328 at [106]:

> "The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give

> judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

13. I will refer to the principles in this passage as the "***Highland* principles**". Lord Sumption (with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin also agreed) cited the *Highland* principles too and described them as "stringent conditions": see [67]. Lord Briggs did not approve the *Highland* principles as such. But he considered that they provided some protection against the abusive use of fraud allegations to re-open decided cases: see [76]. (The last member of the Court, Lady Arden, did not consider them to be threshold conditions for bringing an action at all: see [104].) I consider each principle in turn.

(1) Limb 1: Dishonesty

14. Limb 1 is derived from Lord Wilberforce's speech in the *Ampthill Peerage Case*: see [1977] AC 547 at 571B. Moreover, it is not limited to false statements made in Court but includes "every variety of mala fides and mala praxis whereby one of the parties misleads and deceives the judicial tribunal": see *Spencer Bower* Res Judicata 2nd ed (1969) at 323, which was cited in *R v Humphreys* [1977] 1 at 21 (Lord Dilhorne) and *Jet Holdings Inc v Patel* [1990] 1 QB 335 at 347A-B (Staughton LJ). It was common ground that this test applied not only to giving false evidence but extended to the deliberate destruction of documents (e.g. the deletion of text and WhatsApp messages) and the deliberate failure to disclose documents which a party was under an obligation to disclose.

15. Mr Leiper submitted that the two elements "conscious" and "deliberate" are distinct and that it is not sufficient to show that a party made a conscious decision not to disclose a document but that it must also be shown that this decision was dishonest, i.e. it was done with the intention of deceiving the Court. I accept that submission. It is consistent with Aikens LJ's analysis of the facts in *Highland* (above): see [123]. It is also consistent with principle. A party who makes a mistaken but innocent decision not to disclose a document (however material) is not guilty of dishonesty.

16. Mr Leiper also submitted that where the alleged dishonesty takes the form of perjured evidence the court should apply the test identified by David Steel J in *Kuwait Airways Corp v Iraqi Airways Co (No.11)* [2003] EWHC 31 (Comm) at [146]. I do not accept that the entire passage upon which he relied accurately represents the law. The decision pre-dates *Takhar* and I consider materiality in more detail (below). But I agree with Mr Leiper that David Steel J set out the appropriate test for perjured evidence at [146](c):

> "The new evidence must establish perjury in the sense that a person or persons sworn as a witness in the earlier action who could properly be treated as the successful party itself wilfully made a statement in those proceedings which statement the person knew to be false or did not believe to be true."

17. It is not enough, however, for a party seeking to set aside a judgment to show that a witness gave perjured evidence or was guilty of conscious and deliberate dishonesty. It must be shown that the relevant conduct was that of a party to the proceedings. In the present case, the relevant party is a limited company and the Court of Appeal considered what connection is required between the relevant witness and such a party in *Odyssey Re (London) Ltd v OIC Run-Off Ltd* (CA, unreported, 13 March 2000). All of the members of the court in *Odyssey Re* gave detailed judgments. But it was common ground that the relevant test is set out in the judgment of Nourse LJ (with whom Brooke LJ agreed on this point). At pages 11 to 12 of the transcript Nourse LJ set out the test and then applied it:

> "On that view of the matter the question, ultimately, is this. For the purposes of the fraud of a party rule, did Mr Sage have the status necessary to make his evidence the evidence of Orion? I refer only to his status, because the concept of authority adds nothing in the present context and, moreover, is potentially misleading where the natural person is neither the agent of the company nor someone who has been suborned to commit the perjury……Applying the test suggested, I am satisfied that, at the time that he went into the witness box in November 1989, Mr Sage did have the status necessary to make his evidence the evidence of Orion. In my judgment the two most important considerations are, first, that he was the witness, above all others, on whose evidence the success of Orion's case had come to depend. He was its "vital" witness. There is nothing fanciful, adopting the words of Eveleigh J, in treating Mr Sage as having been, for the purposes of the trial, Orion itself. Of equal importance is the consideration that he had acquired that status not simply because his evidence related to a transaction for which he had been personally responsible as part of Orion's directing mind and will at the time, but also because in the six months or so before the trial he had been a committed

> member of the team which took decisions as to how Orion's case was to be presented. The evidence established that Orion deliberately sought, as Mr Sumption put it, to make Mr Sage feel part of a team which was helping to row it to victory. Whatever the rights and wrongs of that may have been, Orion succeeded in identifying him with its own interests and thus with itself."

18. Both parties also relied on the analysis of *Odyssey Re* in Grant & Mumford *Civil Fraud* (2018) at §38—028. In that passage the authors emphasised the "open-textured" nature of the enquiry, the proximity of the witness to the relevant transaction and the importance of the evidence rather than the witness's past (or existing) authority within the claimant company:

> "The question of when the evidence of a witness will be attributed to a company (or other non-natural person) for these purposes is more difficult to pin down. The leading authority is the decision of the Court of Appeal in *Re Odyssey (London) Ltd v OIC Run-Off*, where the outcome of the later fraud proceedings turned (in part) upon the question of whether the perjured evidence of a witness at the first trial could be treated as that of the party who had succeeded. The dishonest witness had been director and general manager of the previously successful party at the time the relevant event had occurred, but by the time he came to give evidence he had retired. It was held that, even though the company did not know of his perjury, nonetheless his evidence should be attributed to it. The majority of the Court of Appeal said the relevant question was whether the witness had the status (as opposed to the authority, which was a misleading concept in the relevant circumstances) necessary to make his evidence that of the company. This is obviously an open-textured question which allows for a range of considerations to be taken into account; but material pointers towards the conclusion that the witness's evidence should be treated as that of the company included, on the facts of that case: the centrality of the witness to the success of the case (he was a "vital" witness); the fact that the witness, although no longer part of the organisation, had been personally responsible for the relevant transaction about which he gave evidence; and the fact that he subsequently became part of the litigation effort (as opposed to just a witness in it), being part of the decision making team in the first claim and thus identifying himself with the company's interests."

19. Even if a witness does not satisfy the *Odyssey Re* test, there is clear authority that a party may set aside a judgment where the opposing party has suborned a witness and persuaded them to give perjured evidence: see *Salekipour v Parmar* [2018] QB 833 at [95] and [96] (Sir Terence Etherton MR). The issue of attribution is primarily relevant to the evidence of Mr Soanes. But even if the Court were to find that his evidence was not that of SGL, it would be open to the Court to set aside the judgment if satisfied that SGL suborned

him to give perjured evidence.

(2) Limb 2: Materiality

20. In *Highland* Aikens LJ suggested that the dishonest conduct had to be material in the sense that: "the fresh evidence would have entirely changed the way in which the first court approached and came to its decision". However, another decision of the Court of Appeal in *Hamilton v Al Fayed (No 4)* [2001] EMLR 15 was not cited to the Court. In that case Lord Phillips MR applied what may be a lower standard for materiality, namely, that there was a real danger that the dishonest conduct had affected the outcome: see, in particular, [26] and [34]. This point was taken in *Salekipour* (above) although the Court of Appeal did not find it necessary to decide it. Nevertheless, Sir Terence Etherton MR was inclined to agree that "the test was over-stated in the *Royal Bank of Scotland* case and that the proper approach is that laid down by the Court of Appeal in the *Hamilton* case": see [93].

21. Although Lord Kerr set out the *Highland* principles in his judgment in *Takhar* and both Lord Sumption and Lord Briggs cited or referred to it, Mr Wardell submitted that it was agreed between counsel as no more than a convenient statement of general principles. Moreover, it was not necessary for the Court to decide the appropriate test for materiality or to approve the *Highland* principles and he was able to point to other passages in *Takhar* which suggested that the members of the Supreme Court may have intended to adopt the lower *Hamilton* test: see [46] (Lord Kerr) and [76] (Lord Briggs). By contrast, Mr Leiper submitted that the Court must have intended to adopt the *Highland* test for materiality because all of the members of the Court adopted the *Highland* principles without qualification even though *Hamilton* was cited to the Court.

22. I am not satisfied that there is a real distinction in practice between the two tests. Once the Supreme Court had determined whether reasonable diligence was required for Limb 3, the claim to set aside the judgment was remitted to the High Court and tried again by Mr Steven Gastowicz QC (sitting as a Judge of the Chancery Division). He carried out a detailed analysis of the authorities and reached the conclusion that both tests were much the same and that the *Hamilton* test was shorthand for the *Highland* test. He set out his conclusions at [59] and [60]:

> "However, rather than being at odds with the position as I have set it out

> in paragraph 56 above, this appears to me to be not much different to shorthand for it. Unless it is shown that it would not have changed the way in which the court approached and came to its decision, so that it was not an operative cause of the order being made in the terms that it was (and could not therefore have made any possible difference to the order made), it was material to the making of it, and falls to be set aside. In this situation, though not proved that the fraud would in fact have made a difference to the order made, it may have done, as it was part of what was in the mix. Read in this way, on a full consideration of the issue, I do not consider that the test was over-stated by Aikens LJ in the RBS case, as the Court of Appeal in Salekipour at para 93 was inclined to think."

23. I am inclined to agree. However, if there is a real difference between the two tests and I am required to choose between them, I prefer to adopt the *Highland* principles for two principal reasons. First, although I accept Mr Wardell's submission that the Supreme Court did not decide the appropriate test under Limb 2 and this issue remains open for decision at the highest level, it is of significance that all of the members of the Court approved the *Highland* principles without reservation. If there had been any doubt about elements of the test, one would have expected Lord Kerr or Lord Sumption to draw attention to the point and reserve it for later consideration.

24. Secondly, I accept Mr Leiper's submission that it is important to recognise the tension between the public policy interest that a judgment procured by fraud should not be allowed to stand and the public policy interest in the finality of judgments. Limb 2 of the test is one way in which the law resolves that tension (particularly after *Takhar*), and it is common ground that this requires a high threshold. Lord Bridge made this point in *Owens Bank Ltd v Bracco* [1992] AC 443 at 483G-H and, although the decision pre-dates *Takhar*, in my judgment his point still stands:

> "The rule rests on the principle that there must be finality in litigation which would be defeated if it were open to the unsuccessful party in one action to bring a second action to relitigate the issue determined against him simply on the ground that the opposing party had obtained judgment in the first action by perjured evidence. Your Lordships were taken, in the course of argument, through the many authorities in which this salutary English rule has been developed and applied and which demonstrate the stringency of the criterion which the fresh evidence must satisfy if it is to be admissible to impeach a judgment on the ground of fraud."

25. Mr Leiper also submitted that where it is alleged that a witness gave false evidence, the question is not how the judge's conclusions would have been affected by the knowledge

that a witness (who concealed evidence) was not frank and straightforward, but how those conclusions would have been affected if the witness had provided the information which was alleged to have been concealed. He relied on *Coghlan v Bailey* [2014] EWHC 924 (QB) where Tugendhat J stated this at [46]:

> "In an action to set aside a judgment on the ground that it has been obtained by fraud the question is how, if at all, would the conclusions of the trial judge have been affected if the witness alleged to have been fraudulent had given the trial judge the information which the claimant (ie the claimant in the action seeking to set aside the judgment) alleges he concealed? The question is not how would the judge's conclusions have been affected had he known that that witness was not a straightforward and frank witness? See the judgment of Phillips LJ as he then was in *Gaillemer Sarland v McClelland* (19 February 1996 unreported)."

26. I accept Mr Leiper's submission as a matter of general principle. But in my judgment, there will be cases in which the new evidence is so fundamental to the credibility of the witness that it will be material even though it is not directly relevant to the substantive issues. For example, if a solicitor gives evidence that she is a solicitor and holds a valid practising certificate but conceals from the Court that she has been struck off for mortgage fraud, I would consider evidence of the striking off to be material. Likewise, where two witnesses conspire together to mislead the Court, I would consider evidence of the conspiracy to be material.

(3) Limb 3: New Evidence

27. A more significant difference between the parties emerged during the trial and although it could be said to be fundamental to the entire approach which the Court should take, it is convenient to deal with it under Limb 3. It is common ground that the only requirement which must be satisfied is that the new evidence was not deployed before the original Court: see, e.g., *Park v CNH Industrial Capital Europe Ltd* [2021] EWCA Civ 1766 at [53] to [61] (Andrews LJ). In his written closing submissions Mr Wardell interpreted this requirement as follows (at ¶116 and ¶117):

> "In other words, one cannot contend in the original trial that a witness gave false evidence based on X fact and then, when the judge rejects that case, seek to set aside the judgment on the basis that the witness gave false evidence based on X fact. There must be something new that the trial judge did not see even if, as a matter of fact, it might have been possible for the new material to have been put before the trial judge. Where the

> requirements to set aside a judgment summarised above are satisfied, the court will simply set aside the judgment. It will not go on to retry the underlying claim or re-run the original proceedings on the hypothetical basis the fraud had not occurred."

28. In his oral closing submissions Mr Wardell also submitted that if the Court could be satisfied that there was new evidence, it was permissible to hear and decide issues which the Judge had already decided at the Trial in order to reach an overall conclusion whether the Judgment was obtained by fraud. He developed this submission carefully and at some length, but it is reflected in the following two extracts from the transcript:

> "MR WARDELL: They do, but if material comes to light that wasn't deployed at the trial below, which demonstrates that the evidence given on matters on which Judge Russen either made findings explicitly or implicitly, it is open to me to ask you to revisit them."
>
> "MR WARDELL: But one shouldn't be put off by my learned friend saying this is all canvassed below and therefore you should not be getting into it. That is not the law and, as I'll explain in due course, it's absolutely not the right approach. The right approach is to ask the question, "Was the evidence obtained by fraud," and that means was there conscious and deliberate dishonesty, and the extent to which we are entitled to run that case on the material currently before you, if I my say so, you have to address it, and you can't be distracted by a forensic argument that this was all argued before. I'm going to develop this later this morning. My learned friend ends up making bad points. He really invites you to say let's just look at the new material. That's not what the law says. The law says if you are able to establish that a judgment has been obtained by fraud, then you are entitled to have it set aside, and you don't decide the question of whether or not it has been obtained by fraud just by looking at the new material. If the new material casts a different light on the original material, makes the narrative different, then the court has to have regard to that. So I fundamentally disagree with what he is inviting you to do. He is inviting you to adopt an overly narrow approach, and I will develop that a bit more again in a few minutes because it is absolutely essential to a proper understanding of our case."

29. Mr Leiper submitted that it was Mr Wardell's approach which was fundamentally flawed. In his written closing submissions, he submitted that Mr Tinkler was not permitted to traverse matters which had been considered at length at the Trial. After identifying a number of matters which were not pleaded (because permission had been refused by Bacon J and then by me) he continued as follows (at ¶39):

> "(2) These and other matters were considered at length at the 2018 Trial and findings were made on them. They are not, therefore, collateral facts

> in the true sense. (3) As a result, the Claimant is simply not permitted to traverse these points under the guise of credibility. If he wished to mount a challenge to the Judge's findings in relation to them, he had to seek and obtain permission to do so. That is the nature of the challenge which he brings. He may submit that those findings fall away with the judgment as a whole (in light of the pleaded allegations), but he cannot seek to have another pop at the evidence. (4) The vice of the Claimant's approach is obvious: in the 2018 trial, the Judge heard and considered the full range of evidence that was available (at least on those issues). This Court does not have the benefit of that range of evidence. The Claimant is seeking to re-run his challenge to the Company's 2018 evidence but without tendering his own evidence. The limitations of the issues addressed in his own statement is telling."

30. Mr Leiper also developed his argument orally. He took a particular example where Mr Wardell cross-examined at length about the changes to the minutes of a meeting on 25 January 2018 and then made detailed submissions in closing (both written and oral). Mr Leiper's response was as follows:

> "MR LEIPER: But, for example, in relation to Mr Ferguson, all of this cross-examination relates to, for example, the taking of the notes and what was done with the notes and the amendment that was put in and so forth. All of that was completely open to be put at the first trial, and much of it was, but you are being invited as a free-standing matter to reach a view on the credibility of Mr Ferguson in relation to that issue, so was he lying about the formulation of the minutes, when that issue has nothing that comes from new material; it just is simply rehashing what was there before. So it is a pure matter of credibility, which you are then being invited to feed into a conclusion that false evidence was being given, and it doesn't have any, we say, or at least sufficient, nexus with the new material; it is just having another pop."

31. Mr Leiper argued that his approach was reflected in the way in which Aikens LJ had formulated the *Highland* principles. In *Highland* he stated that the new evidence must demonstrate that the dishonest conduct was an operative cause of the Court's decision. In *Hamilton* Lord Phillips also stated that the new evidence must establish that the Court was deceived. Mr Leiper submitted that it was implicit in both of these formulations that the scope of the enquiry was limited to the new evidence and did not give carte blanche to an aggrieved party to re-open issues which had already been decided.

32. Counsel were not able to point to any authority in which this particular point had been considered or decided. Mr Leiper submitted that the Court had come closest to addressing this point in *Tuvyahu v Swigi* (26 October 1998, unreported). The decision must be treated

with some care because it was decided when *Bracco* (above) was the leading case. But in the following passage on pages 5 and 6 of the transcript Laws J (as he then was) dealt with both the burden of proof and operative cause:

> "However, the plaintiff in his closing argument, which was reduced to writing, submitted that he faced only the conventional standard of proof on a bare balance of probabilities; and also that, in relation to one of the documents in the case (referred to as T19), which the defendant had asserted was in part forged by him, the burden of proof lay on the defendant to prove the forgery. These submissions are mistaken. It is for the plaintiff to prove, to a high degree of probability, that the Israeli judgment was obtained by fraud on the defendant's part. A high degree of probability is required by reason of the gravity of the allegation. This is well established in the law of England: see for example *Bater v Bater* [1951] P35, 37, *Hornal v Neuberger Production Ltd* [1957] 1 QB 247 and *Khawaja v Secretary of State* [1984] AC 74, 112C-114C. And the notion that as regards any aspect of the case the burden of proof lies on the defendant to justify the judgment he has obtained is wholly misconceived.
>
> ……But I should say a word about proposition (4), relating to causation. By "operative cause" I mean that the fraud must have procured the result. Thus it would not be enough to demonstrate that the fraudulent evidence had merely strengthened the defendant's case, where the foreign court would anyway have arrived at the same result. Fraudulent evidence going merely to some collateral issue would not suffice. In *Vadala v Lawes* (1890) 25 QBD 310 it was held that the whole case may be re-opened if the successful party had "induced [the] court by fraud to come to a wrong conclusion" (my emphasis)."

33. In my judgment, Mr Wardell's approach involves looking through the telescope from the wrong end. My function was to hear and evaluate the new evidence and then decide whether the Judge's findings could stand in the light of it. It was not to hear and decide the same issues again with the benefit of both the old and the new material and then ask myself in the round whether the witnesses must have deceived the Judge. Moreover, there is a real danger of injustice in a second court reaching different conclusions based on hearing part only of the evidence before the Court. In the present case, Mr Tinkler did not give written evidence and was not cross-examined about most of the issues and documents put to SGL's witnesses.

34. I therefore accept Mr Leiper's submission on this issue. As Laws J pointed out in *Tuvyahu v Swigi*, there is no burden on SGL to justify the Judgment or to prove that the Judge got it right. In approaching the Judgment, therefore, I am entitled to assume that the Judge decided the issues correctly on the evidence before him in the absence of a successful

appeal. The task for me then was to hear and evaluate the new evidence, decide whether Limb 1 is satisfied and, if so, whether the Judgment could stand in the light of that evidence by applying the test under Limb 2.

35. Mr Leiper did not go so far as to submit that I could not evaluate or assess the overall credibility of the witnesses by reference to the evidence which they gave on the substantive issues or the quality of their answers and, in my judgment, he was right not to do so. I make it clear, therefore, that in evaluating the evidence of the witnesses I have set out below and taken into account their evidence on all issues in deciding whether the test under Limb 1 is met. Mr Leiper's submission (which I accept) was not that I should ignore that evidence but that I should not embark on deciding the substantive issues again and then decide whether to set aside the Judgment because I was tempted to reach different conclusions from the Judge. As he submitted, this would clearly offend against the principle of the finality of judgments.

B. Fraud Claims

36. Mr Leiper also made a number of general points about the trial of fraud claims. He reminded me that although the standard of proof was the civil standard, the Court should take account of the fact that fraud is inherently improbable. In *Bank St Petersburg PJSC v Arkhangelsky* [2020] 4 WLR 5 Males LJ summarised the approach which the Court should take at [117]:

> "In general it is legitimate and conventional, and a fair starting point, that fraud and dishonesty are inherently improbable, such that cogent evidence is required for their proof. But that is because, other things being equal, people do not usually act dishonestly, and it can be no more than a starting point. Ultimately, the only question is whether it has been proved that the occurrence of the fact in issue, in this case dishonesty in the realisation of the assets, was more probable than not."

37. Mr Leiper also reminded me that proof of fraud requires cogent evidence which must be commensurate with the seriousness of the conduct: see *JSC BTA Bank v Ablyazov* [2013] EWHC 510 (Comm) at [37] (Teare J). He submitted that where the Court was being invited to draw an inference of dishonesty from primary facts the Court must be satisfied that "an inference of dishonesty is more likely than one of innocence or negligence": see *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) (Flaux J). In the present case, Mr Tinkler alleges both perjury and the deliberate destruction and non-disclosure

of documents. I accept that cogent evidence is required before those allegations can be found to be proved.

III. The 2018 Claim

C. Introduction

Stobart Group Ltd

38. SGL is (and was at all relevant times) a company incorporated in the island of Guernsey but listed as a FTSE 250 company on the London Stock Exchange. By 2017 it had sold the road haulage business associated with its name and operated a number of divisions including Infrastructure, Aviation and Energy. The Aviation Division's assets included London Southend Airport ("**LSA**") and an airline business called "**Stobart Air**", which operated under the Aer Lingus banner. The Energy Division's assets included a 25% interest in an incinerator plant on Teesside known as "**Duranta**" (described in the Judgment at [200]).

Directors

39. Between 1 March 2008 and 1 July 2017 Mr Tinkler was the Chief Executive Officer ("**CEO**") and a director of SGL and it was common ground that he deserved much of the credit for the growth and success of the company during that period. On 1 July 2017 Mr Tinkler stood down as the CEO although he remained an executive director. His successor was Mr Warwick Brady. Between 1 February 2018 and 5 July 2018 Mr Richard Laycock was the Chief Financial Officer ("**CFO**") and an executive director of the company. I deal with his appointment and retirement in more detail (below).

40. Mr Iain Ferguson CBE was the chair of SGL and also the chair of the nominations committee ("**Nomco**") on which he and the other three non-executive directors served. Between October 2013 and November 2018 he was also the chair of Wilton Park (an executive agency of the Foreign and Commonwealth Office) and he used both personal and Wilton Park email addresses. The other three non-executive directors were Mr John Garbutt, Mr John Coombs and Mr Andrew Wood. Mr Garbutt was the chair of the remuneration committee ("**Remco**"), which fixed or approved the remuneration of senior executives. Mr Coombs was the chair of the value creation committee ("**VCC**") which

was formed to evaluate investment proposals and, in particular, to evaluate proposals from the company formed by Mr Tinkler and Mr Soanes (below).

41. On 28 May 2018 a committee of the board of directors of Mr Brady, Mr Wood and Mr Coombs (the "**Committee**") was formed in contentious circumstances and I deal with its formation in some detail. I also use the term the "**Board**" in this judgment although in a fluid way. For the most part I use it to refer to Mr Ferguson, Mr Brady, Mr Wood and Mr Coombs who were in opposition to Mr Tinkler. But sometimes I will use that term to refer to the entire board of directors or to refer to the entire board of directors but excluding Mr Tinkler. The witnesses tended to refer to the Board as on one side of the dispute and Mr Tinkler on the other side and I prefer to do the same.[1]

Other Senior Executives

42. Ms Louise Brace, who was a qualified lawyer, was the secretary to the Board but not a director herself. She did not give evidence either at the Trial or before me. SGL also had an Executive Management Board ("**EMB**") which included the following individuals. Mr Nick Dilworth, who worked closely with Mr Brady, was SGL's commercial director and on 1 September 2018 he became its Chief Operating Officer (after Mr Tinkler's dismissal). Mr Ben Whawell was the Chief Executive of the Energy Division. Mr Richard Butcher was the Chief Executive of the Infrastructure Division.

43. The Judge also used the term Executive Leadership Team ("**ELT**") in the context of a letter (the "**ELT Letter**") which was sent to the Board on 9 June 2018. As far as I am aware, this team did not have a formal status but consisted of senior executives who attended a meeting organised by Xinfu Ltd, a management consultancy and coaching firm: see the Judgment, [285]. Mr Steve Tappin was the Chief Executive Officer and founder of Xinfu and I refer to some of his communications (below).

Principal Shareholders

44. By 2018 SGL's principal shareholders were large corporate funds. The funds, the individual fund manager and the approximate percentages held by each were as follows:

[1] In the 2018 Claim the Judge used the term the "**Four Directors**" to refer to Mr Ferguson, Mr Brady, Mr Coombs and Mr Wood (as used in the parties' statements of case). For narrative purposes, I find it easier just to refer to the "**Board**" and it ought to be clear from the context whom I mean to include at any given time.

Invesco Fund Managers Ltd ("**Invesco**"), Mr Mark Barnett (25%); Woodford Investment Management Ltd ("**WIM**"), Mr Neil Woodford CBE (19.5%); M&G Investments Ltd ("**M&G**"), Mr Tom Dobell (5%); and Miton Group plc, Mr Gervaise Williams (3%). In addition, Mr Tinkler held 8% and Mr Allan Jenkinson held approximately 5% of the shares through a nominee, Svenska.

Brokers

45. Historically, SGL's principal brokers had been Cenkos Securities Ltd ("**Cenkos**") where Mr Paul Hodges, who was a close associate of Mr Tinkler, was one of its directors and founding shareholders. Mr Soanes had also worked for Cenkos for some years before his joint venture with Mr Tinkler (below). In 2017 and 2018 Stifel Nicolaus Europe Ltd ("**Stifel**") and Canaccord Genuity Ltd ("**Canaccord**") also acted as SGL's joint brokers. Mr David Arch was the Managing Director and Head of Corporate Finance at Stifel and both he and Mr Hodges were to play important roles in the boardroom dispute which took place in the first half of 2018. Mr Ben Griffiths was the relevant account manager or executive at Canaccord.

46. SGL's brokers routinely used the Regulatory News Service ("**RNS**") to make public announcements on its behalf. A number of announcements made through the RNS were central to the 2018 Claim and I use the term "**RNS**" to refer to those individual announcements. Where I use that term preceded by a date, I intend to refer to the announcement made on that day. Thus, the "**25 May RNS**" and the "**29 May RNS**" refer to the announcements which SGL made through the RNS on each of those days in 2018.

Law Firms

47. SGL did not have a full-time General Counsel. Mr Jonathan Brown, the non-executive chair of Hill Dickinson LLP ("**Hill Dickinson**"), fulfilled that role on a part-time basis and he introduced the Board to Mr Tony Foster, a partner in Travers Smith LLP ("**Travers Smith**"), who also acted for SGL. The law firm "**Rosenblatt**" (its trading name) acted for SGL in both the 2018 Claim as in this claim and Mr Anthony Field was the partner who led the teams in each action. K&L Gates LLP ("**K&L Gates**") acted for Mr Tinkler in the 2018 Claim although he was represented by Clyde & Co LLP ("**Clyde & Co**") in this action. Herbert Smith Freehills LLP ("**HSF**") also acted for the individual defendants in the Defamation Claim and DMH Stallard LLP ("**DMH**") also acted for

Wilton Park in this claim.

Incentive Plans

48. SGL had a series of incentive plans for its executives and employees. In October 2014 it adopted a long-term incentive plan (the "**LTIP**") under which it made three awards, the first in November 2014, the second in June 2015 and the third in June 2016 (although the second award was delayed for executive directors until November 2015). The LTIP provided for the grant of options at no cost to senior executives which vested after three years. 50% of their value depended on the total shareholder return or "**TSR**" against the FTSE 250 and 50% of their value depended on cumulative earnings per share or "**EPS**". They were also subject to a multiplier if both the TSR and EPS conditions were satisfied in full. In the contemporaneous documents and in evidence witnesses tended to refer to awards made under the plan as "**LTIPs**". I will refer to an individual award as an "**LTIP Award**" and awards collectively as "**LTIPs**".

49. The group had two additional incentive plans for the two principal divisions of the business. The first was the Stobart Energy Incentive Plan or "**SEIP**" set up for Mr Whawell in 2016. The second was the Stobart Aviation Incentive Plan or "**SAIP**" which was set up for Mr Brady in 2017 when he joined the group as Deputy CEO. Both were based on the additional value created to the business after a notional rate of return of 12% was applied to an initial valuation of the business subject to a maximum of 9.3% for the SEIP and a maximum of 4.6% for the SAIP. The mechanism by which each plan operated was to give the recipient of the award the right to subscribe for a fixed number of A ordinary shares in the relevant company. Finally, in 2015 the group introduced a wider Group Share Save Scheme or "**SAYE**" which gave employees the opportunity to purchase shares in SGL at the end of the savings contract at an option price set at the start of the scheme.

The EBT

50. SGL had a conventional employee benefit trust (the "**EBT**") and it held the shares which were used to satisfy the LTIPs which had vested in 2018 or, in Mr Tinkler's case, would have vested if he had not been dismissed (and he had exercised his rights under the LTIP). Jupiter Trustees Ltd ("**Jupiter**") was the corporate trustee incorporated in Guernsey and Mr Chris De Putron, who was a director, dealt with the sale of shares held by the EBT

into the market. One of the questions which the Judge had to decide was whether the Board should have satisfied vested LTIPs by transferring the shares directly to the recipients rather than by routing them through the EBT. Finally, BDO LLP ("**BDO**") gave advice to SGL in relation to the tax payable on the sale of shares required to satisfy any LTIP awards.

Article 89(5)

51. Article 89 of SGL's Articles of Incorporation provided that the office of a director should be "vacated" in certain circumstances. Paragraph (5) of the Article gave the Board a power to remove an individual director themselves and without the need to requisition a general meeting of shareholders but only where it was agreed by all of the other members of the Board that the director should be removed. I set out the Article in full and I will refer to the part in bold as "**Article 89(5)**":

> "**89. The office of a Director shall ipso facto be vacated:** (1) if he not being a person holding for a fixed term an executive office subject to termination if he cease from any cause to be a Director resigns his office by written notice signed by him sent to or deposited at the Office; (2) if he shall have absented himself (such absence not being absence with leave or by arrangement with the Board on the affairs of the Company) from meetings of the Board for a consecutive period of 12 months and the Board resolves that his office shall be vacated; (3) if he becomes a lunatic of unsound mind or incapable; (4) if he becomes a bankrupt suspends payment, compounds with his creditors or is adjudged insolvent; **(5) if he is requested to resign by written notice signed by all his co-Directors;** or (6) if the Company in general meeting shall declare that he shall cease to be a Director; (7) If he dies or becomes ineligible to be director in accordance with the Law PROVIDED THAT there shall be no age limit for retirement."

Stobart Capital

52. On 10 May 2017 Stobart Capital Ltd ("**SCL**") was incorporated. 50.1%[2] of the shares were held by Mr Tinkler himself and 49.9% by Mr Soanes (who had previously been seconded to SGL as the temporary finance director and knew the company well). SCL's function was to generate investment opportunities for SGL and to harness Mr Tinkler's skill as an entrepreneur. SGL held a class of non-voting convertible shares and Mr

[2] The Judge stated that Mr Tinkler owned 51.1%: see [17]. This must have been a typo and Mr Soanes confirmed the correct figures in his witness statement.

Tinkler and Mr Soanes were the sole directors of the company. When he stood down as CEO, the expectation was that Mr Tinkler would devote 50% of his time to SGL as an executive director and 50% of his time to Stobart Capital.

The Management Agreement

53. The relationship between SGL and SCL was governed by a management agreement dated 22 September 2017 (the "**Management Agreement**") under which SCL was entitled to be paid a retainer of £500,000 per annum together with additional fees for providing a range of services which included identifying and originating acquisition and investment opportunities which met SGL's investment objective (defined as "**Transaction Opportunities**"). The only provision which was relevant to the issues which I had to decide was clause 8.3 which contained the following termination provision:

> "8.3 This Agreement may be terminated immediately: 8.3.1 by SGL if SGL is required by any relevant regulatory authority to terminate the Manager's appointment; or 8.3.2 on the liquidation of SGL resulting from the passing of a resolution to wind up SGL; or 8.3.3 by SGL if there is a change of control of the Manager whereby the beneficial interest in more than 50% in aggregate of the A shares and B shares in the capital of the Manager cease to be held by the prevailing shareholders as at the Effective Date; or 8.3.4 by SGL if any competitor of SGL holds the beneficial interest in more than 25% of the share capital of the Manager."

Project Wright

54. Between May 2017 and March 2018, the principal Transaction Opportunity which SGL and SCL were developing was the acquisition of the airline Flybe Group plc ("**Flybe**"). This acquisition was originally given the code name Project Blue and then given the code name "**Project Wright**" (as I will refer to it). The principal anticipated benefits of Project Wright were the merger of Flybe with Stobart Air together with increased traffic through LSA. The Judge described the benefits of the acquisition and its progress in greater detail at [83] to [89].

55. Project Wright was ultimately unsuccessful and none of the competing structures was put in place. On 22 February 2018 SGL issued an RNS stating that it intended to make a cash offer for Flybe but a month later it issued another RNS announcing to the market that it would not be making a bid. But it formed the backdrop to the dispute between Mr Tinkler and the Board and the parallel dispute between Mr Tinkler and Mr Soanes. One source

of tension between Mr Tinkler and Mr Soanes was the introduction of Barclays Bank plc ("**Barclays**") as an additional investment adviser.

Tellus Consulting

56. Mr Soanes was also a director of Tellus Consulting Ltd ("**Tellus Consulting**"). From 19 November 2018 it provided financial services associated with Project Wright under an agreement (or draft agreement) with Connect Airways Ltd ("**Connect Airways**"). This company was a joint venture between the Aviation division, Virgin Atlantic and Cyrus Capital Partners LP ("**Cyrus**"), a private equity fund, and formed in December 2018 to acquire the assets of Flybe. The joint venture was short lived and on 20 March 2020 Connect Airways went into administration.

D. The Boardroom Dispute

57. In this and subsequent sections of the factual narrative, I refer to a number of documents. The parties disclosed and relied on many of these documents in the 2018 Claim. However, SGL did not disclose a number of these documents until these proceedings and the undisclosed documents formed the primary basis of Mr Tinkler's claim to set aside the Judgment. In order to maintain the narrative flow, I use one asterisk (*) to identify these documents. Mr Tinkler also relies on a number of documents which Mr Soanes disclosed to him in the ET Claim or in response to an application for third party disclosure. I use two asterisks (**) to identify these documents and it was Mr Tinkler's case that SGL should also have disclosed these documents in the 2018 Claim.

58. The Judge began his detailed narrative of events in September 2017 with the Management Agreement and the change to Mr Tinkler's terms of employment: see [99]. In November 2017 an issue arose about the calculation of the LTIPs to be made to senior management and Mr Tinkler challenged a calculation prepared by Mr Garbutt. This issue was ultimately resolved when Mr Garbutt accepted Mr Tinkler's calculation. But over the next two months Mr Tinkler expressed dissatisfaction both about the way in which this issue had been handled and more generally about the level of remuneration of senior management.

59. It was SGL's case that Mr Tinkler's sole or, at any rate, predominant concern was his own level of remuneration and that he was prepared to leave SGL if that concern was not

addressed. The Judge set out the relevant email correspondence in [120] to [139] and Mr Tinkler was cross-examined both at the Trial and before me on that basis. For example, Mr Tinkler was cross-examined about an email dated 31 December 2017:

> "Q. Could you look at {H3/84/1}, an email from you. Again, it's to Whawell, Butcher and Jenkinson, the trio, this time, and I think at line 7, just before the break in the message: "I intend to confront Iain and RemCo to explain how they are going to come some way to making this more rewarding for our performance over the last 3 years or move on immediately." Again, you were indicating that if this wasn't resolved to your satisfaction, you would resign. A. Not resign, my Lord, I would discuss with shareholders what alternative there was and the options that I had available. Q. "Moving on" means moving on from the company, doesn't it? A. To what, my Lord, I would have options, to what I did -- Q. But the options lay outside the company, didn't they? A. I don't totally agree with that. Maybe not."

60. By contrast, Mr Tinkler's case was that by the end of 2017 Mr Brady had already formed the view that Mr Tinkler could not remain a director of SGL and had begun to devise a plan to remove him. Mr Wardell suggested to Mr Brady that there were four reasons why he wanted to see Mr Tinkler removed:

(1) It was not comfortable for Mr Brady to have his predecessor for ten years sitting on the Board;

(2) Mr Soanes had told him about Mr Tinkler's inappropriate proposal for the structure of Project Wright (below);

(3) A long-standing tax dispute between SGL and Mr Tinkler was causing him difficulties; and

(4) Mr Tinkler had highlighted the fact that there was a "huge hole in the figures".

Project Wright: The Acquisition Structure

61. At various times different structures for the acquisition of Flybe were proposed by different parties. For present purposes, it is enough to record that on 8 November 2017 Mr Tinkler put forward a structure which involved a group of strategic investors (including himself) taking a 60% stake in Stobart Air (to take it off SGL's balance sheet) before selling it on at a profit to a listed company which would be formed to acquire Flybe. The Judge set out the detailed terms of Mr Tinkler's proposal at [110].

62. Mr Soanes' reaction to this proposed structure was that the strategic investors stood to make a substantial profit at the expense of SGL and that the proposed structure gave rise to a direct conflict between Mr Tinkler's personal interests and the interests of SGL. The Judge recorded that in late November 2017 Mr Soanes reported this concern to Mr Brady. He also recorded that Mr Brady did not reject it out of hand but instead began work in parallel on an alternative structure with Mr Soanes in which the acquisition would be funded by Cyrus (which ultimately became a co-venturer in Connect Airways): see [111] to [117].

63. Mr Wardell suggested to Mr Brady in cross-examination that on 20 November 2017 Mr Soanes persuaded him that Mr Tinkler's structure involved a conflict of interest and that he agreed not to pursue it any further. He put the same point to Mr Soanes who accepted in his witness statement that the project team spent no further time on Mr Tinkler's structure after that date. Mr Wardell also suggested to Mr Soanes that he did not disclose to Mr Tinkler (his fellow director) that his proposal was dead or that Mr Soanes and the project team were now working on something different:

> "Q. You didn't update him at all, did you, as to what was going -- you certainly never told him that his proposal was going to be allowed to fade away, did you? A. By 22 November 2017 all of us, including Mr Tinkler, were pursuing a structure that did not involve the offensive steps. Q. You didn't tell him that his proposal was to be allowed to fade. A. I didn't -- Q. Because you say specifically to the employment tribunal: "And this meant not telling Mr Tinkler directly that his proposal wasn't going to be used." Was that evidence untrue? A. No, that evidence was true. So when I met Mr Brady and we talked about it, it was -- it was common ground that Mr Tinkler wouldn't react well to being told directly. And Mr Brady's response to my question on, I think it was the 22nd, about whether he thought we should pursue the variant that I was proposing, which achieved all of the legitimate aims of all of the parties, his response was, "Yes, if you are happy with the race," which I took to mean, "If Mr Tinkler wants to continue with his structure, he can, if you want to continue with yours, you can, and we will see which one prevails." I then circulated my preferred plan to Mr Tinkler and the rest of the team on 22 November and Mr Tinkler made no objection. Q. But that's not telling him that his plan was dead and was to be allowed to fade away, was it? A. In my actions that's what I'm achieving. I didn't use those words. I didn't say I did use those words."

64. Mr Wardell also took Mr Soanes to emails and texts which he had sent to Mr Brady but not to Mr Tinkler to demonstrate that he was working on a new structure with Cyrus without Mr Tinkler's knowledge. For example, he took Mr Soanes to a text dated 29

January 2018 in which he told Mr Brady that his instinct was to go with Cyrus without telling Mr Tinkler:

> "Q. Yes. But there is no email from you to Mr Tinkler at the time saying that your instinct was to go with Cyrus, is there? A. I don't think so, but if you look back to 9 January, there was an email from me to Mr Tinkler, specifically discussing the options on the project, including the -- well, setting out the three possible funding structures -- funding sources, of which one was private equity. That was 9 January. The period -- you've jumped around in time a little bit, but prior to Christmas, in December 2017, we were in the very early stages of Mr Brady having introduced Cyrus. We were allowing them to get to know the project. There wasn't much interaction, we were sending them some documents, but from about the middle of January, the whole of the Stobart Capital team was involved in dealing with Cyrus, and there are many, many messages during that period, either from me to Mr Tinkler or from others to Mr Tinkler. Q. But no reports on the outcome of meetings with Cyrus from you. A. Well, it was all available, it was all in our systems. Mr Tinkler knew that the conversations with Cyrus were going on. Had he ever -- well, I can't remember if he asked any questions but whenever he did, I would answer them completely candidly. Q. But no reports from you on the outcome of meetings with Cyrus? A. Probably not, but there would be no reason to do that."

65. On 8 January 2018 Mr Soanes also completed an "individual attestation" confirming that SCL had complied with its policies during the period from 7 September 2017 to 31 December 2017 and certifying that SCL had no conflict of interest during the relevant period. When the inconsistency between this document and his disclosure to Mr Brady was put to him, Mr Soanes gave the following explanation:

> "Q. Right: "I have notified all new conflicts of interest of which I am aware." "No conflicts" is what you say. A. No new conflicts. Q. In the period September through to December, Mr Soanes. A. Yes, I accept that that is the period covered by the attestation but, as I explain in the tribunal, where we went into this at great length, my sense was that I was signing this as at the time, and I didn't focus on the whole of the period. Q. Right. Who was this going to? A. This was going to MJ Hudson. Q. And what were they going to do with it? A. It was a part of their compliance review process. Q. So MJ Hudson never knew about your views about Mr Tinkler's proposal for Project Wright? A. At that time they didn't, I don't think, no."

The Tax Dispute

66. SGL had a historic claim for an indemnity against Mr Tinkler arising out of an acquisition

which had taken place some years before. The tax dispute remained unresolved and was relevant to a proposal (the "**StobCap Buyout**" proposal) which Mr Soanes put forward at the beginning of February 2018 (below). Mr Brady described the dispute in the following terms:

> "Q. The third trigger was the tax dispute was giving you a headache? A. Yes, that is true. Q. And that was even though Mr Tinkler had shown you an advice from leading counsel which said categorically that the claim was statute-barred? A. Well, firstly, it was a very nuanced case, the tax case, so there was a -- there was an indemnity that expired, right, that obviously gave a liability of tax to Andrew Tinkler. Our general counsel at the time extended that liability time, and it was quite a grey area, whether or not he was liable for the tax or not, and the company's view was, if you were the chief executive and you effectively kept knocking the can down the road, you were benefiting yourself by not having to -- because -- pay the tax because actually what triggered this was the tax -- HMRC actually asked for the payment, which we paid, the tax, 4 million or so. And I think the board at that point, thinking of the best interests of the company, wanted to make sure that if there was a liability for Andrew Tinkler under the indemnity, that should be paid by Andrew, and there was a bit of a grey area which was ruled -- MR JUSTICE LEECH: You say the tax was about £4 million? A. Yes, something like that, if I remember."

67. By email dated 17 December 2017* Mr Brady wrote to Mr Ferguson dealing with a range of different matters. In the very last sentence, he suggested to Mr Ferguson that he "keep Ian Soanes close" on this issue. Mr Ferguson was asked about this email in cross-examination but he could not remember it:

> "Q. So this is going right back to December and it's a catch-up email from Mr Brady to yourself of 17 December. Can we go to the second page of that -- can we go right the end of that in fact. And you will see a reference there to: "AT Tax -- suggest you keep Ian Soanes close on this as this will impact him." What on earth is going on here? Why is Mr Brady suggesting to you that you should keep Mr Soanes close on the tax issue when it has got nothing whatsoever to do with Mr Soanes? A. I have no idea."

68. Mr Soanes was also asked about the tax dispute. He accepted that he knew about it and that he referred to it in the proposals which he put forward on 6 February 2018 (below). When it was put to him that he discussed it with Mr Brady his evidence was as follows:

> "Q. So you clearly discussed it with Mr Brady? A. I don't think so. Q. So how could Mr Brady possibly form a view about your view about tax matters without discussing it with you? A. Well, the tax dispute was pretty much common knowledge amongst the senior people within that group,

> and it was of concern to me. I did not have a stance to take. I wasn't -- I wasn't involved. Q. So is it your evidence that you didn't speak to Mr Brady about this at this time? A. When is this? Q. 27 January. A. 27 January. I have no recollection of speaking to Mr Brady about this subject at that time. Q. And by that time, you had been shown a copy of an opinion from a QC, hadn't you, given to Mr Tinkler, which said, in pretty trenchant terms, that he was under no liability? A. I remember Mr Tinkler showing me a copy of the advice he had received. Q. Yes. A. I don't remember reading it, and it's a complex subject. I don't -- I have no recollection of forming any sort of a view based on that document. Q. But the short point was the limitation issue, wasn't it; can this claim be brought now or not? A. I don't know. Q. You don't remember? A. No."

The "8 + 4" Figures

69. On 26 and 27 December 2017 Mr Tinkler and Mr Brady exchanged emails about SGL's "8 + 4" figures (i.e. its estimated actual results for 8 months and its forecast results for the remaining four months of the financial year). The Judge set out the principal passages from those emails at [124] to [130]. By email dated 31 December 2017 Mr Ferguson wrote to Mr Brady stating that he would work with Mr Brady "to get the outcome with AT that we want" and "to use your words, 'regularising' the Group". On 1 January 2018 Mr Brady also noted down a list of New Year resolutions which included "Normalise Plc Board re AT" and "Update management team".*****

The Barclays Retainer

70. In January 2018 SGL was also considering whether to appoint Barclays to give financial advice in relation to Project Wright. On 7 January 2018 Mr Soanes sent Mr Brady his script for a meeting scheduled for the following day. He had also prepared a series of structure options which he sent to Barclays directly. On 15 January 2018 Barclays sent a draft letter of engagement to Mr Brown and on 17 January 2018 Mr Brown forwarded the draft to Mr Soanes who made very detailed comments on the draft before sending it back the same day.

71. Mr Tinkler's evidence was that Mr Brady and Mr Soanes had engaged Barclays to act as an investment adviser in relation to Project Wright without his knowledge and that he was upset when he found out at the end of February 2018. Mr Leiper took him to the minutes of a meeting of the Board on 25 January 2018 which record that: "WB/RL to engage Barclays to advise on all options available." When the minutes were put to him

his evidence was as follows:

> "Q. So there was a board meeting on 25 January 2018, which you attended, at which the board approved the appointment of Barclays to advise on all options in relation to Project Wright. A. I think it was engaged is more the fact – my understanding is that they would reach out to them to see if they wanted to take part in that, not actually take them on as an adviser and sign an agreement. Q. I don't understand the difference you are trying to make. A. Well, many a time advisers come to you and give you free advice on trying to get involved with the deal, and that's how I understood that. They were going to come and give us some assistance on options. Q. Well, the word "engage", "engage" means enter into an agreement with, doesn't it? A. I would say it would say sign an engagement letter. Q. Right, sign an engagement letter. And the purpose of the engagement was to advise on all aspects? A. Options. Q. Yes. A. Yes. Q. I said to you earlier you are saying that you found out that Barclays were going to act as an independent adviser on the proposed acquisition of FlyBe in late February. That's not right, is it? A. It's a termination -- I mean, sorry, the engagement letter that I was unaware of, that had been signed on 17 January, my Lord, that I now know."

72. Although the engagement of Barclays was briefly discussed at the meeting of the Board on 25 January 2018, the engagement letter had already been signed three days earlier on 22 January 2018. When Mr Brady was asked why he had not informed the Board, his evidence was as follows:

> "Q. So why are you not telling the board it has already been signed? A. I would have had that -- looking back -- and I can't remember all the details, but I'm sure I would have had a conversation with Iain Ferguson, as well as -certainly Ian Soanes had recommended Barclays, and my assumption would have been -- and I can't remember it precisely because it was a while ago -- that Ian Soanes at that point was still obviously working with Tinkler and would have engaged with Tinkler on that. Q. But why is Mr Tinkler not being put in the picture? A. I can't remember why Mr Tinkler was not in the picture on this one. Q. These minutes are misleading, aren't they? A. They are misleading, I just can't remember whether -- I don't know what he was told and what he wasn't told. I'm sure -- we know he absolutely knew about the Barclays adviser role, that's for sure. Q. You see, Mr Soanes working in the Mayfair office, wasn't he? A. Yes. Q. And that was where you were based most of the time? A. Yes, I based myself in London, then obviously travelled quite extensively to all the operations. Q. Mr Tinkler was up in Carlisle? A. Yes. Q. How many members of staff did the Mayfair office have? A. I don't know, like -- including Stobart Capital or excluding Stobart Capital? Q. Just Stobart Group? A. Only two or three."

73. On 10 January 2018 a meeting took place between Mr Tinkler, Mr Ferguson and Mr Butcher to discuss a spreadsheet which Mr Tinkler had produced to show the returns generated for shareholders. It is common ground that it was agreed at this meeting that Mr Tinkler could discuss his options with the major shareholders (to whom he was close). It is also common ground that on the day after the meeting Mr Ferguson prepared a draft RNS announcing Mr Tinkler's resignation with effect from 9 February 2018. Mr Ferguson accepted at the Trial and before me that Mr Tinkler did not agree to resign on that day and in his evidence before me he described the date which he inserted into the RNS as a "placeholder".

74. In his witness statement Mr Brady suggested that the RNS was prepared because SGL had to be ready to respond quickly to events. Mr Wardell challenged that evidence and Mr Brady's response was as follows:

> "Q. I suggest this makes no sense at all. A company can prepare an RNS in a matter of minutes. A. That would be normal, to be honest -- certainly you have pre-emptive RNSs. Andrew had actually told me in a meeting that, given this FlyBe structure, he would be prepared to resign and come off the board and spend time in Stobart Capital. My understanding from Iain was Andrew was considering stepping down and, of course, as a good chairman would do, you would certainly have a draft ready. Q. There were no draft RNSs for the other directors, were there? A. There was for Mr Garbutt, wasn't there? Q. Well, Mr Garbutt had said he was going. A. Yes. There you go. Q. But he had said he was going. A. Yes, that's right, that's why you prepare a draft."

75. In a note which he produced after exchange of witness statements in the 2018 Claim but before the Trial itself, Mr Tinkler recorded three options for himself: (1) resign and sell his shares, (2) become an adviser to the Board (through SCL) or (3) become executive Chairman. Mr Tinkler's evidence at the Trial was that this note was made at the time and in preparation for the meeting and that he raised all three options with Mr Ferguson who agreed to let him discuss them all with the major shareholders. At the Trial Mr Ferguson accepted that he raised options (1) and (2) but denied that he raised option (3) or that he agreed that Mr Tinkler could discuss it with shareholders.

76. The Judge made no finding about the authenticity of the note or when it was prepared. But he preferred Mr Ferguson's evidence to Mr Tinkler's evidence on the question whether Mr Tinkler raised option (3). He found it "inconceivable" that Mr Ferguson would have given Mr Tinkler permission to discuss that option with shareholders: see

[584] to [588]. The Judge did not find, however, that Mr Tinkler informed Mr Ferguson that he intended to resign. Based on Mr Ferguson's evidence, he found that Mr Tinkler gave "a further indication…that he had it in mind to step down from the Board": see [589].

19 January 2018

77. On 19 January 2018 Ms Brace prepared a draft letter of resignation for Mr Tinkler and sent it to Mr Ferguson. On the same day at 18.52 Mr Soanes sent a text message to Mr Brady** and five minutes later Mr Brady replied.** The exchange of text messages was as follows:

> "I've spoken to Paul a few times too and to Andrew. The situation is very tiring. I hope patience pays off. Paul's idea of getting everyone in a room is an obvious way of eliminating divide/rule and misunderstanding but also risks an explosion at a sensitive time. You know so far the strategy of perseverance while undeliverable plans run their course has worked. It just takes so much energy and creates so much inefficiency and cost. It can't continue beyond the short term but you have a plan for the medium term. I wish I did."
>
> *Soanes to Brady* (18.52)
>
> "Well I think we can find a plan for you medium term! Let's solve this as a first step. I think you do great work."
>
> *Brady to Soanes* (18.57)

20 January 2018

78. By email dated 20 January 2018 Mr Brady wrote to Mr Ferguson. His first bullet point under the heading "Board Changes" and his first bullet point under the heading "Project Wright" were as follows:

> "AT coming off the board. I presume this is now finalised. There are too many little things going on with capex and financial commitment that is not authorised and approved by our Core meeting so it's much better if we get AT off the board and retain him through Stobart Capital. This means we get all the benefits of the entrepreneurial side. I am concerned that his objective is to take our airline into a private SPV before year end. Whilst still open minded to see if will benefit the group I do not want to risk our potential Wright transaction at this stage. More info below."
>
> "Cyrus Capital have spent 2 days with us and will provide us with a term sheet by the end of the week so we are approaching a point where we will have to decide on the investor we want to work with. Apollo Capital are

> also very interested and I will meet with them as a back-up and to see if they are the sort of people we may want to partner with. This option is purely taking Orville private and then re-floating it or trade sale in 3 to 5 years."

79. By email dated 23 January 2018 Mr Brady also reported to Mr Soanes in some detail about the negotiations with Cyrus (but without copying the email to Mr Tinkler). His evidence was that by this stage he had wrongly assumed that Mr Tinkler had already agreed with Mr Ferguson that he would step down. But he denied that he was intending to go forward with Mr Soanes alone.

24 January 2018

80. On 24 January 2018 Mr Tinkler spoke to Mr Ferguson before a meeting of the VCC. Mr Ferguson's evidence was that Mr Tinkler told him that he intended to resign to pursue his proposal for Project Wright and that it was agreed that he would wait until 16 February 2018 before his resignation was announced. Mr Tinkler's evidence was that he did not say or agree to any of this because he had not yet spoken to the major shareholders.

81. The Judge recorded that it was necessary for Mr Ferguson to correct his first witness statement in the 2018 Claim in which he had got the sequence of meetings wrong and had originally said that the conversation had taken place at or after the VCC meeting: see [152]. That evidence had been based on a handwritten note in his notebook which Mr Ferguson claimed to have made after the meeting of the audit committee the following morning. His transcription of the note records as follows:

> "Meeting with Andrew T/IGTF 24/1/2018 at SP. 1730. – Following VCC meeting and Project Wright, AT thinks that he would like to step down as a Director ASAP – related party issues etc + wants to be able to invest in Project Wright. – Agreed to look at draft RNS – will add AT to RNS already prepared for JG and RL – will show to AT at Board tomorrow."

82. The Judge preferred the evidence of Mr Ferguson on this issue too. He found that on 24 January 2018 Mr Tinkler expressed the wish to step down from the Board. In arriving at this conclusion, he relied on Mr Ferguson's note: see [596] and [597]. He also relied upon the minutes of the board meeting which followed the meeting of the audit committee: see further (below).

25 January 2018

83. On 25 January 2018 a meeting of Nomco took place followed by a meeting of the full Board. As I have stated (above), Nomco's members were Mr Ferguson, Mr Garbutt, Mr Coombs and Mr Wood but not Mr Tinkler. It is common ground that Mr Ferguson showed Mr Tinkler the draft RNS before the meeting of the full Board and that Mr Tinkler expressed shock at its contents. Mr Ferguson's evidence was that he showed Mr Tinkler the RNS with the date of Mr Tinkler's resignation changed from 9 February 2018 to 16 February 2018 and that Mr Tinkler said that he did not wish to be rushed into a decision but wanted to discuss his future with shareholders. He then gave the following evidence:

> "Q. And on your evidence, that is a remarkable volte face from what he had told you the day before. A. Well, in one sense it was, and I was bemused because I had understood that this is what he wanted to do. I also understood that as part of this he would want to go and talk to the shareholders. What was a surprise to me was that this is not what he wanted to go and talk to the shareholders about. That was the bemusing part. I had always expected that he would wish to talk to his -- the shareholders with whom he was particularly close but I imagined that it was the RNS he wanted to go and talk to them about. Q. But there is no contemporaneous comment from you to anyone, is there, about this extraordinary turn of events? You don't email Mr Brady -- A. Well, we were all together in a board meeting, so therefore, there was really no need to email. I was able to lean across the table and say to Mr Brady and to my fellow directors that, "This has not gone quite the way that I expected and the way I told you -- I had only told them about this the previous evening, following my meeting with Mr Tinkler on the 24th, we then had a board dinner and I had a private session with my director colleagues, told them where Mr Tinkler was, what we were expecting to do and that I would be seeing him the following morning with the RNS. Then, when Mr Tinkler was clearly shocked -- I mean, he was clearly shocked and I was quite bemused by this -- it wasn't difficult for me to go back into -- to be in the boardroom and to tell them face-to-face what had happened. I really didn't need to sit down and email people that I was sitting six feet away from."

84. At 8.20 pm that evening Ms Brace sent an email from her personal email address to Mr Ferguson attaching a draft letter addressed to Mr Tinkler accepting his resignation and dealing with his remuneration. She also sent a revised RNS to Mr Ferguson which continued to assume that Mr Tinkler would stand down. By email dated 26 January 2018 and timed at 01.33 Mr Tinkler wrote to Mr Ferguson confirming that he would like the opportunity to meet the four key shareholders before any announcement was made and

the Judge set out the key passages from that email at [158] to [160]. He also held that it supported his finding in relation to the discussion on 24 January (above): see [600].

85. Before me, Mr Ferguson accepted that the minutes of the Board meeting on 25 January 2018 were originally drafted on the basis that Mr Tinkler had already made the decision to resign. He also accepted that he added the relevant words himself and some weeks after the meeting had taken place. On 7 February 2018 Ms Brace sent Mr Ferguson and Mr Brady draft minutes for review and on 17 February 2018 Mr Ferguson returned the draft marked up in track changes. Under paragraph 7.1 dealing with actions arising from the earlier meeting of Nomco he had added the following words:

> "NOTE: In a discussion following the Board Meeting it was agreed that AT would personally inform the four key shareholders of his decision to step down from the Board. It was also agreed that the effective date would be decided later in the light of business issues around Project Wright and Stobart Capital."

86. On 6 February 2018 Ms Brace also sent Mr Ferguson draft minutes of the Nomco meeting and on 17 February 2018 he returned the draft of those minutes marked up in track changes adding the same words to paragraph (i). In the covering email he stated: “Please find attached a ‘tracked change’ set of Nomco minutes with an updated section re the AT situation.”

87. It is common ground that Mr Tinkler later challenged the accuracy of the minutes of the Board meeting on 25 January 2018 and that Mr Ferguson agreed to change them. In the final version of the minutes of the Board meeting signed on 29 March 2018 the note above had been replaced with the following form of words: "In a discussion following the Board meeting it had been agreed that AT would personally meet the 4 key shareholders to discuss options around his future with SGL.” However, the final version of the Nomco minutes which were also signed on 29 March 2018 were not corrected to reflect the change to the Board minutes. But there was no evidence that these minutes were ever sent to Mr Tinkler.

88. Mr Wardell suggested to Mr Ferguson that his handwritten note of his meeting with Mr Tinkler was not contemporaneous and must have been made in late February 2018. He also suggested to Mr Ferguson that he amended the draft minutes on 17 February to produce a false record and knowing that the amendment was inaccurate:

> "Q. It's quite clear that the changes come from you on 17 February. A. Yes. Q. And so you were producing a draft board minute that you knew was untrue. A. I knew that Mr Tinkler was going to go and speak to his shareholders, as he called them, the four key shareholders, about his future with Stobart Group Limited and he had also -- part of that was very clearly that he might wish to resign from the board. Q. So the company secretary on 25 January had sent you a draft that says nothing whatsoever about Mr Tinkler stepping down and you've amended on 17 February to include a false minute. A. I didn't believe it was a false minute. I believe it was capturing what we had agreed that Mr Tinkler was going to do."

29 January 2018

89. On 29 January 2018 Mr Brady made a list or note***** on his phone consisting of the following entries: "Board meetings schedule", "Minutes", "RNS", "AT RNS", "Legal office" and "Board changes". On the same day, 29 January 2018, Mr Brady texted Mr Soanes about the model which they proposed to send to Cyrus that day. He also stated: "Don't worry about work we have it covered. AT being sorted as well." This text was disclosed in the 2018 Claim and both Mr Brady and Mr Soanes were cross-examined about it.

The Shareholder Meetings

90. On 30 and 31 January 2018 Mr Tinkler met with representatives of SGL's major shareholders: see [166]. In his third witness statement in the 2018 Claim, Mr Tinkler accepted that he mentioned to the attendees some of his concerns about Mr Ferguson's performance as Chairman and that SGL was going "off-strategy" in the context of discussions about SGL's share price. He also accepted that he said that he thought SGL was weak at the top and that "we might need a change" although he had no specific plan or timescale.

91. The Judge found that Mr Tinkler did not go to the shareholder meetings with any idea of resigning but with the aim of getting their support for his claim for greater remuneration: see [608] to [613]. He also found that Mr Tinkler used the opportunity which Mr Ferguson had given him to discuss his resignation with shareholders by "briefing against the Board" and criticising the Chairman, the Board and their strategy: see [735] and [736].

92. On 1 and 2 February 2018 Mr Brady called and spoke to the shareholder attendees of those meetings himself. He had prepared a script for these calls which began with the statement: "AT approached Iain F and the board and asked to resign so he can spend more time with Stobart Capital". On 4 February 2018 he sent a copy of the script to Mr Ferguson and in the covering email he set out a "few thoughts" after what he had been told:

> "I am not sure what was said but to have an 'Executive Director' and small shareholder campaigning against the board including a potential play to remove a Chairman seems a very serious place for the company to be! Suggest we do organise immediate legal advice as well as ensure we have a clear 'defence plan' with our key shareholders and a plan to deal with any public information that is released i.e. We need to be on the front foot with PR as well.
>
> There was a common theme from my conversations with Tom, Mark and Gervais around "strategy and AT not being happy with the board or the direction of the company".
>
> The best outcome I think for the Group and for AT to come off the board and remain a "Board Adviser" whilst focusing on Stobart Capital and getting additional shareholders to support entrepreneurial ventures with Stobart Group still getting first right of refusal."

93. Mr Wardell suggested to Mr Brady that he was trying to force this as his "best outcome" for SGL and his evidence was as follows:

> "Q. Yes, and you were taking steps at this stage to force that through, weren't you? A. Was I? Q. I'm putting that to you. A. We are not trying to force -- we are not trying to force anything with Andrew Tinkler to get him off the board. If he was going to be a board adviser and resign from the board, it would have to be voluntarily. That was effectively -- there was no more agenda than that."

5 February 2018

94. On 5 February 2018 Mr Brown sent Mr Brady an email enclosing the details of Mr Foster. He also enclosed Mr Tinkler's service contract and the Articles. He quoted the text of Article 89(5) and asked Mr Brady to note its terms. Mr Brady replied in the following terms:

> "Is Tony aggressive enough? We may need somebody that can provide some on going support once we have agreed AT role if there is a variation against any agreement. Make sense? We do need a set of documents that we have in our hands that gives an opportunity to ensure that we protect

> the Stobart brand but also clarifies the AT role and how we continue with Stobart Capital."

95. Mr Brown wrote back stating that he thought that Mr Foster was the right person and that SGL "held all the cards". He also stated that: "we need to ensure that defeat is not snatched from the jaws of victory". Mr Wardell suggested to Mr Brady that this only made sense if there was a plan to oust Mr Tinkler. Mr Wardell then asked him what was meant by "defeat" and "victory" and in the course of that evidence the following exchange then took place:

> "A. On the Article 89.5, we couldn't get a -- I never signed it anyway because I always wanted to use it as a leverage for negotiation for getting the right outcome with Mr Tinkler, say, look, let's find a settlement here, let's try and normalise our relationship and then your contribution. And that was the whole issue surrounding Mr Tinkler, so we were not going to force Mr Tinkler off the board but it's always good in a negotiation to have something up your sleeve and make sure you have a leverage to have a discussion. That was effectively the context. So there was no forcing Mr Tinkler off the board at all. Q. Do you want me to repeat the question? A. Indeed. Q. You haven't answered it. A. Please -- Q. I'll do it in stages. What is the victory that Mr Brown had in mind when he said "jaws of victory"? A. I don't know. I didn't write that email. Q. What is the defeat? A. Again, I genuinely didn't write that email. That was sent to me -- I asked Mr Brown for a potential solicitor or lawyer that would give us advice on what to do with Mr Tinkler if he was -- as I had found out, was briefing against the chairman and the board and the company. Q. You are just making this up, Mr Brady. A. No, I'm not. I'm telling you how it was at the time. Q. If you hadn't understood what Mr Brown said, you would have immediately emailed back and said, "What on earth are you talking about? I don't understand." A. I don't think you can assume that at all."

96. Mr Brown copied his email replying to Mr Brady to Mr Ferguson, who was also asked what he understood Mr Brown to mean by "defeat" and "victory" in this context. Mr Ferguson's reply was as follows:

> "Q. What did you understand that Mr Brown meant by ensuring that "defeat is not snatched from the jaws of victory"? A. What we were trying to achieve is what we have talked about before and what Mr Brady was very eloquent about. What we wanted was a situation where we could have Mr Tinkler contributing to the board, contributing to Stobart Capital. We recognised that if the FlyBe Project Wright arrangement went ahead and it was private, that would change the situation. But we were hoping that we would actually manage to have a situation where we could carry out the plans that we had laid out. I covered this already this morning. Q. So your evidence is that the jaws of victory was the status quo? A. I think the jaws

> of victory was finding a way where Mr Tinkler and Mr Brady could continue to work together to the joint -- to create the prosperity of the Stobart Group and, hopefully, to develop Stobart Capital into a meaningful source of new investable ideas. That's what we had set out to do. Q. So your evidence is that the jaws of victory had nothing to do with him ceasing to be an executive director? A. I can't tell you what Mr Jonathan Brown felt when he wrote this email. I can tell you what victory would have been for me."

97. A few minutes after receiving Mr Brown's reply, Mr Brady forwarded the entire email chain to Mr Soanes. In the subject line of his first email (and, therefore, the entire chain) Mr Brown had inserted the legend "Private – LPPIAOL". It was common ground that this stood for "legal professional privilege in anticipation of litigation".

The StobCap Buyout Email

98. By email dated 26 January 2018 Mr Tinkler had written to Mr Ferguson asking to speak to the four main shareholders. Later that day Mr Ferguson forwarded that email to Mr Brady and Mr Wood. His comment on Mr Tinkler's position was: "I received this email from AT today, not what we wanted from him but not unexpected either." By email dated 27 January 2018 Mr Brady responded setting out a few points for a call with Mr Ferguson the following day. He pointed out the purpose for which SCL was set up and identified a number of issues of principle which included the following:

> "Any co-investment with AT needs to be post a resolution on the "Tax Indemnity". I cannot see how we can participate in any investment until this is resolved and remaining on the board without a clear path to a resolution is somewhat tricky. Stobart Capital as an entity is 49% owned by Ian Soanes and the AT/IS relationship seems to be strained in my view because of the above issues with IS making a firm stance on some of the issues around related party, favourable structured deals, and tax."

99. By email dated 6 February 2018 and timed at 10.57 Mr Soanes sent Mr Brady an email headed "StobCap buyout"****** with a spreadsheet attached and headed "Tax settlement scenarios"******. In the covering email the attachment line showed "Compromise.pdf" and Mr Soanes stated: "Have a look at this. I'll send some notes." In a second email timed at 11.03****** he forwarded the first email to Mr Brady again together with a second email discussing the spreadsheet.

100. I will use the terms "**StobCap Buyout Attachment**" and "**StobCap Buyout Email**" to describe the attachment to the first email and the second email which Mr Soanes sent to Mr Brady. In the email commentary Mr Soanes gave the following explanation about the spreadsheet:

> "The last chart shows the point at which SGL and WAT are paying the same to settle the tax claim, taking account of tax etc. SGL make no concession and the vendors pay ALL of the tax. Everyone takes the moral high ground. Buying in Stobart Capital (making it a subsidiary, which nobody would notice (though I know we need to be sensitive to related party disclosure)) gives room to compromise with WAT without a punitive NIC/Income Tax bill. If you accept my assumptions, SGL and WAT pay the same net amount (£1m) to settle the tax bill without SGL actually paying any of the tax. WS pays tax but will WAT care? In my scenario:
>
> – The vendors pay the outstanding tax bill – the Group makes no concession and everyone claims victory
>
> – Group buys in the shares in StobCap at a reasonable price relative to the commitments it has already made
>
> – StobCap becomes a captive unit (as most people probably thought it was all along, so no shocks there) with a sustainable business plan within the Group
>
> – Andrew saves face and we construct a new relationship between SGL/StobCap and Andrew – he's a consultant developing ideas and he has "favoured nation" status with Stob Cap for his own investments?
>
> – Nobody is taken to court and there are no threats which would harm all parties.
>
> Win, win, win?"

101. Initially, it was Mr Brady's evidence that he had no discussions with Mr Soanes about the tax dispute. But when he was asked about his email dated 17 December 2017, he accepted that it was likely that there had been some communication or discussion about the tax dispute with Mr Soanes. He accepted that Mr Soanes knew about the dispute but he could not recall how and why Mr Soanes had obtained the relevant information (which he described as "common knowledge").

102. Mr Soanes' evidence was that he had not discussed the tax issue with Mr Brady although he "touched upon it" in the days leading up to the StobCap Buyout proposal. It was also his evidence that Mr Tinkler was under a moral obligation to pay the tax. When he was taken to Mr Brady's email dated 27 January 2018, he also gave the following evidence:

> Q. And it's quite clear from this, isn't it, that you had discussed the tax issue

> with Mr Brady? A. Erm, I don't know whether there were any other tax issues at the time. It's -- Q. Well: "IS making a firm stance on some of the issues around related pay, favourable structured deals and tax." A. I had to take a firm stance around related party matters, favourable structured deals but not tax. Q. So you clearly discussed it with Mr Brady? A. I don't think so. Q. So how could Mr Brady possibly form a view about your view about tax matters without discussing it with you? A. Well, the tax dispute was pretty much common knowledge amongst the senior people within that group, and it was of concern to me. I did not have a stance to take. I wasn't -- I wasn't involved. Q. So is it your evidence that you didn't speak to Mr Brady about this at this time? A. When is this? Q. 27 January. A. 27 January. I have no recollection of speaking to Mr Brady about this subject at that time."

103. On 7 February Mr Brady forwarded the StobCap Buyout Attachment to Mr Ferguson and then the StobCap Buyout Email. In his second forwarding email he stated: "We may have a very neat solution for the tax for AT and provide win win for all. See Ian notes below."***** By email dated 8 February 2018 Mr Ferguson replied to Mr Brady: "Had good call with Ian today."***** On 8 February 2018 Mr Brady also replied to Mr Soanes stating: "I am resolute that we will find a solution where we can normalise all of the work that we need to do to create the value!"******

The StobCap Buyout Presentation

104. On 8 February 2018 Mr Soanes produced a detailed paper headed "**SGL/AT/SCL**"****** in which he explained his thinking in more detail. I will call it the "**StobCap Buyout Presentation**" and it began with the statement: "The relationship between SGL and AT isn't working." Mr Soanes then worked through the proposals which he had set out in the StobCap Buyout Attachment and the StobCap Buyout Email in more detail. In his witness statement dated 15 March 2019 in the ET Claim Mr Soanes also stated that on 10 February 2018 Mr Brady gave him permission to speak to Mr Tinkler about his proposal:

> "102. On 6 February 2018 I constructed some analysis [Volume 3, pages 1159 - 1161] describing a potential compromise solution involving the use of the share capital in Stobart Capital. The basis for the suggestion was that if Stobart Group put cash in Mr Tinkler's hands (to allow him to pay the tax bill without further income tax leakage) by acquiring his shares in Stobart Capital the tax on the amount involved would be 10% (being the entrepreneurs rate of Capital Gains Tax) rather than 61% and the saving would enable the parties to compromise without the value destruction that would have followed forgiveness of the liability. I sent the proposal to Mr Brady for his consideration.

> 104. On 8 February 2018, I wrote a paper [Volume 3, pages 1737 – 1739], which I had intended to present to Mr Tinkler, setting out the background to the suggestion and its consequences. In it I noted that by selling our shares, Mr Tinkler and I would forego the retainer income under the Management Agreement but we would enter into new arrangements which should deliver similar upside on success/performance. I noted other ways in which I considered the arrangement would benefit Mr Tinkler, including him setting up an unregulated business to avoid the regulation he clearly did not want. The proposal would also result in my becoming an employee of Stobart Group rather than running my own business and losing the benefit of the Management Agreement and control of the economics of the business, which would pass to Stobart Group. This was a very unattractive outlook for me but one which I was prepared to consider in the wider interests of Stobart Capital and its people.
>
> 105. On 8 February 2018 I told Mr Brady that I wanted to show the proposal to Mr Tinkler and asked if he had any objection. Having said he wanted to have a think, he responded on 10 February 2018 to say I could speak to Mr Tinkler about the proposal. I planned to speak to Mr Tinkler on 11 February 2018. Unfortunately and ironically Mr Tinkler's actions on that day prevented me from presenting him with the proposal that might have saved his relationship with Stobart Group."

105. On 10 February 2018 Mr Brady sent two text messages to Mr Soanes. The second text stated that he had intended to send them both a few days earlier but they had got stuck in his outbox (as he confirmed in his evidence). Mr Brady and Mr Soanes were both cross-examined at the Trial about the first text in which Mr Brady stated as follows:

> "I say that with the fact that I want AT to be a board adviser doing work that we outline. Let's agree an outcome for Group and Capital and see if we can do it together. I expect he will like to avoid actual payment!"

7 February 2018

106. On 7 February 2018 a meeting took place in SGL's offices at Stratford Place. It was attended by Mr Ferguson, Mr Brady, Mr Tinkler and Mr Hodges. The Judge described the meeting in detail at [174] to [180]. Mr Soanes had originally intended to attend the meeting but by email dated 6 February 2018 he explained to Mr Brady why he would not be there:

> "Andrew has suggested I don't attend the meeting tomorrow. I'm relaxed. I want this all sorted tomorrow and I'll be in or out of the meetings as needed to get a solution, I can see how it might be better for you and Andrew if I'm not there since I'm the third leg on the stool and I'm happy that you put StobCap (the team and me) after Group as long as you help

> me to find a solution eventually."

107. Mr Soanes was asked what he was referring to when he stated that he wanted "this all sorted tomorrow". His evidence was as follows:

> "A. This meeting was billed as a clear the air meeting, at Mr Hodges' behest. I was hoping that the air would be cleared. Q. Well, if the air was cleared, you wouldn't need a solution to be found for you eventually, would you, if you read to the end of that? A. The solution would be making it work. Q. Eventually, "As long as you help me to find a solution eventually," making it work, as soon as they have made it work, it works, there is no need for you to have a solution afterwards, is there? A. I don't think that they are going to miraculously make all the issues go away on one day, on 7 February. There is going to be a process of working all of this out. There was the -- you know, there was the tax dispute, there was the trying to replace the chairman dispute. It wasn't all going to go away in one day. There needed to be an agreement to find that solution. Q. Mr Soanes, you are obviously very well prepared in presenting your evidence today but this is another lie you are telling my Lord, isn't it? It's quite clear that what you had in mind: sort out Mr Tinkler first and then get me a solution? A. That's not the case."

108. Mr Brady kept a detailed note of the meeting in which he recorded that Mr Tinkler was "considering an Executive Chairman role" and used the expression "to brief shareholders against the board and the company" to describe Mr Tinkler's conduct. He also recorded Mr Tinkler as acknowledging that his actions were not acceptable.

109. At the Trial Mr Tinkler challenged the accuracy of Mr Brady's note of the meeting because the metadata showed that it was prepared between 16 and 19 February 2018 rather than on the following day (as Mr Brady had claimed). On 19 February 2018 Mr Brady sent the note to Mr Ferguson stating that "it would be a good file note for the future record". Despite Mr Tinkler's challenge, the Judge accepted that Mr Brady's note was accurate: see [179]. He also accepted that at the meeting Mr Tinkler recognised that his actions had been unacceptable: see [736].

110. Mr Wardell cross-examined Mr Brady about the note again and Mr Brady accepted that he had added the following paragraph to the note on 19 February 2018 (i.e. 12 days after the meeting itself):

> "On discussing the issue of AT involvement with the business we did outline that the CEO replacement and AT stepping back and investing in Stobart Capital was primarily his idea. Stepping down from the board as

> an Executive Director was part of the transition. AT basically then started talking about selling all his shares and existing entirely. Discussion circled around selling down to circa 5% and then AT should step down from the board, focus on Stobart Capital and be an 'Adviser to the Group'."

111. On 19 February 2018 Mr Ferguson also made amendments to Mr Brady's note adding the following sentence at the end: "The meeting concluded with all agreeing to keep these discussions private and agreeing that all directors have a fiduciary duty to support the agreed board strategy in external conversations." Mr Wardell suggested to both Mr Brady and Mr Ferguson that they were papering the file to create a false paper trail at a time when the Board had already decided to deploy Article 89(5).

12 February 2018

112. On 12 February 2018 Mr Brady sent an email to from his personal email account to Mr Soanes' personal email account attaching an extract from the Management Agreement including clause 8.3.3 (above) which gave SGL a right to terminate that agreement in the event of a change of control. In the covering email Mr Brady stated: "See the attached. I think this gives you some leverage around change of control".****** Over the course of the day Mr Brady and Mr Soanes exchanged the following emails at the following times:

> "Thanks. I have some ideas. Any chance we could meet this evening?"
>
> *Soanes to Brady* (13.29)**

> "I am at home this evening in Manchester and then get first train to London. Happy to have a call or meet tomorrow eve. We do need a way out of this. Just spoken to AT and he suggests this is a favour to you!"
>
> *Brady to Soanes* (13.39)**

> "Ok. Let's meet tomorrow evening and I can get some proper proposals together. There will be an answer if AT isn't too destructive. Even then I think we can muster plenty of leverage, provided we're prepared to use it! Taking advantage of my situation to describe this as a favour is pretty low."
>
> *Soanes to Brady* (13.46)**

> "Agree, appalling behaviour."
>
> *Brady to Soanes* (21:50)**

> "Could we meet for 10 minutes on your way in? Euston might be best. I think a small thermonuclear device has just detonated in Carlisle."

Soanes to Brady (23:44)**

113. In the event Mr Brady and Mr Soanes did not meet on 12 February 2018 but on 13 February 2018 instead. That night Mr Brady sent an email to Mr Soanes stating: "What is your reason for going from £2.5m for equity for each party to £5m. What's the difference?" This was a reference to figures which Mr Soanes had used in the tax settlement scenarios which he set out in the StobCap Buyout Attachment and also in the StobCap Buyout Presentation.

Mr Soanes' Resignation

114. On Monday 19 February 2018 Mr Soanes wrote to Mr Tinkler resigning from SCL. The Judge explained the detailed background to his resignation in the Judgment at [184] to [192]. Over the previous weekend Mr Tinkler had found the email chain from Mr Brown dated 5 February 2018 (above) and a draft email bearing the date and time 17 February 2018 and 08.49 am in which Mr Soanes stated that he planned to resign and asked to be retained by SGL. This draft contained the inflammatory comment: "AT would enjoy that! It would show AT which of you was calling the shots!"

115. On the same day, Saturday 17 February 2018 and timed at 10.04 am Mr Soanes sent this email from his personal email address to Mr Brady in substantially the same form. By email timed at 5.50 pm Mr Brady tried to discourage Mr Soanes from resigning and making a claim for constructive dismissal and he proposed a call the following day. The text of his email was as follows:

> "Can we chat Sunday. Some thoughts for you to think about:
> - Project Forte and Project Wright are all unfolding in next couple of weeks. I want to avoid the distraction of having to deal with Andrew at war with you. Big picture we need to choreograph timing and action to ensure all parties
> - Resignation is just not the way forward as step 1. I will explain why constructive dismissal is not good for you versus other forms of exit
> - Stobart Group purchase of your share of SCL. That is not an option for SG. Why would we enter into a partnership with AT as a 49% shareholder?"

116. The Tribunal accepted Mr Tinkler's evidence that he suspended Mr Soanes because he discovered the draft email and considered that he had been disloyal (rather than because he had made any protected disclosures). The Tribunal also found that the exclusion of

Mr Soanes from SCL for a period of four weeks amounted to a breach of SCL's duty of trust and confidence and that he resigned in response to this exclusion: see the ET Decision, [158] to [173]. However, because Mr Tinkler had not excluded Mr Soanes from SCL for making protected disclosures and because he had less than two years' service, the claim for automatically unfair constructive dismissal failed.

117. For the sake of clarity, I should record that the evidence before both the Judge and the Employment Tribunal was that Mr Tinkler found the draft of the email to Mr Brady on Mr Soanes' SCL email account and not on his personal email account: see the Judgment, [191] and the ET Decision, [91]. Mr Soanes' evidence in this action was that Mr Tinkler accessed his personal email account and found the draft email there.

The First Article 89(5) Notice

118. On 22 February 2018 Mr Tinkler spoke by telephone to Mr Brady whose note of the conversation recorded that he expressed dissatisfaction with Mr Ferguson: see [194]. On 26 February 2018 Ms Brace circulated a notice to remove Mr Tinkler as a director under Article 89(5). She sent it to Mr Ferguson, Mr Coombs, Mr Laycock and Mr Wood. She did not send it to Mr Garbutt or to Mr Brady (or, indeed, Mr Tinkler).

119. In the covering email Ms Brace asked each of the four directors to sign it, scan it and send it back to her retaining the original. She also stated: "I am in meetings with Warwick from 12 to 4 pm but can call after if any queries at all." I deal with the question whether Mr Brady signed the resolution (below). But the evidence before the Judge was that <u>all</u> of the other directors apart from Mr Garbutt signed it: see [195].

The Travers Smith Memo

120. Mr Ferguson and the remaining members of the Board appreciated that they could only exercise their power under Article 89(5) on a rational basis and in the interests of SGL. On 26 February 2018 Ms Brace circulated a memo prepared by Travers Smith which canvassed the reasons for his removal (the "**Travers Smith Memo**"). It contained a series of statements which purported to represent the views of the Board:

> "The Board of Directors of the Company (other than AT) have concluded that AT's position has become untenable and that there has been an irreconcilable breakdown in the working relationship.

> AT is bringing the Group and its Board into disrepute by making public what should be an internal disagreement on strategy to be debated by the Board. By making this public AT has breached the agreement reached at a meeting on 7 February 2018.
>
> AT clearly no longer has trust in the Group's Board and executive team and his actions now mean they have no trust in him. It is impossible to see how his employment and directorship can continue in that situation.
>
> Unfortunately, it is clear that there is insufficient trust between AT and the Company and that there has been an irreparable breakdown in the trust necessary for a successful employment relationship to continue. AT's actions also appear to amount to serious misconduct and a breach of his fiduciary duties."

121. Under the heading "Proposed Dismissal Process" the Travers Smith Memo set out the procedure which the Board had been advised to adopt to terminate Mr Tinkler's employment:

> "AT's employment will be terminated using a short form process. This is principally so that the business can move forward expeditiously. A more protracted process potentially involving a more formal procedure was considered but it was felt that this would not be appropriate given AT's seniority, his failure to change his behaviour after concerns were raised with him, and the very public way that AT is bringing the Group into disrepute.
>
> The plan is to invite AT to a meeting at which he will be informed that his employment is being terminated. AT will be provided with a letter issuing him with notice of the termination of his employment under the Service Agreement and placing him on garden leave for his 12 month notice period. AT will also be handed a letter removing him as a director of the board."

122. Mr Wardell cross-examined all four members of the Board who gave evidence before me about the Travers Smith Memo and I deal with each witness in turn. After taking Mr Brady through the memo, Mr Wardell suggested to him that: "This was not a drill was it?" Mr Brady's answer was that it was "an option which we didn't exercise." Mr Wardell then put it to him that the Board did not dismiss Mr Tinkler but only because Mr Garbutt refused to sign the notice:

> "Q. Look at the last sentence: "AT will also be handed a letter removing him as a director of the board." That's 89.5, isn't it? A. No, I would say that's definitely not 89.5. You remove someone as an employee, they need to resign as a director as well. Q. But if you want to remove him as a director, you need 89.5. A. He may not have agreed, but we had two options, 89.5, which obviously, if Garbutt didn't sign, left, was not an

> option, even despite me not signing, and the other option -- you can terminate an employee, based on whatever grounds you have. If they are a director as well, of course they may not resign as a director and that might be a different dispute, but certainly from an employment perspective, we could remove Mr Tinkler. We decided not to do that, and that was basically between myself and Iain. We genuinely thought there was a better way to try and work with Mr Tinkler."

123. I then asked Mr Brady some questions about the statements (above) which purported to record the views of the Board at the date of the memo. His evidence was that it was necessary to have written grounds for termination:

> "MR JUSTICE LEECH: So was this just words that Travers Smith had prepared for you or did this genuinely reflect the feelings of those members of the board apart from Mr Tinkler? A. So, I think -- I think the theme is pretty accurate, right, in terms of the feeling of the board was quite -- I think it's reasonably accurate. The detailed words, obviously, were not written -- were written by lawyers and making sure we had grounds for termination, and these were the grounds for the termination. As I said, we didn't -- we thought -- when we considered it and looking back, you know, that's pretty strong grounds. We actually -- but you do have to think what's best -- what is the best interests of the company."

124. Travers Smith's time entries showed that on 6 February 2018 they prepared a letter to Mr Tinkler and that on 26 February 2018 they prepared a settlement agreement and met Mr Soanes (who could not recall the meeting but said that he imagined that he was asked to provide them with information). Mr Wardell took Mr Brady to those entries and asked him again whether the Board intended to go through with Mr Tinkler's dismissal:

> "Q. You were going to press the button at the end of February. A. It was definitely an option, no question. We were very serious, we were really under attack. We were very serious about potentially removing Mr Tinkler, which we decided -- because obviously we didn't push the button, right? The facts are the facts. We genuinely thought, in the best interests of the company, as the chairman myself, and the board, we thought, despite all of what's going on, we still think there is a way we can work with Mr Tinkler and it was not in the best interests of the company; otherwise, we would have terminated him."

125. When Mr Ferguson was taken through the Travers Smith Memo, his evidence was that the Board had not reached the position where the remaining members believed the statements set out for them by Travers Smith and if they had, they would have dismissed Mr Tinkler:

> "Q Is it true to say that, as at 26 February, you thought, together with the rest of the board, that there was insufficient trust between Mr Tinkler and the company and that there had been an irreparable breakdown in the trust necessary for a successful employment relationship to continue? A. If we had -- if that had been our conclusion, we would have fired Mr Tinkler. Q. I'm asking you what your position was as at 26 February? A. I've just told you. If I had believed -- Q. (Overspeaking) ifs and buts. A. I think I need to put an "if" in. If I had believed that on 26 February, Mr Tinkler would have been fired. Q. But you tried to do that and failed on 26 February, didn't you? A. We looked to see what the board felt about an 89.5 order and not everybody agreed with that. But we did have another mechanism whereby we could have fired Mr Tinkler. Q. If you keep telling my Lord that that's privileged and you are not meant to be talking about it, why do you keep mentioning it? I'm not allowed to ask you about it. MR JUSTICE LEECH: You could have fired him as an employee, couldn't you? A. You have exactly the point, my Lord. MR WARDELL: But to get him off the board, you need 89.5. MR JUSTICE LEECH: You could have dismissed him as a director under the power of the Companies Act. A. We could have done, we had other mechanisms, my Lord. You are absolutely correct."

126. Mr Wardell also put it to both Mr Brady and Mr Ferguson that the Travers Smith Memo was inaccurate. It stated that Mr Tinkler had broken the agreement reached at the meeting on 7 February 2018 referring to the last paragraph of Mr Brady's note of the meeting which Mr Ferguson had added to the draft on 19 February 2018. Mr Brady could not recall whether Mr Tinkler had broken this agreement but Mr Ferguson accepted that the Board had no evidence to this effect on 26 February 2018:

> "MR JUSTICE LEECH: I think you are being asked about the accuracy of the factual statement. MR WARDELL: Exactly. MR JUSTICE LEECH: That Mr Tinkler had broken the agreement reached at a meeting on 7 February. I think it's being suggested that no such agreement was made on 7 February. A. Well, there was -- there was a general understanding that we should try not to wash our dirty linen in public. I think that's what we agreed. MR WARDELL: And what I was really putting, or I hoped I was really putting, is there was no possible breach by Mr Tinkler post 7 February. A. Of washing the dirty linen in public? Q. Yes. You had no information at all at that time that Mr Tinkler had in fact gone back to shareholders after 7 February. A. I think that might be correct."

127. When he came to give evidence Mr Coombs also rejected the suggestion that the Board would have used Article 89(5) to dismiss Mr Tinkler if Mr Garbutt had been persuaded to sign the notice. His evidence was that the Article 89(5) resolution was intended to be used as leverage:

> "Q. And your understanding at the time was that 89.5 was going to be used

> provided Mr Garbutt signed up to it? A. Well, no, I think what -- if I look back now -- and my recollection as far as I have got it is the next step would have been for Ian to sit down with Andrew to try and get a resolution and a negotiation with Andrew as to what did he want and how did we resolve it. To negotiate with Andrew, as Iain would have known, we'd all have known, he's a tough negotiator, you need to have some substance behind your negotiation. So they needed -- Iain needed the 89.5 in his back pocket if he was going to have that negotiation. But to actually go to dismiss him as -- this wouldn't have been the way if we actually wanted to get rid of him. If we wanted to get rid of Mr Tinkler straight away, we would have dismissed him as an employee and by dismissing him as an employee, he would have been obliged to resign as a director. So there was a clear way we could have got rid of him immediately, had we wanted to, but that didn't allow -- that wasn't what we actually wanted to do. My recollection was you wanted to negotiate and see can you come to a settlement whilst still retaining -- we wanted Stobart Capital to work and, ideally, one would want to have Andrew remaining as a non-exec on the board. That would have been a perfect solution going forward and, therefore, having a tough discussion but not actually dismissing him would have been the way to have got to that."

128. Mr Coombs was quite candid, however, that he thought the prospects of a negotiated settlement were slim:

> "A. So I think you are asking what was the likelihood that we would get a negotiated settlement. MR JUSTICE LEECH: Yes, I suppose I am, yes. A. In the context that Andrew had said, "I do not want to work with Mr Ferguson, I want him off the board," the odds of getting a satisfactory outcome for all parties were probably not that good, but going in with a weak position wasn't going to get you anywhere, going in with a strong position had, I think, some chance but I would be wrong to say it had a great chance of succeeding."

129. Finally, when Mr Wood was taken to the Travers Smith Memo he accepted that he must have seen it but he could not remember its contents. Mr Wood made no mention of the memo in his witness statement in the 2018 Claim and Mr McWilliams suggested to him that the true position was that he had resolved to dismiss Mr Tinkler come what may:

> "Q. Okay. But you don't make any mention of having seen this document in your witness statement, do you? A. No. Q. The truth of the matter is that you had resolved at this time, hadn't you, to remove Mr Tinkler, come what may, at the end of February? A. No. Q. Not only that, you had planned how you were actually going to do it because that's what this memo says, isn't it? A. No."

Mr Laycock's Service Agreement: First Side Letter

130. On 1 February 2018 Mr Laycock was appointed as CFO: see the Judgment at [13]. By letter dated 27 February 2018 (the "**First Side Letter**") Mr Ferguson wrote to him stating that SGL was willing to vary his service agreement to give him 12 months' notice of termination in certain circumstances. These events included significant changes to the Board or shareholder action which resulted in SGL giving him notice or a strategic change of direction. Mr Ferguson also stated that if he was given notice for any of these reasons he would be treated as a good leaver for the purposes of his LTIPs. Mr Laycock agreed to these proposals and both he and Mr Ferguson executed the First Side Letter as a deed (presumably because of a concern that there might be no legal consideration for the variation).

131. On 26 and 27 February 2018 Mr Brady exchanged a series of text messages with Mr Laycock which dealt both with the Article 89(5) notice and the changes to his terms of employment:

> "Suggest you urgently call Andrew Wood and Iain F as you really need to understand the risks to the Group. Not easy for a new Exec Director!"
>
> *Brady to Laycock* (26 February 2018, 17.40)
>
> "Did you speak to them?"
>
> *Brady to Laycock* (26 *February* 2018, 19.21)
>
> "I have spoken with lain F and Andrew W. Want to speak with John C and hope to do so first thing. Would you send me the advice from Travers Smith to the Board. Thanks."
>
> *Laycock to Brady* (26 February 2018, 21.15)
>
> "Sure"
>
> *Brady to Laycock* (26 *February* 2018, 21.20)
>
> "Richard, spoke to lain F and he will have your letter over but we do need you to sign the other letter! Please let me know urgently. Thanks Warwick."
>
> *Brady to Laycock* (27 February 2018, 11.40)
>
> "Richard – signed side letter signed by Iain F and sent over. Thanks Warwick."
>
> *Brady to Laycock* (27 February 2018, 12.08)
>
> "Thanks Warwick I have spoken with Tony. Will sort out this letter this evening."

Laycock to Brady (27 February 2018, 19.06)

> "Great/we need the leverage even if we don't use it."

Brady to Laycock (27 *February* 2018, 19.08)

> "Warwick, I have sent the signed letter to Louise's personal email address. After nearly 10 years working at Stobart and less than a month as a Board member, it is very unfortunate that I find myself in this difficult position but you and lain have my full support to take the Board forward. I believe this is in the best interests of the Group. I strongly advise not using this letter as leverage until you have unanimous signatures as it is not powerful without that and is likely to lead to more issues and embarrassment. History would suggest that AT will not accept a reasonable compromise arid we should be prepared for a formidable reaction from him. Richard"

Laycock to Brady (27 February 2018, 22.17)

> "Richard, thank you for your support. Agree that without a "full plan" which unanimous it has little value. My personal objective is to work with Andrew as the combination is powerful but it does require a certain trust and to have to continually worry about being ambushed is no way to run and build a company Will revert as our plans unfold. Thanks Warwick."

Brady to Laycock (27 February 2018, 22.38)

12 March 2018

132. By email dated 12 March 2018 Mr Wood wrote to Mr Garbutt stating that he had discussed the "Board issue" with Mr Ferguson and wanted to understand Mr Garbutt's position. He also stated that since this issue would almost certainly escalate, he was likely to be drawn into it as the senior independent director. Mr Wood accepted that the "Board issue" to which he was referring was the problem with Mr Tinkler:

> "Q. And you want to have a chat with Mr Garbutt about it so you can understand his position because you know he has refused to go along with 89.5, don't you? A. That's correct, yes. Q. And you think this is going to escalate and you will be drawn into it? A. Correct. I think there was a risk it was escalating. It did. Q. So as at 12 March, you don't really think things can be amicably resolved, deep down, do you? You think it's going to end one way? A. I thought it would more likely end up in confrontation but I was hoping that we could still resolve it amicably and, in fact, we tried to do that right up to the 11th hour. Q. And you are trying to persuade Mr Garbutt here to change his mind on 89.5, aren't you? A. No, I wanted to understand his position on it."

18 March 2018

133. On 18 March 2018 Mr Brady and Mr Soanes exchanged the following WhatsApp messages at the following times:

> "I've reflected on our conversation. There are clear legal processes to follow to deal with my claims so I think I should just press on with them. That shouldn't cause you to feel under any pressure. As you said, Wright will probably play out before anything becomes public. I think it's important that you have an idea of what's happening so you can be prepared. There are scenarios that we should discuss some time. If my claims succeed and you're refusing to pay fees to SC the business will become insolvent unless he funds it. The dynamics become interesting. The problem for me is that I can't afford to incur big legal fees in case SC becomes insolvent and he lets it go bust. You can help me with a comprehensive response to my Data Protection Act request. That and the Hill Dickinson point must help you when he's accusing you of failing to follow due process! You should start serving legal letters on him rather than the other way around!"
>
> *Soanes to Brady* (14.16)**
>
> "Thanks Ian. We have a plan but we need to get Wright over the line and not disturb sources of funds. Not what you want to hear! On SC we are simply evaluating our options so nothing is set. It is just painful for all but are aware it's not easy for you."
>
> *Brady to Soanes* (14.28)**
>
> "Thanks. Understood. We should stay joined up on tactics re SC. I'm very uncomfortable about reports to regulators etc which probably means months of aggravation but don't think I have any choice given what AT has done. I do expect to need help with back up, evidence, witness statements etc in due course and support if he gets very nasty. I'm hearing more about what he's capable of doing! Hope the weather doesn't upset your travel plans."
>
> *Soanes to Brady* (14.39)**

2 May 2018

134. The Judge described the period between the end of February and the middle of April as a period of relative quiet: see [197]. On 23 April 2018 the dispute crystallised at a meeting between Mr Tinkler, Mr Brady and Mr Ferguson: see [202] to [204]. On 1 May 2018 a meeting also took place between Mr Tinkler, Mr Brady, Mr Ferguson and this time Mr Hodges at which Mr Tinkler expressed the view that Mr Ferguson should stand down. On 2 May the following WhatsApp exchanges took place between Mr Soanes and Mr Brady at the following times:

> "Mark is not a supporter and a fight is the very last thing Neil wants now.

> Plus Paul has his own issues and won't be allowed to drag cenkos into a public fight. The board still holds all the cards. Don't believe the bluff. There is realistically nothing to fear. But you've got to get your act together!"
>
> *Soanes to Brady* (11:02)**
>
> "You are right quick question when are you putting in tribunal."
>
> *Brady to Soanes* (11:03)**
>
> "Today"
>
> *Soanes to Brady* (11:04)**
>
> "So when does it become public"
>
> *Brady to Soanes* (11:12)**
>
> "To be honest I don't know. I asked my solicitor if it was discoverable and he wasn't sure. My guess is that it isn't public until the hearing itself, and there might be a preliminary hearing late summer, but I'm not sure"
>
> *Soanes to Brady* (11:17)**
>
> "Ok thanks"
>
> *Brady to Soanes* (11:20)**
>
> "So other question is when does AT get the news"
>
> *Brady to Soanes* (11:39)**
>
> "In about a week I think"
>
> *Soanes to Brady* (11:46)**
>
> "Ok"
>
> *Brady to Soanes* (11:56)**

7 May 2018

135. After the meeting on 1 May 2018 Mr Brady and Mr Ferguson took steps to contact shareholders as the Judge recorded: see [209] to [215]. On 7 May 2018 the following WhatsApp exchanges took place between Mr Brady and Mr Soanes at the following times:

> "Ian, when is your note going to land? Hope your [sic] enjoying the break/weather? Thanks W."
>
> *Brady to Soanes* (14:42)**
>
> "Just trying to understand re full year results lots happening."
>
> *Brady to Soanes* (18:41)**
>
> "You mean the tribunal claim? I can't be certain but would guess end of this week."

Soanes to Brady (20.52)**

"Yes. I am sure Nick W updated you!!! Chairman seems to now finally grasp the nettle but it's going to get ugly."

Brady to Soanes (20:53)

"Sounds interesting. Let me know if I can help. I haven't spoken to Nick. Might see him this week."

Soanes to Brady (20:54)

11 May 2018

136. On 11 May 2018 the following WhatsApp exchanges also took place between Mr Brady and Mr Soanes at the following times:

"Ian, quick one? Are you going to write to Chairman outlining the action you are taking to ensure we are aware? Thanks Warwick."

Soanes to Brady (16:58)**

"I'm not sure that would be appropriate. We can certainly meet to discuss it. I spoke to Nick on Wednesday and have some further thoughts."

Soanes to Brady (17:00)**

"Did Nick explain the whole situation?"

Brady to Soanes (17:01)**

"He didn't say too much so perhsps [sic] not."

Soanes to Brady (17:03)**

"Ok so let's talk next week if your [sic] in London!"

Brady to Soanes (17:38)**

"…It would help me to have an agreed version of what we're all trying to achieve."

Soanes to Brady (17:44)**

14 May 2018

137. On Tuesday 15 May 2018 and timed at 11.07** Mr Soanes sent a WhatsApp message to Mr Brady stating that he had met Mr Arch the previous day and that Mr Arch had told him that Mr Brady and Mr Ferguson would be together on Thursday 17 May 2018.

17 May 2018

138. On Thursday 17 May 2018 Mr Soanes was able to meet Mr Ferguson (as he had hoped). Mr Ferguson made a handwritten note of this meeting. At 8.13 am that morning Mr Soanes sent the following text message* to Mr Ferguson:

> "Good morning Iain. I hope you're as well as can be expected. Warwick says that you are able to meet between 1 and 2 today. Where would you like to meet? I have meetings in the City before and the West end after so either is fine for me."

25 May 2018

139. On 21 May 2018 Mr Soanes texted Mr Brady suggesting that he joined the Telegram messaging service stating that: "Apparently telegram is more secure than WhatsApp". On 27 May 2018 he repeated the request stating again that it was more secure. Between the two messages, however, Mr Soanes and Mr Brady continued to use WhatsApp and on 25 May 2018 the following exchange of messages took place at the following times:

> "What is going on?? Have you told the shareholders what he has done?? Can I help?"
>
> *Soanes to Brady* (19:21)**
>
> "Will message later but what a mess."
>
> *Brady to Soanes* (19:35)**
>
> "I said only last week to Iain that you had to act before shareholders had a chance to express a view. They wouldn't have backed him if you had already acted. Now you've made it more difficult. It has to be said the board is making a complete horlicks of this. You might actually snatch defeat from the jaws of victory. I can't let that happen. I'm on a train but we must speak very soon.
>
> *Soanes to Brady* (19:40)**

The 25 May RNS

140. On 25 May 2018 SGL issued the 25 May RNS announcing that Mr Tinkler would be voting against the re-election of Mr Ferguson and that two other shareholders would be voting with him. It also announced that all of the directors standing for re-election (i.e. those directors apart from Mr Tinkler and Mr Garbutt) had full confidence in Mr Ferguson and would be recommending his re-election. The Judge described the announcement as both neutral and balanced: see [247].

The Appointment of the Committee

141. On 28 May 2018 a meeting also took place at which the Board appointed Mr Brady, Mr Coombs and Mr Wood as the committee with full authority to exercise the powers of the Board: see [253] to [259]. The Board resolved that the Committee should not include either Mr Ferguson or Mr Tinkler because they were interested parties or Mr Garbutt because he was standing down. The minutes also record that Mr Laycock felt that it was best that he did not become a member of the Committee because of his long history of working with Mr Tinkler.

142. It was common ground that the Committee permitted Mr Ferguson to join its meetings and to speak at them. He also continued to communicate with individual members of the Committee. By email dated 25 May 2018 Mr Wood wrote to Mr Ferguson stating as follows: "Given that AT has previous, would it not be worthwhile to build up a picture of previous incidents? Not sure who would be best placed to do this but let me know what you think." Mr Ferguson replied: "Yes, I agree. Strangely enough Ian Soanes just might be the man to do this----- let's think about it next week." In cross-examination he accepted that the Board enlisted Mr Soanes' help for this purpose.

26 May 2018

143. On 26 May 2018 Mr Arch emailed the members of the Committee recommending that they issue a "hard-hitting announcement" on 29 May 2018 (which was the day after the Whitsun Bank Holiday). On the same day Mr Brady sent an email to Mr Ferguson stating: "We are all thinking about the strategy for ensuring we win this very difficult battle and get on the front foot." Mr Ferguson replied: "I think you and I should try to speak together sometime tomorrow before we have a group call."

The 29 May RNS

144. On 28 May 2018 the Committee held a Board call and resolved to send out another RNS the following day. Mr Garbutt was not a member of the Committee and at the Board call he raised a concern about the Committee's independence:

> "Sorry Andrew, just to make one point about the difficulty of forming this committee, whatever its purpose exactly maybe, as you say its perhaps somewhat unclear, but the point about independence of the members of that committee, yourself and John have clearly signed up with lain and that's of course your choice, and Warwick, and Warwick's on the line and I don't know Warwick's position but clearly erm its not independent in that

> sense that it's not independent in the sense that one would perhaps prefer that it was, the members not being committed one way or the other to one side or the other in this situation, so I guess what concerns me two-fold. One, as I said, what exactly is the committee going to do, and as you say perhaps we don't know at this point but more importantly that the members of it are not independent in the sense they are non-exec but obviously yourself and John have already committed yourselves to one side of things and therefore my concern is that it's not an independently constituted committee."

145. When the 29 May RNS was released Mr Tinkler found it very offensive. The Judge set out the background to the 29 May RNS, its contents, the passages to which Mr Tinkler objected and the reaction to it at [260] to [276]. It was (and remains) Mr Tinkler's case that its purpose was to publicly discredit him and to persuade shareholders to vote in favour of Mr Ferguson. The Judge expressed the view that it was unwise and inappropriate to issue the 29 May RNS but he did not find that it amounted to a breach of duty: see [788] to [794]. It was put to Mr Brady that the Board was planning to terminate Mr Tinkler's employment when the announcement was made:

> "Q. You were planning to terminate Mr Tinkler's employment at that time?
> A. No, we had no plans of -- we hadn't -- we had looked into, as you know, previously, we could use 89.5 or we could use another method to terminate his employment. We had reviewed that, and we had considered obviously that was not in the best interests of the company. At this point on that weekend, we were not thinking about whether we were going to terminate Mr Tinkler or not, we were thinking about making sure that we were prepared for the AGM and to win the AGM as well put out an RNS that gave all shareholders a structure and reasoning behind what was happening in the company. We thought that was -- you know, we thought that was our duty as directors of the company to do that."

146. Mr Laycock was not a member of the Committee either and he also expressed his concern that he should not be associated with the 29 May RNS. By email dated 29 May 2018 he wrote to Mr Ferguson with a copy to the other Board members stating:

> "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 Ongoing Board does not include me in the definition in a number of places I suggest an amendment urgently."

147. By email dated 4 June 2018 Mr Wood asked Mr Brady whether Mr Laycock was still supportive and Mr Brady answered: "Yes he is supportive of the Chairman and the board – if he changes now it will be very difficult for him."* This prompted the comment from

Mr Wood: "Would be a touch tricky for us as well!"* Mr Brady concluded the exchange by stating: "Agreed. I spent time with him yesterday and so hopefully he knows what the right thing to do is but will follow up with him."*[3]

6 June 2018

148. By email dated 6 June 2018 Mr Ferguson wrote to Ms Brace (with a copy to Mr Brady). Ms Brace was preparing a submission to the Takeover Panel with the assistance of Mr Leon Ferrera, a solicitor at Jones Day, who were acting for Invesco. In that email Mr Ferguson stated as follows:

> "Happy to help with this one thing we need to be careful about is ATs assertion that we are not independent Directors -- we don't want to give him ammo in this direction In summary John and I worked together for 2 years at Unilever 2001—2003 John reported to me but was operating as the CEO of an autonomous business unit and had considerable independence within an agreed strategic plan. Andrew and I first meet in 2010 when we were both appointed as NEDs on the Berendsen Board we then both joined SGL in 2013. In terms of when AT might have concluded that we would support each other I suspect it was when we first got TS and Tony Foster involved in February and John Garbutt took a different view and almost certainly told AT about the matter."

149. Mr Coombs followed up Mr Ferguson's email by sending two emails of his own to Ms Brace (who also forwarded them on to Mr Ferrera). In those emails he stated as follows:

> "I had a phone conversation with Andrew T on the evening of May 23rd, his intent was to persuade me to persuade lain to step down gracefully, along the lines that he's done a good job, share price well up go with dignity. He obviously acknowledged that I have a long history with lain and so might be able to do this. I laboured the point that if lain went then AW and I would go and Warwick would be close behind. And that if Warwick went the market would lose all confidence in ever getting Southend to work. He got cross and said he would sign the Ryanair deal because it was done and anyway it was a soft deal. He didn't dispute the fact that we would all go. I first worked for lain 19 years ago, we worked intensely together for 8 months setting up Unilever Ventures, he was then my line manager for the next two years. Once he left Unilever we continued to meet up every 6 months or so for dinner. It was st [sic] one of these that he first mentioned the Stobart Board role. Only risk in making this public, is does it make me not look independent?"
>
> "I think an important point to include in this discussion was that AT was

[3] It is unclear whether Mr Tinkler's case is that all of these exchanges were undisclosed or only the email from Mr Wood. I assume in his favour that the entire exchange was not disclosed.

> fully aware of Iain's prior relationship with AW and I at the point of our recruitment, my understanding is that he raised no objections then so what's changed?"

150. Mr Wardell took both Mr Brady and Mr Ferguson to the email which Mr Ferguson had sent to Ms Brace. He asked Mr Brady how he could properly allow one shareholder to participate in this process and Mr Brady's evidence was as follows:

> "Q. How can you properly allow one shareholder to be involved inside the tent in writing submissions to the takeover panel? A. I was -- I personally was not allowing anything. These are our largest shareholders and they were taking a number of initiatives that they were taking on their own. Q. But it was your submission to the takeover panel. I thought it was a fundamental part of company law that as a board, you can't give information to one shareholder without giving it to all. A. Generally -- I think there are some exceptions but I think generally as a rule, you would obviously distribute information to all shareholders. I'm not sure this is -- I think it's not as black and white as that because otherwise companies would have a very difficult -- it would be very difficult to operate in a company if you only -- you only communicated with all shareholders all of the time. Q. But getting a shareholder on board to fight a campaign in that way is allowing them to be insiders, isn't it? It's grossly inappropriate. A. I can't remember at the time but I certainly think you can bring the shareholder inside and have inside discussions which then prevented them from trading. I would have said, if I was sitting on their side, they would have governance themselves, if they were talking to us on insider issues, they would be (inaudible) inside and in that case, because you just reminded me, you are allowed to talk to your shareholder as long as they can't trade."

151. When his email to Ms Brace was put to Mr Ferguson, his evidence was that in special situations it was permissible to involve shareholders like Invesco in such a submission (even though its name would not appear on the relevant submission) or to disclose privileged information to shareholders provided that they did not trade whilst they were insiders. Mr Wardell asked Mr Ferguson directly whether it was inappropriate to involve Invesco and he answered as follows:

> "Q. I'll try again. Do you think it was appropriate to allow Invesco to participate in the campaign involving the press and the Takeover Panel? A. Well, what they were being asked to be involved with here, I think, was principally the preparation of the RNS for 25 May, but also looking at making a submission to the Takeover Panel, and our brokers -- by that stage, effectively, we were really not using Cenkos, for the obvious reasons of Mr Hodges' partisan approach, but we were using Stifel, and Stifel were very much involved as our brokers in the application to the

Takeover Panel."

The Briefing Note

152. Mr Brady was also taken to a document which he prepared using the Apple Notes App which the parties called the "**Briefing Note**"*. Mr Tinkler's pleaded case was that Mr Brady prepared it in advance of the AGM in July but Mr Brady's evidence (which was not challenged) was that it was prepared on 28 August 2018 for a meeting with Mr Williams of Miton. The Briefing Note recorded as follows (my emphasis):

> "**What do we think AT has been saying**
> Renumeration for WB and Aviation driving risk
> Victim of the board and shareholders for the breach of fiduciary duty and tax case
> What has WB done in his first year?
> **Board are not independent**
> If AT were back in the business AT would never cut the dividend"
>
> "**Answers:**
> Commerciality Andrew was not visible operationally for 6 months or so in the run up to his departure He did play a role in non operating assets however Furthermore Energy has been enhanced with Steve Potter and Stewart Winchester and we have a new COO for LSA As the two biggest growth businesses they are in good shape Furthermore new
> commercial director in Rail recently started of good pedigree My continued input also
> alongside new CFO to support you Investment plan in to management development also with people plan.
> Customer and Quality - performance key to longterm value Did not land the Energy service metrics during the last meeting Long term contracts with good supply chain for Energy Great quality of earnings levering niche logistics/'supply chain Qualitative MI to be provided also.
> Believes next few years companies will be in difficulty there will be a lot of opportunities for the likes of Stobart Group with strong balance sheet We have a constant conveyor belt of opportunities of an MA nature.
> What has WB done in his first year Management appraisal/strengthening structure for sharing timely info/MI to make informed business decisions Advanced dialogue/ subscription to LSA with operators.
> **(A) Board are not independent (B) Whatever the view best practice process for new appointments.**"

153. Mr Wardell suggested that in the first extract from the Briefing Note Mr Brady recorded that Mr Tinkler was or might be saying that the Board was not independent and that in the second extract he was accepting that criticism. Mr Brady's evidence was that in the

second extract he was doing no more than recording Mr Tinkler's statement again: see (A) (above) and giving his response: see (B).

Project Shelley

154. By letter dated 6 June 2018 (the "**Stifel Engagement Letter**") Mr Arch wrote to Mr Brady setting out revised terms of Stifel's engagement as SGL's joint corporate broker and on 18 June 2018 Mr Brady counter-signed it on behalf of SGL. It was headed "**Project Shelley**" and it provided that Stifel would provide additional services which included advising the Board on communications with institutional shareholders and securing their votes in favour of Mr Ferguson's re-election at the forthcoming AGM. Clause 1(d) provided for a fee of £10,000 per week and clause 1(e) provided for the payment of a success fee of £100,000 in the event of his re-election. Clause 1(f) also provided that Stifel was entitled to take instructions from Mr Ferguson in connection with the engagement.

155. Mr Brady accepted that the aim of the Stifel engagement was to secure the re-election of Mr Ferguson. He said that the Board was on a "war footing" and when Mr Wardell suggested to him that it was contrary to good corporate governance to allow Mr Ferguson himself to give instructions to Stifel, his response was as follows:

> "Q. There is an AGM coming up. Your shareholders are going to vote on the reappointment of Mr Ferguson and the re-election of Mr Tinkler. It's extraordinary, isn't it, to set up a committee full of people who are all against Mr Tinkler and Mr Ferguson and for them to appoint Stifel with a contract whereby they get a success fee if Mr Ferguson is re-elected and then to allow Mr Ferguson to communicate with Stifel. Where is your corporate governance in that? A. I'm not going to get into, obviously, the corporate governance side, but it was very clear as a board, as a chief executive, we were very determined to make sure that we got the chairman re-elected because that's effectively what our largest shareholder wanted. We thought that was in the best interests of all shareholders and, yes, we did go to extreme measures, right, to try and get that done but we were in an extreme situation. You know, there was a proper attack on the company by Mr Tinkler. Q. And you decided to play it dirty? A. I don't think we played it dirty, we just played it hard."

156. Mr Brady also confirmed that SGL paid the success fee of £100,000 to Stifel. When the Stifel Engagement Letter was put to Mr Ferguson, he too accepted that the aim of Project Shelley was to get him re-elected although he also added that the ultimate aim was to

provide stability for the Board. Mr Coombs could not recall being told about the Stifel Engagement Letter at the time. But he did not consider it so bad for the Committee to enter into a contract with a broker to pay a success fee of £100,000 dependent upon Mr Ferguson's re-election (and drew an analogy with a hostile takeover).

7 June 2018

157. On 1 June 2018 Mr Soanes and Mr Brady began to communicate by using the Telegram message service. On Thursday 7 June 2018 they exchanged the following Telegram messages at the following times:

> "meeting Tuesday at 1300 - want to bring our litigator! Ok?"
>
> *Brady to Soanes* (16:21)**
>
> "Yes. No problem."
>
> *Soanes to Brady* (16:31)**
>
> "Assuming we are all on the same side!!"
>
> *Soanes to Brady* (16:37)**
>
> "Indeed we are."
>
> *Brady to Soanes* (18:50)**

158. It is common ground that on Tuesday 12 June 2018 Mr Soanes met Mr Field of Rosenblatt. SGL asserted legal professional privilege in relation to the communications between them and Mr Tinkler did not challenge that claim. However, he relied on the meeting for two reasons: first, because it evidenced Mr Soanes' close involvement in the 2018 Claim and, secondly, because it demonstrated that SGL was gearing up to dismiss him before the events of 8 and 9 June 2018 (which I now describe).

Mr Tinkler's Dismissal

159. On 8 June 2018 Mr Tinkler started to send out a letter to shareholders (the "**Letter to Shareholders**") and on 9 June 2018 he sent a copy to the Board. Almost immediately, K&L Gates sent a copy of the ELT Letter to the Board on behalf of the ELT. On 9 June 2018 Mr Tinkler also forwarded the Letter to Shareholders to all of SGL's employees with a company email address. The Judge used the term the "**Communication to Employees**" to refer to this communication.

160. On 14 June 2018 the Committee dismissed Mr Tinkler for gross misconduct and required him to resign from his office as a director of SGL. On 15 June 2018 SGL also issued the 2018 Claim. The Judge described these events in detail at [288] to [334]. He found that Mr Tinkler's actions in briefing against the Board, sending the Letter to Shareholders and the Communication to Employees, and orchestrating the ELT Letter amounted to serious breaches of fiduciary duty: see [750] to [766]. He also held that the Committee was properly constituted and had the authority to dismiss Mr Tinkler: see [892] to [899]. Finally, he found that it was lawful for the Committee to dismiss Mr Tinkler summarily even though Mr Ferguson was present at the relevant meeting: see [900] to [915].

161. On 13 June 2018 SGL announced that Ryanair would be entering into an agreement with SGL to fly into LSA. Between 13 June 2018 (the day before Mr Tinkler's dismissal) and 16 June 2018 (two days after), Mr Soanes and Mr Brady exchanged the following Telegram messages on the following dates at the following times:

> "Well done on the announcement. I heard it was all down to AT. I trust you got some key man conditions into the contract!"
>
> *Soanes to Brady* (13 June at 12:17)**
>
> "Of course/big day today as well."
>
> *Brady to Soanes* (14 June at 11:57)**
>
> "I've been struggling to keep up! Let me know if I can help. I think you've got him now. Just need shareholders to see the facts and nobody could support him."
>
> *Soanes to Brady* (14 June at 11:58)**
>
> "We need to land M&G and Milton – still in AT camp!"
>
> *Brady to Soanes* (16 June at 12:08)**
>
> "I'll think. These people might just get what they deserve. Unbelievable."
>
> *Soanes to Brady* (16 June at 12:12)**

The LTIPs

162. On 7 June 2018 the Board approved the transfer of shares to the EBT in anticipation of the vesting of senior management's LTIPs: see [293] to [299]. At that time 7,035,235 ordinary shares were held in treasury whilst Jupiter held 2,503,527 and £1.2m cash on behalf of the EBT. Ms Brace's calculations showed that if all of the shares and cash held by the EBT were used to satisfy the LTIPs, there would be a shortfall of 1,110,578 shares: see [294]. To complicate matters, Mr Tinkler was reviewing his own position in relation

to his 2014 LTIP Award (526,495 shares) but had indicated that he would not be exercising his 2015 LTIP Award (1,327,332 shares).

163. On 19 June 2018 SGL transferred 1,715,000 treasury shares to the EBT and on 25 June 2018 it transferred a further 5,230,425 treasury shares to the EBT. Mr Brady was cross-examined at the Trial about the first transfer of 1,715,000 shares to the EBT and his motives for directing it to be made. Mr Tinkler's counsel, Mr John Taylor QC, put to Mr Brady a WhatsApp exchange of his with Mr Dilworth on 11 June 2018. In one message Mr Brady had asked Mr Dilworth to sort out the shares which were to go the EBT. He also stated: "So we need to move Treasury shares into the employee benefit trust so we can vote them. Paul or Damian will know how. Louise already confirmed the EBT can vote."

164. By email dated 13 June 2018* (and therefore before Mr Tinkler's dismissal) Ms Brace also wrote to Mr Ferguson, Mr Wood, Mr Coombs and Mr Brady stating that she had taken advice from Mr Foster on the subject of LTIPs. She set out in a table the LTIPs for Mr Tinkler for the four years between 2014 and 2017. It showed that he had 526,495 vested but unexercised and that 1,305,292 were due to vest on 22 June 2018. She continued as follows:

> "The last three are straightforward unvested awards if not a good leaver which is disability redundancy retirement or have died under the Rules, you are leaver "for any other reason". In that category the award lapses unless the Committee exercises its discretion otherwise (which clearly should not be done where the circumstances are dismissal for gross misconduct). AT will no doubt challenge this in legal proceedings in any event.
>
> The first award which has vested but is unexercised is less clear as unfortunately the Rules are not as clear as they should be. The Rules don't appear to specifically address this situation so it is arguable that he would retain them and the clawback process would then be invoked. If that is right then he could attempt to exercise and vote on the shares. We might need to think about whether to try and injunct him from doing so or at least be prepared for a legal attempt to exercise and vote I can pick that up with Rosenblatt."

165. Ms Brace did not send the email dated 13 June 2018 to Mr Garbutt, who was the Chairman of Remco, or to Mr Laycock, who was the CFO. By email dated 19 June 2018 Mr Ben Griffiths of Cannacord wrote to Ms Brace, Mr Ferguson, Mr Coombs and Mr

Brady to set out the position in relation to the imminent vesting of LTIP awards. He stated as follows:

> "There are a number of LTIP awards vesting on Friday of which 3.7m are to be sold. There has typically been a two day window in which to deal in order to limit impact on the market. Given the context into which these shares are vesting the exercise and sale will need very careful handling the shares are eligible to be voted at the AGM. The brokers would be under best execution obligations to fill any buy orders if the shares are advertised for sale. So if for example Woodford came on to buy we/Stifel risk being obliged to trade with them. To avoid that we'd need to line up a buyer in advance, however there is understandably very minimal appetite from investors (new and existing) with the capacity to absorb c. £9.5m of stock at the moment. Invesco could be an option and David is going to run by Fred but our understanding is that he has precluded himself/Invesco from trading given their proximity to the situation. Our and Stifel's combined view is that we should explore alternative vesting dates options understanding that will likely present difficulties internally."

166. Mr Griffiths also made two numbered points the first of which is relevant. His point was that the shares were to come from the EBT and that this would reduce the number of shares which the EBT could vote in favour of Mr Ferguson although this would be more than offset by the transfer of treasury shares. By email dated 19 June 2018 Mr Brady replied to Mr Griffiths offering the following suggestion:

> "Let's get the list of people with LTIPs and explain to them they do not need exercise the vesting of the LTIPs as they can do that any time after the date. They will not loose [sic] anything by not exercising [sic]. This will require some individual letters. Trading on the day. Again we should go back to the LTIP holders and say they will get more value by spreading out the trading over say 3 months."

167. By email dated 19 June 2018 Mr Arch also replied to Mr Griffiths reporting that Invesco could not buy the shares and proposing that legal advice should be taken on whether to it was possible to defer the vesting process. The following exchange of emails then took place (all on 19 June 2018):

> "Given the sensitivity and small free float this will have a negative impact so we do need to find a way to put behind the EGM! Good idea."
>
> *Brady to Arch*
>
> "Are any of these shares for AT?"
>
> *Wood to Brady*
>
> "Of course a large chunk and he does not need to exercise as needs to wait

> another 2 years to sell I will get Louise to send around the breakdown."
>
> *Brady to Wood*
>
> "Louise can you send the list of LTIP individuals excel file so we can see the breakdown of the shares."
>
> *Brady to Brace*
>
> "Please can you advise urgently Can we do this delay vest and/or ask participants not to exercise? Please can one of you call me asap."
>
> *Brace to Foster*
>
> "As we fired him for breach of contract etc can we withhold them?"
>
> *Wood to Brady*
>
> "I expect we can but will get Louise to send the breakdown of the shares and then we can delay after EGM that would be a better outcome. We then decide on AT shares."
>
> *Brady to Wood*
>
> "See below. If we can withhold LTIP we should in my opinion."
>
> *Wood to Ferguson*

168. Mr Wardell suggested to Mr Brady that the Board was looking for a way not to honour its contractual obligations to those executives, whose LTIPs were about to vest. The first point which Mr Wardell put to Mr Brady was that he had been considering the impact of dismissal on Mr Tinkler's LTIP awards (and I consider Mr Brady's evidence in more detail below). The second point which he put to Mr Brady was that the Board was looking for a way to delay the vesting of the shares to which the SGL executives would be entitled. Although Mr Brady did not accept that SGL would have been in breach of contract, he accepted that the Board was "looking at all angles to get as many votes as possible" and that this was "clear as day".

169. Mr Wardell put the same point to Mr Coombs who defended Mr Brady's emails on the basis that he was doing no more than exploring the options. The following exchange sums up the debate between them:

> "Q. Well, I don't want to go back to that email. Mr Brady was not saying we must make sure it is entirely above board. Mr Brady was exploring ideas to dissuade those entitled to the LTIPS from exercising their rights? A. I think the exchange we have had over the last five minutes is, yes, he was exploring ideas and that exploration went nowhere. Q. Yes. But it's clearly wrong to interpret his email as saying let's do it entirely above board, isn't it? A. No, he was concluding, in his own mind, that though it would be good to do that, I still need to make sure we do everything above

board."

170. Finally, Mr Wardell suggested to both Mr Brady and Mr Coombs that there was ample time to transfer the shares to their recipients before the AGM. When this point was put to Mr Coombs, his evidence was that it took BDO a week to ensure that the tax calculations were correct. Mr Brady could not remember the detail but he was candid that the key question for him was whether they would be available to vote against Mr Ferguson and the Board:

> "Q. There was ample time between 22 June and the AGM for the shares to vest and to be transferred, wasn't there? A. I can't remember, to be honest. That's like a technical point. I just knew we needed to -- the question is could we have these shares to voting and would they vote against us. That was the question and this was all about that. I certainly didn't get into that detail."

Mr Laycock's Service Agreement: The Second Side Letter

171. By email dated 14 June 2018 Mr Laycock had informed Mr Brady that he was not in a position to join the Board call that evening or to participate in any decision made by the Board that night. By email dated 18 June 2018* Mr Brady replied to Mr Laycock in some detail dealing with his position and suggesting that he might step down from the Board:

> "The first thing I think we ought to do is arrange for you to see an occupational health specialist so that we can ensure we're getting all the advice we should about your condition and prognosis. That specialist will also be able to say whether you are fit for work, what you are able to do and over what time period. I think you should possibly remain on (paid) sick leave until that meeting which I'm asking Jo to arrange as soon as possible but let's discuss.
>
> Once we get that advice through well need to discuss if what you're able to do fits with what the company needs from a CFO and how any duties you aren't able to do can be covered, as it is of fundamental importance to the business and its obligations that all CFO duties are carried out fully and in a timely manner.
>
> Linked to that we need to work out how to deal with your concerns about involvement with board matters. As a board member you get invited to all board meetings and would then need to consider your fiduciary duties which would apply whether you choose to vote on an issue or not. Similarly, where we make announcements which reference board decisions, I think it would be unrealistic to tell the market that you hadn't been voting on a particular issue (and such an announcement would lead to questions about why not).

> There are a number of different ways we could address the above competing issues and I would be happy to discuss them with you. It does partly depend on how long the phased return is likely to last and which duties (both as CFO and a board director) you would be unable to do and for how long. One option could be you stepping down from the board and as an executive director on an interim basis. Another option we could consider if you wished would be to bring in an interim CFO who could cover certain elements of your role with you stepping back into the FD role until you feel well enough to return to being CFO and serving on the board. These are very much initial options I'm considering, and I would appreciate the chance to talk them through with you and get your views (and advice from Occupational Health) about how much of your role you are able to do and how long it is likely to be until you are ready to carry out all duties again."

172. There was an issue between the parties whether Mr Laycock's illness and Mr Brady's concern about his welfare were genuine. Mr Brady's evidence was that Mr Dilworth and he were very worried about Mr Laycock's health and that there was no attempt to bully Mr Laycock to stand down. Nevertheless, Mr Brady agreed that he was surprised to receive an email from Ms Brace on 19 June 2018 saying that Mr Laycock was in the office: "What is the current position re Richard L? We say he is on sick leave but he was in Widnes office on Monday. Need to clarify for the submission."

173. Between Mr Tinkler's dismissal on 14 June 2018 and the AGM on 6 July 2018 (below) Mr Brady exchanged the following WhatsApp messages with Mr Dilworth and Mr Tappin:

> "We may we'll [sic] need Richard as part of a deal A lot of shock internally at AT dismissal."
>
> *Brady to Tappin* (15 June)*[4]
>
> "Tread carefully in dealing with him Perhaps call him first then me Ask him if he thinks it sensible to get some interim support whilst off and to help ease him back in."
>
> *Dilworth to Brady* (18 June)*
>
> "Richard was a numpty - one arse and two horses!!!"
>
> *Brady to Dilworth* (*22* June)*[5]
>
> "We will issue an RNS on Monday and take our time we do need RL to be fully behind board or step down though."

[4] Mr Tinkler did not plead that this message was not disclosed in the 2018 Claim but I assume in his favour that it was not.
[5] Mr Tinkler did not plead this message at all. But again I assume in his favour that it was not disclosed.

Brady to Dilworth (29 June)*

174. On 1 July 2018 Mr Brady went to meet Mr Laycock in Skipton. On 30 June 2018, the day before the meeting, he made a detailed note on his phone (the "**Laycock Note**")* which I set out in full:

> "Reference from our last meeting and email
> worried about dropping the ball
> Not getting a proper support as CFO
> Need a CFO that actively participates in Board issues
> Difficult times ahead as we are going to to [sic] win
> What does he think?
> We need to come to a decision to the way forward
> Whatever decision will make sure your well looked after from reputation and finances
> Nothing needs to be permanent and means you can come back. Step back and welcome you back when you fit and ready
> Worried about you that you may miss something
> We have run this company with disrupted work force, we have a lot of work to do shareholders, staff, serious clean up of then business, gaps in leadership, need top team functioning 100%
> Stepping away gracefull [sic] reputation in tact
> Will need to message carefully including simple announcement
> ####################
> Stepping of board for health reasons
> Off sick for x time and then join the business the board
> Directorship - removing AT from the Board need unanimous
> Fiduciary duty being on the board. Statutory obligations
> Staying on the board but not being involved so you need to be in or out
> Exposing yourself as a director
> Put the board in a difficult position and the CEO as well
> Need to resolve the issues with shareholders and we need a CFO that act according to
> the best outcome. Need to voice your opinion and you are going to have side with one party or the other.
> Does not mean that you have to agree with Chairman and board but you do have have a clear view with clear opinions
> Employment –
> Cannot be just doing FD role
> CFO key part of the job is the board part
> If you are not well enough to that part of the role
> Two options
> Enforced absence
> Reduced duties and step down of the FD
> Plenty of scope to for us to remove you from the board
> Either way we must appoint an Interim CFO"

175. After the meeting, Mr Dilworth sent Mr Brady a WhatsApp asking how it had gone and Mr Brady replied stating that he thought that Mr Laycock would step down. His final comments were: "Tough place to be! I had a full script."* In the event, Mr Brady was correct and Mr Laycock agreed to resign as a director before the AGM. However, he did so after SGL had agreed to vary the terms of his employment for a second time.

176. By a second side letter dated 5 July 2018 (the "**Second Side Letter**")* Mr Brady wrote to Mr Laycock recording this agreement and on the same day Mr Laycock signed and returned the letter. In the first paragraph Mr Brady acknowledged that the circumstances were extraordinary and he referred to their recent discussions. He then set out the new terms which included the following (and paragraph references below are to the numbered paragraphs in the letter):

    (1) Mr Laycock's role would change to Finance Director and he would report to the interim CFO. He would continue in this role until 5 November 2018: see paragraph 2.

    (2) He would resign from the Board immediately by delivering a resignation letter in an agreed form and would take leave of absence for 8 weeks: see paragraphs 3 and 4.

    (3) Save as required by law, he would not disclose the existence or the terms of the letter other than to his immediate family, professional advisers or HM Revenue and Customs: see paragraph 5.

    (4) SGL would pay him a bonus of £30,000 (on an "after tax" basis) to compensate him for the fact that he would not be eligible to participate in the SAYE scheme. Otherwise, his employment contract would remain in full force until the expiry of the agreement: see paragraphs 7 and 8.

    (5) The parties would enter into good faith discussions about whether it was appropriate for him to return to the CFO role after the expiry date of 18 November 2018 or take up another role. But if his employment was terminated, he would receive a severance payment equivalent to six months' notice, he would be treated as a "Good Leaver" for the purposes of his entitlement to LTIPs, he would receive a payment equivalent to one year's pension contributions, car allowance and

private health insurance and he would also receive a contribution of £5,000 towards his legal costs: see paragraphs 9 and 11.

The AGM

177. On 6 July 2018 the AGM took place and the Judge set out the prelude to the meeting (including Mr Tinkler's application to the Royal Court of Guernsey for an injunction) and what took place during it in some detail: see [350] to [367]. Mr Garbutt did not offer himself for re-election and Mr Ferguson, Mr Brady, Mr Wood and Mr Coombs were all re-elected. The Judge specifically noted that where shareholders had submitted proxies stating an intention to abstain on the resolution to re-elect Mr Tinkler, Mr Ferguson exercised his discretion to vote against that resolution. Despite this, Mr Tinkler was also re-elected a director of SGL: see [367].

The Second Article 89(5) Notice

178. On 7 July 2018 Mr Ferguson, Mr Brady, Mr Wood and Mr Coombs all signed a second notice under Article 89(5) removing Mr Tinkler as a director and it was served on him immediately. Because Mr Garbutt and Mr Laycock were no longer directors of SGL, it was now possible for the Board to exercise the power under Article 89(5). As the Judge put it (at [368]): "The wishes of the 51.44% voting in favour of Mr Tinkler therefore prevailed for no more than a day."

179. On 11 July 2018 Mr Brady and Mr Soanes exchanged Telegram messages. I set out immediately below their substantive exchange at 12.15 and 12.28 respectively (but they also exchanged a series of short messages later that day and the following morning which show that they must have met on 12 July):

> "I sent a telegram to say congrats but don't think you saw it. It would be good to catch up soon if you have the chance. My tribunal process will get underway soon and now the meeting is out of the way I have to start looking for a resolution."
>
> *Soanes to Brady* (12.15)**
>
> "Just seen it! We had an all party meeting this morning and mentioned we need to get In touch about some information you worked on in the past with AT inc the fact that AT is now disputing he never agreed to the value of aviation division at £160m!"
>
> *Brady to Soanes* (12.28)**

E. The Proceedings

180. On 14 June 2018 SGL issued the 2018 Claim Form claiming equitable compensation for breach of fiduciary duty, damages for breach of contract, damages for participating in an unlawful means conspiracy and an account of profits or equitable compensation for breach of confidence. On 24 July 2018 SGL served Particulars of Claim which now included a claim for a declaration that Mr Tinkler had been validly dismissed. SGL also claimed that in breach of fiduciary duty Mr Tinkler had authorised excessive and unnecessary expenses of £4.72m (and the use of a flat). SGL withdrew the expenses claim at trial and at [31] the Judge endorsed the following submission made on behalf of Mr Tinkler: "the allegations should never have been made and have been almost entirely abandoned by the [majority of the Board] in evidence".

181. On 1 August 2018 Mr Tinkler served a Defence and Counterclaim. He claimed declarations that he was not validly dismissed as an employee or removed as a director. His case was that the Board had purported to dismiss him on 14 June 2018 for the following improper purposes:

> "45. The purpose of the purported dismissal and removal of Mr Tinkler on 14 June 2018 was designed deliberately by the Four Directors to: (a) Seek to present shareholders with a fait accompli whereby Mr Tinkler had already been removed as a director and could not be re-elected as a retiring director at the AGM. (b) Deprive shareholders of a direct choice between Messrs Tinkler and Day on the one hand, and Mr Ferguson on the other, at the AGM. (c) Give shareholders the false impression that Mr Tinkler was guilty of serious misconduct and had been justifiably and effectively removed, and that conversely the Four Directors were in the right in their boardroom dispute, by presenting allegations which were false or misconceived as if they were proven facts so as to shore up support for Mr. Ferguson; (d) Provide a pretext for wrongfully refusing to allow the 1,545,548 shares (plus additional shares in excess of 300,000 representing accrued dividends, making a total of in excess of 1.85m shares with a current market value in excess of £4.4 million) which were due to vest in Mr Tinkler under the EBT on 22 June 2018 ("the Tinkler EBT Shares"), to vest in him (and thus preventing him from voting those shares at the AGM or any EGM)."

182. On 3 August 2018 His Honour Judge Waksman QC (as he then was) gave directions in the 2018 Claim. He ordered SGL to serve its Reply and Defence to Counterclaim by 31 August 2018, standard disclosure by lists on or before 20 September 2018, inspection on or before 27 September 2018 and exchange of witness statements on or before 18 October

2018. He also ordered that there should be an expedited trial on liability and of injunctive and declaratory relief (with any financial relief to be determined after a second trial). He ordered a pre-trial review ("**PTR**") in the week beginning on 22 October 2018

183. During the early stages of the 2018 Claim Mr Brady continued to communicate with Mr Soanes and shortly after the AGM, on 12 July 2018, he also met Mr Soanes. Between 2 and 7 August 2018 (and, therefore, either side of the directions hearing), Mr Brady and Mr Soanes also exchanged the following Telegram messages on the following dates and at the following times:

> "Tribunal claim issued at last so I think the window is now open for finding a solution. I am trying to meet with Tony to draft plans to put to you. Stob Cap's quarterly fee was due yesterday. Presumably you won't pay that."
>
> *Soanes to Brady* (2 August 10.25)**
>
> "Hi, not sure about SC payment! Not sure we even got an invoice but will check. We have invoiced office costs and will involve all the travel so circa £200k ! Daniel spoke to me and wants a solution!! Tony F is ill! We need a plan for SC."
>
> *Brady to Soanes* (3 August 11.33)**
>
> "OK. Explains lack of response from Tony. I have a plan!"
>
> *Soanes to Brady* (3 August 11.47)**
>
> "Well don't hold back!"
>
> *Brady to Soanes* (4 August 10.11)**
>
> "I thought it would be best to go through it with Tony and iron out the legal wrinkles. Essentially I think we can bring enough pressure to bear to persuade him to sell his shares to me and we can establish a successor business providing a better service to Group at alower [sic] cost. But we have to get all the steps right."
>
> *Brady to Soanes* (4 August 10.11)**
>
> "Ian – Tony Foster is going to be off for the next 2 or 3 weeks so not sure that's going to work. Suggest Rosenblatt may be a better route… AT has been in Carlise office under the ruse of its Stobart Capital which is bollox but we need to deal with it. Thanks Warwick"
>
> *Brady to Soanes* (6 August 19.57)**
>
> "He has no right to be in any group office if you haven't invited him"
>
> *Soanes to Brady* (6 August 19.59)**
>
> "Could you send details at Rosenblatt. I'll make contact and try to meet then as soon as possible. This is a vital window when we can apply maximum pressure to make SCL appear a liability not an asset to get him to walk away from it"

Soanes to Brady (6 August 20.02)**

> "Hi Warwick. I am still away but can speak to Ian Soanes tomorrow (I am out at sea today with no phone signal). Are you going away today?"

Brady to Soanes (forwarding *Field*) (7 August 10.19)**

> "I need a solution quickly – we could actually give notice on the office! Not pay! Keep sending bills… CF30?"

Brady to Soanes (7 August 19.03)**

184. Rosenblatt were by now representing SGL in the 2018 Claim and in the light of these messages Mr Wardell asked Mr Brady why he had given the impression in his witness statement that Mr Soanes was a nuisance:

> "Q. And so why have you given the false impression in your witness statement that Mr Soanes was being a nuisance -- he kept asking for meetings, he kept making unsolicited approaches -- when what we have seen so far, the position is very different? A. Again, you just put it out of context. Mr Soanes did a lot of unsolicited proposals, right, and was a bit annoying, right? However, we all felt a bit sorry for Mr Soanes for the way he has been treated. He lost everything: at a war, in a tribunal case. It was quite difficult and costly for him and I personally felt we had a bit of a moral obligation towards him. However, he was a bit annoying with all his proposals, many of which, if any -- I can't remember anything that we followed of his advice. But, I mean, I may be wrong but that's my recollection."

Project Overlord

185. On or before 9 August 2018, when the Court had just given directions for an expedited trial, Mr Soanes set up a WhatsApp group called "Overlord". Its initial members were Mr Brady, Mr Coombs and himself. On 9 August he sent a WhatsApp** to them stating that he had sent them his thoughts using a different email address and sending them the password. By email also dated 9 August 2018 he sent them a document headed "**Project Overlord**"* which used a series of codewords derived from the invasion of Normandy in 1944.

186. Mr Wardell took Mr Soanes through the critical parts of Project Overlord but rather than set out the document itself and explain the codewords which Mr Soanes had used, it is more convenient to set out the relevant passage from Mr Wardell's cross-examination of Mr Soanes in full:

“Q. Well, the occupation of Normandy by Rommel is -- you tell my Lord what you had in mind. Normandy is Stobart Capital, isn't it? A. Yes. Q. Rommel is Mr Tinkler? A. Yes. Q. Eisenhower is Esken. Do you agree? A. Yes. Q. And you are Montgomery? A. Yes. Q. And you are coming to rescue the economic value from Stobart Capital: "... ideally via the establishment of a successor relationship with Eisenhower." A. Yes. Q. And: "Strategic options." Either: "Remove Rommel, replace him with Montgomery and establish a new relationship between Normandy and Eisenhower on similar terms but fit for purpose ..." Or: "Eliminate Normandy and establish a new relationship with a new entity, Brittany, formed by ..." Yourself? A. Yes. Q. And the objective: "Force [Mr Tinkler] to concede all ownership and control of Normandy and/or allow Normandy to become insolvent or achieve the termination of the management agreement between Normandy and Eisenhower without significant risk to Eisenhower or Montgomery by applying maximum pressure on Rommel." And the management agreement, you say, is the primary target: "Termination solves the problem but the protections it gives Normandy mean it has to be handled with care. An inadvertent breach could be dangerous". You go on to say: "There are plenty of clauses which could be alleged to have been breached, some of which are potentially capable of remedy ..." I think you then go on, don't you, to identify the clauses which you say have been breached, on the next page. Mr Soanes? 2 A. I think so, but I can't see the next page. Yes. Q. And I think you then have a conclusion at the bottom of page 2, last bullet point: {I14/427.2/2} "I think there are ample grounds for giving notice of a breach of the Management Agreement. Rather than seek to terminate immediately and risk counter-actions, I would give notice that Eisenhower considers that breaches may have occurred and invite evidence from Normandy to refute the breaches before further payments can be made under the agreement." So that's your first proposal, do you agree? A. What do you mean by the question? Q. Because you have an alternative scenario, don't you, later on in this document? A. Okay.

Q. The first one is Operation Omaha, if you go back to. Do you have that? {I14/427.2/1} A. Yes. Q. And then if we go through the document, we then have another operation, which you find on page 6, if we can go to that: {I14/427.2/6}"Operation Gold, the efforts by Montgomery to remove or neutralise Rommel, could, with Eisenhower's support, result in the compulsory transfer of Rommel's shares or render Normandy effectively worthless and/or create significant irritation and distraction." And the objective is the same as Omaha. Do you agree? A. Yes. Q. And then go on to page 7, {I14/427.2/7} where you propose that the new entity, which you are going to own and control, would be set up to provide the same services to Esken that Stobart Capital used to provide. A. Yes. Q. At the bottom of page 7: "We need a new agreement based loosely on the existing management agreement but with changes to reflect: "The revised service package; "A reduced level of fees ..."Protections ..." Et cetera. Under "Actions", you propose: "Eisenhower and Montgomery need to start working together, actively, immediately, in order to agree and coordinate plans."

187. On 9 August 2018 Mr Brady was on holiday in South Africa and he sent a WhatsApp message to Mr Soanes suggesting that "you and John Coombs need to come up with a robust plan quickly for SC."* About 20 minutes later Mr Soanes replied to him copying in Mr Field**. This message was followed by both WhatsApp and email exchanges between Mr Soanes, Mr Brady and Mr Coombs and between members of the Board:

> "I'll call John then. Is there a particular hurry/deadline? If so, I need to fit it into the plan. Did you say you have already billed for services, rent etc? Anthony - do you have any initial comments before I contact John?"
>
> *Soanes to Brady* (9 August 09.07)*
>
> "Morning John Warwick says I need to speak to you to find a solution to Stobart Capital urgently. Were you aware you had that job I have been in touch with Travers Smith and, more recently, Rosenblatt and I have documented my current thoughts. Should I send you that document?"
>
> *Soanes to Coombs* (9 August 09.48)*
>
> "Yes happy to discuss, on holiday at the moment so why don't you send me your note and let's have a call Monday?"
>
> *Coombs to Soanes* (9 August 16.01)*
>
> "I have had a couple of conversations with Ian Soans [sic] this week developing options as to how we might shut…[REDACTED]…The other interesting element to the conversation has been listening to Ian explain his unfair dismiss claim against AT. What I hadn't fully realised is that AT has given him no reason for the dismissal and does not appear to have a defence. Ian said there had been the first indirect approach to see if he wanted to settle. Being a whistleblower case the damages are unlimited and Ian is still very angry and seeking revenge. It's certainly in our interest that Ian takes a vigorous approach to his case and seeks big damages. His issue though is funding the case, his local Bournemouth solicitor is minded to go the softer route, Ian is not impressed and ideally would like to retain a heavier hitter. The issue he faces is the cost. I think there is a case for us to find a way of funding his legal bill, having AT tied down in yet another demanding and expensive case, with the prospect of making a big settlement payment at the end can only help us in our overall objective of getting him to sue for peace by the end of the year."
>
> *Coombs to Wood, Ferguson, Brady* (14 August 16.15)*
>
> "Anthony Field is going to produce a strategy & options paper for us. [REDACTED] I think if the Board is minded to support IS in his claim against AT you should discuss with him the basis for doing this (even to the extent of making repayment contingent on a successful payout?)"
>
> *Coombs to Brady, Ferguson, Wood* (14 August 19.41)*
>
> First of all, thank you John for taking on the challenge of how to deal with the SC issue. I think that we should discuss this in some detail once we have Anthony Field's paper to consider."

Ferguson to Coombs, Brady, Wood (14 August 20.23)*

"Agree 100%. £500k cost saving even with an offset of IS legal fees seems a reasonable investment."

Brady to Ferguson, Coombs, Wood (14 August 21.07)*

"I've spent some more time thinking about the courses of action available to me and the nexus with the Group's agenda. It's best discussed but I have noted some headlines in the attached. same pw. The theme that has become increasingly clear to me as I have thought through the issues is that the picture for me is very polarised: either we are in this together, in which case I think the chances of success are very good or if we are not I am incentivised to do all I can to preserve the management agreement while extracting what I can from AT without undue risk. It seems to me even clearer now that we must agree a coherent plan and because I have responses to make to the tribunal before 28 August, which requires the input of a solicitor, and ideally a new one. I don't have much time. I appreciate I'm slow in following up on the meeting but I have been stretched. How is the Board positioned Are we in a position to get things agreed? Should I be thinking in terms of getting more detail down on the shape of the new relationship? The very top priority for me is to make my submission on the value of the claim to the Tribunal before next Tuesday and the big picture has a bearing. It would be ideal to have a new solicitor in place before then, although I can do that with the current solicitor and switch before the preliminary hearing. All the advice I am getting is that if I am going to switch, as Anthony Field said now is the time."

Soanes to Coombs (20 August 13.48)*

"Some notes Ian Soans sent me to give you context"

Coombs to Brady (20 August 19.50)*

"I am seeing Ian tomorrow morning. I am thinking what would we do instead of SC if AT had not needed a home? For much less money than SC I would probably have the likes of Deloitte's (as a sample) to work on our energy business. Looking for opportunity to develop ie consolidation. etc. For Aviation may have say PWC working on similar. So the question is what do we do with Ian S and Stobart Capital? IS can provide us with some help inc with the next 3-5 year business plan over next few weeks and we can support his tribunal but the question is what do we want the outcome to be? It will come down to what they can provide, how much it will cost and is it comparable to my idea above? If SC was not under AT ownership what could they do? Will report back after I have seen Ian S."

Brady to Ferguson, Coombs, Wood (20 August 20.53)*

"Ian just a quick one. How's your thinking going around Stobart Capital and a Strategy that supports the wider plan We also talked about the whole 5 year plan investor messaging etc etc."

Brady to Soanes (3 September 19.08)**

"Hi Warwick I have just had Andrews defence to the tribunal claim. As expected, lies, distortion etc. I've spent the last couple of days working on

> a response to that and valuing the claim. Next step is the preminary [sic] hearing. The role the tribunal plays in your bigger picture is now very clear to me. We use it to help you towards the end game. Otherwise the claim has no value because Stobart Capital will be insolvent when the management agreement is terminated. But we definitely need to coordinate to get the right result. As to support for you/Group there's lots I can do. I'm on holiday this week. Could I send you an update note this week with legal strategy and plans for the future then meet early next week?
>
> *Soanes to Brady* (3 September 20.11)**
>
> Thanks Ian Just need to make sure we can support and aligned on the bigger to picture to win!"
>
> *Brady to Soanes* (3 September 20.29)**
>
> "Definitely!"
>
> *Soanes to Brady* (3 September 21.41)**

188. The notes which Mr Soanes sent to Mr Coombs (and which he then forwarded to Mr Brady) consisted of a table setting out the breaches of duty which he considered Mr Tinkler to have committed and the remedies available. In another table he set out the decisions which he thought needed to be taken in relation to the ET Claim. Mr Brady could not recall either receiving or reading Project Overlord or the notes which Mr Soanes subsequently sent to Mr Coombs or, indeed, Mr Coombs' covering email addressed to him.

189. On 20 August 2018 Mr Brady also exchanged WhatsApp messages** with Mr Soanes which showed that they must have met for a coffee the following day. Mr Brady could not recall this meeting or why he asked for it and Mr Soanes could not recall it either. Mr Wardell cross-examined Mr Brady on the basis that he must have read Project Overlord in some detail because of his response dated 20 August 2018 and timed at 20.53 (above):

> "A. I think that's a good summary of the sort of thoughts that were happening at the time. Q. You must have read the document, to be able to respond to this? A. So I don't remember reading the documents. Q. And -- A. If you look -- sorry, just to be clear, there are solutions for Stobart Capital. I've laid it out quite clearly there, and those genuinely -- I have not seen this since probably I wrote it -- that sets quite well what my thoughts were at that time. Q. And you were looking to be aligned with Mr Soanes? A. It's not necessarily being aligned with Mr Soanes. It was being aligned to make sure we have a solution for Stobart Capital -- Q. (Overspeaking). Sorry. A. Let me finish. If we could help Mr Soanes – and I genuinely think in hindsight, did we help him too much? It's a question. But certainly, my objective was for the company -- from a company perspective, we were having half a million pounds out the door for no

> value. I could have used PwC, KPMG, a proper company that did proper services, not a company with a war between two partners and a very poor service. I mean, that's not worth the money, is it."

14 September 2018

190. On 13 September 2018 Mr Soanes spoke to Mr Field and by email dated 14 September 2018* Mr Soanes proposed that SGL should make a loan to him of £80,000 with a zero rate of interest to be repayable out of the proceeds of any award in the ET Claim or if that was insufficient from the sale of his B shares in SCL. He explained the rationale for this proposal in some detail:

> "I think we can keep the arrangement pretty simple, with a loan, as you suggested, along the lines we discussed. I have thought through some of the alternatives and none seem anywhere near as elegant. I would not object to a non recourse loan but perhaps that would create problems either in terms of tax or the directors compliance with their duties in providing it, so I think it needs to be repayable from the proceeds of a successful claim or otherwise using the shares. If there needs to be any additional rationale for the Directors to offer such a loan and avoid criticism if there was ever any disclosure my suggestion would be that I agree to waive all potential claims against the Group in relation to Andrew Tinkler's conduct. Whether I have any is neither here nor there. As you know I wrote to Warwick early on to register my objection to ATs use of his Stobart Group office – in particular his email address and by instructing Hill Dickinson, the Groups solicitors – which implicated Group in his attacks on me. I think the idea of the Board having to enter into any arrangement to absolve the Group of potential liabilities created by Andrew Tinklers misconduct is rather good. I think it should be interest free. There could be an interest rate as it should be for quite a short period but it can't be much so I would prefer it to be zero and deal with the Boards rationale for providing it as set out above rather than claim the rate is commercial."

16 September 2018

191. Mr Soanes remained in contact with Mr Brady. On 7 September 2018 he sent a WhatsApp message** to Mr Brady asking for a meeting during the following week and it is clear from their subsequent exchanges that they must have met on 11 September 2018. It is also clear from a WhatsApp message** which Mr Soanes sent to Mr Brady on 10 September 2018 that he wanted to discuss the ET Claim with him. He also described Mr Tinkler as adopting a "hyper aggressive approach". By WhatsApp message** dated 12 September 2018 Mr Soanes then informed Mr Brady that he had spoken to Mr Field. Finally, on 16 September 2018 Mr Brady sent the following messages** to Mr Soanes:

> "Ian, post our board meeting on Friday we agreed the plan we discussed. First thing we need from you though is a complete review of the SIEP [sic] given its available to vest next June. What do you need? Best keep it very limited and suggest Louise be the conduit for information required. The key is the value metrics Ben on the strategy Day is already putting in hope value for the RDF plan. I will get Louise to send strategy papers to you."
>
> "Ian, Our CoSec Louise Brace was at the board and suggest she provides you the information you need. Her email is LouiseBrace@stobartgroup .com. You need Friday's strategy presentation as a start John Coombs is RemCo Chair so suggest you touch base with him to get the exam question right."

192. Given their contact in September 2018 it was put to Mr Brady that he was continuing to liaise closely with Mr Soanes. He accepted that the Board was trying to find a solution for SCL and that he had put Mr Soanes in touch with Mr Field. He also accepted that by this stage the plan was to terminate the Management Agreement and to get Mr Soanes to work for SGL directly. Mr Brady's evidence was as follows (and Mr Coombs' evidence was to similar effect):

> "Q. And part of the plan is you were going to help fund his legal fees. A. I don't think it was connected, so there is two points. One is, yes, we wanted Ian Soanes to work on the incentive scheme, especially on the energy because he had been party to creating it, as far as I understood, and it's quite complex, and we had to do a payout on an incentive scheme, so it was actually a good bit of resource to use for that. Secondly, there was some debate whether or not we should fund Ian Soanes and support him. There was a discussion at the management, wasn't a good idea, wasn't a good idea. Anyway, overall, from a moral perspective --…we thought it was the right thing to do, to support Ian Soanes, given it was Tinkler, lots of money, Mr Soanes, not lots of money, lost his job, needs to earn an income, right, quite difficult. That was the decision around the loan."

Disclosure

193. On 27 September 2018 Mr Brady signed the disclosure statement in the 2018 Claim on behalf of SGL (the "**Disclosure Statement**"). The date range began on 1 September 2017 and the statement recorded that a total of 933,560 documents, including duplicates, had been collected by Rosenblatt in response to the search terms.

1 October 2018

194. By early October 2018 and, therefore, at about the same time the Board was considering a possible management buyout of the Energy Division which had the code name "Project

Mercury". On 1 October 2018 Mr Soanes exchanged the following WhatsApp messages with Mr Brady at the following times:

> "Ian what's best email to use? Thanks Warwick"
>
> *Brady to Soanes* (11.01)**
>
> "I'm using ian@lincolngreentrust.org for anything more sensitive, StobartGroup@tellusconsulting.co.uk for project correspondence with Group folks"
>
> *Soanes to Brady* (11.04)**
>
> "Thanks sent a email re Ben and MBO"
>
> *Brady to Soanes* (11.09)**
>
> "I thought that might be on the agenda. Huge tactical implications. Do you want to chat before i get stick in to it is there more background i need to know?"
>
> *Soanes to Brady* (11.10)**
>
> "Will messsge [sic] later and we can have a chat but have a look at the presentation it's not long"
>
> *Brady to Soanes* (11.14)**
>
> "Will do. So many thoughts! I'll get them on paper and we can speak whenever it suits you"
>
> *Soanes to Brady* (11.15)**

195. Mr Soanes' evidence (which was unchallenged) was that "Ben and MBO" was a reference to Project Mercury and that he prepared some notes to send to Mr Brady on 2 October 2018 (which he exhibited). By email dated 2 October 2018* Mr Soanes also wrote to Mr Brady stating as follows:

> "If this initiative were to form the basis of some kind of settlement of all the outstanding issues, I do think the SCL equity gives you a useful option to avoid unnecessary tax leakage, per my workings back in February. Do you want me to re-send those?"

196. By email dated 4 October 2018* Mr Soanes forwarded the StobCap Buyout Email and the StobCap Buyout Attachment to Mr Brady again. On 18 October 2018, less than two weeks later, SGL served witness statements from Mr Brady, Mr Wood, Mr Coombs, Mr Soanes and Mr Ferguson. It follows that both Mr Brady and Mr Soanes must have been working on their witness statements on or about 4 October 2018 when Mr Soanes sent Mr Brady the StobCap Buyout Email and Attachment again.

197. On 19 October 2018 Mr Tinkler issued an application for specific disclosure and, in particular, for an order that Mr Brady and the Board members provide an image of their mobile phones for forensic examination. On 22 October 2018 Mr Field made a witness statement in answer to that application stating that Mr Brady's phone had been imaged for the purposes of the Defamation Claim and that 3,937 documents had been provided to KL Discovery, the electronic disclosure support provider. He also gave evidence that KL Discovery had located 105 documents which responded to the search terms and that he had reviewed them himself. He also disclosed some additional "chat" messages between the principal witnesses which had not been disclosed.

198. On 23 October 2018 the PTR took place before His Honour Judge Kramer. At the hearing Mr Tinkler continued to press for an order that Mr Brady provide his telephone and any other handheld devices for forensic examination. In his judgment the judge recorded that it was now unnecessary to make such an order because Mr Field had performed the relevant searches himself and this exercise had produced a harvest of 290 documents. The judge also recorded that SGL had agreed to provide electronic images of the mobile phones of Mr Ferguson, Mr Coombs, Mr Wood and Ms Brace. However, the judge did require Mr Field to make a further witness statement explaining the process in more detail.

199. On 24 October 2018 SGL served Mr Field's second witness statement together with SGL's Amended Particulars of Claim and on 25 October 2018 Mr Tinkler served an Amended Defence and Counterclaim. On 29 October 2018 SGL served an Amended Reply and Defence to Counterclaim. Between 28 September 2018 and 13 November 2018 SGL also served ten supplemental list of documents (as, indeed, did Mr Tinkler). This was, therefore, a period of intense activity for both parties in the 2018 Claim.

The Loan Agreement

200. Under cover of an email dated 11 October 2018* Mr Field sent Mr Soanes a clean copy of a proposed loan agreement and in the covering letter he stated that it had been approved by the Board. It was Mr Tinkler's case that Mr Soanes signed the agreement on 18 October 2018 (i.e. on the same day as he signed his witness statement) although it is possible that he may have signed it a week earlier on 11 October 2018. On 26 October

2018 Mr Brady signed it on behalf of SGL. I will refer to the signed agreement as the "**Loan Agreement**"* and it provided as follows:

(1) SGL agreed to lend Mr Soanes the sum of £80,000 and all amounts drawn down under the Loan Agreement would be paid towards the ET Claim: see clause 2.

(2) Mr Soanes could draw the loan at any time by written request and payment would be made by SGL within five business days of receiving notice of the request: see clause 3.

(3) Mr Soanes would repay the loan in full from any award, settlement or other conclusion of the ET Claim: see clause 4.1.

(4) In the event that Mr Soanes was unable to repay the loan in full or in part in accordance with clause 4.1, he was to transfer sufficient B shares in SCL to SGL at the value of £1,000 per share to repay the loan: see clause 4.2.

(5) In the event that Mr Soanes was unable to repay the loan in accordance with clause 4.1 and 4.2, the loan was not to be repayable and would be written off: see clause 4.3.

(6) The loan was to carry interest at 2.5% per annum and was to accrue from month to month on an annual 12 month basis: see clause 7.1.

201. By email dated 20 December 2018 Mr Soanes wrote to Mr Laycock giving notice to draw down £53,852.56 of the loan to cover payments on account of legal fees which he was required to make. It was common ground that the full amount of the loan was advanced to him and that it had never been repaid. It was also common ground that no attempt had been made to enforce the loan and that Mr Soanes had not been required to transfer to SGL any of his B shares in SCL.

29 October 2018

202. On 29 October 2018, and during the intense period of activity in the 2018 Claim (which I have described above), Mr Brady and Mr Soanes exchanged the following series of WhatsApp messages at the following times:

> "Could you remind me what the flybe valuation of the airline is. I'm trying to set out more clearly for Anthony the problem with ATs Blue structure and a third party value could be very helpful."
>
> *Soanes to Brady* (19.15)**
>
> "Cyrus valued at 46p max when the undisturbed share price was circa 33p! Value of Stobart Air was £20m in our deal and leading f40m"
>
> *Brady to Soanes* (19.45)**
>
> "Thanks. So if we need to we can say that there is good evidence for a value of SA at 20m and AT was inflating it to 40m by ramping the cost of the ESO service."
>
> *Soanes to Brady* (19.57)**
>
> "I can now see a clear trail through the correspondence. AT portrayed his proposal as gains for everyone. You supported it but said to me by email its ok "only as long as Group benefits at least as much as AT". I showed you that Group was paying for ATs gain so you withdrew your support. I'll get it down on paper and send it to you tomorrow
>
> *Soanes to Brady* (20.01)**
>
> "Also the ESO has costs some millions!!!! This was his bloody plan with E195's and all that…..he was CEO and I had not even joined when it went on sale! Still cheaper than starting his own airline sept 16 strategic plan"
>
> *Brady to Soanes* (20.25)**
>
> "Yes. It's incredible That all meds [needs] to come out in the trial"
>
> *Soanes to Brady* (21.10)**

The Consultancy Agreement

203. On 16 October 2018 SGL entered into a confidentiality agreement with Tellus Consulting*. The stated purpose of the agreement was to enable Tellus Consulting to provide services to SGL in relation to the establishment or review of SGL's various incentive schemes. On 12 December Mr Soanes prepared a draft of a consultancy agreement (the "**Consultancy Agreement**")* and, although it was never executed, Mr Soanes accepted that he was paid in accordance with its terms. It provided that Tellus Consulting was to be paid £10,000 per week with effect from 19 November 2018 and it was Mr Soanes' evidence that he charged SGL for six weeks' work.

204. It was also his evidence that when he chased SGL to sign the Consultancy Agreement, he was told by Mr Dilworth and Mr Brady that his principal would be Connect Airways rather than SGL itself. SGL has disclosed a further draft of the Consultancy Agreement which identifies Connect Airways as the contractual counterparty rather than SGL. But

in any event, Tellus Consulting invoiced SGL for £60,000 (plus VAT) rather than Connect Airways.

Trial

205. On 12 November 2018 the Trial began. It lasted for 11 days and concluded on 29 November 2018. On 13 November 2018, the second day of the Trial and the day before Mr Soanes was due to give evidence, Mr Soanes and Mr Brady exchanged the following WhatsApp messages at the following times:

> "Hi Warwick Did the afternoon go ok I have seen an email from BW to AT and AWJ on 6-2-18 with an attachment 'Tink Project Split' If you know what that's about could you give me a call. Thanks"
>
> *Soanes to Brady* (17.03)**
>
> "Be good just send it so we can give to the QC!"
>
> *Brady to Soanes* (17.21)**
>
> "The email I'm talking about is in the evidence already ROS 3640. I don't know what it refers to. Do you?"
>
> *Soanes to Brady* (17.40)**
>
> "I will look it up"
>
> *Brady to Soanes* (19.41)**
>
> "It's just an email about the split very short"
>
> *Brady to Soanes* (20.07)**

Judgment

206. On 15 February 2019 the Judge handed down the reserved Judgment. On 29 April 2019 he declared that Mr Tinkler had acted in breach of his fiduciary and contractual duties and that other members of the Board had acted in breach of their fiduciary duties by resolving to transfer 5,320,425 shares to the EBT for the primary purpose of influencing the result of the AGM. He also declared that Mr Tinkler had been lawfully dismissed and removed from the office of director.

207. On 16 May 2019 the Judge ordered Mr Tinkler to pay 55% of the costs of the 2018 Claim and to make an interim payment of £650,000, He also gave directions for a second trial to deal with financial relief. On 6 June 2019 Flaux LJ dismissed Mr Tinkler's application for permission to appeal and on 13 November 2019 Males LJ dismissed an application to re-open the refusal of the application. On 20 March 2020 the 2018 Claim was finally

resolved when the parties entered into Tomlin order on the terms of a confidential schedule which were not revealed to the Court.

IV. The ET Claim

208. On 3 May 2018 Mr Soanes filed the ET Claim. His case was that his communications with Mr Brady in November 2018 about the structure of Project Wright were "protected disclosures" for the purpose of the Employment Rights Act 1996; that Mr Tinkler's insistence that he took 4 weeks off on 11 February 2018 was aggressive and intimidatory; and that on 19 February 2018 he felt that he had no option but to resign. He also asserted that he suffered detrimental treatment from Mr Tinkler because of his protected disclosures. He claimed compensation but not reinstatement.

209. On 28 August 2018 K&L Gates filed the response form on behalf of Mr Tinkler and SCL. In the "Grounds of Resistance" which accompanied the form they denied that Mr Soanes had grounds for making any protected disclosures or that Mr Tinkler was aggressive or intimidatory. They also relied upon the fact that Mr Tinkler had found a draft of the email to Mr Brady on 17 February 2018 and contended that he had acted in breach of his own fiduciary duties and service agreement and that Mr Tinkler suspended him following his letter of resignation. They denied that Mr Soanes had suffered any detriment as a result of any protected disclosures or that he had been unfairly dismissed and contended that he chose to resign at a time when he had positioned himself to enter into a new venture with SGL.

210. On 16 November 2018 Employment Judge Deol dismissed an application by Mr Tinkler to strike out Mr Soanes' "whistleblowing claim" that he had been dismissed for making protected disclosures and the ET Claim was heard by the three member Tribunal over 11 days between November 2019 and March 2020. On 27 April 2020 the Tribunal unanimously dismissed the ET Claim on the basis that although he had made qualifying disclosures, there was no automatic right to claim unfair dismissal and Mr Soanes was not subjected to any detriment as a consequence of making the protected disclosures.

211. It was Mr Tinkler's case that in the course of the ET Claim Mr Soanes disclosed a number of documents or communications which were in the power or control of SGL and that it gradually became clear to him that SGL had not disclosed them in the 2018 Claim. It was his evidence that he then realised that the Judgment had been "highly tainted" by the

absence of these documents and that Mr Brady, Mr Soanes and Mr Ferguson had given false evidence at the Trial in a number of material aspects.

V. The Issues

F. Statements of Case

(1) The Particulars of Claim

212. In the Re-Re-Re-Amended Particulars of Claim (the "**Particulars of Claim**") Mr Tinkler's case was that the documents which Mr Soanes disclosed in the ET Claim contradicted the evidence which Mr Brady, Mr Soanes and Mr Ferguson had given in the 2018 Claim and that if they had been disclosed, they would have undermined the credibility of those witnesses and shown them to have given false evidence. His case in outline was that those documents:

> "...are consistent with a pre-mediated [sic] scheme on the part of at least Mr Brady, Mr Soanes and Mr Ferguson to oust Mr Tinkler as a director of the Company from in or around early January alternatively February 2018 onwards, the existence of which: 6.7.1. at the lowest, would have been highly material to the issues the learned Judge had to decide in the 2018 Proceedings; and 6.7.2. at the highest, would have compelled the learned Judge to find in favour of Mr Tinkler rather than the Company on a number of matters in dispute such that Mr Tinkler would have been the ultimately successful party in the 2018 Proceedings;…"

213. Mr Tinkler also pleaded a detailed case that from January 2018 the Board conducted a successful campaign to remove him as a director and dismiss him as an employee and that this campaign began in January 2018 with an attempt to "bounce" him into announcing his resignation and continued up until the second Article 89(5) notice. He also pleaded that SGL's case in the 2018 Claim was as follows:

> "The removal of Mr Tinkler was categorically not part of a plan pursued from the outset of 2018. Rather, it was said that it was only when Mr Tinkler had himself taken steps to undermine the Board in alleged contravention of his own duties to the Company that the other directors even considered what action would be appropriate to deal with his misconduct. Mr Tinkler's case that he had been the victim of a campaign to secure his removal was decried in the Company's opening submissions in the 2018 Proceedings as "paranoid – and ultimately baseless"."

214. Finally, it was Mr Tinkler's case that the Judge's conclusion that the decisions to dismiss him summarily and to remove him as a director were effective and as taken were based on his finding that there was no premeditated plan of this kind:

> "In reaching the conclusion he did in the Judgment, a material part of the learned Judge's reasoning was his conclusions on the facts that the steps taken to remove Mr Tinkler as a director of the Company in the course of 2018 were not part of a pre-ordained plan or desire on the part of Mr Brady, Mr Soanes and/or Mr Ferguson from January 2018 onwards that Mr Tinkler should be removed as a director. Rather, they were a response only to Mr Tinkler's alleged wrongdoing, beginning with the comments he made to shareholders on 30 and 31 January 2018."

215. The Particulars of Claim then set out detailed particulars of SGL's deliberate failure to disclose documents or to delete them and the false evidence which the witnesses had given. I add that Mr Tinkler was given permission to make various amendments as the present claim progressed. However, both Bacon J and I refused permission for him to make certain amendments which included the first variation to Mr Laycock's employment contract and the role of Stifel.

(2) The Defence

216. SGL's case was that most of the material upon which Mr Tinkler relied in support of his allegation that there was a premeditated plan to remove him was either available or deployed in the 2018 Claim. In the Re-Re-Amended Defence (the "**Defence**") it was also SGL's pleaded case that in the absence of fraud there was an issue estoppel:

> "The facts relevant to the present Claim are: (i) the parties' respective cases in the 2018 Proceedings (as pleaded by Mr Tinkler at paragraphs 12-13); and (ii) the Court's findings and judgment in relation thereto. In relation to the latter, the Company will rely on the Judgment for its meaning and effect. Mr Tinkler's subjective understanding at the time of the 2018 Proceedings of the events leading to his dismissal are thus wholly irrelevant. Nor is it permissible for Mr Tinkler to seek to 'recast' his position in the 2018 Proceedings with the benefit of hindsight. Further, in the absence of the Court finding any fraud occasioned by the Company in obtaining the Judgment, Mr Tinkler is prevented from calling into question or adopting a position inconsistent with the findings in the Judgment by reason of issue estoppel."

217. SGL accepted that the summary of its case in the 2018 Claim as set out by Mr Tinkler in the Particulars of Claim was broadly accurate but it also advanced the following positive case about the events in January and February 2018:

> "Paragraph 12.4 is admitted as a broad summary of the Company's case on the absence of any plan to remove Mr Tinkler at the outset of 2018. It is further averred that the Company admitted that Mr Ferguson and Mr Brady were gravely concerned by Mr Tinkler's conduct in early February 2018 and sought advice as to whether Mr Tinkler could be removed from the Board (the privilege in which was not and is not waived). It became apparent that Mr Ferguson, Mr Brady, Mr Wood, Mr Coombs and Mr Laycock were all willing to sign a resolution under Article 89(5) of the Company's Articles of Incorporation to remove Mr Tinkler, albeit initially in order to demonstrate to Mr Tinkler the strength of feeling among the Board in an attempt to persuade Mr Tinkler to change his attitude and conduct. Mr Garbutt, however, was not willing to sign a resolution, meaning that the Board could not use Article 89(5) to remove – or threaten to remove – Mr Tinkler from his directorship (since the mechanism required unanimity amongst the other directors). Consequently, the remaining directors resolved at that point to 'move on', and work as best they could with Mr Tinkler."

218. It was also SGL's case that the existence (or otherwise) of a premeditated plan and the intentions of Mr Brady, Mr Ferguson and Mr Soanes were not material to the conclusions which the Judge reached:

> "The first sentence is denied: in respect of the Judge's conclusion regarding the lawfulness of the dismissal and removals of Mr Tinkler, the conduct and intention of Mr Brady and Mr Ferguson did not form a material part of his reasoning (¶797-801, 903-904, 921). In particular, the Court expressly identified that Mr Ferguson did not form part of the Committee that took the decision to dismiss or remove Mr Tinkler on 14 June 2018. The relevance of Mr Soanes' conduct and/or intentions is denied, in circumstances in which it was not part of Mr Tinkler's case that Mr Soanes was involved in any plan to dismiss or remove him."

G. Closing Submissions

(1) Mr Tinkler's Submissions

219. In his written closing submissions Mr Wardell asked me to make sixteen primary findings of fact in the light of the evidence as it emerged over the course of the trial. I will refer each of the sixteen issues on which he invited me to make those findings of fact as an

"**Issue**" and I number them "**(1)**" to "**(16)**". The findings which Mr Wardell asked me to make were as follows:

(1) As at the start of 2018 Mr Brady had concluded that Mr Tinkler could not remain on the Board as an executive director and he had accordingly begun to devise a plan to remove or otherwise neutralise him.

(2) Mr Brady had made Mr Soanes privy to his plans regarding Mr Tinkler and over the course of 2018 generally, both Mr Brady and Mr Ferguson shared confidential information regarding Mr Tinkler with Mr Soanes.

(3) Mr Brady and Mr Ferguson at the very least intended to use Article 89(5) in February 2018 to remove Mr Tinkler from the Board (whether by using it to persuade Mr Tinkler to step down voluntarily to save face or forcibly removing him against his wishes) and would have done so but for Mr Garbutt's refusal to sign the Article 89(5) letter.

(4) Mr Brady deliberately deleted his WhatsApp messages with Mr Soanes on 28 May 2018 at a time when he appreciated that litigation was in prospect and deliberately did not mention that fact to SGL's solicitors.

(5) The Committee as formed in May 2018 was not independent nor was it intended to be.

(6) Mr Laycock was induced to step down as a director of SGL in July 2018 in order to permit Mr Tinkler's removal using Article 89(5) following his anticipated re-election at the AGM on 6 July 2018.

(7) Mr Brady deliberately deleted his Telegram messages with Mr Soanes prior to his mobile telephone being imaged by HSF on 2 July 2018 and deliberately did not mention that fact to SGL's solicitors.

(8) Mr Ferguson deliberately deleted emails pre-dating 3 May 2018 in his Wilton Park email account and did not mention that fact to SGL's solicitors, nor did he draw to their attention to the fact that he realised he had not captured all of his SGL-related emails for the purposes of the 2018 disclosure exercise.

(9) SGL deliberately failed to disclose documents which it was under a duty to disclose in the 2018 Claim.

(10) It can properly be inferred that SGL deliberately failed to give disclosure of other relevant documents in the 2018 Claim.

(11) Mr Soanes was no mere witness for SGL in the 2018 Claim but rather an individual heavily involved in the preparation for trial and a man who was – and even now appears to remain – firmly inside SGL's tent.

(12) Mr Brady gave knowingly false evidence on behalf of SGL in the 2018 Claim.

(13) Mr Soanes gave knowingly false evidence on behalf of SGL in the 2018 Claim.

(14) Mr Ferguson gave knowingly false evidence on behalf of SGL in the 2018 Claim.

(15) Mr Brady knew that Mr Soanes had given knowingly false evidence on behalf of SGL in the 2018 Claim.

(16) The Loan Agreement was on uncommercial terms and was demanded by Mr Soanes as the price of his evidence and assistance in the 2018 Claim.

(2) SGL's Submissions

220. Issues (1), (2), (3) and (5) all involve me making similar findings of fact to those made by the Judge (although not identical). Although it was SGL's pleaded case (above) that the findings made by the Judge gave rise to an issue estoppel, Mr Leiper did not submit either in writing or in his oral closing submissions that I should not decide those issues or that Mr Tinkler was bound by an issue estoppel (or estoppels) in relation to them. This was a realistic concession. The existence of a premeditated plan was a central plank of Mr Tinkler's case and provided the motive which he attributed to the witnesses for their willingness to give false evidence to the Judge. It would have been very difficult (if not impossible), therefore, for me to decide whether the Judgment should be set aside without deciding some of those issues (at least).

H. The Court's Approach

221. In the light of SGL's position at trial, therefore, I am satisfied that I should go on to make findings of fact on Issues (1), (2), (3) and (5). In doing so I adopt the approach which I have set out in section II (above) under Limb 3. For the reasons which I have explained there, I address the issues in the following way. First, I identify the relevant finding which the Judge made (insofar as he did so). Secondly, I identify the new documents (or other evidence) upon which Mr Tinkler relied. Thirdly, I consider whether Limb 1 of the test is satisfied and, in particular, whether the new documents or evidence (including cross-examination of the witnesses), provides cogent evidence of dishonest conduct. Fourthly, and finally, I consider Limb 2 and whether the new documents or evidence (including cross-examination) were material. In addressing this fourth question, I consider whether both the *Highland* test and the *Hamilton* test are satisfied.

VI. Findings

I. The Witnesses

222. Mr Tinkler gave evidence himself and Mr Hodges also gave evidence in his support. They did not give very much evidence about any of the issues which I had to determine and neither was cross-examined at length. It was not necessary for me to form any views about their credibility and I accept the evidence which they gave. Indeed, their evidence presented the difficulty which Mr Leiper identified in opening. I was not able to compare Mr Tinkler's evidence with the evidence of SGL's witnesses and not asked to decide between them.

223. For each of SGL's witnesses, cross-examination was almost entirely a test of credibility and in some ways, it seems artificial to assess the credibility of that evidence separately from deciding the substantive issues. Nevertheless, I formed views about the honesty and reliability of the individual witnesses not only from their evidence in relation to the specific issues which I deal with (below) but also from hearing them give evidence about the issues which the Judge had decided at the Trial. Given the approach which I adopt (below), it may be important for any possible appeal that I set out my overall assessment of the evidence of each witness.

(1) Mr Brady

224. Mr Brady was cross-examined for two full days on a wide range of topics and documents which were often subject to detailed analysis by Mr Wardell. He was patient and courteous and my impression of him over those two days was that he was an honest and reliable witness. When I came to review his evidence closely against the documents, I became more and more convinced that he had been telling the truth throughout his evidence. I make it clear, however, that when I came to decide whether Mr Brady had deliberately deleted WhatsApp and Telegram messages, I approached those issues by testing the available documentary evidence (and, in the case of the Telegram messages, the expert evidence) against the inherent probabilities before taking account of Mr Brady's oral evidence. But having carried out that exercise, I was satisfied that his evidence was truthful.

(2) Mr Ferguson

225. I formed the same impression of Mr Ferguson over the course of his cross-examination. Mr Wardell chose primarily to cross-examine him by reference to documents which had been available and deployed in the 2018 Claim. As he gave evidence, I became more and more convinced that he had given truthful evidence at the Trial and that the Judge's own assessment of him had been correct. For example, I accepted his evidence about the minutes of the meeting of the Board on 25 January 2018 despite the changes which he made to the drafts over time. Moreover, the choice of documents which Mr Wardell put to Mr Ferguson also satisfied me that the new documents upon which Mr Tinkler relied cast no real doubt on Mr Ferguson's integrity or honesty as a witness.

226. As with Mr Brady, however, I did not rely solely on my assessment of Mr Ferguson's credibility when I had to decide whether he had deliberately deleted emails from his Wilton Park account. I also approached that issue by testing the documentary and expert evidence against the inherent probabilities before taking account of Mr Ferguson's oral evidence. But having done that exercise, I was fully satisfied that he too was telling the truth.

(3) Mr Coombs

227. I found Mr Coombs to be an impressive witness and both honest and reliable. Mr Tinkler re-amended the Particulars of Claim to allege that he gave false evidence in relation to Mr Brady's email dated 19 June 2018. He gave the same evidence about that email in

this action as he did at the Trial and it was obvious to me that he was telling the truth. Indeed, it was so obvious that Mr Tinkler withdrew the allegation of dishonesty against Mr Coombs in closing submissions. I found him to be equally straightforward in all of his cross-examination.

(4) Mr Wood

228. Mr Tinkler did not challenge the honesty of Mr Wood and I also found him to be an honest and impressive witness. He clearly understood the importance of questions which were being put to him but made concessions where he felt it right to do so. For instance, he accepted that the terms of the Loan Agreement were not commercial. But he was also clear that the Second Side Letter was not an inducement or bribe to persuade Mr Laycock to resign as a director. I accepted his evidence on both points without hesitation.

(5) Mr Soanes

229. The one witness about whom I had concerns was Mr Soanes. He did not strike me as an independent and thoughtful witness in the way that he struck the Judge and I found his evidence to be unreliable and inconsistent with the documents in some respects. However, I am not satisfied that he deliberately gave false evidence at the Trial or that he was paid to do so. The examples of false evidence which were put to him were not compelling and appeared to me to be isolated answers which had been taken out of context and even if he had meant something different, it would have made no difference to the Judge's findings.

J. Findings of Fact

(1) By the start of 2018 had Mr Brady concluded that Mr Tinkler could not remain on the Board as an executive director and had he begun to devise a plan to remove or otherwise neutralise him?

(a) The Judge's Findings

230. Mr Ferguson gave evidence that at the meeting on 10 January 2018 Mr Tinkler did not raise the third option in his note and that he did not give permission to Mr Tinkler to speak to shareholders about the possibility of him taking over as Chairman. Mr Ferguson also gave evidence that at the meeting on 24 January 2018 Mr Tinkler expressed his wish

to stand down from the Board. The Judge preferred Mr Ferguson's evidence to the evidence of Mr Tinkler: see [588] and [596] and he made the following finding at [612]:

> "612. I therefore find that Mr Tinkler's decision to stay on as a director was not the product of his discussions with those shareholders in late January 2018 because it was not on the agenda so far as discussions with them were concerned. It follows that I find that Mr Tinkler had said one thing to Mr Ferguson, about leaving the Company, and another thing to the shareholders."

231. I will refer to the agreed issues which the Judge was asked to decide as the "**Trial Issues**" to distinguish them from the issues which I have to decide in this action. Trial Issue 1 was whether Mr Tinkler raised genuine concerns about the management of SGL and the Judge decided that issue as follows at [633]:

> "I therefore accept the Company's submission that this first of the Issues is correctly answered by saying that Mr Tinkler had some underlying and rather generalised concerns about the way the Company was being led by Mr Brady, which he expressed on occasion to Mr Ferguson, but these essentially reflected his recognition of the basic point that he himself had lost control over its direction upon stepping down as CEO. If and to the extent Mr Tinkler had particular, identifiable concerns then he did not take them to the Board. The first clear indication of anything like a complaint by him at Board level appears to have been when he produced to the Board meeting on 24 April 2018 his spreadsheet which showed how the Company's performance was departing from the five-year plan."

232. Trial Issue 2 required the Judge to decide whether Mr Tinkler was liable for unlawful means conspiracy and he rejected that claim. Trial Issue 3, however, required him to decide whether Mr Tinkler had also acted in breach of fiduciary duty. He rejected SGL's case that Mr Tinkler had committed a breach of duty by putting forward the contentious acquisition structure for Project Wright (and I return to this in the context of Issue (2) in this claim). However, he found that Mr Tinkler had committed a breach of fiduciary duty by speaking to shareholders in January 2018 at [733] to [736]:

> "733. I therefore turn to the other matters identified within Issue 3 for consideration as potential breaches of fiduciary or contractual duty. They are four in number. In my judgment, the Company has made out its case on each and each one constituted a serious breach of duty by Mr Tinkler.
>
> 734. The first allegation is that Mr Tinkler spoke to the Company's significant shareholders and, when doing so, criticised the Board's management and the Group's business and agitated for the removal of Mr Ferguson. I approach this allegation in the light of my conclusions in

> Section 4(a)(iv) and (vi) upon the duty to act on good faith in the best interests of the Company and the duty to exercise an independent mind.
>
> 735. In my judgment the evidence and the conclusions I have reached on Issues 1 and 2 above (and those made in first establishing the context for my consideration of the Issues) amply support a finding that in late January 2018 Mr Tinkler set out on a process of "briefing against the Board". He used the opportunity which Mr Ferguson had given to him, to discuss the timing of his departure from the Company with major shareholders, to instead do something that Mr Ferguson would not have countenanced and that was to foment shareholder dissatisfaction over the direction of the Company. I accept Mr Brady's evidence that this is what he discovered when he spoke to each of Mr Barnett and Mr Dobell on 1 February and Mr Williams on 2 February 2018. Mr Tinkler had not raised with any of them the idea of him resigning and they were surprised to hear of it from Mr Brady. Instead, Mr Tinkler had expressed concerns about the Chairman, the Board and the strategy of the Company.
>
> 736. Mr Tinkler did this without having raised his gripes with the remainder of the Board so that (to the extent that they went to matters of corporate strategy, as opposed to self-reward, and were reasoned and properly articulated) they might then have addressed them. Mr Tinkler's explanation in the witness box that he was only responding to the shareholders' questions which, once asked, he could not refuse to answer rang entirely hollow. In any event, even if I had been persuaded that it was the shareholders who somehow changed the agenda for the discussions from that of his intended resignation, Mr Tinkler should have curtailed the discussion rather than taking it upon himself to offer his own dissenting views. I also accept the evidence of Mr Ferguson and Mr Brady, supported by Mr Hodges, that Mr Tinkler recognised his actions had been unacceptable at their meeting (with Mr Hodges present) on 7 February 2018."

233. The meeting on 7 February 2018 was important to these findings because it was SGL's case that at that meeting Mr Tinkler accepted that he had behaved improperly by discussing the replacement of Mr Ferguson with shareholders at the end of January 2018. Mr Tinkler challenged the authenticity of Mr Brady's note of the meeting on 7 February 2018 at the Trial (as he did before me): see [178] and [179]. But the Judge recorded that Mr Hodges (who was Mr Tinkler's witness) gave evidence that Mr Tinkler acknowledged that "it would be superior to have discussions in private without going off to shareholders on your own": see [180]. Mr Hodges accepted that again when he was cross-examined by Mr Leiper again at this trial:

> "Q. There was also an exchange about Mr Tinkler's discussion with shareholders in the meeting on 7 February. A. Yes, there was. Q. And Mr Tinkler acknowledged that it would be superior to have discussions in private without going off to the shareholders on his own, didn't he? A. Yes,

> he did. My recollection is they all did. Q. Well, Mr Tinkler specifically gave that acknowledgement in the course -- A. Yes, I believe he did. Q. Yes. You expressed the view that it was not acceptable to air disagreements to shareholders before airing them internally, as that was damaging to the company, didn't you? A. Yes, I did."

234. Trial Issue 4 required the Judge to decide whether Mr Brady, Mr Ferguson, Mr Coombs and Mr Wood had themselves committed breaches of fiduciary duty. He rejected the allegation that they had committed a breach of duty by signing the first Article 89(5) notice for a number of reasons and it is necessary for met set them all out here:

> "780. Of course, the Four Directors' contemplated use of Article 89(5) in February 2018 came to nothing. Although they signed the Article 89(5) notice on 26 February, Mr Garbutt would not do so. I do not believe that the proper purposes rule (which is essentially concerned with acts that are effective but tainted by a primary improper purpose that may lead to them being set aside) can have any sensible application to this "attempt". The notice was not complete, in terms of the necessary signatories, and neither was it served. Had Mr Garbutt signed it, then not only would his willingness to sign be of some significance to the allegation of improper purposes on the part of the Four Directors but I think it is also a fair inference to conclude that the directors would have paused to consider further whether or not to serve Mr Tinkler with it. The evidence of the Four Directors was that the "tipping point" had not by then been reached. The idea of serving such a notice had been raised by Mr Brown who had put them in touch with Mr Foster, so some final legal advice on the decision to serve it would have been likely.
>
> Although it might be said that the other fiduciary duties have greater potential application to inchoate steps, and that the presence of an improper motive would indicate a lack of good faith and might also be indicative of a conflict of interest, they too most obviously concern effective action on the part of a director. I draw a comparison with my conclusion that Mr Tinkler did not act in breach of duty in merely making his proposal within Project Wright.
>
> 782. In any event, I am unable to conclude that any of the Four Directors acted in breach of fiduciary duty when signing the Article 89(5) notice. I have no reason to doubt that, when he did so, each had formed a genuine belief that it was in the best interests of the Company that Mr Tinkler should be removed. Although further serious breaches of duty on his part were to emerge after 26 February 2018, as I have found under Issue 3 above, they had by that stage discovered that he had been briefing shareholders against the Board. That was enough to justify their belief and there is no basis for the court to conclude that no reasonable director could have come to the conclusion they had. Nor is there any evidence to suggest that any of them acted out of conflict of interest (by that stage Mr Tinkler had not sought to make it a clear choice between himself and Mr Ferguson though they had discovered from Mr Williams on 8 February that Mr

> Tinkler had told him that he wanted Mr Ferguson removed) or that any of them failed to exercise an independent mind on the point."

(b) The New Evidence

235. *The New Year's Resolution Note.* The first new document upon which Mr Tinkler relied was Mr Brady's note made on 1 January 2018 in which he recorded his resolution to "Normalise Plc Board re AT" and "Update Management Team". Mr Wardell cross-examined Mr Brady on the basis that the term "normalise" was a euphemism for removal:

> "Q. Normalising the company" is shorthand for getting help off the board, isn't it? A. That's completely incorrect and wrong. Q. What do you say "normalising" means? A. I would say a normal relationship to have with one of your other executive directors, or non-executive director, is one that contributes constructively and -- including challenge, to running of the business. Normalise the relationship with Andrew and normalise the running of this company meant sorting out a way to get Andrew to contribute constructively and bring what he did best, which was the entrepreneurial talents that he had, to the business. That's what I mean, and not constantly create enormous tension in the team. Q. "... and how we use him as we planned in Stobart Capital." That suggests you had already had conversations with Mr Ferguson about what to do with Mr Tinkler? A. I had been quite open that I thought the best place for Andrew would be to be contributing through Stobart Capital. I didn't think it was very normal to have a previous CEO on the board. I did not have a problem with that, if he contributed. I was very open to it, but I would have thought it was better, and I was pretty open with that, including with him. Q. But best place for Andrew being through Stobart Capital, that involves him being off the board, doesn't it? A. Yes, but it doesn't have to be off the board but that's the best place for him -- I thought that was the best place for Andrew to contribute because that was the entrepreneurial engine created specifically for that."

236. Mr Wardell also relied on Mr Ferguson's email dated 31 December 2017 referring to the "outcome with AT that we want" both because it appeared to be consistent with this conclusion and also as evidence that Mr Ferguson was privy to Mr Brady's plan. This email had been disclosed by SGL in the 2018 Claim (although not Mr Brady's reply the following day). I accept that it is appropriate to consider it again in the light of Mr Brady's note and the evidence which he gave about it.

237. *19 January Text Message Exchange.* Mr Tinkler relied next upon the exchange of text messages between Mr Brady and Mr Soanes on 19 January 2018. His case was that this exchange showed that Mr Soanes was firmly in Mr Brady's camp, that Mr Brady's plan

for the medium term was the removal of Mr Tinkler and that Mr Soanes was asking for Mr Brady's help to make a similar plan to sideline or remove Mr Tinkler from SCL. Mr Wardell explored this with both witnesses, who refused to accept this explanation. Mr Brady's evidence was as follows:

> "Q. If we look at paragraph 25, you say you understood this as the plan being Mr Tinkler voluntarily resigning, but to have a plan, if he doesn't go voluntarily, you have to get rid of him, don't you? A. There was no plan to get rid of Mr Tinkler. The plan -- my plan was to make sure we effectively normalised the board relationships. I personally thought it would be better if Andrew contributed through Stobart Capital and not on the board, given all of what had gone on, right? Even after he had really what I called sort of briefed against the board against -- the shareholders against the board and the chairman, I still thought there would be an opportunity to work with Andrew, right, all the way through really, right, until he had behaved very badly. Q. And if we can go back to {I17/304/1}, please, just to see your response, {I17/304/15}. You say: "Well, I think we can find a plan for you medium term. Let's solve this as a first step." A. Mm-hm. Q. Well, Mr Tinkler goes and then you will sort Mr Soanes out. A. No, I think -- so it was obviously a long time ago but I'm very clear on what I wanted as a theme, which was to get Mr Soanes and Tinkler to work together, get the FlyBe transaction out the way, and also I would like to have retained Mr Soanes in some sort of -- in some sort of fashion, to make sure he could contribute, if we needed him.""

238. Mr Soanes' written evidence was that he could not recall what he thought when he received Mr Brady's text but there was certainly no arrangement that he would abandon SCL and work directly for SGL. When the exchange of text messages was put to him his evidence was as follows:

> "Q. You must have had an understanding of it at the time, particularly as he is using exactly the same language as you've used, "medium term" and "plan"? A. I think we are agreed that we are all working in very difficult circumstances and we need to get through this. Q. "Let's solve this as a first step. I think you do great work." So the plan for you medium term was going to come after the first step, wasn't it? What's your evidence as to what the first step was? A. I would have thought the first step was to get the transaction that we were working on done. Q. You say in paragraph 33 of your witness statement --would you remind yourself. You say you categorically deny that this had anything to do with you going to work for the company. A. That's correct. Q. But you spent months during the rest of 2018 agitating for that, didn't you? A. You've got to distinguish between the period before I was dismissed and the period afterwards. After I was dismissed, I had to try to recover from that situation. Stobart Group had been a client for more than ten years. It seemed to me natural that I would try to find work with them as a client. But prior to that -- and this is prior

> to that -- there was no intention whatsoever to leave Stobart Capital."

239. *29 January Note.* Mr Wardell relied next upon Mr Brady's note dated 29 January 2018 and the reference in it to "AT RNS". Mr Brady could not recall making the note. Mr Wardell also asked Mr Brady about the text message which he had sent to Mr Soanes on 29 January 2018 (which had been disclosed in the 2018 Claim). He suggested to Mr Brady that he used the phrase "AT being sorted as well" to mean that the Board was trying to force out Mr Tinkler:

> "Q. "Ian, hope all okay with you. Just to get you know we will give a locked down model and give to Cyrus today. Don't worry about work we have it covered. AT being sorted as well." That must be a reference to forcing him out. A. No, that's definitely not a reference to forcing him out. Q. What do you understand by "AT being sorted as well"? A. Trying to get a normalised relationship with him, where he can contribute. We were not trying to push out Andrew Tinkler, right, we wanted to find a proper way forward with him. Q. There is absolutely zero evidence at this stage of you taking any steps to liaise with Mr Tinkler to try and improve relations on the board? A. That's not true."

240. Mr Brady had been cross-examined about the phrase "AT being sorted as well" in the 2018 Claim. When Mr Taylor cross-examined him about this phrase at the Trial, his evidence was that he meant getting Mr Soanes and Mr Tinkler to work together:

> "Q. This is another email that you sent to Mr Soanes. It might be a text. And this was, is just before you forwarded on to him the fact that you were instructing Travers Smith on Article 89.5. You said: "Ian, hope all okay with you. Just to let you know we'll give a lock-down model and give away to Cyrus today." That's a Flybe model: "Don't worry about work. We have it covered. AT being sorted as well." And that was further to -- that was your discussions with Mr Soanes about sidelining Mr Tinkler from the management of Stobart Group and indeed Stobart Capital, wasn't it? A. The context of that email, from my perspective, was -- "AT being sorted", was I knew there was -- it was a tricky situation for Ian because he was working on the Siris deal as well as the Flybe multi-step deal, and I know he was struggling with that conflict, because he knew, you know, to do both and knowing full well that the Flybe three-step/four-step one was really not going to fly, and they couldn't raise the money, so in that perspective I'll say "Look, I'll try to talk to Andrew just to make sure that you can work on both without being conflicted", that's how I saw it, but ... Q. Well, it's quite clear, isn't it "AT being stored" [sic] is -- A. Well, it's a long way from -- if you're trying to insinuate that was the context, I mean that was January and that was a long -- we hadn't even considered legal advice by then. I hadn't even spoken to the shareholders by then."

241. Mr Soanes also gave evidence about this text message at the trial of the 2018 Claim. When Mr Taylor had put the text message to him, he suggested again that Mr Brady was referring to a discussion about side-lining Mr Tinkler from the management of both SGL and SCL. Mr Soanes described this as a "complete fabrication". Mr Wardell took him to the transcript of that evidence in the 2018 Claim and suggested that it was untrue. He also suggested that the exchange on 29 January 2018 was a continuation of the discussion between Mr Brady and Mr Soanes evidenced by the exchange of text messages on 19 January 2018:

> "Q. I just want to look at the evidence you gave about this at the trial. Can we look at {C/97/49}. You were asked on page 194 at line 15: "... the reference to 'AT being sorted', that is a reference to a discussion between you and Mr Brady about side-lining Mr Tinkler from the management of Stobart Group and Stobart Capital ... "Answer: That is a complete fabrication." And then you are asked.Q. "Question: So when it says 'AT being sorted as well', what does that mean? "Answer: I have absolutely no idea." But, of course, on your version of events you are telling my Lord about, you did have every idea what he was talking about; it was reconciliation. A. It could have meant anything, so the question that was put to me was that I was involved in side-lining Mr Tinkler from management of Stobart Group and Stobart Capital, which was completely untrue, and then asked about AT being sorted, that links back to that question and I didn't know what it meant. Q. Well, it's pretty -- I would say it's pretty obvious what it meant; it was a continuation -- A. Just that the project is being sorted. Q. No, it was a continuation of your conversation which had preceded the 19 January messages we've looked at, where you understood that Mr Brady had a plan to remove Mr Tinkler from the board and you wished you had a plan. A. That's not true."

242. Finally, Mr Wardell suggested to Mr Brady that he must have known that the evidence which Mr Soanes had given about the phrase "AT being sorted as well" was untrue and that Mr Soanes was lying to the Court:

> "Q. So {C/97/49}, please. And at page 194, the question at line 15. "Question: And the reference to 'AT being sorted', that is a reference to a discussion between you and Mr Brady about sidelining Mr Tinkler from the management ... "Answer: That is a complete fabrication. "Question: So when it says 'AT being sorted as well', what does that mean? "Answer: I have absolutely no idea." Sitting in court, you would have known that Mr Soanes was lying, wouldn't you? A. Again, I can't remember that part of court."

243. *The StobCap Buyout Email and Attachment.* Mr Tinkler relied next on the sequence of documents relating to the StobCap Buyout proposal. Mr Brady's evidence was that he

discarded the proposal although he sent it on to Mr Ferguson and recalled discussing it with him. He described it as "a nice package" but "too complicated for us to get into". Mr Ferguson was prepared to accept that he may have had a call with Mr Soanes about the StobCap Buyout Email. But apart from receiving the email (which he described as "unsolicited") he could not recall any other discussions with Mr Soanes about the tax dispute or the StobCap Buyout proposal. Mr Soanes was cross-examined on the basis that he would not have put forward the proposal unless he understood that there was a plan to remove Mr Tinkler. He did not accept this although he ultimately accepted that the proposal envisaged that he would remain at SGL in London but that Mr Tinkler would not.

244. *The StobCap Buyout Presentation.* Mr Wardell also relied upon the StobCap Buyout Presentation which I must address separately. Mr Soanes' evidence was that he prepared it as a script or speaking note for a meeting with Mr Tinkler rather than a proposal for Mr Brady:

> "Q. Pausing there, as I put to you when I was asking you about the StobCap buyout email, you were envisaging that you would end up within StobCap in London, working for a subsidiary of Esken. Do you agree? A. I think so, yes. Q. And Mr Tinkler would be out of StobCap. Do you agree? A. Mr Tinkler could be inside if he wanted to. Q. It's not what you are proposing in this proposal, is it? You said: "AT would establish a new, unregulated business -- A. A couple of points, my Lord, in that regard. This was a script for me to speak to Mr Tinkler. Nothing could be done in relation to SCL without Mr Tinkler's full support. He controls the business. So there is no prospect of doing anything to him. I'm preparing to make the suggestion to him. If he didn't like it, it would end there and then, but Mr Tinkler has previously said that he hadn't envisaged the business being regulated. He said so in his witness statement for the employment tribunal. He wasn't comfortable being in a regulated business, so I was simply suggesting as part of that we deal with that preference at the same time. Stobart Capital is currently a consultant. He would continue to be a consultant. Q. Could you answer my question, please. You said Mr Tinkler could be inside if he wanted to. I merely asked you: it's not what you are proposing in this proposal, is it? Is the answer to that yes? A. Yes, that is not what I was going to propose to Mr Tinkler."

245. When the presentation was put to him, Mr Brady agreed with Mr Wardell's summary of its contents. He also accepted that although it was interesting at first, SGL did not enter into any discussions with Mr Soanes about any of the structures which he was proposing:

> "Q. So what was being proposed is just an expansion of the 6 February

> StobCap buyout email, wasn't it? What was being proposed was that Esken should buy in Stobart Capital and Stobart Capital would be the London-based team and Andrew Tinkler would have a new relationship with Stobart Capital. Do you agree? That's what's being proposed here. A. Absolutely. That was Ian's proposal to the company. We were not interested in that proposal, as I said to you yesterday, it looked kind of interesting on the first blush, when I first got the email, but we did not enter any discussions with Ian about any of these structures. We were not interested in structures. As it happens, because the -- it's a fact -- we actually pursued the tax claim independently of Ian Soanes and we didn't terminate the Stobart Capital agreement until much later, when the performance of the business -- when we are not getting the services from Stobart Capital, and we didn't -- this was another Ian Soanes proposal, effectively to make sure he secured his own position and looked after himself, which I perfectly understood."

246. Mr Wardell also asked Mr Brady about his two text messages dated 10 February 2018 (which had got stuck in his outbox). They had been disclosed in the 2018 Claim and Mr Brady had given evidence about them both at the Trial and in the ET Claim. Mr Wardell suggested that he had been referring to the StobCap Buyout proposal in the first text and that his evidence at the Trial was untrue:

> "Q. "Let's agree an outcome for Group and Capital and see if we can do it together. I expect he will like to avoid actual payment!" "We" is a clear reference to you and Mr Soanes, isn't it? A. Again, I was -- just for clarity, I wanted to normalise the relationship with Andrew. We wanted to have a healthy working relationship with Stobart Capital contributing. If that couldn't happen, I would have definitely liked the contribution of Ian Soanes on both the FlyBe transaction and, obviously, later on, as you know, he did some work for us on the incentive schemes. Q. "I expect he will like to avoid actual payment!" is clearly a reference back to the StobCap buyout email, isn't it? A. I can't -- it's a long time ago, so I'm making an assumption. It does appear that it would be about the tax, but again -- it's a -- I generally would be hard pushed to remember the exact meaning of that text. Q. Let's have a look at your evidence in the 2018 proceedings, please. That's {C/98/38}. And we can pick it up -- A. Which page are we looking now? Q. I'm about to tell you. We can pick it up at page 151, line 19. Mr Taylor asked you to look at this 10 February message: "Let's agree an outcome ..." And he asks you: "Now, can we agree that the "he" was Mr Tinkler?" He would like to avoid actual payment. You said yes: "What it shows ..." Mr Taylor puts to you: "... is that you were trying to agree with Mr Soanes how he would work for the group to the exclusion of Mr Tinkler? "... that's not correct." But that was a lie, wasn't it? A. No. Q. A deliberate lie on your behalf? A. No, that's not. I think that's an incorrect statement."

247. Mr Wardell put next the evidence which Brady had given to the Tribunal on Mr Soanes' behalf in the ET Claim:

> "Q. Shall we see what you said in the employment tribunal proceedings at G12, page 7….At paragraph 27, you say this: "I have been shown a text message which I sent to Mr Soanes ... stating 'Let's agree an outcome ... see if we can do it together ...' This message was sent in response to Mr Soanes following up, on 6 February ... on his tax settlement suggestion. Although I had not looked at Mr Soanes' suggestion properly I was open to ideas as to how to resolve the dispute with Mr Tinkler." That's what you say in the employment tribunal proceedings. Can we now go back to the 6 February StobCap buyout email at {I5/494/1}. So you will recall this. You responded to this, second paragraph says: "Buying in Stobart Capital (making it a subsidiary..." And then at the bottom of the page, second point: "Group buys in the shares ... at a reasonable price ..."StobCap becomes a captive unit ..."Andrew saves face and we construct a new relationship between SGL/StobCap and Andrew -- he's a consultant developing ideas and he has 'favoured nation' status with StobCap for his own investments?" So the premise of this proposal is that Andrew Tinkler is going to leave Esken and he is also going to have no role within StobCap. He will be operating as a consultant and he will have favoured nation status. So the outcome you were commenting on was a proposal that Mr Soanes would end up working for Esken because Esken will own StobCap and Mr Tinkler will no longer have any real role. And your comment is: "Let's agree an outcome and see if we can do it together." A. Again, just for clarity, the outcome I wanted for the business, in the best interests of the company, was to find a solution to normalise relationships with Andrew and obviously work with Ian Soanes to contribute for our -- I keep saying it, the FlyBe deal. This proposal for Ian was interesting, we did not entertain it. As far as I know, I don't think it was even discussed with Andrew Tinkler. I don't know what Ian Soanes actually discussed. I certainly don't know that. All I know is we did not pursue any of this."

248. When Mr Soanes was giving evidence about the StobCap Buyout proposal Mr Wardell also took him to the evidence which he gave about Mr Brady's text dated 10 February 2018 in the 2018 Claim. Again, he relied on the StobCap Buyout Presentation to suggest that Mr Soanes had lied at the Trial. He put this to Mr Soanes twice (and within a few minutes of each other):

> "Q. Let me remind you of what you said at the trial, {C/97/51}. On page 202, you are asked: "That's you and Mr Brady plotting, isn't it, to sideline at least Stobart Capital and that you would go and work directly for the group? "Answer: There was absolutely no intention at that time, or in fact in truth any other, of me going to work for Group separately." That's an obvious lie, isn't it, Mr Soanes? A. No, it isn't. Q. Your presentation included a plan for you to work for the company in Stobart Capital being a subsidiary of Esken? A. It wasn't a plan for me to go and work for Esken,

> it was a plan -- it was a suggestion to put to Mr Tinkler to solve his tax issue, which would have had that consequence. Q. And therefore saying, "I had absolutely no intention at that time," when you had just produced a proposal envisaging that very outcome, is an obvious lie? A. No, no, it's not a lie. I was being -- my Lord, I was being asked questions directly about the -- I think this was about the message that Mr Tinkler extracted from my drafts folder, which was subsequently sent to Mr Brady. Q. No, it's not."
>
> "Q. Can we stay on this page, page 203. Line 21: 23 "... you were planning to do something with Stobart Group to the exclusion of Mr Tinkler, that's right ..."Answer: I've said numerous times and I will continue to say that was not the case." But that was the plan. A. I don't think I've got the section you are looking at. Q. It's 203, line 21 through to 25. A. So I'm being asked if I was planning to do something with Stobart Group to the exclusion of Mr Tinkler. Q. I will say that your answer at line 24 to 25 was deliberately untrue. A. No, it can only be including Mr Tinkler because nothing can happen without Mr Tinkler's full support."

249. *8 February Email*. The last document in the StobCap Buyout proposal sequence was Mr Brady's email to Mr Soanes dated 8 February 2018 which also formed part of the chain which Mr Soanes re-sent to him on 4 October 2018. It was put to Mr Brady that the "end goal" to which he was referring was the removal of Mr Tinkler. He did not accept this and stated that the end goal was: "to normalise the group and to be able to get on and run the business with Andrew's contribution." When the email dated 8 February 2018 was put to Mr Soanes, his evidence was as follows:

> "Q. So that's quite clear what Mr Brady has in mind; he wants Mr Tinkler off the board and to be a board adviser. Do you agree? A. It's clear that he wants him to be a board adviser. I don't know that he is currently at this time a board adviser. Q. He is an executive director at this time. A. Through SCL he is a board adviser. Q. I would suggest to you it's clear as day that what Mr Brady is doing is following on from the conversations you have been having since January, in which Mr Brady makes it clear that the medium term plan is to get Mr Tinkler off the board and just be an adviser. A. The conversations that you are describing didn't happen. That wasn't my -- I wasn't -- that wasn't my view of what he was saying. Q. And then he says, over the page: {I17/304/17} "Let's agree an outcome for Group and Capital and see if we can do it together. I expect he will like to avoid actual payment!" And him saying "see if we can do it together" and "agree an outcome for Group and Capital" -- this is a reference to him wanting to go on working for you once a solution had been found for Mr Tinkler, isn't it? A. I think it's just a statement that we all need to do it together and that Mr Tinkler wants to avoid payment, which is what my suggestion achieves."

250. Mr Ferguson commented on Mr Brady's 8 February 2018 email in his witness statement. Mr Wardell suggested both that this evidence and the evidence which he had given at the Trial in the 2018 Claim were deliberately untrue:

> "Q You say that the end goal was just to create shareholder value, and I suggest to you it's quite obvious that the end goal was the plan to remove Mr Tinkler from the board as an executive. That's what I'm putting to you. A. Is that a question? Q. It is. A. Well, you are mistaken. The end goal is what I have written in paragraph 37 and I have written what I have written there because I believe that is the truth. Q. The company's case at trial was that there was no plan to use 89.5 to actually remove Mr Tinkler. Do you recall that? A. Yes. Q. Your evidence that you were just going to use it to get him to behave. A. I hoped that it might prove to be a benign influence on his behaviour. Q. And we can see that from {C/96/23-24}. A. Could I ask the operator to enlarge that a little bit, please. Q. I think we need to pick it up at the bottom of page 23, internal 92, where you are asked a question at line 20: "... the only reason why that was not successful at the time, isn't it, is because Mr Garbutt, one of the other directors, refused to sign that? "Answer: That's correct. I would just say at this point that the strategy I had in mind with having this Article 89.5 was to try to have a further very straight conversation with Mr Tinkler with in a sense being able to say to him, 'We would really like you to stay and behave and run -- behave as a director in an appropriate way and run Stobart Capital. But if you absolutely will not agree to do that, we are going to have to do what we don't want to do but we're going to have to remove you.' That was the conversation I wanted to be able to have, and I hoped -- Mr Tinkler is a tough negotiator, and I hoped that by having that potential ability it would allow me to have a conversation which would result in him actually rejoining the board in the way that he had been before, as a supporter and as a contributor, not as a destructive dissident." I suggest that evidence was deliberately untrue, Mr Ferguson. What do you say about that? A. I disagree with you fundamentally."

251. *12 February Email Exchange.* The final piece of new evidence upon which Mr Tinkler relied was the series of short emails between Mr Brady and Mr Soanes on 12 February 2018 (which was followed by the meeting on 13 February 2018). Mr Wardell submitted that these emails were important because they showed that the two of them were continuing to work closely together to remove Mr Tinkler. When this was put to Mr Brady, his response was as follows:

> "Q. If you are not interested in Mr Soanes' proposals, as you've told my Lord on a number of occasions, why have you agreed to meet him? A. Ian Soanes has put in a very -- he had just been effectively put on four weeks' leave, right. We were using him extensively for the FlyBe deal, right. I thought this was -- from a personal perspective, I thought he was appallingly treated, right, and or all his hard work and effectively doing

> the right thing, right, so the FlyBe deal, the transaction, which was obviously the step 1, step 2, had some regulatory issues. He raised them, quite rightly, despite being, obviously, creating tension with Andrew Tinkler, and I genuinely had a bit of sympathy for Ian and I was very happy to help him -- we were keen to help him actually but not for the purpose of removing Mr Tinkler. Because we could -- you know -- that was a separate issue."

252. When he was asked about the meeting itself Mr Brady accepted that Mr Soanes' objective was the removal of Mr Tinkler. But he stood by his written evidence that there was no discussion of any plan to remove him:

> "MR JUSTICE LEECH: So your evidence is that you didn't treat with Mr Soanes with a view to getting rid of Mr Tinkler from Stobart Capital, because it's clear -- you would accept that that's what Mr Soanes was after? A. There was no question Mr Soanes was after that. I accept that entirely. That was definitely not our objective, right. Our objective was to try and keep and retain the skills of Andrew. And -- you know, he had known Ian Soanes for ten plus years. I was hoping they could reconcile and work together. MR WARDELL: But if Mr Soanes was after that, he would have raised it in his meeting with you. He would have raised the possible departure of Mr Tinkler from Esken and SCL, and you say that was never discussed. A. I cannot remember exactly what we discussed at that coffee meeting, but there was no discussions about us working together to try and get rid of Andrew from SCL and let alone -- he was not -- and Ian was definitely not involved in any of our discussions around Andrew Tinkler and Stobart Group Capital -- Stobart Group in terms of some of the actions later on in the year."

253. When he came to give evidence, Mr Soanes accepted that the meeting on 13 February 2018 was prompted by Mr Brady's reference to the change of control provision in the Management Agreement. He also accepted that at the meeting he complained bitterly about Mr Tinkler's treatment of him. But he also maintained that there was no discussion about the removal of Mr Tinkler:

> "Q. Sorry, I asked you: "You made it clear you would be willing to go and work for the company, effectively doing the work you were doing in your capacity as a director and employee." You said: "Certainly after I was removed ... my view was that my relationship with the company had been terminated by the company and I was free to go and work. So, yes, I think I did at that time want to -- well, I wanted to work, I wanted to go to work for the company. So I think the answer to that question is yes." Are you resiling from that? A. I'm just saying I don't know what we discussed at that meeting. Q. And it's also obvious that you would have had further discussions with Mr Brady about the plans to remove Mr Tinkler from the executive board? A. No."

254. Mr Brady was also asked about his email timed at 17.50 on 17 February 2018 in which he replied to Mr Soanes' email (the draft of which Mr Tinkler had found on SGL's server). He was specifically asked about his suggestion that: "we need to choreograph timing and action". It was put to him that he wanted to get his timing right before he removed Mr Tinkler:

> "Q. That's pretty obvious, isn't it? You want to get your timing right before you remove Mr Tinkler? A. So let's be clear that, as I completely state here, I want to make sure we have got Project Forte, Project Wright, those are my priorities. I didn't want to deal with Andrew and -- Andrew Tinkler and Ian Soanes at war. Right? So I would prefer -- it would have been much better if Ian Soanes had delayed all sorts of actions he had and worked with us through Stobart Capital. He didn't want to do that, but that's -- I would love to have choreographed that for that outcome."

255. I turn, therefore, to my finding of fact on Issue (1). In my judgment, the new documents upon which Mr Tinkler relied do not demonstrate that by the start of 2018 Mr Brady had begun to devise a plan to remove or otherwise neutralise him. I say this for the following reasons:

(1) None of the new documents contained clear evidence that Mr Brady had such a plan or, equally importantly, how he intended to implement it. It is common ground that Mr Brady did not receive legal advice until 5 February 2018 and was not aware of Article 89(5) until then. I consider the first Article 89(5) notice under Issue (3) (below). But it was never put to Mr Brady that he was considering an alternative method of removing Mr Tinkler before that date or what that method might be.

(2) The only document in which Mr Brady expressly referred to a plan was his text message in reply to Mr Soanes on 19 January 2018. It is clear that this was a plan to deal with Mr Soanes not Mr Tinkler. Mr Brady was cross-examined on the basis that his plan for Mr Soanes involved removing Mr Tinkler. But he rejected that explanation and gave evidence that his plan for the medium term was to get Mr Soanes and Mr Tinkler to work together, get Project Wright out of the way and then retain Mr Soanes in some sort of role, if he could.

(3) I accept that evidence. The new documents are consistent with Mr Brady's explanation and his explanation to me was consistent with the evidence which he gave in the 2018 Claim. For example, Mr Brady was clear that his preferred

solution was that Mr Tinkler should resign from the Board and contribute through SCL. It was in the context that he talked about "normalising" the Board in relation to Mr Tinkler in his New Year's resolution note. Mr Brady gave the same evidence on Day 4 of the Trial and he used the same expression in his email to Mr Ferguson dated 27 December 2018.

(4) I also accept the evidence of Mr Brady and Mr Soanes that they did not discuss working together to remove Mr Tinkler as a director or employee of SGL at the meeting on 13 February 2018. None of the new documents suggests otherwise. Mr Brady's initial first email dated 12 February 2018 showed that he was considering whether the dispute between Mr Tinkler and Mr Soanes would entitle SGL to terminate the Management Agreement by exercising the exchange of control provisions and Mr Soanes' email to Mr Brady timed at 13.46 shows that he wanted to meet Mr Brady to enable him to formulate proposals for him to put to Mr Tinkler.

(5) I accept that the dispute between Mr Tinkler and Mr Soanes was closely related to the dispute between the Board and Mr Tinkler. I also accept that in his email timed at 13.46 Mr Soanes was referring to leverage which SGL and Mr Soanes could use against Mr Tinkler. However, as Mr Leiper pointed out in his closing submissions, clause 8.3.3 would not have entitled SGL to terminate the Management Agreement even if Mr Soanes had sold his shares (or threatened to do so).

(6) But in any event, nothing came of the discussion on 13 February 2018 and in his email dated 17 February 2018 Mr Brady tried to persuade Mr Soanes not to resign. I take this email at face value and I accept Mr Brady's evidence that the "timing and action" to which he was referring was not the timing for the removal of Mr Tinkler. Moreover, this email was disclosed in the 2018 Claim and in the bundle for trial.

(7) Finally, the formulation of Issue (1) reflects a critical change in Mr Tinkler's case. His pleaded case was that there was a premeditated scheme on the part of not only Mr Brady but also Mr Ferguson to oust Mr Tinkler. It was also his pleaded case that the new documents to which I have referred demonstrated that there was a plan to remove Mr Tinkler in which Mr Ferguson was an active participant. But the new

documents provide no evidential basis for reaching such a conclusion and they were never put to Mr Ferguson.

(c) Dishonesty

256. But even if I had been prepared to reject Mr Brady's evidence on Issue (1) and to find that he had a premeditated plan to remove Tinkler by the start of 2018 or even by 13 February 2018, I would also have to be satisfied that Mr Brady, Mr Soanes or Mr Ferguson made a conscious and dishonest decision not to disclose any of the new documents or that those documents provide cogent evidence that they deliberately gave false evidence in the 2018 Claim. Again, I deal with each document or document category in turn.

257. *The New Year's Resolution Note*. SGL did not disclose this note and the note dated 29 January 2018 in the 2018 Claim but it disclosed them in these proceedings. There is, therefore, no suggestion that Mr Brady deleted them and Mr Tinkler did not challenge his evidence that these texts were on the image of his phone taken by HSF and manually reviewed by Mr Field as part of the disclosure exercise. Mr Wardell submitted that SGL should have disclosed it following that review. I do not accept that submission. I have compared the note with the table of keywords which Mr Field set out in his witness statement dated 22 October 2018 and I am satisfied that in carrying out a manual review Mr Field could not have been expected to identify the note as a document which SGL was obliged to disclose.

258. But in any event, I accept Mr Brady's evidence that this was a short note to himself setting out his goals for 2018 and that it is likely that he did not look back at it again. Moreover, in my judgment this document does not have the significance which Mr Wardell attributed to it. I also accept Mr Brady's evidence that by using the word "normalise" or "normalising" he meant no more than that he wanted a normal relationship with Mr Tinkler. If that is correct, then the document loses almost any significance. I find, therefore, that Mr Brady did not consciously or deliberately choose not to disclose his note made on 1 January 2018.

259. *19 January Text Message Exchange*. Mr Tinkler did not challenge SGL's evidence that these texts were also on the image of Mr Brady's phone and manually reviewed by Mr Field. In submitting that SGL ought to have disclosed these text messages, Mr Wardell

placed particular reliance upon the Skeleton Argument in support of the specific disclosure application heard by His Honour Judge Kramer on 23 October 2018. He also relied upon a witness statement dated 19 October 2018 made by Ms Clarissa Coleman, a partner at K&L Gates, made in support of the application. In that statement Ms Coleman stated as follows:

> "We also note that there are no disclosed text messages between Mr Brady and Mr Soanes after 29 January 2018. In circumstances where it is apparent that Mr Soanes and Mr Brady were in close communication about Mr Tinkler's position in the Company and Stobart Capital that is very surprising. Furthermore, the Company does not appear to have disclosed an important email which Mr Tinkler obtained and has disclosed from Mr Soanes' email account. That is an email in which Mr Brady forwards an email of 5 February 2018 [Pages 2A to 2D] from the Company's solicitor about how to remove Mr Tinkler from the board on to Mr Soanes."

260. Mr Leiper submitted, however, that when Mr Field came to carry out the additional review ordered by His Honour Judge Kramer, this exchange of text messages would not have responded to the agreed search terms. I accept that submission. Again, I have carefully compared both messages with the table of keywords which Mr Field set out in his witness statement dated 22 October 2018 and I am satisfied that in carrying out the additional review he would not have identified these texts as documents which SGL was obliged to disclose. Moreover, Mr Wardell and his team did not identify the search term or terms to which the exchange would have responded and this was not the case which he put to Mr Brady. He suggested instead that Mr Brady had failed to reveal their importance to Rosenblatt:

> "Q. You hadn't forgotten your discussion with Mr Soanes, though, had you? A. What discussion? Q. Your discussions you had with Mr Soanes by text? A. Can you be more specific, please. Q. Did you not recall having had discussions about the future, in January? A. Of Mr Soanes? Q. Yes. A. Yes, I said to Mr Soanes we would like to keep him as -- in some fashion, to work and continue supporting the FlyBe transaction. Q. But you didn't alert your solicitors to the importance of this exchange of messages, did you? A. No, I didn't -- I didn't do anything. I just gave them all the information."

261. Mr Leiper submitted that it was "beyond fanciful" that Mr Brady would have had in mind these "wholly unremarkable" text messages and that he thought that he should bring them to Rosenblatt's attention. He used the striking description: "They are not even a needle in a haystack; but rather just another piece of straw." Although I would not go this far, I

agree with Mr Leiper that it is improbable that Mr Brady would have gone through his texts, appreciated that this exchange should be disclosed and then taken a conscious decision not to draw them to Mr Field's attention. I find, therefore, that Mr Brady did not make a conscious or deliberate decision not to disclose them.

262. *29 January Note*. I deal first with the allegation of deliberate non-disclosure. This note was also on the image of Mr Brady's phone and manually reviewed by Mr Field. As with the note dated 1 January 2018 and the 19 January text message exchange, I am satisfied that Mr Field would not have identified this note as a document which SGL was obliged to disclose. But in any event, I accept Mr Brady's evidence that he left it to Rosenblatt to decide what documents to disclose:

> "Q. So is your evidence you just left your solicitors to work out whether or not a note was relevant or not on your phone? A. Yes, I gave -- all -- everything to the Rosenblatts and I said, look, whatever you disclose, that's up to you. Genuinely I was relying 100 per cent on Rosenblatt team. We were pretty busy, right, we are running a company. We had a challenge from one of the executive directors, trying to buy FlyBe, doing 8+4, it was a very busy, busy time. Q. But it's up to you. You are the person who knows what's relevant or not? A. Yes, but out of the 9,000 or 7,000 documents, I mean, I don't think it's reasonable that anybody can go through a list of documents that long and decide what's -- certainly from my perspective, which is why I relied 100 per cent on the Rosenblatt team. Q. But your phone doesn't have 7,000 or 9,000 documents? A. My phone has got a lot of documents. Q. I see. A. Like thousands plus."

263. Mr Wardell relied on the fact that Mr Brady signed the Disclosure Statement himself. I accept that, as the CEO of the SGL and Rosenblatt's client, he would have been ultimately responsible for any deficiencies in the disclosure process. But in complex litigation, it is inevitable that a party will rely on its solicitors to identify search criteria and to perform the searches. It is one thing to find that Mr Brady was responsible for ensuring that SGL complied with its disclosure obligations and quite another to find that he consciously and deliberately withheld or suppressed a document. I accept his evidence that he relied on Rosenblatt and I find that he did not make a conscious or deliberate decision not to disclose his note dated 29 January 2018.

264. I turn, therefore, to consider the allegation that Mr Brady and Mr Soanes gave false evidence in the 2018 Claim. I am not satisfied that either the 19 January 2018 text message exchange or the 29 January 2018 note provide cogent evidence that they were

not telling the truth at the Trial of the 2018 Claim. As I have stated above, none of these documents provide clear evidence that Mr Brady had a plan to remove Mr Tinkler or how he intended to implement it. But in any event, I accept Mr Brady's evidence by using the phrase "AT being sorted as well" Mr Brady did not intend to refer to a plan to force Mr Tinkler out of SGL.

265. I find that Mr Brady did not deliberately mislead the Judge when Mr Taylor put to him the phrase "AT being sorted as well" in the text message dated 29 January 2018. In particular, I accept that he was telling the truth when he said that what he meant was: "I'll say "Look, I'll try to talk to Andrew just to make sure that you can work on both without being conflicted", that's how I saw it". I also find that Mr Soanes did not deliberately mislead the Judge when he rejected the suggestion that in the same text Mr Brady was referring to a discussion between himself and Mr Brady to side-line Mr Tinkler. Finally, I accept that Mr Brady was telling the truth when he said that he could not recall Mr Soanes giving this evidence at all. I therefore reject the allegation that Mr Brady knew that Mr Soanes' evidence in relation to the text message dated 29 January 2018 was false.

266. *The StobCap Buyout Email and Attachment*. Mr Tinkler's pleaded case was that the critical undisclosed documents were responsive to the agreed search terms "to a significant degree" but to the extent that they did not respond to those terms, they should all have been available for review by Mr Field. In the Defence, it was SGL's case that the StobCap Buyout Email and Attachment did not fall within the agreed search terms. In the Amended Reply, however, Mr Tinkler contended that the StobCap Buyout Presentation responded to the agreed search terms but did not address the other documents in the StobCap Buyout proposal sequence.

267. Mr Tinkler did not advance a positive case at trial that the StobCap Buyout Email and Attachment were responsive to the agreed search terms. But in case there is any doubt, I have compared the two documents with the table of keywords and I am satisfied that in carrying out the additional review Mr Field would not have identified them as documents which SGL was obliged to disclose. I bear in mind that Mr Soanes' attempts to broker a solution shortly before his dismissal would have appeared fairly peripheral to the issues in the 2018 Claim (a point to which I return when I consider Mr Soanes' evidence more generally).

268. The primary basis upon which Mr Tinkler put his case (both in the Particulars of Claim and at trial) was that Mr Brady and Mr Soanes had the StobCap Buyout Email and Attachment very much in mind when they were preparing for trial because Mr Soanes sent them to Mr Brady on 4 October 2018. Mr Wardell put this to Mr Brady in the following passage:

> "Q. Can you explain why Mr Soanes was emailing it to you on 4 October, either during a meeting or after a conversation -- I'm afraid I can't remember which, but certainly you communicated that day. Why is this being sent then? A. No idea. Q. You were working on your witness statement at the time, weren't you? A. I really can't remember about, like, what I was doing on 18/10, 4/10. Q. The only possible reason it's being forwarded at that date is because you must have thought it was relevant to the case? A. I honestly don't know. I genuinely -- from Ian Soanes to me on the 4th -- I don't know, I have no idea. Q. And you couldn't find it because it hadn't been disclosed. A. I don't think I even received it, did I? Q. Well, you received this. A. I received this, yes, that is true. Q. Yes, so you received it in February. A. And he sent it again out of the blue on the 10th. Q. Mr Soanes isn't going to send it to you for no reason on 4 October, is he? A. Mr Soanes sent a lot of things to me, as you have seen from the bundles. Q. Is that your evidence -- A. My evidence is I don't remember this at all. Q. And what's clear, isn't it, it doesn't prompt you to flag this up to your solicitors that this is an email that hasn't been disclosed? A. No, I thought everything was disclosed. I gave everything to Rosenblatt. I genuinely didn't look down the many, many documents. Q. And the truth of the matter is that you didn't want this email to see the light of day? A. No, that's completely wrong. I was very happy for just everything to be disclosed in all the cases."

269. Furthermore, on 14 November 2018 Mr Soanes was due to give evidence at the Trial. On 13 November 2018 he sent a WhatsApp message to Mr Brady saying that he had seen an email dated 6 February 2018 with an attachment called "**Tink Project Split**". Although the covering email was dated 6 February 2018 the email was not the StobCap Buyout Email and the attachment was not the StobCap Buyout Attachment. It was an email from Mr Whawell to Mr Tinkler and Mr Jenkinson concerned with an unrelated project (as Mr Brady confirmed in his witness statement).

270. It was Mr Tinkler's case that Mr Soanes messaged Mr Brady on 13 November 2018 because he was concerned by the reference to "Tink Project Split" and thought that the StobCap Buyout documents might have been included in the trial bundle. The StobCap Buyout Email and the Tink Project Split email were put side by side on the screen in Court and then Mr Wardell put that proposition to Mr Brady:

> "Q. We have got two documents up on screen. On the right you have the StobCap buyout email, which you no doubt recall, and this is the document in which Mr Soanes offers a solution for the tax bill, which involves Esken buying out StobCap. Do you remember going through that? A. I do, yes. Q. And you remember that was the document sent to you again by Mr Soanes on 4 October? A. And I only remember seeing the Excel spreadsheet, just to confirm. Q. I wasn't asking you about that. I was just asking you to remember that this document on the right was sent to you again on 4 October? A. I certainly remember that document. Again reminded. Q. And the Tink Project Split document is completely anodyne, as you will see on the left-hand side, nothing to do with the StobCap buyout. A. Correct. Q. But anyone reading, if we go back to {I17/46/10} -- anyone reading the trial bundle and not knowing actually what the Tink Project Split document says and knowing that there was a proposal made on 6 February, which would involve a split between Mr Tinkler paying and the company paying, might be forgiven for thinking that they were one and the same document, mightn't they? A. I would think not myself but I think they are completely separate documents, one is a split of the company and one is a Tinkler tax solution. Q. Yes, and your answer is: "It's just an email ..." So you are telling him it's nothing to worry about. A. I'm not sure -- yes, it was just an email, yes. The Project Split was just an email. Q. It was just an email. It's the use of the word "just" I'm asking you about. I'm suggesting, because you knew perfectly well that the 6 February document was important, you knew perfectly well that it hadn't been included in the trial bundle because you hadn't disclosed it and you are reassuring Mr Soanes. A. My Lord, that's just -- that's farcical. It's just not true. That's not the meaning at all."

271. Mr Wardell also put the same proposition to Mr Soanes. He suggested that Mr Soanes must have been asking about the Tink Project Split email in the context of his evidence the following day:

> "Q. Okay. Down to 13 November, please, 17.03. You said: "Hi Warwick, did the afternoon go okay?" Pausing there, this is 5 o'clock on the evening before you are due to give evidence. Do you agree? A. Yes. Q. And you were obviously posing this question in relation to you being on the stand the next day. Do you agree? A. No, I don't. Q. "I've seen an email from BW to AT and AWJ on 6 February with an attachment Tink Project Split. If you know what that's about, could you give me a call. Thanks." And your concern was that this might be a reference to the 6 February StobCap buyout email that you knew or you thought hadn't been disclosed in the proceedings. A. That's not true. Q. And you clearly hadn't lost sight of it because you produced it on 6 February and you returned to it again on 4 October, when you sent Mr Brady a copy. A. I had sent Mr Brady a copy on that day, yes."

272. If I had found that Mr Soanes sent the StobCap Buyout proposal documents to Mr Brady on 4 October 2018 because he thought they were relevant to the preparation of their

witness statements or their evidence more generally, then this would have provided a good reason to draw the inference that Mr Brady was aware of their significance and knew that they should be disclosed (even at that late stage). Moreover, if I had drawn that inference in relation to these documents, I might well have been prepared to draw the same inference in relation to other documents.

273. However, I am not satisfied that Mr Soanes sent them to Mr Brady for that purpose and I am not prepared to draw that inference. Mr Soanes did no more than forward the email on to Mr Brady and the covering email contained no text. It is obvious, therefore, that it must have followed an earlier discussion or exchange. Mr Leiper submitted that the context was a discussion about Project Mercury. Mr Soanes gave evidence about Project Mercury in his witness statement and in his email dated 2 October 2018 he referred to "per my workings back in February" and asked Mr Brady whether he wanted him to re-send them. The StobCap Buyout Email and Attachment were the only workings back in February which might have been relevant to Project Mercury and it was not suggested to him that he produced any other working papers. I therefore find that Mr Soanes was referring to the StobCap Buyout Email and Attachment in his email dated 2 October 2018.

274. I also accept that Mr Brady was telling the truth when he said that he was not interested in Mr Soanes' proposal in February, that he could not remember the StobCap Buyout Email and Attachment being sent to him again in October and that he thought that he had given everything relevant to Rosenblatt. Given that the two documents did not respond to the agreed search terms and that Mr Soanes' proposal had gone nowhere, it is highly improbable that Mr Brady would have seen them again in October, appreciated that they had not been disclosed and made a deliberate decision not to disclose them even at that late stage. I find, therefore, that Mr Brady did not make a conscious or deliberate decision not to disclose the StobCap Buyout Email and Attachment.

275. Finally, I attach no weight to the exchange of WhatsApp messages between Mr Soanes and Mr Brady on 13 November 2018. It was contrived to suggest that Mr Soanes might have been worried that the StobCap Buyout email had been disclosed simply because he asked Mr Brady about another email which had the same date. I accept Mr Soanes' evidence that he was not concerned about disclosure of the StobCap Buyout Email.

276. *The StobCap Buyout Presentation*. By contrast with the earlier two documents, Mr Tinkler's pleaded case was that the StobCap Buyout Presentation was responsive to the agreed search terms. Mr Soanes had disclosed it in the ET Claim and SGL originally admitted that it had received the presentation but later withdrew that admission. Mr Wardell did not submit in closing that the presentation was on SGL's server. But if there is any dispute about this issue, I find that it was not. There was no documentary evidence to support such a conclusion and this is consistent with the evidence which Mr Soanes gave in the ET Claim.

277. Mr Wardell continued to submit, however, that Mr Soanes must have discussed the presentation with Mr Brady. Mr Brady was prepared to accept that Mr Soanes must have intended to show it to him (before Mr Soanes had given evidence). But he did not remember seeing it and he did not accept that he had received it. Mr Wardell also put the same point to Mr Soanes in cross-examination:

> "Q. Have a look at {I6/75/1}, same day. Before I ask you a question about it, I suggest to you you not only prepared your presentation for discussion with Mr Brady but you did in fact give it to him and discuss it with him. A. I don't think I did. The metadata shows that I began drafting it at about 10 o'clock in the morning and finished at 9 o'clock at night. Q. What's stopping you discussing it with him on the 9th? A. Which day is the 9th? That was the Friday. Yes. I don't know. I didn't discuss it with him."

278. I accept Mr Soanes' evidence that he did not give the StobCap Buyout Presentation to Mr Brady or discuss it with him. I also accept that Mr Brady was telling the truth when he said that he could not recall seeing it. Even though it was responsive to the agreed search terms, I find that SGL did not disclose the StobCap Buyout Presentation in the 2018 Claim because it had never received it. I also find that Mr Brady did not see the presentation and did not make a conscious or deliberate decision not to disclose it.

279. I turn, therefore, to consider the allegation that Mr Brady and Mr Soanes gave false evidence in the 2018 Claim. I am not satisfied that the StobCap Buyout Email, Attachment or Presentation provide cogent evidence that either Mr Brady or Mr Soanes deliberately gave false evidence at the Trial. Even if Mr Brady had been referring to the StobCap Buyout proposal in his text message dated 10 February 2018, I accept his evidence that the "outcome" was not the exclusion of Mr Tinkler but a normal relationship with him which involved SCL making a contribution. I find, therefore, that

Mr Brady did not deliberately mislead the Court in the 2018 Claim when he rejected Mr Taylor's suggestion that he was "trying to agree with Mr Soanes how he would work for the group to the exclusion of Mr Tinkler". Moreover, I consider that there was no inconsistency between that evidence and the evidence which he gave in the ET Claim.

280. I also accept Mr Soanes' evidence that he did not deliberately mislead the Court in the 2018 Claim when he gave evidence that he had no intention of going to work for SGL separately on 10 February 2018. In particular, I accept his evidence that the StobCap Buyout Presentation contained a proposal which he intended to put to Mr Tinkler not to Mr Brady and that he hoped that it would resolve the tax issue and achieve an overall outcome which was beneficial to all three parties.

281. *8 February 2018 Email*. I deal first with the issue of non-disclosure. Mr Tinkler accepted that Mr Brady's email dated 8 February 2018 did not respond to the agreed search terms and I am satisfied that Mr Field would not have identified it as a document which SGL was obliged to disclose. Mr Wardell challenged Mr Brady's evidence that he also relied on Rosenblatt in relation to this document on the basis that this email also formed part of the chain which Mr Soanes sent to Mr Brady on 4 October 2018:

> "Q. The trouble is about that answer, as we saw yesterday, the email at the bottom of this chain, at the bottom of page 1, was the email that you and Mr Soanes were discussing on 4 October. It's very difficult to see how it could have been overlooked, isn't it? A. The 4 October in 2018. Q. Yes. We looked at that yesterday. I do not want -- A. I understand that, but 2018, that was just before the court case. Q. Yes, and Mr Soanes had sent it to you -- we looked at that yesterday. A. Yes, we did. Q. And it wasn't disclosed. A. I'm not sure I get the connection, what's the connection? Q. It's in the same chain. Look towards the bottom of this page, there you see the 6 February original StobCap buyout email, which was sent to you on 4 October by Mr Soanes, and at the top of the page, we have: "I am resolute that we will find a solution ..." A. And the date of that email? Q. The first one 6 February and the second one 8 February. A. There was categorically no plan to collude or work with Ian Soanes to -- in dealing with Andrew Tinkler. Ian Soanes was very keen on finding a solution for Ian Soanes."

282. It is clear from this passage that Mr Brady found it difficult to understand the point which was being put to him and that he did not understand the significance of the email or why it mattered whether Mr Soanes had sent it to him again on 4 October 2018. In my judgment, this was not the evidence of someone who had made a conscious and deliberate decision to withhold a document from his solicitors or the Court and I am satisfied that

Mr Brady did not take such a decision both for this reason and for the reasons which I have given in relation to the StobCap Buyout Email and Attachment.

283. I turn, therefore, to consider the allegation that Mr Ferguson gave false evidence in the 2018 Claim. I am not satisfied that Mr Brady's email dated 8 February 2018 provides cogent evidence that Mr Ferguson deliberately gave false evidence at the Trial. I have found that Mr Brady had not begun to devise a plan to remove or neutralise Mr Tinkler by the beginning of 2018 and Mr Ferguson's evidence was consistent with that conclusion. Moreover, his evidence about Article 89(5) was consistent with the evidence of Mr Coombs which I consider under Issue (3). Finally, as I have stated I found Mr Ferguson generally to be an honest and reliable witness.

284. *12 February Email Exchange.* There is no dispute that the 12 February 2018 email exchange was on SGL's servers and that it could have disclosed them. There is a dispute whether the emails were responsive to the agreed search terms although Mr Tinkler's team did not plead the relevant terms or adduce any evidence to satisfy me that they did. But in any event, there is no evidence that Mr Brady was involved in the disclosure exercise or took a decision not to disclose them. His written evidence was as follows:

> "76. I played no part in the extraction or the provision of documents from the Company other than to give my authority for the work to be done. I assumed that if documents were required, they were requested and provided. I had no reason to think otherwise. There were no discussions by the Board about whether to withhold any information and I did not hear anyone raise any concerns about what the Company was being asked to disclose, save with respect to the Ryanair contract documents and details of my incentive programme due to the commercially confidential nature of that information. those concerns were managed by steps being taken by all parties to the 2018 Proceedings to keep that information confidential.
>
> 77. I recall that it was not only Company data which was provided, but I was also asked to provide access to my personal email account. I did not do this myself and instead I gave my password to Rosenblatt so that they could take whatever they needed from my personal email accounts. I took no steps to delete or suppress any data in my personal email accounts before providing access to them."

285. I accept this evidence. Mr Wardell did not challenge it either more generally or by reference to the emails dated 12 February 2018. Nor he did he suggest that Mr Brady had deleted these emails (or made an unsuccessful attempt to do so). It follows, therefore, that Mr Brady provided these emails to Rosenblatt and if they had responded to the

agreed search terms, Mr Field's team would have disclosed them or taken the decision themselves that SGL was not required to disclose them under CPR Part 31.6. In either event, I am satisfied that Mr Brady did not make a conscious or deliberate decision not to disclose them.

(d) Materiality

286. I approach Limb 2 by considering whether the new evidence would have led the Judge to change his other findings and, if so, what effect this would have had on the overall outcome. I also approach this question on the basis that the "new evidence" which I may take into account consists not only of the undisclosed documents themselves but also the evidence which the witnesses gave about them and which I have either set out or summarised in section (b) (above).

287. Approaching Limb 2 in this way, the Claimant has not satisfied me either that the new evidence would have entirely changed the way in which the Judge came to his decision (the *Highland* test) or that there is a real danger that the failure to disclose the new evidence would have affected the outcome (the *Hamilton* test). I say this for the following reasons:

(1) The Judge was not asked to decide whether Mr Brady had devised (or was devising) a plan to remove or neutralise Mr Tinkler by early January 2018 and it was not necessary for him to decide that issue. It is difficult, therefore, to see how the new evidence would have had a decisive impact on the findings which he did make. Mr Brady's private notes on 1 January 2018 and 29 January 2018 were just that, private aide-memoires which had no bearing on any of the issues.

(2) I accept that Mr Brady's exchanges with Mr Soanes would have revealed that he was firmly in SGL's camp by the end of January 2018. But the Judge was well aware of this fact and said as much: see [185]. Mr Brady never accepted or acted upon the proposals in the StobCap Buyout Email and Attachment and those documents would have provided no evidence of wrongdoing by SGL.

(3) But even if the new evidence had shown that Mr Brady was planning to remove or neutralise Mr Tinkler by early January 2018, I am not satisfied that such a finding would have made a material difference. I accept that if Mr Ferguson had shared Mr

Brady's plan, the Judge might have rejected his evidence about the meetings on 10 and 24 January 2018: see [612]. I also accept that the Judge might have gone on to find that Mr Tinkler did not "brief against the Board" at the shareholder meetings in late January 2018 or commit a breach of fiduciary duty by doing so: see [735] and [736].

(4) But I consider this outcome to be unlikely. The Judge found it inconceivable that Mr Ferguson would have permitted Mr Tinkler to talk to the shareholders to whom he was close about replacing Mr Ferguson as chair of the Board. Even if Mr Ferguson and Mr Brady had decided to remove him, it is even less likely that Mr Ferguson would have given him a free hand to discuss the situation with the shareholders.

(5) Further, none of the shareholders gave evidence at the Trial and Mr Tinkler was not in a position to challenge Mr Brady's evidence about what they said to him a few days later. The Judge also found that on 7 February 2018 Mr Tinkler admitted that his actions had been unacceptable. It is fair to say that he relied on Mr Brady's note of the meeting even though the metadata showed that it was not finalised until 19 February 2018. But he also relied on the evidence of Mr Hodges who expressed the view that Mr Tinkler should not have gone off to the shareholders on his own.

(6) If the new evidence had shown that Mr Brady was planning to remove or neutralise Mr Tinkler by early January 2018, it is also possible that the Judge might have accepted Mr Tinkler's case that it was a breach of fiduciary duty to sign the first Article 89(5) notice: see [780]. But again I doubt this. The Judge's first and principal reason for rejecting that case was that the resolution was ineffective and the proper purposes rule did not apply. He applied the same reasoning to Mr Tinkler's own conduct: see [726] (below).

(7) Finally, if the new evidence had shown that Mr Brady was planning to remove or neutralise Mr Tinkler by early January 2018, it is also possible that the Judge would not have found that the four directors believed that they were acting in the best interests of SGL when they signed the notice: see [782]. But I doubt this too. Mr Wardell gave four reasons why Mr Brady wanted to remove or neutralise Mr Tinkler by January 2018 which I have set out in the narrative section (above). But

they were all concerned with the management of SGL and none of them would have justified the conclusion that Mr Brady was acting in bad faith and contrary to the interests of SGL.

(8) I have been through this detailed exercise to demonstrate that in my judgment the new evidence would have had a marginal effect on the Judge's findings (at best). But on any view, I cannot be satisfied that the new evidence would have entirely changed the way in which the Judge approached his critical findings. Nor can I be satisfied that there is a real danger that it would have done so.

(2) Did Mr Brady make Mr Soanes privy to his plans regarding Mr Tinkler and over the course of 2018 generally and did both Mr Brady and Mr Ferguson share confidential information regarding Mr Tinkler with Mr Soanes?

(a) The Judge's Findings

288. In the 2018 Claim Mr Soanes' evidence was primarily relevant to the question whether Mr Tinkler committed a breach of fiduciary duty by proposing the acquisition structure for Project Wright which I have described (above). The Judge found that he had not committed a breach of fiduciary duty but that this structure provided context for the indication which Mr Tinkler gave to the Board that he intended to stand down. The Judge based his finding on Mr Brady's evidence and found as follows at [725] and [727]:

> "I can deal with it quite shortly because Mr Tinkler's proposal (embodied in his "Investor Working Step Plan") did not in my judgment constitute or evidence any breach of fiduciary duty on his part. It was only that, a proposal, and the potential for Mr Tinkler to derive personal benefit from its implementation was reasonably plain for all to see when he presented it to the meeting on 8 November 2017. By the end of that month Mr Soanes had highlighted the potential for conflict (with perhaps £12m proposed to be gained by the private consortium at the Company's expense). Mr Brady's response was essentially to treat Mr Tinkler's proposal as the weaker runner in a race to the finish against his own proposal backed by Cyrus Capital. Of course, neither got to the end. In his evidence (though I recognise that the matter is ultimately one for legal analysis) Mr Brady accepted that Mr Tinkler was not acting breach of duty: "*No, absolutely not. There's no breach of duty in putting proposals forward*.""
>
> "In my view, the only real significance of Mr Tinkler's proposal in relation to Project Wright is that, in particular, it provides the context for the clear indications that he gave in late 2017 and early 2018 that he intended to step down from the Company. Mr Tinkler would have known that the only basis on which he could implement his proposal, and benefit under it with the informed agreement of the Company, was one where he had stood

> down from the Board and was no longer under his fiduciary obligations to the Company. It must be remembered that, when promoting Project Wright, Mr Tinkler (together with Mr Soanes) was really doing so on behalf of Stobart Capital. Until things turned sour between him and Mr Soanes, part of Mr Tinkler's thinking was that he might concentrate on Stobart Capital. The fact that Mr Soanes thought that the nature of Mr Tinkler's proposal to the Company caused regulatory issues for Stobart Capital is not a matter I need to explore further."

289. Mr Wardell submitted that Mr Brady and Mr Ferguson shared confidential information with Mr Soanes in relation to two specific matters: first, the tax dispute and, secondly, Mr Brady's decision to forward Mr Brown's email dated 5 February 2018. The Judge did not deal with the tax dispute but he referred to Mr Brown's email in his detailed narrative at [185]:

> "It is clear that, by February, Mr Soanes, believing that Mr Tinkler's proposal for Project Wright was creating regulatory issues for Stobart Capital (authorised by the FCA) so far as client conflicts were concerned, was confiding with Mr Brady more than he was with Mr Tinkler. On 5 February, Mr Brady had forwarded to Mr Soanes the email by which Mr Brown had recommended Mr Foster, and referred to Article 89(5), under the rubric "LPPIAOL" (Legal Professional Privilege in Anticipation of Litigation)."

290. I deal with the appointment of the Committee and its independence under Issue (5) (below). But the Judge also had to decide whether Mr Ferguson and its members committed a breach of fiduciary duty by publishing the 29 May RNS. The Judge found that it was "unwise and inappropriate" for them to do so and that it was unjustifiably inflammatory: see [788] and [789]. But he also held that the four directors did not act in breach of their duty to act in good faith and in the best interests of SGL for two reasons at [792] to [794]:

> "792. As to that first duty, there are two reasons why I have concluded the Four Directors were not in breach of it. The first is that I find that each of them thought that it was in the best interests of the Company to publish the RNS. I have already referred to Mr Coombs' view about the need for the 29 May RNS in addressing, on the question of an intention to injure within Issue 2, what he perceived to be Mr Tinkler's aims. All four of them considered that his challenge to Mr Ferguson (with its repercussions in respect of Messrs Wood and Coombs) was destabilising the Company.
>
> 793. The second reason is that the terms of the RNS, though inappropriate in the respects mentioned above, do not justify the conclusion (by way of an objective check upon their subjective thoughts) that no reasonable

> director would have agreed to it. This second reason is reinforced by the advice the Four Directors received at the time and by the absence of any evidence that it damaged the Company. In addition to saying it damaged him personally, Mr Tinkler argued, by reference to Mr Grimes' evidence and the "surprise and regret" at the RNS expressed in a letter from three executives in the Aviation Division, that it did damage the Company. Mr Grimes referred to unsettlement amongst employees and questions from brokers and customers of the Jet Centre. Mr Tinkler also points to the evidence of Mr Whawell in relation to the general disquiet expressed at the ELT event in Manchester on 5 and 6 June 2018.
>
> 794. However, it is difficult to attribute employee disquiet to the 29 May RNS when I find it is just as likely, if not more likely, that such concerns on the part of employees and customers, about what was going on at the head of the Company, would have been generated by the terms of the earlier 25 May RNS. That earlier RNS would have told anyone who read it about the potential for upheaval within the Board and that Mr Tinkler was opposed to Mr Ferguson. It must be remembered that the gravamen of Mr Tinkler's challenge to the 29 May RNS is that it was an unnecessary attack upon, and damaging to him personally."

(b) The New Evidence

291. *5 February 2018 Email*. In the 2018 Claim SGL disclosed both Mr Brown's email to Mr Brady and Mr Brady's forwarding email to Mr Soanes. Mr Wardell put it to Mr Brady that by forwarding on a privileged email to Mr Soanes, he committed a breach of confidence:

> "Q. It's clearly not material that you should send to someone outside the group, is it? A. I don't know. That was my question -- that was my question to Ian was actually I wanted his note on -- I wanted his advice on Tony Foster. Q. I'll repeat again, the fact that the board was considering going down the 89.5 route -- park for the moment whether it was just a card you were going to play or whether you were going to have to use it. Ignore that issue. I'll come to that later. A. Probably in hindsight -- Q. Hang on. Telling Mr Soanes about this is a gross breach, isn't it? A. I don't think so -- the context was Mr Soanes was having a very difficult time with Tinkler, like a very difficult time, and in hindsight, if I had my time again, I probably wouldn't have sent it, but it was a very tumultuous time with tensions -- tricky time -- it was just an awful time actually. Q. Mr Soanes wasn't a director of Stobart Group, was he? A. No. Q. He wasn't even an employee? A. No. Q. So this is highly confidential information? A. As I said, in hindsight, if I had my time again, I probably wouldn't have sent it. I would have just have asked for his opinion on Tony Foster."

292. Mr Taylor had also cross-examined Mr Brady in the 2018 Claim about forwarding Mr Brown's email to Mr Soanes. It was Mr Tinkler's pleaded case that the evidence which he gave in the following passage of that cross-examination was untrue:

> "Q. And at this time you were working to undermine Mr Tinkler, weren't you? Why on earth were you sending that to Mr Soanes who is in a different -- works for a different company who is a co-director with Mr Tinkler in Stobart Capital, why on earth are you sending this to Mr Soanes? A. So I certainly was not trying to undermine Andrew Tinkler. I sent this to Andrew Soanes (sic) knowing full well that he was having a very, very tricky time dealing and managing Andrew Tinkler, and I just said -- I was making sure that (a) he would give me some -- what was his -- because he'd actually said to me -- I'd said to him "Do you know Tony Foster?" So I wanted some advice on what his thoughts were around Tony Foster but also just to let him know that, you know, we were going to protect the company in the event of Andrew Tinkler taking action against the company."

293. Before me, Mr Soanes gave evidence that on 2 February 2018 Mr Tinkler spoke to him about his discussions with the shareholders and that this was a crisis for him. He also said that he heard Mr Brady speaking about Mr Foster and that it was his understanding at the time that the Board was not trying to oust Mr Tinkler. Mr Wardell then asked him where he could have got this information:

> "Q. You could only have got this understanding if you had spoken to Mr Brady about it. A. I believe I had spoken to Mr Brady about it, yes. Q. So what on earth was Mr Brady discussing highly confidential matters concerning the board of Stobart Group with you? A. I didn't discuss it in any detail with Mr Brady. I discussed it in detail with Mr Tinkler. Mr Tinkler had first informed me of the situation. I knew that it was just the most monumental issue and that Mr Brady was dealing with it as well. I would have done anything I could at the time to try to resolve matters between them. So it was very much of my concern and, you know, in my interest to make sure that there was a resolution. Q. So you were heavily conflicted by being given this information. Do you agree? A. How was I conflicted? Q. You were a director of Stobart Capital. You are a shareholder. You get this information from Stobart Group and you don't talk to Mr Tinkler about it? A. I got the information from Mr Tinkler. Q. No, the 89.5 point. So you keep secrets from your fellow director? A. I have become aware that Stobart Group is taking advice on how to handle the situation with Mr Tinkler, that he has already told me about. Q. Mr Tinkler did not tell you anything about 89.5? A. No. Q. So you are keeping secrets from him. A. It's not a matter of keeping secrets. Mr Tinkler is in the process of destroying, effectively, our company. Of course, I'm going to take an interest in that. It's not for -- I'm not sort of telling tales from one to the other. I mean, I'm caught in the middle of this. And as you will see

from what happened on 6 February, I'm trying to find solutions."

294. Mr Taylor had also cross-examined Mr Soanes at the Trial of the 2018 Claim about the email dated 5 February 2018. Again, it was Mr Tinkler's pleaded case that Mr Soanes gave false evidence in the following passages:

> "Q. So, Mr Soanes, you are talking with Mr Brady about how Mr Brady is trying to sack Mr Tinkler from the board of the Stobart Group, aren't you? A. I don't believe that's the case. Q. So can you provide any rational explanation why Mr Brady would forward all of that to you on 5 February? A. The reason I believe that he forwarded it to me was because we had a conversation where he was -- he'd mentioned that he was looking for further legal advice in relation to the ongoing and increasingly serious dispute, and he mentioned that Jonathan Brown had mentioned Tony Foster's name. Tony is somebody I've known for probably ten years and I was able to comment on his credentials."
>
> "Q. So Mr Brady's forwarding to you his plan to remove Mr Tinkler from Stobart Group by using Article 89.5 of the company's articles, isn't he? A. I don't know what was on Mr Brady's mind at that time. I can see the text. Q. Mr Soanes, he was forwarding this to you because you had been discussing with Mr Brady how you would side-line Mr Tinkler from both Stobart Group and Stobart Capital. A. I've already said to you, and I will repeat as many times as you like, that that just simply is not the case. Not only is it not the case, but it's not possible for it to be the case. I have no influence over -- I have no nexus with Stobart Group except insofar as I'm an adviser through Stobart Capital, and it's very clear that Andrew Tinkler controlled Stobart Capital. So I'm, you know, mystified by that allegation."

295. Mr Wardell suggested to Mr Soanes that his evidence was untrue because Mr Brady had shared confidential information with him. Mr Soanes accepted that Mr Brown's email contained confidential information but he did not accept that his evidence was untrue:

> "Q. Well, so far as you say you have no nexus, you have been given confidential information by Stobart Group, haven't you? A. I have been given the 5 February message, yes. Q. So in formal terms you are correct, in that you were only employed by Stobart Capital, but Mr Brady was in fact letting you in on the know in respect of highly confidential information? A. Yes, I don't know why he sent it."

296. Mr Wardell went back to Mr Soanes' evidence in the 2018 Claim again. He suggested to Mr Soanes that the statement "I don't know what was on Mr Brady's mind at that time" was untrue and that he knew perfectly well what Mr Brady had in mind. He also suggested that the evidence which Mr Soanes had given in the ET Claim was inconsistent

with his evidence in the 2018 Claim. He relied upon an attendance note of his evidence which recorded as follows:

> "He certainly was sharing the detail; I want to provide context. By this date AT had embarked on his course of meeting shareholders to try to get rid of the Chairman. Of course it is a massive problem for all of us. The SCL office was within SGL's office. Open plan office. Just an executive meeting room and a small working office. Not in middle of wide open space but our office was part of that and so impossible to not feel all of the tension going on. Round about this time he made me aware of what he was doing. So it's not common knowledge but it is clear to me and WB that AT's conduct is going to cause problems for all of us."

297. This attendance note had been made by Ms Felicity Bramall of the law firm CMS Cameron McKenna Nabarro Olswang LLP and it was not suggested that it had been approved by Mr Soanes or by the Tribunal itself. Mr Soanes did not accept that he had given inconsistent evidence. He also said that he was referring to Mr Tinkler when he gave evidence that "he made me aware of what he was doing":

> "Q. You are asked questions about Mr Brady. You start off by saying: "He certainly was sharing the detail ..." You can't get out of it that way. A. This is not a reliable note. Q. It looks like a pretty clear and full transcript, doesn't it? A. No, it doesn't, there is lots of disjointed text in here, lots of abridging and summarising. Q. You are saying this attendance note is unreliable, are you? A. In this respect, certainly. I'm saying it was around about that time that Mr Tinkler had made me aware of what he was doing. Q. "Not in middle of wide open space but our office was part of that ..." You are talking about the office being shared with Stobart Group and Mr Brady, aren't you? You are not talking about sharing an office with Mr Tinkler. Come off it, Mr Soanes. A. Well, physically, our office was within the Stobart Group office. That's not in dispute. Q. And: "Round about this time he made me aware ..." Is in the context of your offices being close together and it being impossible to not feel the tension -- A. Okay, all I can tell you is that that is not -- if you are saying that I'm saying that Mr Brady made me aware of what he was doing, I did not say that."

298. Finally, Mr Wardell suggested to Mr Brady that he must have known that Mr Soanes was not telling the truth to the Court about Mr Brown's email dated 5 February 2018 and that his evidence was dishonest:

> "Q. And the next one is on the right-hand page at line 16. "Question: So Mr Brady's forwarding to you his plan to remove Mr Tinkler from Stobart Group by using Article ... "Answer: I don't know what was on Mr Brady's mind at that time. I can see the text. "Question: Mr Soanes, he was forwarding this to you because you had been discussing with Mr Brady

> how you would side-line Mr Tinkler from both Stobart Group and Stobart Capital. "Answer: I've already said to you, and I will repeat as many times as you like, that that just simply is not the case." And you would have known that that answer was dishonest? A. I don't remember that conversation in the court. Q. And at page 198, line 14, he's asked. {C/97/50} "Question: So, Mr Soanes, you are talking with Mr Brady about how Mr Brady is trying to sack Mr Tinkler ... "Answer: I don't believe that's the case." And I suggest you would have known that answer was untrue and dishonest? A. That is not correct. Q. "Question: So can you provide any rational explanation why Mr Brady would forward all of that to you on 5 February? "Answer: The reason I believe that he forwarded it to me was because we had a conversation where he was -- he'd mentioned that he was looking for further legal advice in relation to the ongoing and increasingly serious dispute, and he mentioned ... Jonathan Brown ...mentioned Tony Foster's name." I suggest you knew that answer was untrue? A. That's again not correct and I don't obviously remember these parts of the court case, but I was very clear that in hindsight, I probably should not have sent that email to Ian Soanes."

299. *The 18 March WhatsApp exchange.* In his message timed at 14.16 Mr Soanes referred to the "Hill Dickinson" point. Mr Wardell cross-examined both Mr Brady and Mr Soanes on the basis that this was a reference to the legal advice about Article 89(5) which Mr Brown had given in his email dated 5 February 2018. Mr Brady accepted this in answer to a question from me but in re-examination Mr Leiper took him to an email dated 1 March 2018 from Mr Brown and he confirmed that the message referred to a complaint by Mr Soanes that he had been asked by Hill Dickinson to sign a form of waiver without the benefit of legal advice. Mr Soanes confirmed this when he came to give evidence.

300. In his message timed at 14.28 Mr Brady also stated: "We have a plan but we need to get Wright over the line". Mr Wardell cross-examined him on the basis that this was the same plan which he had kept in mind since the beginning of the year and that he was now waiting to deploy Article 89(5) until after the AGM when Mr Garbutt had stood down:

> "A. We had obviously thought about dismissing him as an employee, as you've seen from the thing, right? But again -- so my plan was, of course, I would like to have done a proper handover where Andrew stepped down from the board and left. I didn't think it was healthy having him on the board, and I still preferred as a plan to have him contributing through SCL if we could find a way forward. That was kind of a consistent -- even at that time, even with a lull, you know, because he is actually, he does spot some good opportunities, right and there was quite a lot of stuff around the rail and the infrastructure business that he had built up, that he knew very well and could help us with. MR JUSTICE LEECH: You were in different physical locations as well. So he was presumably still involved quite

> intimately in the business, it's just that there wasn't much by way of interaction between the board members. A. Yes, he used to come to London quite regularly, maybe one day a week, and I used to shuttle between Dublin, South End and Widnes. I used to go to Carlisle more but it was Widnes I tended to go to. MR JUSTICE LEECH: Thank you, that's very helpful. Thank you, Mr Brady. MR WARDELL: Mr Garbutt had said he wasn't going to stand for re-election, was he? A. That's what I understood. Q. So you could deploy 89.5 the day after the AGM, as long as you still had the signatories? A. We could. Yes, we could. Q. That was the plan, wasn't it? A. No, that was -- that was definitely -- that can't have been the plan at that point because we were just trying to work out what we were trying to do and how we were going to resolve the Tinkler situation."

301. *The May 2018 WhatsApp Exchanges*. In his witness statement Mr Brady gave evidence that Mr Soanes repeatedly asked him for meetings and contacted him both in an attempt to shore up his personal position but also to be useful. Mr Wardell put a number of the May WhatsApp exchanges to Mr Brady and suggested to him he had given a misleading impression:

> "Q. How do you reconcile that with what you say in your evidence about Mr Soanes repeatedly requesting meetings and giving unsolicited advice? You seem very keen to have a catch-up with him. A. Yes, I think the theme was Ian did request and put a lot of proposals which basically we kind of didn't follow up or we ignored. Of course, I was more than happy to meet Ian Soanes from time to time and I had a lot of sympathy for the situation he was in and I still wanted to have a relationship with him because we really wanted -- I still wanted him to continue to work on the FlyBe transaction actually. Q. If you look at paragraph 51 of your statement, at {B/2/17}, you say in the middle of that, about five lines in: "I cannot now recall why I met Mr Soanes but it was at his request and was part of a pattern, Mr Soanes repeatedly requesting meetings and contacting me in an attempt to shore up his position and try to be useful to the company." That's really not quite right, is it? A. I stand by that. Absolutely right, if you kind of -- if you went -- if you were to present it in a proper way with all of the meeting requests and the times and the proposals, you would see it is quite correct." Q. I suggest you asked for as many meetings as Mr Soanes asked of you. A. No, that's definitely not correct."

302. When Mr Soanes gave evidence about these messages, he was taken first to his WhatsApp message timed at 11.02 on 2 May 2018 in which he offered Mr Brady advice about Mr Hodges and the principal shareholders. He was asked what he meant by the Board holding all the cards:

> "Q. "The board still holds all the cards". That can only be a reference to

> the Hill Dickinson point, as I put it, not as you put it? A. That's not correct. Q. What did you mean by: "... holds all the cards." What cards did you think the board was holding? In respect of whom? A. I think that what I'm saying is that the board has truth on its side. The board is doing the right thing. Q. So it's in respect of Mr Tinkler, isn't it? A. Yes. Q. Yes. So you are giving advice to Mr Brady, saying, "The board holds all the cards," and you say by that you mean they had truth on their side? A. Yes. Q. That's absurd, Mr Soanes, utterly absurd, isn't it? A. No. Q. And it's also absurd, the proposition that Mr Brady hadn't told you after your meeting -- and you can remind yourself, you met him, Burberry -- you met at 7 Margaret Street, if you look up the page at 9.04, and you say you're at the back. The idea that the day after Mr Tinkler dropped the bombshell that he was going to vote against Mr Ferguson, the idea that Mr Brady sat there, said nothing about it at your meeting but the next day -- the same day, within an hour or two of the meeting, you were able to come up with the proposed proposition that the board holds all its cards. It's quite obvious, Mr Soanes, what you were talking about. A. I don't recall exactly what was discussed. My recollection is that I knew nothing of the detail of what was going on between those parties. What I did know, my Lord, was the background, I knew the personnel and I was happy to volunteer a view -- it's quite a general view -- that there is nothing to fear from what's going on because I didn't think that the other shareholders wanted a fight.

303. In a WhatsApp message dated 15 May 2018 Mr Soanes had also referred to a meeting with Mr Arch of Stifel. Although this was not pleaded as one of the critical undisclosed documents, it was part of the sequence and I therefore consider the evidence which the witnesses gave about it as part of my assessment of the new evidence. Mr Brady could not explain why Mr Soanes had gone to meet Mr Arch and Mr Soanes' evidence was that this was a social meeting and unrelated to the dispute between Mr Tinkler and SGL or between SCL and himself. Mr Wardell challenged that evidence in the following passage:

> "Q. So why did you go and see David Arch? A. My Lord, David Arch is an ex-colleague of mine from Close Brothers, and he and I and other ex-Close Brothers people meet perhaps twice a year. I think this was one of those meetings. Q. So why was he telling you, if this is all meant to be confidential, that Mr Brady and Mr Ferguson were meeting on Thursday? A. I may have -- I mean, I'm guessing that I was suggesting that I wanted to meet them and he said that they were together. Q. And why do you say: "Any chance of meeting?" A. Because the common theme throughout this is my wanting to keep in touch with Mr Brady to obtain help from Stobart Group. MR JUSTICE LEECH: You say that the meeting with Mr Arch was a social occasion, just a catch-up, no more than that? A. Yes. MR WARDELL: But he happened to mention Mr Tinkler and the dispute with the company? A. He has merely mentioned that Mr Brady and Mr Ferguson are together on Thursday. That's -- Q. Why would he think that might be of interest to you? You no longer had anything to do with Stobart

> Capital or Esken? Why on earth would he mention it? A. I think you've asked me that question before and I've answered to say that I'm guessing that I would have expressed an interest in meeting with Mr Brady. Q. Why would you speak to David Arch about it? A. Because he was involved with Stobart Group as well. Q. How would you know that? A. Because he is a retained adviser to Stobart Group."

304. In a later WhatsApp message dated 25 May 2018 Mr Soanes referred to his discussion with Mr Ferguson a week before on 17 May 2018. Based on his handwritten notes of the meeting, Mr Ferguson's recollection was that Mr Soanes asked for the meeting and wanted to tell him about the ET Claim:

> "MR WARDELL: Would I be right in thinking your notes appear to be recording what Mr Soanes is telling you? A. I think the first part is definitely about that, down to: "SGL ..." And probably down to -- yes, the FlyBe part certainly. That would all be what he was telling me. He asked to meet me, and I think it was very clear he wanted to tell me about his tribunal claim, he wanted to tell me who was acting for him and he wanted to tell me that he hoped, I think, or was going to require SGL to testify and, of course, ultimately I believe Mr Brady and Mr Coombs were both called as witnesses to this tribunal."

305. When this message was put to Mr Brady, he accepted that Mr Soanes and Mr Ferguson must have discussed SGL's dispute with Mr Tinkler and that Mr Soanes had expressed the view that the Board should act before the shareholders expressed a view. Mr Brady stated: "And you read it in black and white there". Mr Soanes also used the same expression "snatch defeat from the jaws of victory" as Mr Brown had done in his email dated 5 February 2018.

306. Finally, when this message was put to Mr Soanes, he would not accept that Mr Ferguson and he discussed the dispute at their meeting on 17 May 2018. Mr Soanes' evidence was that the information in his WhatsApp dated 25 May 2018 was derived from the public announcement which was made that day. Mr Wardell pointed out to him that he could only have been reporting the advice which he gave to Mr Ferguson before the announcement was made. Mr Soanes response to this suggestion was as follows:

> "MR WARDELL: If we can go back to the first sentence, just help me: how was the board going to act before the shareholders had a chance to express a view, other than by utilising 89.5? A. The ... Q. What can the board do? A. The board can make the shareholders aware of what's going on. Q. No, it doesn't work, Mr Soanes: "I said only last week to Iain that you had to act before shareholders had a chance to express a view." That's

> doing something without the shareholders' prior knowledge or approval, isn't it? A. No, it's saying that you need to act and make sure the shareholders are aware before they are forced to express a view and make a decision. Q. I don't understand that answer. Your English is perfectly clear. A. In that 25 May announcement, the shareholders had divided themselves on to one side or another, and I couldn't really believe that shareholders would be backing Mr Tinkler if they knew the full story of what was going on. Q. You are not answering my question: "I said only last week ..." So pre the announcement. You can't interpret what you wrote by reference to an announcement that hadn't been made. Do you agree? A. So I'm not saying that the conversation the week before or the suggestion the week before was informed by the announcement. I was -- in the week before, I was saying that you had to get on the front foot with the shareholders. Q. "... before shareholders had a chance to express a view." It's quite obvious what you are talking about here, Mr Soanes, isn't it? A. I certainly don't agree with your interpretation."

307. I turn now to my finding in relation to Issue (2). Mr Wardell submitted that Mr Soanes enjoyed a "high level of access" to Mr Brady and Mr Ferguson throughout 2018. I deal with the period from June to November under Issues (5), (13) and (16) (below). But I accept that during the period between February 2018 and the end of May 2018 Mr Soanes had access to both Mr Brady and Mr Ferguson and that they discussed Mr Tinkler's position with him not only in the context of the ET Claim but more generally.

308. Mr Tinkler adduced no new documentary evidence in relation to the tax dispute and the Judge made no findings in relation to it. But if it is necessary for me to decide the issue, I accept Mr Soanes' evidence that the tax dispute was common knowledge within his group and that it was Mr Tinkler who disclosed to him the opinion which he had received from tax counsel. I am prepared to accept that Mr Soanes may have discussed the tax dispute in general terms with Mr Brady when he was considering his options in early February 2018. But given that the existence of the dispute was common knowledge, there is no evidence to support Mr Tinkler's contention that Mr Brady disclosed confidential information about it to Mr Soanes.

309. Again, Mr Tinkler adduced no new documentary evidence in relation to Mr Brown's email dated 5 February 2018 and the Judge made no finding that Mr Brady committed a breach of confidence by forwarding it on to Mr Soanes. But, again, if it is necessary for me to do so I find that Mr Brady committed a breach of confidence by forwarding Mr Brown's email to Mr Soanes. Mr Brady as good as accepted that he should not have

forwarded it on to Mr Soanes at least twice during his evidence and, in my judgment, he was right to do so.

310. I am not satisfied, however, that either Mr Brady or Mr Ferguson disclosed any other confidential information to Mr Soanes in this period on the basis of either the March or May WhatsApp exchanges. In particular, I am not satisfied that either of them disclosed confidential information about the Board's plans (whether to remove Mr Tinkler or otherwise) for the following reasons:

(1) Apart from the word "plan" in his message on 18 March 2018 Mr Brady's WhatsApp messages to Mr Soanes in March and May do not contain or refer to any confidential information. I accept Mr Brady's evidence that the "plan" to which he was referring was not a plan to remove Mr Tinkler under Article 89(5) after the AGM in July that year but a plan to arrange a proper handover when Mr Tinkler stood down.

(2) Mr Soanes' messages to Mr Brady do not provide evidence that Mr Brady or Mr Ferguson had disclosed confidential information to him during their calls or meetings either. The only possible reference to Article 89(5) (or any other plan to remove Mr Tinkler) was the "Hill Dickinson point" in Mr Soanes' text dated 18 March 2018. But I accept the evidence of Mr Soanes and Mr Brady that this was not a reference to Mr Brown's email dated 5 February 2018 but to Mr Soanes' complaint about Hill Dickinson's attempt to persuade him to sign a waiver without taking legal advice (in circumstances where they had acted for SCL). His reference to "due process" makes little or no sense if he was referring the Board's exercise of Article 89(5) to remove Mr Tinkler.

(3) I accept Mr Ferguson's evidence that the principal purpose of the meeting on 17 May 2018 was to enable Mr Soanes to tell him about the ET Claim and to ask whether SGL would be willing to provide evidence on his behalf. I also accept Mr Brady's evidence that Mr Soanes offered his views to Mr Ferguson about SGL's dispute with Mr Tinkler. However, I am not satisfied that Mr Ferguson shared any confidential information with him about the Board's immediate plans.

(4) In particular, I am not satisfied that Mr Ferguson discussed Project Shelley with Mr Soanes on 17 May 2018 even though Mr Soanes had seen Mr Arch earlier that

> day. This was never put to Mr Ferguson and there is no clear evidence that the Board was considering either the 29 May RNS or Project Shelley by that date. Although Mr Arch may have been responsible for encouraging the Board to issue the 29 May RNS, there is no evidence that he did so before 26 May 2018: see [251]. The Stifel Engagement Letter was not signed until 6 June 2018.

311. I should add at this stage, however, that I did not accept Mr Soanes' evidence about his WhatsApp message dated 25 May 2018. It is obvious from the message itself that he discussed the dispute between SGL and Mr Tinkler with Mr Ferguson and that is what the recipient, Mr Brady, understood. Nor did I accept his evidence that he was suggesting that SGL should get on the front foot with the shareholders. He was clearly encouraging Mr Ferguson to take action against Mr Tinkler. I also add that in assessing Mr Soanes' evidence in relation to other issues, I had these conclusions well in mind.

(c) Dishonesty

312. I have found that on 5 February 2018 Mr Brady committed a breach of confidence. But before setting aside the Judgment, I would also have to be satisfied that Mr Brady, Mr Soanes or Mr Ferguson made a conscious and dishonest decision not to disclose the new documents or that there is cogent evidence that they deliberately gave false evidence in the 2018 Claim. It is Mr Tinkler's case that Mr Brady deliberately deleted his WhatsApp exchanges with Mr Soanes and that Mr Brady and Mr Soanes deliberately gave false evidence in relation to Mr Brown's email dated 5 February 2015. I prefer to deal with the issues in that order because a finding in Mr Tinkler's favour on the first issue would have had a significant effect on my findings on the second issue.

313. *The March and May 2018 WhatsApp Exchanges*. Mr Brady accepted that he deleted his WhatsApp conversation with Mr Soanes on about 28 May 2018 (i.e. the day before the issue of the 29 May RNS). He gave the following detailed explanation for the deletion in his witness statement (footnotes omitted):

> "63. I have been reminded that on 27 May 2018, Mr Soanes again sent me a text inviting me to sign up to Telegram as he said it was more secure and would make it easier to send me things. I have no idea what 'things' he wanted to send me. I took his reference to Telegram being 'more secure' as in it would be harder to hack into or bug than WhatsApp. What I was aware of, because he told me, I think during our call on 28 May, was that Mr Soanes was very concerned about Mr Tinkler in some way bugging his

> devices or accessing his emails. I remember Mr Soanes was also genuinely fearful for his physical safety and the security of his home. He seemed to me to be very paranoid about what Mr Tinkler might do and Mr Soanes told me that he knew that Mr Tinkler had an acquaintance, Mal Greenwood, who could be threatening and intimidating and, as both Mr Soanes and I knew, having seen Mr Tinkler in action, he could be very vindictive with those he believed had crossed him.
>
> 64. I cannot now recall what I was thinking when I deleted from my phone my WhatsApp messages with Mr Soanes in May 2018 but it might have been as a result of this conversation, I cannot think of any other reason. My recollection is that I deleted my WhatsApp messages with Mr Soanes' at his request, but I may have just deleted them because of what Mr Soanes had told me about his fears that he was being bugged rather than any direct request by him – I simply cannot now remember. Likewise, I cannot remember or explain why I did not delete my text messages with Mr Soanes at the same time as I deleted the WhatsApp messages. I was not in the habit of routinely deleting messages. At this time, I was not thinking about legal proceedings. Obviously, I know now that Mr Soanes did not delete the messages from his phone."

314. I deal with the June Telegram conversation under Issue (7) (below). But Mr Brady accepted in his witness statement that he could not find any Telegram messages when he checked his mobile phone in December 2020. When he was cross-examined about the deletion of the WhatsApp conversation with Mr Soanes, Mr Wardell put a number of points to Mr Brady who responded as follows:

(1) Telegram was not identified as a separate medium of communication in the Disclosure Statement and Mr Brady did not inform Rosenblatt about his Telegram exchanges with Mr Soanes. Mr Brady's answer was that he could not recall whether he had mentioned it but the entire image of his phone would have been available.

(2) Mr Brady deleted the WhatsApp conversation because SGL had embarked on a very aggressive campaign against Mr Tinkler and was about to issue the 29 May RNS designed to persuade shareholders not to back him. Mr Brady accepted that it was a very aggressive campaign but no more.

(3) Mr Brady knew that Mr Tinkler would not take these aggressive tactics lying down, that the dispute was likely to end up in the courts, that he had already taken advice from Travers Smith and that he had anticipated that any attempt to exercise of Article 89(5) might end up in litigation. Mr Brady denied that he was expecting or thinking about litigation when he deleted the messages.

(4) Mr Brady had taken further advice from Travers Smith on 10 May 2018 and that litigation was now a "betting certainty". Again, Mr Brady denied that he thought that the parties were going to end up in litigation.

(5) Mr Brady's recollection that Mr Soanes asked him to delete them was not consistent with Mr Soanes' evidence and Mr Soanes did not delete the WhatsApp conversation himself. Mr Brady accepted this but repeated that he could only provide his own recollection.

(6) The reason why Mr Brady deleted the WhatsApp exchange was that the messages contained much more sensitive material on them than his text messages with Mr Soanes. Mr Brady's evidence was that this was not correct.

(7) Mr Brady deleted his WhatsApp conversation with Mr Dilworth. Mr Brady accepted this but he could not recall when. In his second witness statement he had already stated that he believed that he did this after the end of the trial.

315. Mr Brady did not accept that he deleted the WhatsApp conversation with Mr Soanes consciously or deliberately or for any of the reasons which were put to him by Mr Wardell. He stood by the evidence which he had given in his witness statement as is illustrated by the following exchange:

> "Q. And your act of deleting the WhatsApp messages were to ensure that they never saw the light of day? A. My Lord, can I just explain the reasons behind the deletion. Would you allow me to just give you -- MR JUSTICE LEECH: Perhaps you just answer -- A. No, so that's not correct. No is the answer to that question. MR JUSTICE LEECH: And then give your explanation. A. Thank you so much, my Lord. So Ian Soanes -- he had obviously asked me to go to telegraph. He specifically was very worried about his security and he felt under threat, right, and asked me to go and communicate with him through telegraph. We thought there was a potential that Andrew Tinkler and his team were bugging and obviously observing certainly him, if not myself, at the same time. So there was an underlying threat, right? And I thought -- Ian Soanes said go to telegraph, and I can't remember exactly why I deleted but I thought he had asked me to delete the messages. I'm not sure whether he did say that or not but I thought, I'll just delete them. I didn't delete them thinking I must preserve them for a potential court case at the time. It never crossed my mind, right? So it was not about that and it was really -- you know, it has been quite a theme, you know. I downloaded some spy software. Even at Christmas they were tracking my phone when I was in South Africa on holiday, which was really quite disturbing, so the whole security around myself, certainly

> Ian -- you know, we also had some threats against my ex-wife in the court case. You know, there was just general -- generally, the atmosphere was quite toxic."

316. Before I turn to my assessment of the evidence, I should deal with a preliminary submission made by Mr Leiper. He submitted that Mr Wardell had not put the allegation to Mr Brady that he had consciously and deliberately deleted his WhatsApp messages with Mr Soanes to prevent their disclosure in litigation. I reject that submission. I am satisfied that Mr Wardell put that case to Mr Brady and gave him an opportunity to answer it. Indeed, the case which Mr Wardell put to Mr Brady was a strong one and if I had rejected Mr Brady's evidence on this point, it would undoubtedly have influenced my decision-making on the other issues.

317. Despite the strength of that case, however, Mr Tinkler has failed to satisfy me on the balance of probabilities Mr Brady deleted his WhatsApp exchange with Mr Soanes consciously and deliberately and with the purpose of preventing its disclosure either in the 2018 Claim or in litigation more generally. I find that he did not do so for the following reasons:

    (1) The 18 March and May WhatsApp exchanges (and, indeed the other WhatsApp exchanges upon which Mr Tinkler relies) were not material to the Judge's findings for the reasons which I set out below. Indeed, they did not contain very much of relevance. I do not accept, therefore, that Mr Brady had a motive to prevent them from being disclosed in litigation or that they provide cogent evidence that he deleted them deliberately. If any of them had been a "smoking gun" which would have changed the course of the 2018 Claim, I would no doubt have taken a very different view.

    (2) Further, I do not accept that Mr Brady had a strong motive to disguise the fact that he was still in communication with Mr Soanes or that Mr Soanes had taken sides with SGL. I doubt that it would have come as any surprise to the Judge that Mr Soanes felt strongly about the way in which Mr Tinkler had treated him or that he wished to help SGL if he could. Indeed, in my judgment it would only have reinforced his conclusions on the one issue to which Mr Soanes' evidence was relevant (and on which he found in Mr Tinkler's favour).

(3) But even if I had considered the contents of the WhatsApp conversation to be more significant, there would have been little purpose in Mr Brady deleting the messages from his phone without also attempting to delete his email and text message exchanges with Mr Soanes. Moreover, it is probable that he would have asked Mr Soanes to do the same. It is also Mr Tinkler's case that SGL paid Mr Soanes to give false evidence in the 2018 Claim. In that event, I would have expected Mr Brady to take rather greater care to cover his tracks than it is suggested that he did.

(4) But not only did Mr Soanes not delete this WhatsApp conversation or, indeed, his other communications with Mr Brady, he disclosed the 18 March and May WhatsApp messages (and the other messages upon which Mr Tinkler relied) in the ET Claim. Again, if Mr Brady had deleted these messages and paid Mr Soanes to give false evidence in the 2018 Claim, I would have expected Mr Soanes to take much greater care about what he disclosed in the ET Claim and, indeed, to consult Mr Brady before he did so.

(5) Finally, even if I had reached the conclusion that the 18 March and May WhatsApp exchanges provided evidence that the Board was planning to remove Mr Tinkler much earlier than the Judge found, I ask myself why Mr Brady would have consciously and deliberately deleted this WhatsApp conversation and the Telegram messages. As Mr Brady would have appreciated, the critical evidence of such a plan would have been contained in the communications between himself and other Board members rather than in the communications with Mr Soanes.

(6) For these reasons, therefore, I consider it improbable that Mr Brady would have deleted the WhatsApp conversation with Mr Soanes to prevent its disclosure and more probable that he deleted it for the reasons which he gave. Moreover, I found him to be an honest and reliable witness and, powerful though it was, Mr Wardell's cross-examination on this issue did not change my assessment of his evidence. As the CEO of a listed company, I am satisfied that he would have understood the significance both for himself and for SGL of destroying documents to prevent their disclosure or use in litigation. Based on my overall assessment of his evidence, I am satisfied that he did not.

318. *5 February 2015 Email.* I turn, therefore, to the allegation that Mr Brady and Mr Soanes gave false evidence in relation to Mr Brown's email. In his written closing submissions Mr Leiper submitted that Mr Wardell had not pleaded the particular aspects of Mr Brady's evidence which were false or put them to him in cross-examination:

> "At RRRAPOC ¶ 79 Mr Tinkler has pleaded a whole paragraph of oral evidence that he suggests was knowingly given falsely (concerning the forwarding of the email referring to Tony Foster and to Article 89(5)). He has not set out in his pleading which particular aspects of that evidence he alleges was false. Moreover, that evidence does not appear to have been put to Mr Brady in cross-examination, although the 'theme' of Mr Brady forwarding the 5 February email to Mr Soanes was addressed. That is not enough, though. It cannot suffice to address the same ground as the 2018 Proceedings in cross-examination, and then presumably in closing to undertake a compare and contrast exercise to see if the witness has tripped up and said something different to his evidence in 2018. To make out this case, it had to be put to Mr Brady what his evidence was in 2018; and the precise respects in which Mr Tinkler contends it to have been given falsely – and knowingly so."

319. There is considerable force in this submission. But in any event, I find that Mr Brady did not mislead the Judge when he rejected Mr Taylor's suggestion that he was working with Mr Soanes to undermine Mr Tinkler and gave evidence that his purpose in forwarding the email to Mr Soanes was to get his thoughts on Mr Foster. The Judge accepted that Mr Tinkler had not committed a breach of fiduciary duty in relation to Project Wright on the basis of Mr Brady's concession: see [725]. I consider it highly improbable that Mr Brady would have given dishonest evidence about Mr Brown's email if he was prepared to make that concession. This was the one issue to which Mr Soanes' evidence was directly relevant and Mr Brady was unable to give evidence to support him.

320. I also find that Mr Soanes did not mislead the Judge either when he rejected the same suggestion by Mr Taylor and the suggestion that he was discussing with Mr Brady how to sack Mr Tinkler from the Board. I am also satisfied that he was stating the position accurately when he said that he had no nexus with SGL on 5 February 2018 apart from his interest in SCL (and Mr Wardell accepted that this was correct when he put Mr Soanes' evidence to him for the first time). Finally, I accept that Mr Brady was telling the truth when he said that he could not recall Mr Soanes giving this evidence at all. It follows that I reject the allegation that Mr Brady knew that Mr Soanes' evidence in relation to Mr Brown's 5 February 2018 email was false.

(c) Materiality

321. Approaching Limb 2 in the same way as I did for Issue (1), Mr Tinkler has not satisfied me either that the new evidence would have entirely changed the way in which the Judge came to his decision (the *Highland* test) or that there is a real danger that the failure to disclose the new evidence would have affected the outcome (the *Hamilton* test). Again, I have reached this conclusion for the following reasons:

(1) The new evidence shows that Mr Soanes had access to Mr Brady and that both Mr Brady and Mr Ferguson were prepared to discuss the dispute with Mr Tinkler in general terms. But it goes no further than that. In particular, it does not demonstrate that either Mr Brady or Mr Ferguson shared confidential information with Mr Soanes before the appointment of the Committee or the publication of the 29 May RNS.

(2) But even if it had shown that Mr Brady made Mr Soanes privy to his plans and that both he and Mr Ferguson had shared confidential information regarding Mr Tinkler with Mr Soanes, it would have had no effect on the Judge's finding about the acquisition structure of Project Wright. He found in Mr Tinkler's favour on that issue and further evidence that Mr Soanes was in SGL's camp would only have led to the conclusion that there was nothing in Mr Soanes' complaint about the structure or that Mr Brady was right to concede that Mr Tinkler had not committed a breach of duty.

(3) It is possible that the Judge might have found that Mr Brady and Mr Ferguson were not acting in good faith when they issued the 29 May RNS if he had also found that Mr Brady or Mr Ferguson had shared the Board's strategy with Mr Soanes and that Mr Soanes was involved in their discussions with Mr Arch. But again I consider this highly unlikely. The Judge dismissed the allegation that they were acting in breach of fiduciary duty even though he was highly critical of the 29 May RNS. But he did so primarily because he could not criticise them for holding the view that Mr Tinkler had destabilised SGL at a crucial time.

(4) Moreover, the new evidence would not have undermined either of the Judge's reasons for rejecting Mr Tinkler's case. He found that Mr Brady and Mr Ferguson subjectively believed that they were acting in the best interests of SGL. He also

found that the tone of the 29 May RNS did not make it so unreasonable that no reasonable director could have agreed to it. He reached this conclusion because the Board took advice before issuing the RNS and because there was no evidence that it had damaged SGL. Mr Brady's ongoing dialogue with Mr Soanes had no obvious relevance to either of his reasons.

(5) I have been through this exercise to demonstrate that in my judgment the new evidence would also have had a marginal effect on the Judge's findings. But on any view the new evidence would not have entirely changed the way in which the Judge approached his findings. Nor can I be satisfied that there is a real danger that it would have done so.

(3) Did Mr Brady and Mr Ferguson intend to use Article 89(5) in February 2018 to remove Mr Tinkler from the Board (whether by using it to persuade Mr Tinkler to step down voluntarily to save face or forcibly removing him against his wishes) and would they have done so but for Mr Garbutt's refusal to sign the Article 89(5) letter?

(a) The Judge's Findings

322. The Judge found that the first Article 89(5) notice was incomplete and never served because Mr Garbutt did not sign it. But he also found that even if Mr Garbutt had signed it, the Board would have paused to consider whether or not to serve Mr Tinkler and that it was likely that they would have taken further legal advice before doing so: see [780] (above).

(b) The New Evidence

323. I have considered Mr Ferguson's evidence in relation to Mr Brady's email dated 8 February 2018 (above). Strictly speaking, Mr Tinkler was not able to rely on any other new evidence in relation to Issue (3) because I refused to permit him to amend to plead the change to Mr Laycock's service agreement in the First Side Letter. I also refused to permit him to amend to plead the text messages passing between Mr Brady and Mr Laycock on 26 and 27 February 2018. However, I permitted Mr Wardell to cross-examine the witnesses in relation to these documents.

324. When Mr Wardell took Mr Brady through the text messages which he exchanged with Mr Laycock on 26 and 27 February 2018, Mr Brady refused to accept that the variation to Mr Laycock's employment terms was the quid pro quo for him signing the Article

89(5) notice. When he was asked why it was so urgent for Mr Laycock to sign the First Side Letter, his evidence was as follows:

> "Q. What's the urgency if you are just discussing options? A. We wanted to be in a position to be able to have a discussion with Andrew Tinkler around how we are going to move forward and manage this company. Q. So why is that urgent? A. The whole thing -- the destabilisation of what was going on in the business I considered to be quite urgent. Q. And why do you need a signature from Mr Laycock before you have a discussion with Mr Tinkler? A. Because we were going to make sure we had -- if we had a unanimous board support, right, ie one of the options and the leaver to have a discussion with Mr Tinkler. As it happens, Mr Garbutt didn't sign, so it was irrelevant. Q. What exactly are you going to ask Mr Tinkler to do when you turn up with all these signed letters? A. You see, my objective to Mr Tinkler, which I said at the beginning, was to try and find a way -- now, he could be a board adviser, he could be with Stobart Capital, he could remain on the board but it needed to be in a way which supported the strategy of the company and how we managed the company. You can't have two chief execs. We had a signed-off strategy in September 2017, that hadn't changed, actually it never changed, and I never, even to this day, understood why he wanted Iain Ferguson to step down anyway. But putting that aside, that was the outcome we wanted, and I was certainly going to explore all options with Andrew to see which option would work for the group and work for him. Q. Point 13, you message again: "... signed side letter signed by Iain F and sent over. Thanks Warwick. "Thanks Warwick, I have spoken with Tony. Will sort out this letter this evening." You say: "Great/we need the leverage even if we don't use it." You were lying to Mr Laycock. You were telling Mr Laycock, as a newly appointed executive, that you didn't in fact propose to use it immediately, when the truth is you had every intention of using it immediately. A. That's utter rubbish, absolutely not. I've written it there. It's clear as day, it was a leverage, even if --if we don't use it. I mean, I can't be clearer."

325. I have set out the answer which Mr Ferguson gave in relation to the "end goal" (above). Mr Wardell also cross-examined Mr Ferguson on the basis that the variation to Mr Laycock's terms of employment went hand in hand with the Article 89(5) notice. Mr Ferguson's evidence was that they were "running in parallel" and that one was not a condition of the other. When he was asked what prompted the Board to change its mind about Mr Laycock's terms of employment, he gave the following answers:

> "Q. So what prompted the board to change its mind as to the terms of remuneration for the newly appointed director between the end of January and 26 February? A. Well, it was clear that Mr Laycock was concerned about his future. Q. Where do I get that from, other than your own lips, Mr Ferguson? A. And Mr Brady would have told you the same if you had asked him. Q. Where is any documentary evidence as at February 2018

> that Mr Laycock had concerns about his future? A. Well, you can see effectively in what was changed in his contract. That's a response to giving him additional security. Q. It was an inducement? A. It was giving him additional security. Q. So why not tell him no? You've just appointed him. You've said no to 12 months and then you turn round a few weeks later -- A. Well, the situation has dramatically changed. Q. In what respects? A. Mr Wardell, you have just been through this with me at considerable length. Obviously, the situation has changed. We have an executive director, a 50 per cent of his time executive director, briefing against the board and asking to have the chair removed. Surely you can understand that that's a major change if you are a director of the same company."

326. When the First Side Letter was put to Mr Wood, he could not recall whether Remco approved the variation to Mr Laycock's terms of employment. He agreed, however, that the variation was unusual and that the Remco report to shareholders was wrong:

> "Q. But Mr Laycock's terms and conditions were varied less than a month later, weren't they? We can see that at {I17/86.7/1}. And Mr Laycock now gets his 12 months' notice period, essentially, in certain circumstances. A. Yes. Q. And on to the top of page 2, {I17/86.7/2}, he also gets to keep his LTIPs if he leaves the board under certain circumstances; he will be a good leaver. A. Yes. Q. It's unusual, isn't it, for the remuneration terms of a director to be changed less than a month after being set, without a significant change in circumstances? A. I agree with that. Q. Yes. A. But I do think the circumstances had changed. Q. These changes and the rational for them was never put before RemCo to approve, was it? A. I honestly can't remember. Q. And RemCo never approved it, did it? A. I don't know. Q. Were you aware of this decision at the time or do you not remember? A. I don't remember. Q. And shareholders weren't told about this change to Mr Laycock's terms either, were they? If you go back to {I16/135/6}. A. No, that Rem Comm report is wrong, isn't it –"

327. I also accept Mr Ferguson's evidence that Mr Laycock's agreement to exercise Article 89(5) was not a condition of the change in his employment terms. I am not satisfied that the arrangement was as crude as that and the text messages between Mr Brady and Mr Laycock do not support such a conclusion either. On the other hand, Mr Ferguson said that the two initiatives were running "in parallel". By this, I took him to mean that it was important to secure Mr Laycock's signature on the Article 89(5) notice at the same time as the side letter even though SGL would probably have agreed to the amendment if he had refused to do so. I approach my finding on Issue (3) on this basis.

328. If it is necessary for me to decide Issue (3), then I find that if Mr Garbutt had signed the first Article 89(5) notice, the Board would have used the notice as leverage in one last

attempt to negotiate with Mr Tinkler. I also find that if those negotiations had been unsuccessful, the Board would have served the notice. I accept the evidence of Mr Coombs on this issue. Mr Tinkler withdrew the single allegation of dishonesty against him but I also found his evidence convincing. Mr Coombs' evidence was consistent with the evidence of both Mr Brady and Mr Ferguson. In particular, it was consistent with the evidence which Mr Ferguson gave about using Article 89(5) to bring Mr Tinkler into line or, to use his phrase, to use it as "a benign influence". It was also consistent with the evidence which he had given in the 2018 Claim.

329. I add that in reaching this conclusion I have taken into account the fact that there was no meeting of the Board called to consider the Travers Smith Memo and which would have recorded clearly the Board's intentions. I have also taken into account the fact that Ms Brace did not circulate the notice to Mr Garbutt. Mr Wardell suggested to both Mr Brady and Mr Ferguson that they were plotting to present Mr Garbutt with a fait accompli. But I accept Mr Ferguson's evidence that he discussed the prospect of using Article 89(5) with Mr Garbutt even though he could not produce any notes of the discussion. I am also satisfied that Ms Paige Cass, a company secretary assistant, sent Mr Garbutt a copy of the side letter on 9 March 2018 and that it was by oversight that he failed to mention in the annual report (when dealing with Remco).

330. For the sake of completeness, I add that Mr Brady, Mr Ferguson and Mr Coombs all gave evidence that they were advised by Travers Smith that they could dismiss Mr Tinkler without relying on Article 89(5) (or obtaining Mr Garbutt's consent) but that they chose not to do so. In making my finding on Issue (3) I have discounted this evidence because SGL did not waive privilege in the relevant advice. I fully accept that it is not permissible to draw an adverse inference from the decision not to waive privilege. But I have discounted this evidence because without a waiver of privilege, it is impossible to assess what weight to attribute to it. If the advice of Travers Smith had been optimistic, this might have supported SGL's case. But if it had been very pessimistic, it might well have supported Mr Tinkler's case.

(c) Dishonesty

331. Because I refused to permit the amendment, Mr Wardell was unable to explore with the witnesses, why the side letter and the text messages were not disclosed. It follows that

the question of dishonesty does not arise in relation to Issue (3). Nevertheless, I record that the reason why I refused the amendment in the first place was because the side letter had been in Mr Tinkler's possession or control throughout the 2018 Claim (even if he did not understand the significance of it).

(d) Materiality

332. Even if Mr Tinkler had been able to rely on the first amendment to Mr Laycock's employment contract and his text message exchange with Mr Brady, I am satisfied that the Board would have paused to consider further whether or not to serve Mr Tinkler with it, as the Judge found. It may well be that the Board would also have taken further legal advice from Mr Brown as the Judge also suggested: see [780]. But either way I am satisfied that the new evidence would not have been material even if I had permitted the amendment.

(4) Did Mr Brady deliberately delete his WhatsApp messages with Mr Soanes on 28 May 2018 at a time when he appreciated that litigation was in prospect and did he deliberately not mention that fact to SGL's solicitors?

333. For the reasons which I have set out in answer to Issue (2) I am satisfied that Mr Brady did not deliberately delete his WhatsApp messages on 28 May 2018 or deliberately withhold that information from Rosenblatt.

(5) Did the Committee as formed in May 2018 lack independence and was this intended?

(a) The Judge's Findings

334. The Judge held that the Board properly delegated its powers to the Committee under Article 96 and had authority to dismiss Mr Tinkler from his employment as an executive director: see [893] to [899]. He also held that Mr Ferguson, Mr Brady, Mr Coombs and Mr Wood did not act for the improper purpose of retaining control of SGL and ensuring that Mr Ferguson was re-elected: see [904]. In relation to the presence of Mr Ferguson at meetings and the independence of the Committee more generally he held as follows at [906] to [910]:

> "906. So far as Mr Ferguson's presence at Committee meeting is concerned, the Committee's terms of reference included a power to invite non-members to attend and speak.
>
> 907. Mr Ferguson accepted that it was agreed at the Board meeting on 7

June 2018 that he would attend meetings of the Committee but he said in his evidence that this was to give advice on various matters and that he was scrupulous in not attempting to vote. This was confirmed by the evidence of Mr Wood who said that Mr Ferguson had an important role to play in providing input into the Committee's deliberations. He explained that the Committee would normally meet by telephone at 8.30am and "at the end of the meeting Mr Ferguson would leave the meeting and the committee would deal with the business it had to deal with." When it was suggested to him that it would have been equally appropriate for Mr Tinkler to have been present on the call, he disagreed because "…Mr Tinkler was the person that was causing – the committee had been set up to deal with the actions that he'd taken. How can you possibly have a discussion about what we were going to do if Mr Tinkler was there?"

908. In my judgment, the presence of Mr Ferguson during the Committee's deliberations cannot be the basis of an objection to the basis of its decision-making powers.

909. As to the wider conflict of interest which Mr Tinkler says Mr Brady, Mr Coombs and Mr Wood each faced, and which caused them to support Mr Ferguson, in my judgment this lacks any proper basis. It is inevitable that individual directors will have their own individual views upon matters which call for a choice to be made and the duty to exercise independent judgment requires that they should. Mr Coombs and Mr Wood (though not Mr Brady) had made their choice clear by indicating in the 25 May RNS that they would stand down if Mr Ferguson was not re-elected. However, provided each of the three, having exercised his independent judgment, acted genuinely in what he believed to be the best interests of the Company, I cannot see how his decision can be said to tainted by some "self-interest" simply because it is consistent with the decision-maker continuing in the office of director. That office is as much a burden as a benefit, but any benefits which flow from remaining in position cannot be the basis for an argument that any decision which might be said to be consistent with that end is somehow infected by a conflict of interest or an improper purpose. On that approach, and as the Company submitted, business at the Board level would become impossible. Mr Tinkler's point appears to come close to saying that the desire to remain in office, or to support a co-director in doing so, in fact precludes the person from being able to do so lawfully and effectively by making decisions which support or are consistent with that aim, regardless of the independent business case for making them. Mr Wood said, of his presence on the Committee, "I considered myself to be impartial because I believed I was acting in the best interests of the Company." Although he did not have Mr Tinkler's point directly in mind when saying that, it would have been a good response to it. And there is nothing in the evidence which has caused me to doubt his belief or that of his co-directors."

(b) The New Evidence

335. The new evidence upon which Mr Tinkler relied was the Briefing Note. Mr Wardell suggested to Mr Brady that he had recorded in this note that the "Board are not independent". Mr Brady rejected that suggestion and it was his evidence that he was doing no more than setting out Mr Tinkler's criticism and then answering it. I have set out the note and explained the rival interpretations (above). But Mr Wardell also suggested to Mr Brady that even if his interpretation was correct, his response to Mr Tinkler was equivocal:

> "Q. You say "Whatever the view", you don't say what Mr Tinkler may have been saying about that is wrong, you do not say the board was independent. You just say: "... Whatever the view, best practice process for new appointments." A. So I remember -- there are some meetings I remember quite well. Meeting Gervais from Miton is one of those meetings, he is a very unusual, clever, thoughtful character. He writes lots of articles on Asia and economics, et cetera. He is always very interesting to meet. He was a big supporter of Andrew Tinkler and liked the unorthodox approach of Andrew. So it was quite an interesting meeting. In this meeting, we were going to see him because he had been a staunch supporter of Andrew and we were trying to make sure that he understood there was another perspective, and this was the main aim of that meeting. I would not be promoting to him that the board was not independent. It just doesn't make any sense. I was trying to make sure that if that was a question that he had heard or an observation he had heard, I was going to be sure to land that actually the board was acting independently and for the best interests of the company."

336. Mr Wardell put the allegation that the Committee lacked independence to both Mr Brady and Mr Ferguson. When the formation of the Committee was put to Mr Coombs, he accepted that it was formed because both Mr Ferguson and Mr Tinkler had a potential conflict of interest. He also accepted that it was inappropriate for Mr Ferguson to be a decision-maker:

> "Q. So if a committee is being set up to be independent because of conflict of interest between Mr Ferguson and Mr Tinkler, it would be inappropriate, wouldn't it, for Mr Ferguson to be involved with the committee? A. Well, it would be inappropriate for him to be a decision-maker in the committee, yes. Q. But inappropriate for him to attend and express his views? A. Not necessarily, no, he was and remained the chairman of the company. Q. So Mr Tinkler was a director at that time. Was he invited to attend and express views? A. No. Q. Why not? A. I have no particular answer to that. Q. It's not consistent with independence, is it? A. Well, the decision-makers of the committee were not in the fray but we were part of the status quo, and Mr Ferguson was part of the status quo, so we were trying to exercise independent judgment as best we could. Q. You

> put yourselves into the fray by making a public announcement that if Mr Ferguson went, you and Mr Wood would go. You had taken sides before you had your first committee meeting. A. We were still the independent directors on the board. Q. Yes, but doesn't being an independent committee require you to have something of an open mind before you open your mouths in a committee meeting? A. Well, I think in the circumstances that we were in at the time, everybody had a well-defined point of view but somebody still needed to take decisions on behalf of the company. Mr Garbutt had -- was no longer actively involved in any activity in the company, or almost no activity in the company. Mr Tinkler and Mr Ferguson were clearly the main protagonists. So it was left for the three of us who -- we did have a point of view, there is no doubt about it. We had a point of view on what we thought the right thing to do was but we weren't the centre of the fight."

337. Mr McWilliams relied upon the cross-examination of Mr Wood as evidence not only that the Committee lacked independence but also that it was never intended to be independent. Mr Wood accepted that he asked Mr Arch for a briefing note before the Board meeting at which he proposed the formation of the Committee. He was taken to the explanation which he gave to Mr Garbutt at that meeting and it was put to him that he gave a scripted answer prepared by Mr Arch and that it was dishonest. It was also put to him that the membership of the Committee had been fixed:

> "Q. Okay. What's going on with the committee here is gerrymandering, isn't it? The only people who are actually excluded are Mr Tinkler and Mr Garbutt, and Mr Laycock, who you know doesn't have the stomach for it? A. Mr Laycock was nowhere to be seen when it came to the committee. He wasn't interested at all in being on the committee. Q. So the people who are left on the committee is Mr Brady, and he wanted Mr Tinkler gone, didn't he? A. I don't think any of us wanted Mr Tinkler gone. We were trying to find a solution to the problem that we had. We tried right up to the 11th hour to rescue this situation and we couldn't do it. Q. And you were hardly independent, were you? A. No, I wasn't. Q. And Mr Coombs had also worked with Mr Ferguson for a long time? A. But that has got nothing to do with it. The fact that I knew Iain Ferguson had nothing to do with the decision I made, that I felt it was in the best interests of the company that Iain Ferguson continued as chairman. That was where I was coming from; not because I knew Mr Ferguson or I had any other vested interest in staying on the board; I genuinely felt that was the right thing to do. Q. But you weren't an independent committee, were you? The purpose of the committee was to get rid of the dissenters and clear the way to get rid of Mr Tinkler? A. That's rubbish, absolute rubbish."

338. If it is necessary for me to decide Issue (5), I find that the Committee did not lack independence. None of the members of it had a conflict of interest which prevented them

from performing their duties to SGL or acting in what they considered its best interests to be. I also reject the allegation that in delegating their powers to the Committee the Board intended it to lack independence.

339. In making this finding, I accept Mr Brady's evidence about the interpretation of the Briefing Note. It is obvious that he was simply recording Mr Tinkler's criticism and giving his answer to it. I also accept that the answer itself was not equivocal and no more than preparation for his meeting with Mr Williams of Miton. I also accept the evidence of Mr Wood and his emphatic rejection of Mr McWilliams' suggestion that the Committee was formed to get rid of Mr Tinkler. The Judge relied on his evidence at the Trial (see [910]) and so do I.

(c) Dishonesty

340. But in any event, Mr Tinkler withdrew the allegation of conscious and deliberate non-disclosure in relation to the Briefing Note in a footnote to his written opening submissions. Mr Wardell did not address this point in oral submissions and in case there is any doubt, I am satisfied that Mr Brady did not deliberately and consciously fail to disclose the Briefing Note.

(d) Materiality

341. Finally, even if I had been satisfied that there were any grounds to believe that Mr Brady had deliberately failed to disclose this document, it would not have been material to the Judge's finding that the members of the Committee were independent in the sense that none of the individual directors had a conflict of interest which disabled them from making decisions on behalf of SGL.

(6) Was Mr Laycock induced to step down as a director of SGL in July 2018 in order to permit Mr Tinkler's removal using Article 89(5) following his anticipated re-election at the AGM on 6 July 2018?

(a) The Judge's Findings

342. Mr Tinkler's pleaded case was that the change to Mr Laycock's terms of employment in July 2018 was relevant to the independence of the Board because it showed that the Board was unwilling to tolerate him exercising his independent judgment (and I have already set out the findings which the Judge made in relation to the appointment of the

Committee). However, the case which Mr Wardell also put to Mr Brady and made in closing is reflected in the formulation of Issue (6) (above). I must therefore consider the series of findings which the Judge made in relation to Mr Tinkler's ultimate removal under Article 89(5). Because of the way in which the Judge approached this issue, it is necessary for me to set out those findings in full:

> "939. I have already said in the course of making findings under Issue 2 that nothing had changed from the majority's perspective so far as the desirability of keeping the recently dismissed Executive Director off the Board was concerned. Mr Tinkler's actions, which had justified his summary dismissal, had not somehow gone away and it was the Four Directors' view that the Company's best interests required that he be removed again.
>
> 940. Although I have explained in Section 4(a)(vii) that taking a decision in the Company's best interests will not necessarily meet the charge that it was nevertheless taken in breach of the proper purposes rule, the existence of this separate issue does beg the question as to what improper purpose is said to have motivated the majority. By the time Article 89(5) was invoked on 7 July 2018 Mr Ferguson had been re-elected to the Board and Mr Tinkler had been dismissed from employment, though I recognise that the Four Directors would have then been aware that Mr Tinkler was disputing his dismissal and had both brought and threatened proceedings in Guernsey which had a bearing upon both matters. I have seen no evidence to suggest that, by deciding to remove him from office on 7 July, the Four Directors considered they were improving the prospects for resisting any challenge to those earlier steps.
>
> 941. In my judgment, the evidence does not support any conclusion that the Four Directors were motivated by any purpose other than the same one which had driven the Committee's actions on 14 June, and which was not an improper one. It is clear from their evidence that Mr Tinkler's actions were still "considered to be a threat to [that strong] corporate governance which in turn would be likely to lead to instability of the Company" (to quote from the minutes of the Committee meeting). The fact that a bare majority of shareholders might have been persuaded otherwise does not mean the majority should have been. As at 7 July 2018, the Four Directors would have had no cause to think that either Mr Jenkinson or WIM had applied their minds impartially to the implications of Mr Tinkler's actions (when they were amongst those with whom he had been having private discussions and they had not benefited from the majority's viewpoint).
>
> 942. The improper purpose relied upon by Mr Tinkler is therefore really one which is said to arise as a matter of principle rather than by reference to a discrete piece of evidence as to the Four Directors' motives as at 7 July 2018. It really amounts to saying that the Board cannot properly decide something which is contrary to what has been decided by the shareholders in general meeting. My general observations which attempt to set the context at the beginning of Section 3 above will indicate why

> that strikes me as a questionable submission. The court generally respects the executive function of a board of directors on the basis that it is the board that the shareholders have decided to appoint to manage its affairs.
>
> 943. If I have, perhaps unfairly, reformulated Mr Tinkler's submission in terms that are too general, and it is only the members' decisions as to the composition of the Board that should not be second-guessed afterwards by the Board, or, perhaps, not too soon afterwards, then it still runs up against the point that the majority (of all directors bar one) was still armed with the Article 89(5) power from the moment the Board was constituted at the AGM. One cannot read into that power a limitation that it will not be exercised, or, perhaps, not exercised too soon against a newly appointed director, or that it will only be exercised against him on "new" grounds arising after his appointment (though it is clear that the majority thought the threat posed by Mr Tinkler to the stability of the Company was a continuing one).
>
> 944. The difficulty with the "*golden thread*" argument, therefore, is that Mr Tinkler seeks to apply it in a way from which only he benefits. This is illustrated by his counterclaim for "*an injunction restraining the Board from purporting to remove Mr Tinkler as a director of the Company pursuant to Article 89(5)*". As the Company has questioned, why should Mr Tinkler (on the assumption he is back on the Board) benefit from such special protection against the exercise of a power that the members have agreed to confer upon the Board (and not revoke)? Of course, Mr Tinkler is forced to seek that relief to protect himself against the remainder of the Board (now differently constituted but with the Four Directors still on it) doing again that which was done on 7 July 2018.
>
> 945. Yet the decision of members at the AGM was to appoint the whole Board, including the Four Directors who chose to exercise the Article 89(5) power available to them. If the golden thread runs, it runs for the benefit of all directors whose appointment reflects the shareholders wishes. As Mr Coombs made the point in evidence, when making the point that the outcome at the AGM had not really resolved the problem when the other directors felt unable to work with Mr Tinkler:
>
> *"Well, so what's supposed to happen? You have a board that's been elected by shareholders and four or five people have to stand down because they can't work with the one? I got 60-odd per cent votes. I got more votes than Mr Tinkler. Why should I step down? Or am I less of a director than him?"*
>
> 946. In my judgment, there is no basis for concluding that the Four Directors exercised the Article 89(5) power on 7 July 2018 for an improper purpose. Its exercise was therefore a valid and effective one."

(b) The New Evidence

343. *The Laycock Messages*. The new evidence upon which Mr Tinkler relied consisted of the exchange between Mr Wood, Mr Brady, Mr Coombs and Mr Ferguson on 4 June 2018, Mr Brady's email to Mr Laycock on 18 June 2018 and the series of WhatsApp messages

between Mr Brady, Mr Tappin and Mr Dilworth between 15 June and 29 June 2018 (and I will refer to these communications collectively as the "**Laycock Messages**"). Mr Wardell suggested to Mr Brady that they showed that he had no concern for Mr Laycock's health and was cynically trying to remove him. Mr Brady's response was as follows:

> "Q. No concern about his health. It was back us or step down. A. This is simply not true. This is just one text and it does not take into the broader -- on the broad account of I went to see him, we drove up to Yorkshire, I spent quite a lot of time with him. We were worried about him. He was genuinely not in a good place and he was taking sick leave, and all through, both myself, the chairman, Nick, and even Andrew Tinkler was concerned about him, right? So there was a genuine concern for Mr Laycock and, by the way, I think it's right, he either is in the camp or he is not in the camp. If he is not in the camp and he can't manage the business, he needs to step down."

344. *The Laycock Note.* Mr Wardell then put the Laycock Note to Mr Brady, who accepted that the Board wanted Mr Laycock's support and that if he was not going to provide that support and to act as a proper CFO, the Board wanted him to step down:

> "Q. This is all about you getting his support, and if you don't get his support, you want him to step down for a time so that you can implement your plan? A. Of course, we wanted support from him, right, or if he didn't -- if he wasn't going to support and he wasn't going to manage it as a proper CFO, we wanted him to step down. We are certainly not trying to be unclear about that."

345. Mr Brady also rejected Mr Wardell's suggestion that his real concern in asking Mr Laycock to resign as a director was to put the remaining directors in a position to exercise Article 89(5) in the following passage:

> "Q. But it's perfectly proper for an executive director to abstain on an issue, isn't it? A. You can abstain on an issue, of course you can (inaudible) but you can't abstain, in my view, on a core issue that's going to decide the future of the company. You can't be riding two horses in terms of your duty as a director. You have to decide one way or another. Of course you can abstain from a particular notion, not if it's going to affect the core business and the interests of the company, in my view. Q. The only effect it was going to have was to stop you using 89.5. That's the only issue you could possibly be worried about -- A. Assuming we needed to use 89.5. Q. Yes. If Mr Tinkler got in, you would need to use 89.5. That was your entire concern about Mr Laycock? A. No, I don't agree with you. Obviously -- I just don't agree with what Mr -- the QC is saying."

346. *The Second Side Letter*. Finally, Mr Wardell put the Second Side Letter to Mr Brady suggesting that he persuaded Mr Laycock to resign by offering him a more generous package and that by doing so he was buying off opposition:

> "Q. Let's have a look at {I14/171.2/1}. So you persuade him to go out, to be removed by a more generous engagement letter? A. But if you remember, I was very clear that we needed to make sure his reputation was protected and he was financially protected. I think that was only fair given the situation he was put in, not of his own making. He joined to be the CFO of a company that then went into a massive dispute with one of its shareholders. It's not normal for someone in that situation. Q. And then if you look at this, it's dated 5 July and you agree the following. Point 2, he returns to being a finance director but you don't change his salary, do you? A. No. Q. Immediately resign from the board, point 3. Do you see that? A. Yes. Q. Paragraph 4, leave of absence for eight weeks, during which he will be paid in the usual way. Do you see that? A. Yes. Q. And then 5, there is a gagging order, not allowed to disclose the existence of this letter? A. Yes. Q. And then 7: "The company will pay you a bonus of £30,000 ..." A. For clarification, point 7 was -- he had missed out on a save as you earn scheme because he was on a project where he was considered inside, so this was just making good the money he would have had if he had been in the SAYE scheme himself because, remember, we offered this, he came back to us and said, look, I'm very happy to step down and keep out of all this mess but this is what I'd like, and we thought that was wholly appropriate at the time. Q. And paragraph 9: "We will enter into good faith discussions with you about whether it's appropriate for you to return to the CFO role following the expiry date." Which I think was December. But you were again buying off opposition, weren't you? A. No."

347. Mr Ferguson was also asked about the Second Side Letter. Mr Wardell took him to messages which suggested that Mr Dilworth became aware of it and that SGL had to agree to vary his terms of employment too. Mr Ferguson could not recall this process but accepted that SGL must have increased Mr Dilworth's notice period to give him equality with Mr Laycock. Mr Ferguson also accepted that Mr Garbutt was not involved in the variation of Mr Laycock's terms even though he was the Chair of Remco.

348. When Mr Coombs was asked about the Second Side Letter, he could not recall seeing it or being aware of the bonus which was awarded to Mr Laycock. On this basis, he accepted that Remco should have approved the letter but had no recollection of it doing so. However, in re-examination Mr Leiper took him to the minutes of a Board meeting on 5 July 2018 at the offices of Carey Olsen in Guernsey at which Mr Ferguson, Mr Brady, Mr Wood and he were all present and at which they approved the Second Side Letter.

349. Finally, Mr McWilliams asked Mr Wood about the Second Side Letter and Mr Laycock's position. Mr Wood could not recall whether Remco had approved it either. After some thought, he accepted that the decision to sign the Article 89(5) notice was a matter for the personal conscience of each director and a lone director who refused to sign could not be expected to resign. I then asked him whether he thought that Mr Laycock had been bought off:

> "MR JUSTICE LEECH: But the additional -- the change to his terms and conditions, which allowed him to remain effectively (Overspeaking) remain on the same terms, you don't consider that they were linked or was it all part of a rather complex decision-making process? A. What I don't know, my Lord, is whether Richard would have resigned absent the continuation of his service contract on the same terms with the enhanced bonus. I just don't know. I don't think -- it certainly wasn't -- I cannot believe that it could be -- it wasn't an inducement. MR JUSTICE LEECH: You don't think he was as crude enough that he was bought off, in a sense? A. No way, no way. MR JUSTICE LEECH: But it was important enough to make sure that he stood down, for all sorts of reasons -- A. But it wasn't a bribe or an inducement. I just don't believe that."

350. Having considered the evidence of all four directors, I find that Mr Brady asked Mr Laycock to step down as a director of SGL in July 2018 because he was concerned that Mr Laycock was not prepared to support the remainder of the Board at the AGM. Mr Brady accepted this much in answer to Mr Wardell's questions in the first passage (above). But I also find that Mr Laycock's resignation from the Board was not part of a preconceived plan to buy off Mr Laycock and exercise Article 89(5). Mr Brady did not accept this in the second passage (above) and I accept his evidence on this point.

351. Finally, I accept Mr Wood's evidence that the bonus which SGL paid to Mr Laycock was not a bribe. He thought carefully before answering my question and I accept his answer. I also find that Mr Brady had a number of other reasons for asking Mr Laycock to step down. Those reasons included a genuine concern for his health, a concern that he could not cope as a director and the CFO in the context of the dispute and a concern that he should not lose his existing bonus if he agreed to step down.

352. The Laycock Note provides the best evidence of Mr Brady's motives for asking Mr Laycock to resign as a director and CFO of SGL. It referred to the need for Mr Laycock "to be in or out". But it also provides clear evidence that Mr Brady had a genuine concern for Mr Laycock's health, his ability to cope and his ability to discharge the functions of

a CFO. I accept that it refers obliquely to Article 89(5) ("removing AT from the Board need unanimous"). But, as Mr Brady said, this was not a foregone conclusion and the Board might never need to exercise this power.

353. Further, the Laycock Note provides no evidence for Mr Tinkler's case that Mr Brady offered Mr Laycock a bonus of £30,000 to resign to enable the Board to exercise the Article 89(5) power. Mr Wardell did not suggest to Mr Brady that the note was not an accurate reflection of Mr Brady's thoughts in preparation for his meeting with Mr Laycock or an accurate record of what he said. If Mr Brady had been intending to offer a bribe to Mr Laycock to enable the Board to remove Mr Tinkler, I would have expected to see more prominent evidence of this in the Laycock Note. But all that Mr Brady recorded was: "Whatever decision will make sure your [sic] well looked after from reputation and finances."

354. Finally, in reaching these conclusions I have taken into account the fact that Mr Laycock's reluctance to support the Board in June 2018 was induced by the threatening behaviour of Mr Whawell, who sent Mr Laycock a text message on 29 May 2018 stating that SGL's insurance did not cover him for defending the Defamation Claim: see [267]. The Judge described this message as "intimidating" and he rejected Mr Whawell's evidence that he was not acting at Mr Tinkler's direction: see [658] and [659]. Mr Tinkler could not (and did not) challenge these findings before me.

355. Mr Brady put his meeting with Mr Laycock and the change to his employment terms in this context. He also gave evidence (which I accept) that as well as texting him Mr Whawell telephoned Mr Laycock and threatened him:

> "Q. And as a result of this, the rest of the board began to be concerned as to whether or not Mr Laycock could be relied upon to support your planned action against Mr Tinkler if and when Mr Tinkler was re-elected? A. So, my Lord, just as a little context for Mr Laycock, so when we issued the RNS on the 29th, Mr Laycock was called by Mr Whawell. What we understand was quite a threatening conversation in terms of he would not be covered by the DNO, he would end up with no house. So there is a kind of implicit threat to Mr Laycock, who already is not the most robust character, right? So he was already felt threatened literally within hours of the release of the RNS. In fact, when we sent the RNS round, we then -- because of the DNO [sic] -- what happened was -- the DNO {sic] -- sorry, the RNS was not issued immediately, as planned, at 7 o'clock in the morning, Richard Laycock had got a call very early, like 3 or 4 in the morning, if I remember rightly, with this threatening structure of, look, the

> DNO [sic] insurance won't cover you. You are going to lose your house, we are going to take away everything if you sign this. We then got further advice from a QC on defamation and only then did we release the RNS, the point being to the allegations that we were effectively trying to get Richard Laycock in a place where he would just do what we told him, he was already immediately post that RNS not in a good space and felt threatened and, you know, we were very worried about Richard Laycock, and I think even Andrew Tinkler was worried about Richard Laycock at one point. I think that's the context of how it all started, and he was already -- I had already spoken to him in April saying, look, you need to be able to stand up, you know, know your numbers, make sure that you can stand up to Andrew and Ben and you need to act like a proper CFO, both from a fiduciary duty point of view but also from a governance point of view. So that's the context of Richard Laycock and what you are putting to me."

(c) Dishonesty

356. *The Laycock Messages.* SGL did not disclose the Laycock Messages in the 2018 Claim. Mr Wardell suggested to Mr Brady that he deliberately failed to disclose them because they would expose the pretence that the Board was independent:

> "Q. None of the messages being exchanged about Mr Laycock, as far as I know, were disclosed. A. Again, I didn't check all those documents. I certainly assumed that -- well, certainly that our legal team had all the messages. Q. And the reason they weren't disclosed is because they would highlight the fact that your story of an independent board was far from the truth? A. I don't agree with that. Q. And would show you as a person who brooked no dissent? A. Sorry, excuse me? Q. It would show you as someone who brooked no dissent? A. Sorry, I can't understand what you are saying. Q. You were not prepared to have Mr Laycock disagree with you -- A. Sorry, I understand that now. No, that's not true."

357. There was no direct evidence that Mr Brady had taken any steps to prevent disclosure of these messages and Mr Wardell was in substance inviting me to draw this inference from the content of the documents themselves. In my judgment, their content does not provide cogent evidence that Mr Brady consciously and deliberately chose not to disclose the Laycock Messages and I find that he did not do so for the following reasons:

(1) As Mr Leiper pointed out, the Laycock Messages were a mixture of text messages, WhatsApp messages and emails passing between Mr Brady and a number of individuals (who did not include Mr Soanes). It would have been necessary for Mr Brady to persuade Mr Coombs, Mr Wood and Mr Dilworth to delete these

messages themselves or to give instructions to Rosenblatt not to disclose any of these messages whoever the custodian.

(2) Mr Wardell did not suggest to Mr Brady that he deleted these messages or that he attempted to persuade the others to do so and I consider this improbable. He gave his phone to HSF for imaging only three days after the last message in the sequence and it would have been very risky for him to delete these messages before doing so. I accept his evidence, therefore, that the text and WhatsApp messages would have been on his phone and the emails on the server when Rosenblatt carried out the disclosure exercise.

(3) The alternative is that Mr Brady gave instructions to Rosenblatt not to disclose these messages. But Mr Wardell did not put this to Mr Brady and, as I have stated above, there is no direct evidence that he had any involvement in the disclosure exercise. The more obvious reason for the failure to disclose the Laycock Messages, therefore, is that Rosenblatt did not identify them as disclosable documents during the initial disclosure process and Mr Field did not do so either.

(4) But in any event the Laycock Messages do not bear the weight which Mr Wardell attributed to them. I have set out Mr Brady's detailed email dated 18 June 2018 (above) in which he presented the options to Mr Laycock. It was consistent with Mr Brady's evidence and its tone was sympathetic. Indeed, it can be contrasted with Mr Whawell's text and telephone conversation with Mr Laycock only two weeks earlier. I do not accept that Mr Brady had a motive, far less a strong motive, to prevent its disclosure in the 2018 Claim.

(5) The other messages were a short email exchange and some text messages over a period of almost a month. Although they suggest that Mr Brady was less sympathetic about Mr Laycock with his close colleagues, it is not credible that Mr Brady would have hunted through his phone, identified these messages as particularly damaging and then taken steps to prevent their disclosure.

358. *The Laycock Note*/*the Second Side Letter*. Mr Wardell suggested to Mr Brady that he deliberately misled the Judge by giving the impression that the Board and the Committee were independent and hiding Mr Laycock's misgivings. He also suggested to Mr Brady

that the Laycock Note and the Second Side Letter were important documents relating to an issue in the 2018 Claim and that his failure to disclose them was deliberate:

> "Q. And yet again we have important documents relating to an issue in the case not being disclosed. A. Again, I was -- I have disclosed everything to our lawyers. It was really for them to disclose to the court. Of course, I went through the high level but I didn't check everything. Q. And one struggles to find any documents disclosed last time round which had anything adverse to your case. A. I think you need to take that up with the Rosenblatt team. Q. Well, I say the failure to disclose these documents, the Laycock amendment and the dialogue with him in your notes was deliberate? A. That's absolutely untrue, my Lord. Q. And you cannot possibly have forgotten them? A. Again, another incorrect statement."

359. Again, there was no direct evidence that Mr Brady took any steps to prevent disclosure of the Laycock Note or the Second Side Letter and I was being invited to draw an inference that he did so from the content of these documents. In my judgment, their content does not provide cogent evidence either that Mr Brady consciously and deliberately chose not to disclose them and I find that he did not do so for the following reasons:

(1) It is more probable that Rosenblatt did not identify the Laycock Note or the Second Side Letter as disclosable documents. I have set out my detailed reasoning above in relation to the Laycock Messages (above).

(2) As with the email dated 18 June 2018, I do not consider the Laycock Note to be a damaging document. It was consistent with Mr Brady's evidence and although it referred to Article 89(5) obliquely, I am not satisfied that this would have provided a strong motive for Mr Brady to prevent its disclosure.

(3) Mr Leiper pointed out in his closing submissions that the existence of the Second Side Letter was recorded in the minutes of the Board meeting on 5 July 2018 which were in the bundle for the Trial (although he conceded that they were not marked as such):

> "The Chairman noted that the purpose of the meeting was to consider and, if thought fit, to approve a draft letter amendment to the service agreement of Richard Laycock (executive director) which was proposed to be entered into between on the one hand, the Company and on the other Richard Laycock (the "Letter"). It was noted that discussions between Richard Laycock and the Company had led to the preparation of the Letter, which

> provided for certain amendments to Mr Laycock's service agreement, in broad terms, to reflect Mr Laycock's stepping down from the Board and the role of CFO for a specified time. The Letter provided for an agreed form RNS announcement to be included in the AGM statement scheduled to be released at 7 am on 6 July 2018. It was noted that Mr Laycock had approved the terms of the Letter, and the related RNS announcement."

(4) I accept that the minutes did not record the terms of the Second Side Letter and, in particular, the bonus. But if Mr Brady had considered it essential to prevent disclosure of the Second Side Letter, it is highly unlikely that the minutes would have recorded its existence at all. Mr Brady would have known that SGL would have to give disclosure of board minutes and that there was a significant risk that Mr Tinkler would then ask for disclosure of the document itself.

(d) Materiality

360. For Issue (6) I approach Limb 2 in the same way as I did for Issues (1) and (2). Applying either test, I am not satisfied that the new evidence would have entirely changed the way in which the Judge came to his decision (the *Highland* test) or that there is a real danger that the failure to disclose the new evidence would have affected the outcome (the *Hamilton* test) for the following reasons:

(1) The Judge found that Mr Brady, Mr Ferguson, Mr Coombs and Mr Wood were acting in good faith when they gave notice to Mr Tinkler under Article 89(5) on 7 July 2018. He also found that they were not acting for an improper purpose by removing a director who had been re-appointed to the Board by the shareholders at the AGM. He treated this issue (or sub-issue) as a question of principle.

(2) On the basis of the new evidence in this action I have found that Mr Brady induced Mr Laycock to step down as a director because he was not prepared to support the remainder of the Board at the AGM but that there was no preconceived plan to buy off Mr Laycock and exercise Article 89(5). I consider it highly unlikely that the Judge would have found that Mr Brady or the other three directors were acting in bad faith or for an improper purpose if he had considered the new evidence and reached similar conclusions.

(3) In particular, it was an important part of the Judge's reasoning that Mr Tinkler's earlier actions which had justified his summary dismissal "had not somehow gone

away": see [939]. The Judge had earlier found that Mr Tinkler had briefed against the Board, shared the Duranta budget with Mr Day and sent both the Letter to Shareholders and Communications with Employees in breach of his service contract and in breach of fiduciary duty and he regarded those breaches as both serious and repudiatory: see (below).

(4) If the Judge had found that Mr Brady had a pre-conceived plan to buy off or bribe Mr Laycock with a bonus of £30,000 and exercise Article 89(5), it is possible that he might have found that the Board was acting for an improper purpose when it approved the terms of the Second Side Letter on 5 July 2018. It is also possible that he might have found that the removal of Mr Tinkler under Article 89(5) on 7 July 2018 was ineffective. But again I consider this unlikely. There was no clear evidence that Mr Laycock would have decided not to step down as a director or the CFO if Mr Brady had not agreed to the terms set out in the Second Side Letter. Moreover, there is no clear evidence that he would not have fallen into line and agreed to exercise Article 89(5).

(5) But on any view, I cannot be satisfied that the new evidence would have entirely changed the way in which the Judge approached his findings. Nor can I be satisfied that there is a real danger that it would have done so. When he considered whether Mr Laycock would have resigned absent the continuation of his service contract on the same terms with the enhanced bonus, Mr Wood's evidence was: "I just don't know". This evidence does not meet either test of materiality.

(7) Did Mr Brady deliberately delete his Telegram messages with Mr Soanes prior to his mobile telephone being imaged by HSF on 2 July 2018 and did he deliberately not mention that fact to SGL's solicitors?

(a) The Judge's Findings

361. Trial Issue (4) required the Judge to decide whether Mr Brady, Mr Ferguson, Mr Coombs and Mr Wood committed breaches of fiduciary duty. The Judge framed the factual context as follows at [768] and [769]:

> "768. As with the previous one, there are many limbs to this issue as set out in Section 2 above. They can be broadly grouped into two parts: the actions of the Four Directors in, firstly, securing Mr Tinkler's removal from employment and office (including the setting up the Committee

> whose composition and powers form the subject of Issues 5 and 6) and, secondly, both in advance of, and at the 6 July AGM (including transferring shares from Treasury to the EBT, issuing the 29 May RNS and decisions in relation to voting upon Mr Tinkler's election). The challenge to their action in removing Mr Tinkler from office obviously extends to their decision to invoke Article 89(5) again, after Mr Tinkler had been voted back on to the Board at the EGM. 769. Mr Tinkler argues that both parts were aspects of an orchestrated plan, described as "Project Shelley", by which the Four Directors aimed to secure Mr Ferguson's appointment over Mr Tinkler's. That name was used in various emails passing between them and the Company's advisers from 24 May onwards."

362. The Judge did not address Mr Tinkler's allegation about Project Shelley directly. But he accepted SGL's evidence that 8 June was the "tipping point": see [780]. On that day Mr Tinkler issued the Defamation Claim and the Committee instructed Rosenblatt to give advice about the strategy for the AGM: see [311] and [312]. In relation to Mr Tinkler's dismissal his findings were as follows at [904] and [912] to [913]:

> "904. There is no basis for concluding, in relation to Mr Tinkler's dismissal, that any of the Four Directors acted for an improper purpose and the evidence overwhelmingly points the other way. I therefore reject Mr Tinkler's argument that they acted for the improper purpose of retaining their control of the Company and making it more likely that Mr Ferguson would be elected. Not only I am unpersuaded that Mr Tinkler's status as an employee would have been thought by most shareholders to be material to the prospects of any of the Four Directors being re-elected at the AGM (a point which Mr Ferguson made in his evidence) but, in any event, it is Mr Tinkler who, by his actions, had precipitated the consideration of his dismissal."
>
> "912. The last basis on which the authority of the Committee is thrown into question by the present issue is one that is premised upon Mr Tinkler either not having been in breach of his Service Agreement or, if he was, his breach or breaches not being repudiatory in nature. 913. In the light of my findings under Issue 3, this ground of challenge to its authority has no substance. I have referred in my determination of that issue to Mr Tinkler's breaches of duty being serious ones. In my judgment, when viewed cumulatively, they were repudiatory in nature. Indeed, the breaches constituted by his Letter to Shareholders and Communication to Employees were, in my view, each repudiatory breaches. By writing in those terms, Mr Tinkler had brought his campaign against the Board, his employer's representative body, out into the open. Those most recent breaches did not land in an empty scale and, by his actions between late January and early June 2018 and the Company was entitled to conclude that Mr Tinkler had abandoned his responsibilities as Executive Director. And acting through the body endowed with the Board's delegated authority – the Committee – the Company was entitled to dismiss him."

(b) The New Evidence

363. On or after 27 May 2018 Mr Brady downloaded the Telegram App and began to exchange Telegram messages with Mr Soanes. In the ET Claim Mr Soanes disclosed thirty-five messages in total for the period between 1 June 2018 and 7 August 2018. However, Mr Brady was only cross-examined about messages which he exchanged with Mr Soanes on 7 and 13 June 2018 which I have set out in the narrative section above. His evidence about those messages was as follows:

> "Q. If we look at the Telegram messages for June, I suggest it is perfectly obvious that Mr Soanes was helping the company in its campaign against Mr Tinkler. We can pick this up at {I17/304/18}, please. You send a Telegram to Mr Soanes on 1 June telling about you are using a few people in Redleaf, and then on 7 June you say: "Please Tuesday at 1300 -- want to bring our litigator. Okay?" Do you see that? A. Yes. Q. And he says: "Yes, no problem. "Assuming we are all on the same side." And you say: "Indeed we are." A. Yes, I can see that."
>
> "Q. After the AGM. He had sent you a Telegram saying congratulations after the AGM. We don't need to look it up, I don't think: "I sent a Telegram to say congrats but I don't think you saw it. It would be good to catch up soon if you have the chance. My tribunal process will get underway soon and now the meeting is out of the way I have to start looking for a resolution." You say: "Just seen it. We had an all party meeting this morning and mentioned we need to get in touch about some information you worked on in the past with AT {into} the fact that AT is now disputing he never agreed to the value of aviation division at £160 million." A. That's interesting actually because when I joined this company, Andrew was involved in, obviously, the aviation incentive plan and that's why I joined actually, to have like kind of a private equity structure and a listed business. I was a bit surprised that Andrew was actually now agitating against my incentive scheme, having been party to putting it together. Q. I'm not going to ask you about that. A. No."

(c) Dishonesty

364. Mr Wardell relied on the Telegram messages as a clear example of a class of documents which Mr Brady had deliberately deleted or failed to disclose. He also suggested that Mr Brady had deliberately lied about deleting the messages in these proceedings:

> "Q. In paragraph 73 of your witness statement -- this is your first witness statement -- you say -- page 24 -- that's {B/2/24} -- you deal with the Telegram messages from Mr Soanes. A. Yes. Q. You say after checking your mobile phone in December 2020: "... following service of this claim to see if I could locate Telegram messages ... I looked but found none. I

> could not even find at that time Mr Soanes on Telegram which made me wonder if he had closed his account. I did not delete the messages. From my own experience of using Telegram, I know that it is possible for the sender to delete messages they have sent to the recipient. I thereof assumed that the deleted Telegram messages had something to do with Mr Soanes but I have not discussed it with him." A. Would you like me to give you my account? Q. No, I'm going to ask you a question. A. Okay, I'm waiting for it. Q. That's a deliberate untruth on your part, isn't it? A. No, that's definitely not a deliberate untruth. It's absolutely the truth."

365. Shortly before trial the joint expert, Mr Barker, was able to retrieve a number of messages from Mr Brady's phone and Mr Wardell put two Telegram messages to Mr Brady both dated 7 August 2018. The first was sent by Mr Soanes to Mr Brady and the second from Mr Brady to Mr Soanes. Mr Wardell suggested to Mr Brady that he must have deleted these messages because the joint expert had found them on his phone and because Mr Soanes did not delete them. When this was put to him, Mr Brady could not explain why they were not on the image of his phone which he provided to HSF. But he repeated a number of times that he could not remember deleting these messages:

> "MR WARDELL: We now have the list of messages that was sent to Clyde & Co by the -- either solicitors or the expert. I don't know which. It doesn't matter. I would like you to -- can we scroll down, please, and stop, and you will see messages 7 and 8 are Telegram messages. Do you see that? A. Yes. Q. One is incoming, to you, saying: "Thanks. I'll contact him." And the other is outgoing from you: "I need a solution quickly -- we could actually give notice on the office! Not pay! Keep sending bills ..." A. Yes. Q. So the expert has looked at your phone, having reimaged it recently, and found two deleted Telegram messages. A. And I don't recall deleting them. Q. But you must have done and the reason you must have done is if we compare those messages with {I17/304/20} first of all, you see the bottom left-hand of the page: "Thanks. I'll contact him." So the first of the two deleted messages we have just looked at was in fact disclosed by Mr Soanes for the purposes of the employment tribunal proceedings and again in this action. I'm not showing the employment tribunal list because it's just too small to read on our screens. But, "Thanks, I'll contact him," was produced by him in 2019, which means you must have deleted it. A. Listen, the whole account was deleted. I don't remember deleting messages on WhatsApp -- on telegraph, but the whole account was deleted. And I'm not sure what they retrieved or what they have not retrieved. I don't remember deleting telegraph messages. Q. What you say in 73 -- let's look at the next one over the page first of all, which is a better example -- you will see we have got from Mr Soanes the Telegram message from you saying: "I need a solution quickly -- we could actually give notice on the office! Not pay! Keep sending bills ...CF30?" A. The question is was that deleted by me or deleted as part of the account, and I certainly don't know about the account -- Q. I don't understand the difference. Your evidence,

> we go back to paragraph 73, page 24 of B2, {B/2/24}, you say: "I did not delete the messages. From my own experience of using Telegram, I know that it is possible for the sender to delete messages they have sent ...I therefore assumed that the deleted Telegram messages had something to do with Mr Soanes ..." But once you realise that Mr Soanes hasn't deleted those two messages, the only conclusion that can possibly be drawn is that you deleted them? A. I don't recall deleting them. I think the question is are they retrieved from the deletion of the account. Right? I'm not sure, I'm not a technologist, but I don't remember deleting any Telegraph messages with Mr Soanes."

366. In his first report dated 20 December 2021 Mr Barker stated that he had been provided with two images from Mr Brady's Apple iPhone X, the first taken on or before 2 July 2018 and the second taken on 30 November 2020. He dealt with the WhatsApp messages on Mr Brady's phone first and his evidence was that the data contained in a WhatsApp message is stored in a database and that even if the user deletes the message, it can still be displayed again until the message is overwritten. However, his evidence in relation to Telegram messages was as follows:

> "[29] Telegram as a messaging service, almost identically to WhatsApp to the user, however in its background operation it differs vastly. Like WhatsApp the user interface and application system files are installed to the device. However, unlike WhatsApp, which stores all user messages locally on the device, Telegram's primary storage of user messages is on remote servers owned by Telegram. Messages are stored in some capacity on the device, however a more comprehensive electronic extraction of the device would be required to obtain these message containing files. It may be possible for CCL to conduct this more comprehensive extraction, with the same dependencies and limitations as set out in paragraph [21].
>
> [30] Due to no user messaging data relating to Telegram being present within the recovered mobile images, I am unable to comment on the removal of chat threads or messages relating to the mobile device being examined.
>
> [31] Similarly to WhatsApp, Telegram messages, when they are stored on the device, are stored in a SQLite database. Therefore, if the circumstances set out in paragraphs [12] and [13] were also applicable to Telegram databases, recovery of deleted messages may be possible."
>
> "[37] No Telegram messages were present within the provided mobile phone images. No metadata or traces of messages, deleted or non-deleted, were identified from the provided the mobile phone images. Please refer to paragraph [29]."

367. In his second report dated 24 January 2022 Mr Barker stated that the parties had agreed that Mr Brady's original device should be made available for examination and analysis.

Following his examination, he gave evidence that the Telegram App was currently installed and that eight Telegram messages had been identified with full message content, associated authors and recipients, and sent times and dates.

368. On 27 January 2022 Mr Barker sent the metadata of ten messages which he had recovered from Mr Brady's phone to Clyde & Co. All of them were identified by him as WhatsApp messages apart from the two messages dated 7 August 2018. Although the metadata does not identify the messaging service, I am satisfied that these were Telegram messages because they corresponded to two of the Telegram messages which Mr Soanes had disclosed in the ET Claim. Moreover, Mr Wardell put them to Mr Brady on the basis that they were Telegram messages.

369. In his third report dated 2 February 2022 Mr Barker was asked to provide any technical explanation for the Telegram messages which had been located not appearing in either of the two images taken on 2 July 2018 and 30 November 2020. He gave the following explanations:

> "[20] Installation logs for applications are kept by the operating system of iOS devices, however these only extend so far back. These logs are recoverable in a full file system extraction as obtained in January 2022 but were not recovered by the logical extractions taken on 02 July 2018 and December 2020. [21] In the case of the January 2022 image, recovered installation logs extend back to 14 December 2021 with no earlier information being present. [20] It may have been possible to have recovered this information if the recovery of data was conducted closer to the time in question. How close this would need to be is unknown, however, it is my opinion that the sooner a comprehensive image of the mobile phone can be obtained, the more likely relevant information can be identified."
>
> "[23] Due to developer decisions made when creating the Telegram application, data relating to Telegram messaging data is not recoverable from the logical extractions taken on 02 July 2018 and December 2020. It is recoverable using the recovery methods employed by CCL, therefore deleted Telegram data is present within the 13 January 2022 image of the mobile device and not in the previous images obtained."

370. I turn to my finding of fact on Issue (7). In my judgment, the expert evidence of Mr Barker does not demonstrate that Mr Brady deleted his Telegram exchanges with Mr Soanes before HSF took an image of his phone on 2 July 2018 and I find that Mr Brady did not delete those messages from his phone before 2 July 2018 for the following reasons:

(1) Mr Barker was acting as a joint expert and I accept his evidence. The notes to CPR Part 35.8 in Civil Procedure (2022 ed) Vol 1 at 35.8.6 suggest that where a single joint expert provides the only evidence on a particular issue, it is difficult to envisage circumstances in which it would be appropriate to decide the issue on the basis that the expert is wrong.

(2) His evidence was that Telegram messaging data was not recoverable from the images taken on 2 July 2018 and 30 November 2020 because of decisions taken by the developer of the Telegram App. It follows from his evidence that it was not possible to tell whether Mr Brady had deleted the Telegram conversation with Mr Soanes or whether the messages were still on his phone when HSF took the image on 2 July 2018.

(3) It also follows that Mr Barker's evidence did not support the case which Mr Wardell put to Mr Brady in cross-examination (above). It is not surprising, therefore, that Mr Brady found it difficult to explain why the Telegram messages were not located by HSF or Mr Field on his phone in 2018 and I accept that he was telling the truth when he said that he could not recall deleting the Telegram messages.

(4) Moreover, when he was preparing his first report Mr Barker was unable to recover either of the Telegram messages dated 7 August 2018 from the image of Mr Brady's phone taken on 30 November 2020. However, when he examined and analysed Mr Brady's phone itself, he was able to locate them. Whilst not conclusive, this evidence supports the inference that the earlier Telegram messages between Mr Brady and Mr Soanes in June 2018 were still on Mr Brady's phone when the image was taken by HSF on 2 July 2018 but were not recoverable from that image.

(5) The June Telegram conversation was not material to the Judge's findings for the reasons which I set out below. Indeed, the messages did not contain very much of relevance. As with the May WhatsApp conversation, I do not accept that Mr Brady had a motive to prevent them from being disclosed in litigation or that they provide cogent evidence that he deleted them deliberately. Again, if any of them had been a "smoking gun" which would have changed the course of the 2018 Claim, I might

have been prepared to draw the inference that Mr Brady had deleted them. But none of them were.

(d) Materiality

371. For Issue (7) I approach Limb 2 in the same way as I did for Issues (1), (2) and (6). But again, applying either test, I am not satisfied that the new evidence would have entirely changed the way in which the Judge came to his decision (the *Highland* test) or that there is a real danger that the failure to disclose the new evidence would have affected the outcome (the *Hamilton* test) for the following reasons:

(1) In the first Telegram message dated 7 June 2018 Mr Brady invited Mr Soanes to meet Mr Field a few days later and in the third and fourth messages Mr Brady and Mr Soanes agreed that they were on the same side. I accept, therefore, that Mr Soanes was already helping SGL in the dispute with Mr Tinkler. But, as I have stated above, this would have come as no surprise to the Judge.

(2) It is possible that the Judge might have found that the "tipping point" for the Board was a day or two earlier than 8 June 2018 because SGL had already instructed Mr Field to gather evidence and to meet Mr Soanes (which was Mr Tinkler's pleaded case). But I find it impossible to see how such a conclusion would have affected the findings in [904] and [902]. The Judge found that Mr Tinkler had committed repudiatory breaches of contract by early June 2018 and that SGL was entitled to dismiss him summarily.

(8) (i) Did Mr Ferguson fail to draw Rosenblatt's attention to the fact that he realised he had not captured all of his SGL-related emails for the purposes of the 2018 disclosure exercise? (ii) Did he deliberately delete emails pre-dating 3 May 2018 from his Wilton Park email account and fail to mention this to Rosenblatt?

(a) The Judge's Findings

372. Mr Tinkler has not identified any individual emails which Mr Ferguson failed to disclose from his Wilton Park email account. His case was that the Court should draw the inference that Mr Ferguson either deliberately failed to disclose material emails pre-dating 3 May 2018 from his Wilton Park email account or deleted those emails from it. For the purposes of analysis I have modified Mr Wardell's finding (8) and I deal with

deliberate non-disclosure (Issue 8(i)) first before deletion (Issue 8(ii)). None of the Judge's findings are relevant to either of these sub-issues.

(b) The New Evidence

373. By Application Notice dated 23 March 2021 Mr Tinkler applied for non-party disclosure against Wilton Park, which carried out a review of Mr Ferguson's email account and identified a review pool of over 4,000 documents. By an Amended Consent Order dated 3 September 2021 Wilton Park agreed with Mr Tinkler to appoint Mr Alexander Megaw, a consultant solicitor from Clarke Willmott LLP, to act as an independent solicitor to identify and remove privileged and commercially sensitive information and then review the remaining documents and identify documents which were responsive to specified search criteria. Those criteria required him to search for emails to and from Board Members, senior executives and Mr Soanes for the date range 1 November 2017 to 23 July 2019 relating to SGL, SCL and Mr Tinkler.

374. By email dated 3 November 2021 Ms Liane Simmonds of DMH wrote to Clyde & Co stating that Wilton Park had confirmed that it had searched for documents from 1 November 2017 to the date on which Mr Ferguson's email account was deactivated after his departure from Wilton Park. She also stated that no emails were found dating before May 2018 because its archive did not hold those documents. By email also dated 3 November 2021 Ms Rachel Cropper-Mawer of Clyde & Co replied stating as follows:

> "I am sorry to say that I think something has gone wrong here and we cannot figure out what it is. I attach an email sent to and from Wilton Park which is in June 2018 in the period Liane has confirmed is on the server. This was not in the disclosure we received from Alex but it is relevant and disclosable. We really need to get to the bottom of what has happened to the Wilton park emails in respect of the harvest and possibly the review."

375. Ms Cropper-Mawer also asked a series of numbered questions. By email dated 8 November 2021 Ms Simmonds replied answering each one and I set out below both the numbered questions and the answers which Ms Simmonds gave to them immediately below:

> 1. What is the reason these are not on the server – was there a system change?
>
> Our client's current archive system was set up in July 2018. The migration

> of emails was completed by a member of staff who is no longer working for Wilton Park and so our client does not have any information in respect of why the emails prior to May 2018 are not on the archive but, to confirm, the fact is that any emails that may have existed prior to May 2018 are no longer in our client's possession or control.
>
> 2. If not, can you tell us if this data only missing for his account of for other custodians too?
>
> Our client has not checked the position in respect of other custodians because its task has been solely in relation to Mr Ferguson's email account.
>
> 3. Would it have been possible for Ferguson to delete data from the archive and would there be a record of this?
>
> We are instructed that the answer to this question is no; Mr Ferguson did not have access to the archive.
>
> 4. Can you confirm that all 4,000 documents were responsive to the search terms?
>
> We confirm that our client ran the searches in accordance with search terms set out in the draft order attached to your client's application and provided all the resulting documents to us."

376. By email dated 16 November 2021 Ms Cropper-Mawer followed up these answers by asking whether any emails from before May 2018 were missing for other custodians and, if so, the reasons why they might not be accessible. By email dated 18 November 2018 Ms Simmonds replied as follows:

> "Having taken our client's further instructions, it appears that there has been some confusion, which we will attempt to clarify below. Our client's archive does generally store emails dated prior to May 2018; however, for the search conducted for the purposes of your client's application, no emails prior to May 2018 were located in the archive. It is not therefore necessarily the case that "emails became accessible in July". You asked us if there had been a system change and we confirmed that our client's current archive system was set up, and any emails migrated, in July 2018, but our client had no information about why any emails pre-dating May 2018 responding to the search criteria would not be stored on the archive. As mentioned previously, there could be any number of reasons for this and our client has no information on what that reason might be. However, our client's IT manager has suggested that possible reasons could be as follows:
>
> 1. The emails to or from the specified email addresses were deleted by Mr Ferguson before they were migrated to our client's archive;
>
> 2. There never were any emails to or from the specified email addresses that used Mr Ferguson's Wilton Park email address before May 2018;
>
> 3. There is another unknown reason.
>
> As noted above, the potential reasons listed above are a matter of

> conjecture and our client simply does not have any available information in this regard."

377. On 3 December 2021 Mr Tinkler amended the Particulars of Claim to allege that Mr Ferguson had only disclosed 238 emails from his Wilton Park Account, that he knew that he had sent or received more than 238 emails relating to SGL from that account and that he either knew or was reckless to the fact that he had not captured all relevant emails. Mr Tinkler also alleged that Wilton Park had disclosed no emails from Mr Ferguson's account from before 3 May 2018 but was aware of no technical reason why its archive should not have contained emails from before that date. He alleged, therefore, that Mr Ferguson had deleted emails pre-dating 3 May 2018 from his Wilton Park account.

378. SGL amended the Defence to admit that Mr Ferguson had provided Rosenblatt with 238 emails from his Wilton Park account, that he sent or received more than that number but denied that he knew that he had not captured all relevant emails or was reckless as to that fact. SGL also admitted that it was likely that Mr Ferguson sent or received more emails before 3 May 2018 than Wilton Park had been able to identify in the third party disclosure process.

379. Mr Megaw prepared a report for the Court dated 22 January 2022 explaining the searches which he had carried out and his evidence was as follows. He was provided with the review pool of 4,318 documents of which 4,311 fell within the date range and he removed 2,629 as potentially privileged. He found 617 of the remaining documents which responded to the search criteria and he reduced this number to 203 documents after the removal of duplicates. He considered 194 documents to be relevant and 9 documents to be potentially relevant and after a review by DMH he disclosed all 203 documents to the parties.

380. Mr Megaw then reviewed the pool of 2,269 potentially privileged documents and he reduced this number to 852 after removal of duplicates. He found 708 documents to be privileged and 139 not to be privileged. He disclosed all 139 documents to the parties once DMH had reviewed them. It follows that Wilton Park disclosed a total of 342 documents to Mr Tinkler pursuant the Consent Order. Although Mr Megaw did not state this in his report, it was common ground that none of those documents pre-dated 3 May 2018.

(c) Dishonesty

381. Mr Ferguson's evidence in his two witness statements was that he never had an SGL email account but used a personal BT Internet account and his Wilton Park account, that for the purposes of disclosure he gave Rosenblatt direct access to his BT Internet account or downloaded folders for them to search but that he conducted the search of his Wilton Park account himself for security reasons and emailed them to Rosenblatt on 28 August 2018. Mr Wardell tested this explanation in cross-examination:

> "Q. Yes. Can we now look, please, at {D/11.1/1}, which is the letter from Rosenblatt of 7 June last year, and they answer some specific questions about Wilton Park on page 2. They say: {D/11.1/2} "As regards your specific questions ..." Four lines in: "The pst files provided by Wilton Park contained 238 emails; "Mr Ferguson harvested (with assistance from the IT team at Wilton Park) and sent them to us on 28 April -- A. August, I think. Q. August, thank you: "The copy of the pst files which we received from Mr Ferguson on 28 August ... have been stored on this firm's file server." And as far as you are concerned, that's accurate, I take it? A. Yes, I mean, I sent 238 emails to Rosenblatt, having harvested them, if that's the correct word, or selected them and put them into, I think it was, four folders, and they were sent on 28 August. I was retiring from Wilton Park in September/October 2018, and I was security-cleared to the highest level, my Lord, and I knew that the moment that I stood down from Wilton Park, my email would be unavailable to me. Q. {D/108/3}, please. Better look at page 1, so I can identify the document. If we go to page 1. {D/108/1} It's another letter from Rosenblatt of 12 November. Can we go to page 3 in that document, please. And they confirm, at point 16, that included in what you gave them -- included in the 238 emails were some emails pre-dating May 2018. A. That's correct, and I did notice in some of the huge correspondence from Clyde & Co which my lawyers showed me, I think there were 105 emails. Actually there were 17 repetitions of one email in that from Clyde & Co, that this -- they were complaining in several places that they had received numerous emails prior to May 2018 in the original parcel they had got from Rosenblatt."

382. Mr Wardell put a schedule of the documents disclosed by Mr Megaw to Mr Ferguson. He pointed out that none of them pre-dated 3 May 2018. He then explored with Mr Ferguson why he had been able to harvest and provide emails from before that date to Rosenblatt himself. (Mr Wardell identified six emails although SGL admitted that it was four in the Defence.) Mr Ferguson's evidence was as follows:

> "Q. Yes. So the six emails that were produced first time round were no longer there to be accessed by the supervising solicitor? A. And I have obviously no knowledge of this. My last contact with my email account at

> Wilton Park was some time in October 2018, early October 2018, I think. And I also saw a reply from Wilton Park in one of the emails to Clyde & Co from, I think it's DMH Stallard or somebody like that, which was basically saying that I had had no access to the archive and there was no way I could have done anything with the archive, and absolutely I was unable to -- once I left, I could not again access my emails. They were part of the Foreign Office's -- behind Firecrest archive. Q. So if the supervising solicitor found 4,000 emails linked to Stobart post May, there must have been thousands of emails in your email account relating to Stobart for the period September through to May. A. Well, there would have been -- there would have been a number, there is no doubt about that. It took me quite a while to go through -- there were lots of occasions where there were email chains with people replying to emails, where what I selected was the final email in a whole run and there might have been ten/fifteen emails in the run-up to that. So that's where the duplication comes from."

383. Mr Wardell then put Ms Simmonds' email dated 18 November 2021 (above) to Mr Ferguson. He pointed out that Wilton Park generally stored emails which pre-dated 3 May 2018 and the reasons which Wilton Park's IT manager put forward to explain their absence. He then asked Mr Ferguson how he selected the six emails which he had disclosed:

> "How did you select the six? A. At the time, I think, as I said in my witness statement, I think Simon Walton at Rosenblatt gave me indications as to the sort of things I should be looking for and that's what I selected. Q. But you weren't meant to be selecting, you were meant to be downloading all Stobart emails to be handed to your solicitors. We have already established that. A. I've said very clearly in my witness statement I recall speaking to Simon Walton of Rosenblatt, who told me what emails I needed to collate. I cannot now remember all the details of what I was told to do but I remember following Rosenblatt's instructions. Q. Let's go back to {D/1/1}. This is what we have looked at before. You were meant to personally select all Stobart-related emails. You didn't apply key word or search terms. So if you are telling the truth, you must immediately have known that something had gone horribly wrong with the exercise you were being asked to undertake. You can't possibly have thought that you only had six Stobart-related emails covering the period September through to May. A. Well, I had also sorted through my BT internet emails as well. They were all in files, and they were accessed by the -- by whoever it was who accessed this through Rosenblatt as well. So you have all of those too. Q. I'm not asking about BT, I'm asking about Wilton Park. I'll try again. You can't possibly have thought that you only had six Stobart-related emails covering the period September through to May. A. At the time, that didn't occur to me. Otherwise, I would have done something about it. I believed that I had done what I was required to do. Q. And the short answer is you are not telling my Lord the truth about this. A. Well, I'm trying very carefully to tell my Lord exactly what I did. Q. You produced a handful of

> anodyne documents and deleted the rest. A. That's not true, I deleted no emails. Q. Was it David Arch who suggested you should delete all your emails? A. I deleted none of my emails. Q. And then you didn't tell Rosenblatt what you had done. A. I did tell -- I believed I had followed Rosenblatt's instructions. Q. How else, on your evidence -- how else could your pre-May Stobart emails alone have disappeared from your inbox? A. I have no idea."

384. In re-examination Mr Leiper took Mr Ferguson to Ms Simmonds' initial response dated 8 November 2021 and the answer which she gave to Ms Cropper-Mawer's third question, namely, whether Mr Ferguson would have been able to delete emails from the archive. Her answer was: "We are instructed that the answer to this question is no; Mr Ferguson did not have access to the archive." Mr Ferguson confirmed that this was accurate and explained the implications:

> "Q. And the answer to number 3, does that reflect the position? A. Yes, I had no further access to my email account or any archive. MR JUSTICE LEECH: Just so that I can be certain, the archive was created or the emails were archived in, is it, July 2018? MR LEIPER: Yes. MR JUSTICE LEECH: So the answer to 3 is referring to the situation after July 2018, isn't it? A. I mean, I left Wilton Park, as I said, in October 2018, and at that point my access to my email account terminated. What Wilton Park then decided to do with the email account is their business. They may have decided to wipe it completely or they may have decided to retain it. That's government -- and any of us who are cleared to the high level of security never have access to our emails again once we finish in the set position. MR JUSTICE LEECH: I fully understand your answer, Mr Ferguson. I'm just trying to make sure that the answer to question 3 deals only with the situation after July 2018, as I understand it. MR LEIPER: That must be right, and it also follows from the earlier answer, which is that he didn't, as I understand it, even know that the archiving was taking place but certainly didn't have access to it either, as I understand his evidence. Thank you, I have no further questions."

Issue 8(i): Deliberate Non-Disclosure

385. I deal first with Issue 8(i). Mr Tinkler alleges that Mr Ferguson knew (or was reckless as to the fact) that he had not captured all of the relevant emails on his Wilton Park account and withheld this information from Rosenblatt. I reject that allegation and I accept Mr Ferguson's evidence that he followed Rosenblatt's instructions and that he believed that he had done what he was supposed to do. I also accept that in harvesting or selecting the 238 emails which he sent to Rosenblatt he carried out an exercise of de-duplication and

no more (or believed that he had carried out such an exercise). I reject Mr Tinkler's first allegation for the following reasons:

(1) I accept that Mr Ferguson only produced 238 emails from his Wilton Park account. But I am not satisfied that I could properly draw the inference that Mr Ferguson deliberately withheld emails from Rosenblatt from this number alone. Mr Megaw, the independent supervising solicitor, produced only 203 documents on his first review and 139 documents on his second review.

(2) Further, Mr Megaw was required to carry out a search for all documents relating to SGL, SCL and Mr Tinkler in the date range 1 November 2017 to 23 July 2019 which Mr Ferguson received from, or sent to, his own BT Internet address, all of the members of the Board, Mr Tinkler, Mr Dilworth, Mr Laycock, Ms Brace and Mr Soanes. Given the wider date range of the search which Mr Megaw carried out, it is not surprising that he produced 104 documents more than Mr Ferguson.

(3) I also accept that Mr Ferguson only disclosed either four or six emails which pre-dated 3 May 2018. But, again, I cannot draw the inference that Mr Ferguson deliberately withheld emails sent or received before that date from the small number alone. As Mr Ferguson pointed out, he also disclosed emails from his personal BT Internet account. Mr Wardell did not provide me with any analysis of Mr Ferguson's emails from which I could have drawn the conclusion that he was more likely to use his Wilton Park account rather than his BT Internet account to deal with SGL matters or even to show that he used them equally.

(4) Moreover, Mr Wardell did not point to any obvious gaps which could only be explained by Mr Ferguson's failure to disclose emails from his Wilton Park account (and I return to this point below). Indeed, most of the key emails upon which Mr Tinkler relied in this action were sent by or to Mr Ferguson using his BT Internet account. For instance, Mr Brady forwarded the StobCap Buyout Email and Attachment to Mr Ferguson at his BT Internet address on 6 and 7 February 2018. Further, Ms Brace sent the draft minutes of the Board meeting on 25 January 2018 to Mr Ferguson at his BT Internet address and on 17 February 2018 he sent back the tracked version which contained the changes which Mr Wardell challenged as deliberately untrue.

Issue 8(ii): Deletion of Emails

386. I turn to Issue 8(ii) and the allegation that Mr Ferguson deleted emails pre-dating 3 May 2018 from his Wilton Park. I am not satisfied that Mr Megaw's report and DMH's explanations provide cogent evidence that Mr Ferguson deleted any emails from his Wilton Park account for the following reasons:

(1) I accept that Mr Megaw, the independent supervising solicitor, carried out an extensive search of the Wilton Park archive and produced no emails pre-dating 3 May 2018. But I also accept that Mr Ferguson was not involved in the process and had no access to the archive. DMH stated this in answer to Clyde & Co's questions and Mr Ferguson confirmed it to be accurate in re-examination.

(2) In her email dated 8 November 2018 Ms Simmonds of DMH stated that Wilton Park's archive was set up in July 2018 and in her email dated 18 November 2018 she also confirmed that Mr Ferguson's emails were migrated to the archive from July itself. If this correct (and Mr Wardell did not challenge it), then Mr Ferguson could only have deleted emails pre-dating 3 May 2021 before July 2018 (as I put to Mr Ferguson in re-examination).

(3) But on 28 August 2018 Mr Ferguson produced and sent to Rosenblatt the emails which he had harvested from his Wilton Park account and those 238 emails included either four or six emails pre-dating 3 May 2018. Neither party could explain how this happened and Mr Ferguson had no explanation either. It is possible that he harvested his emails before they were archived and then deleted the remaining four or six emails before the Wilton Park IT manager began the migration process. But this is pure speculation.

(4) Moreover, the case which Mr Wardell put to Mr Ferguson in cross-examination was that he "produced a handful of anodyne documents and deleted the rest". But even if Mr Ferguson had included four or six anodyne emails in his disclosure to Rosenblatt to throw Mr Tinkler off the scent, I ask myself why he would also delete the anodyne emails from his Wilton Park account before they were archived by Wilton Park. This makes no sense at all.

(5) SGL was not involved in the third party disclosure process and the search parameters were set by Mr Tinkler and then agreed with Wilton Park. Under the Consent Order Mr Megaw was instructed to search for emails to and from Mr Ferguson's own BT Internet account, Mr Brady, Mr Dilworth, Mr Laycock, Mr Wood, Ms Brace, Mr Coombs and Mr Soanes in relation to SGL, SCL and Mr Tinkler in the date range 1 November 2017 to 23 July 2019. Moreover, Mr Wardell did not suggest that Mr Ferguson should have searched for a wider pool of documents himself when he carried out his own disclosure exercise in 2018.

(6) If Mr Ferguson had deleted relevant emails from before 3 May 2018, one would have expected SGL to disclose some of them (at least) from the email accounts of the other Board members and senior executives identified (above). However, it is striking that Mr Wardell did not draw my attention to a single email sent or by any of those individuals to or from Mr Ferguson's Wilton Park account and which Mr Ferguson or Mr Megaw had failed to disclose. This strongly supports Mr Ferguson's evidence that he did not delete any emails from that account and that he disclosed all relevant emails.

(7) Indeed, if anything I would have expected Mr Tinkler to have been able to locate all relevant emails to or from Mr Ferguson's Wilton Park account from 1 November 2017 to 3 May 2018 in SGL's disclosure from the 2018 Claim. He should have been able to locate them from the email accounts of Mr Brady, Mr Dilworth, Mr Laycock, Mr Wood, Ms Brace, Mr Coombs and Mr Soanes or from Mr Ferguson's own BT Internet account. The Disclosure Statement stated that they were all custodians and that SGL had carried out keyword searches on their email accounts from 1 September 2017.

(8) In summary, therefore, I cannot draw the inference that Mr Ferguson deleted emails pre-dating 3 May 2018 from the fact that Mr Megaw's searches of the Wilton Park archive produced no emails from before that date. The more likely explanation is that the four or six emails which Mr Ferguson produced to Rosenblatt on 28 August 2018 were either lost or archived in the wrong folders during the migration process in July 2018 and that there were no other relevant emails on Mr Ferguson's Wilton Park email account.

(9) Finally, Mr Wardell also put to Mr Ferguson that Mr Arch of Stifel suggested that he delete his emails from his Wilton Park account. This was pure speculation unsupported by any evidence and I accept Mr Ferguson's evidence that Mr Arch did not make this suggestion and that he did not follow it.

387. Finally, in deciding Issue (8) I have taken into account my overall assessment of Mr Ferguson's evidence. I found him to be an honest and credible witness. I have no doubt that he understood the seriousness of deleting emails or preventing their disclosure. He also struck me as an intelligent man who would have appreciated the limited value of deleting or withholding emails from his Wilton Park account. In particular, I am satisfied that he would have understood that the emails on his BT Internet account were likely to be more important and that SGL was likely to disclose the emails on his Wilton Park account from other sources. I am satisfied, therefore, that he did not have a motive, far less a strong motive, to prevent disclosure of his emails pre-dating 3 May 2018.

388. I therefore find that Mr Ferguson did not consciously and deliberately choose not to disclose emails from his Wilton Park email account pre-dating 3 May 2018 or consciously and deliberately delete any of those emails. Mr Tinkler's alternative case was that Mr Ferguson recklessly failed to disclose the relevant emails. In opening, Mr Wardell accepted that a finding of recklessness would not justify setting aside the Judgment. But in any event, I find that Ferguson did not fail to disclose or delete emails from his Wilton Park email account not caring whether they were relevant or whether SGL or he personally had a duty to disclose them.

(d) Materiality

389. Because Mr Tinkler was not able to identify any emails which Mr Ferguson had deliberately withheld or deleted, it is not possible for me to conclude that any further disclosure from Mr Ferguson's Wilton Park account would have been material to any of the Judge's findings. However, I should record that if I had found that Mr Ferguson deliberately deleted or failed to disclose emails from his Wilton Park email account, I would have been prepared to draw the inference that the emails which he had prevented from disclosure were material to the Judge's findings from that conduct alone.

(9) Did SGL deliberately fail to disclose documents which it was under a duty to disclose in the 2018 Claim?

390. Mr Tinkler's pleaded case was that SGL failed to disclose a number of critical documents consciously and deliberately. I have addressed all of those documents under Issues (1) to (8) (above) apart from the email sent by Ms Brace on 13 June 2018 at [164] (above) and the WhatsApp exchange between Mr Brady and Mr Soanes on 3 September 2018 at [187] (above). I deal with both now.

(a) The Judge's Findings

391. On 22 June 2018 the 2015 LTIPs "vested" and the recipients became entitled to exercise their options. The Judge recorded that Mr Tinkler was already entitled to acquire 526,495 shares under his 2014 LTIP Award and would have been entitled to acquire a further 1,327,332 shares under his 2015 LTIP Award if he had not been summarily dismissed: see [342]. On 19 June 2018 the Board authorised the transfer of 1,715,000 shares to the EBT. The Judge set out the basis for the transfer and held that the Mr Ferguson, Mr Brady, Mr Coombs and Mr Wood were acting for proper purposes in authorising the transfer at [839] to [841]:

> "839. Ms Brace's memo to the Board, of 6 June 2018, had shown that there were not enough shares in the EBT to satisfy the 2015 award and that, for the purpose of meeting it, there was a shortfall of over 1.1 million shares that would need to come from Treasury.
>
> 840. This was based upon an anticipated 4,089,532 shares vesting on 22 June 2018. That figure specifically excluded any awards due to Mr Tinkler as he had indicated that he would not be taking any awards in June. I have referred in Section 3 to Mr Tinkler's statement at the Board meeting on 7 June that he was still reviewing whether he would be exercising his 2014 LTIP award (526,495 shares) – and, as the Company points out, he said this when he must have known that the voting at the AGM would be tight – and that he would not be exercising his 2015 LTIP award (1,327,332 shares).
>
> 841. In my judgment, the transfer of the 1.7m odd shares on 19 June 2018 was made for the primary purpose of the Company being able to meet its immediate obligation to meet the 2015 LTIP awards. On the test applicable to the proper purposes duty, that was the primary or substantial purpose behind the transfer even though the Four Directors were aware of the implications of favourable voting by the trustee."

392. By contrast, the Judge found that the Board's primary purpose in authorising the second transfer of 5,320,425 shares was to secure Jupiter's favourable vote at the AGM: see [855]. He accepted that Mr Ferguson, Mr Brady, Mr Coombs and Mr Wood acted in what they believed to be the best interests of SGL but he found that they acted for an improper

purpose and that the transfer of shares was voidable: see [872] to [873] and [890]. The Judge dealt with the potential consequences of these findings under Trial Issue (9) at [923] to [927]:

> "923.Was the purported re-election of Mr Ferguson as a director at the AGM on 6 July 2018 invalid by reason of the alleged breaches of fiduciary duty as set out in Issue 4?
>
> 924. I address this issue on the basis of my finding (under Issue 4) that the Four Directors did breach the duty to act for proper purposes in deciding on 19-20 June 2018 to make the further transfer of 5,320,425 shares to the EBT. I also do so on the basis of my conclusion (in Section 4(a)(viii) above) that the issue (i.e. transfer) of shares to the EBT for an improper purpose would result in the transfer being voidable rather than void.
>
> 925. Mr Tinkler had adduced in evidence (as Annex A to his fifth witness statement) a table which showed that Mr Ferguson would have failed to secure a majority vote in favour of his re-election if all of the shares transferred to the EBT – both the 1.7m odd and the 5.3m odd – were to be treated as deducted from the vote in favour. Apart from pointing out that the calculation impugns both transfers, and not just the second, the Company made a number of criticisms of Mr Tinkler's analysis which would see the vote in favour of Mr Ferguson reduced from 51.21% to 49.68%. These included the assumptions that Mr Tinkler would have exercised his LTIP awards so as to receive the full entitlement of 1,853,827 shares (despite what he said at the Board meeting on 7 June 2018 and the loss of his 2015 LTIP entitlement on his dismissal) and that he and other opposing employees would have received their LTIP shares before the voting deadline of 4 July 2018.
>
> 926. In their closing submissions, the Company's counsel produced a rival table which assumed that the voting deadline would have been met (even though it is the Company's case is that it never would have been) by those exercising their LTIP awards and wishing to vote against but, as has proved to be consistent with my findings above, that only the second transfer to the EBT was impugned and that Mr Tinkler had no entitlement to the 2015 LTIP by reason of his dismissal. On those assumptions, the Company says Mr Ferguson would still have been elected by a vote of 50.15% in his favour.
>
> 927. Mr Taylor QC countered not only by saying that the whole of the EBT vote should be ignored, which is a submission now unsupported by my conclusion in relation to the 1.7m transfer, but also that the EBT vote should be treated as re-cast to reflect the wishes of those who had been identified in Mr Tinkler's evidence and submissions as wishing to have voted against."

393. The Judge considered that these exchanges highlighted the difficulty which the Court faced in deciding whether the transfer of 5,320,425 shares would have affected the outcome of the vote at the AGM. But in the event, he decided not to approach the

consequences of the breach of duty by Mr Ferguson, Mr Brady, Mr Coombs and Mr Wood by asking what would have happened if the shares had not been transferred to Jupiter and it had not exercised its voting rights at the meeting: see [928] to [934]. He adopted this course for three reasons: first, because the transfer was voidable and not void; secondly, because Jupiter was an independent trustee; and, thirdly, for the following reason:

> "933. This reasoning applies to the present case in relation to Jupiter's exercise of the vote in respect of the 5.3m shares. The fact that the Company can credibly argue that Mr Ferguson would still have obtained a 50.15% vote in his favour, if the vote in respect of the 5.3m is discounted, is a further reason not to attempt an unwinding of Resolution 2 at the AGM. 934. It therefore follows that I am not persuaded to make a finding that the re-election of Mr Ferguson at the AGM was invalid."

(b) The New Evidence

394. *13 June 2018 Email.* At the Trial Mr Taylor asked Mr Brady whether he was aware that Mr Tinkler's dismissal would have provided a basis for refusing his 2015 LTIP Award. Mr Brady's answer was that this did not cross his mind. Before me, Mr Wardell challenged this evidence and put two documents to Mr Brady. The first was Ms Brace's email dated 13 June 2018 which had not been disclosed in the 2018 Claim. In that email Ms Brace reported Mr Foster's advice about Mr Tinkler's LTIP Awards to the Board.[6] When his earlier evidence was put to him Mr Brady response was as follows:

> "MR WARDELL: And your answer is, at line 14: "I genuinely didn't even -- didn't enter into my consideration about Andrew's LTIPs at all ..." That's the evidence you gave. A. It was, yes. Q. That's again a deliberate lie on your part? A. So there was no lie on my part, in my view, right. I genuinely -- Andrew completely destabilised the company and the last thing I really cared about was whether he had got his LTIPs or not. Once he had been dismissed, of course, if he was a bad leaver, he shouldn't get his LTIPs. But in the scheme of things, what Andrew did, writing to the shareholders, writing to all the employees, having a petition against the chairman, all of those things were just an absolute shock, right, and of course we terminated him at that point because it was just -- that was it, that was the final straw that broke the camel's back, and certainly, thinking about his LTIPs -- for me were not important, and LTIPs, I had no idea how much they were worth. I hadn't done the calculation, and that week we were doing a

[6] In her email Ms Brace's figures were slightly different from those given by the Judge at [342]. She stated that the number of shares due to vest under Mr Tinkler's 2015 LTIP Award on 22 June 2018 was 1,305,292 giving a total of 1,831,787 compared with the figure or 1,853,827 given by the Judge at [925]. Nothing turns on this and I ignore the discrepancy.

> Ryanair announcement. It was a busy week and -- the termination of him. It wasn't like we were not busy. Multiple emails. So my -- I definitely categorically didn't think it was -- it certainly wasn't a factor in the dismissal of Mr Tinkler, that's for sure. Q. I didn't ask that. I was just reminding you what you said, it never entered into your consideration about Andrew's LTIPs, "It didn't cross my mind." You were certainly alive to it very quickly after his dismissal, weren't you? A. Yes, of course, once we dismissed him, it was raised as a point, what should we do with his LTIPs. Normally as a bad leaver, you don't get anything. If he was a bad leaver -- he acted -- it was appalling behaviour, appalling, it completely destabilised the company. It was a shocker. I have never seen anything like it. Q. So {I12/351/1}. So this is written the day before dismissal, and Louise Brace is speaking to Mr Ferguson and Mr Wood, Mr Coombs and yourself, and you are looking at the position of LTIPs and these are Mr Tinkler's LTIPs, aren't they? A. Mm-hm. Q. And you are looking at this before you dismiss him? A. No, I had had the email, for sure. Q. And Louise Brace has taken advice from Tony Foster and his team? A. Yes. Q. Team. A. Team. Q. With your knowledge? A. Well, she had gone -- she had gone and found out all of the facts. Even now when I look at it, it was obviously during those days was one of the many emails that were going round. I personally didn't take much notice of it and was certainly focused on the whole destabilisation of the company. Q. But this wasn't disclosed either, was it? A. I don't know. Q. And it's quite clear that, contrary to what you told the court last time round, that you had been considering the impact of dismissal on Mr Tinkler's LTIP shares? A. Let's be clear, I personally was not thinking about Mr Tinkler's LTIPs, right. My consideration was the destabilisation of the company. This was kind of almost irrelevant in the scheme of things at the time to me. Q. So who had instigated Ms Brace taking legal advice about this? A. I honestly don't remember."

395. Mr Wardell also put to Mr Brady his exchange of emails with Mr Griffiths on 19 June 2018: see [165] and [166] (above). Mr Tinkler could not rely on those emails as new evidence in these proceedings. Nevertheless, Mr Brady freely accepted that by 19 June 2018 the Board was looking at all angles to get as many votes as possible at the AGM and I am entitled to take that evidence into account. But at the same time I am also entitled to take account of Mr Coombs' evidence that Mr Brady wanted everything to be "above board" and would not have deliberately done anything unlawful.

396. *3 September 2018 WhatsApp Exchange*. On 3 September 2018 Mr Brady sent a WhatsApp message to Mr Soanes asking him how his thinking "was going around Stobart Capital". This prompted an offer from Mr Soanes to send Mr Brady a note with legal strategy and plans for the future and a reply from Mr Brady stating that they needed to be "aligned on the bigger picture to win". Mr Brady's evidence about this exchange was as follows:

> "Q. Then we are back to {I17/46/1}, also on 3 September. Mr Soanes text messages you again on WhatsApp, and we can pick it up four lines from the end, if we may: {I17/46/5} "But we definitely need to coordinate to get the right result. As to support for you/Group there's lots I can do. I'm on holiday this week. Could I send you an update note this week with legal strategy and plans for the future then meet early next week?" And you say: "Thanks Ian. Just need to make sure we can support and aligned on the bigger picture to win!" A. Just to be clear again, just remind ourselves of the time. It's September. We have got a court case in November, which has been requested by Mr Tinkler to accelerate, due to the nature of the case, right. We have already -- by that time, we have already engaged the Rosenblatt team. Of course, we want to win the case. He also had a tribunal case, which we thought might be helpful as an overall strategy to win -- to make sure we didn't lose a case where we thought the management and the directors were acting in the best interests of the company."

397. Mr Tinkler's pleaded case was that Mr Soanes regarded the ET Claim as playing an important role in the plan to terminate Mr Tinkler's employment and remove him from the Board and, having done so, to keep him off the Board. It was also his case that Mr Soanes and Mr Brady were seeking to align their respective legal strategies in the ET Claim and the 2018 Claim so as to achieve victory over Mr Tinkler. Mr Wardell submitted that Mr Tinkler's case was made out in his written closing submissions.

398. I am satisfied that Mr Brady and Mr Soanes were seeking to align their respective legal strategies in the ET Claim and the 2018 Claim. Mr Brady effectively accepted this in the passage (above) and to that extent Mr Tinkler's case is made out. However, whatever Mr Soanes' motives may have been, I accept Mr Brady's evidence that his motive for aligning the two legal strategies was to achieve a solution for SCL and because he considered it to be in the best interests of SGL. This was his evidence when he was cross-examined about his email dated 20 August 2018.

(c) Dishonesty

399. *13 June 2018 Email.* I accept that Ms Brace took advice from Mr Foster about Mr Tinkler's LTIPs and communicated that advice to Mr Brady on the day before Mr Tinkler's dismissal. I also accept that by 19 June 2018 Mr Brady was already looking for all angles to get as many votes as possible. However, I do not accept that Mr Brady deliberately misled the Judge in his answer to Mr Taylor. It is important to read Mr Brady's evidence in context and for that reason I set it out in full:

> "Q. As regards your motives, Mr Brady, can you go to E19, bundle page 214, please. So it's 214.2. Again, these are WhatsApps between you and Mr Dilworth and it's the entry two up from the bottom. So this is you to Mr Dilworth on 11 June 2018. And you send a WhatsApp to him saying: "Will you sort the shares that need to go to the EBT? 2 per cent is a lot in our game. Not dealt with this aspect before. Is this with Cannacord?" They were the brokers, and you said: "No. So we need to move Treasury shares into the employee benefit trust so we can vote them. Paul or Damian will know how. Louise already confirmed the EBT can vote." And that was your motive, wasn't it, Mr Brady? A. It certainly was one of the motives. Q. The predominant motive. A. Not the predominant motive, it was definitely one of the motives to allow the EBT shares to be voted. Yes, you're correct. Q. You're not suggesting there was a motive more dominant than that, are you? A. I think you have to take it in the round, which is we need to service the LTIPs. If you need to service the LTIPs, why would you not make sure the EBT shares were going to be there if they were potentially votable by independent trustees. Again, you remember that there's no -- there is no question about knowing which way they're going to vote. So, it literally allows them to vote. Q. And you were aware, weren't you, Mr Brady, that if Mr Tinkler was dismissed that gave you a basis for refusing him his LTIP shares? A.I genuinely didn't even -- didn't enter into my consideration about Andrew's LTIPs at all, never mind voting. I was so upset that the company had been now destabilised and I was going to have -- it would be impossible for me to manage. I certainly wasn't thinking that the dismissal Andrew would then have some ramifications into his LTIP share vesting. It didn't cross my mind."

400. Mr Brady was being questioned about Mr Dilworth's WhatsApp dated 11 June 2018 and his motive for the first transfer of shares. It is clear from the entire passage that Mr Taylor was suggesting to him that his primary motive for giving instructions to Mr Dilworth to transfer the shares to the EBT was to take advantage of their votes. He was also suggesting that Mr Brady must have known about the consequences of Mr Tinkler's dismissal. I accept Mr Brady's evidence that when he was giving instructions to Mr Dilworth it did not cross his mind that the effect of Mr Tinkler's dismissal was to deprive him of his LTIPs. Indeed, it is clear from Ms Brace's email dated 13 June 2018 that she did not take advice on this issue until two days later.

401. Furthermore, I am not satisfied that Mr Brady was dishonest in failing to disclose Ms Brace's email dated 13 June 2018. Although Mr Wardell suggested that SGL had a duty to disclose it under CPR Part 31.6 in his written closing submissions, he did not explain why such a duty arose and he did not put that proposition to any of the witnesses. Ms Brace sent the email to Mr Ferguson, Mr Wood and Mr Coombs as well as Mr Brady and he did not suggest to any of them that they had taken a decision not to disclose it to

Rosenblatt. But in any event, I am satisfied that the Rosenblatt team was entitled to take the view that this email was protected by legal professional privilege and SGL did not owe a duty to produce it. In the absence of any evidence to the contrary, I draw the inference that this is the reason why SGL did not disclose it in the 2018 Claim.

402. *3 September 2018 WhatsApp Exchange*. In his witness statement Mr Brady gave the following evidence about the four WhatsApp messages which he exchanged with Mr Soanes on 3 September 2018:

> "I have been reminded of some WhatsApp messages I exchanged with Mr Soanes in August and September 2018. By August 2018, we were in the full throes of the 2018 Proceedings. I remember things being very acrimonious with Mr Tinkler and there was a row about whether he could come to the Company's offices to do work for SCL. I recall asking Mr Soanes to speak to Rosenblatt because he was involved in putting together the arrangements for SCL with Mr Coombs in the first place. I did not attend any meeting with Mr Soanes and Rosenblatt, I left this to Mr Coombs. Mr Soanes' message to me on 3 September 2018 is a further example of M Soanes making an unsolicited approach, offering help and presenting advice. My response as usual was placatory. From my point of view, the Company's objective was to win the 2018 Proceedings. I had in mind that we needed Mr Soanes as a witness and likewise I might end up being a witness in his ET Proceedings."

403. Mr Wardell suggested to Mr Brady that this evidence was "a blatant lie". He suggested that Mr Brady's evidence was so inconsistent with the messages themselves that he must have been making his evidence up:

> "Q. That is a blatant lie. A. No, it's not. Q. How do you reconcile that with what you are saying on {I17/46/1} at 20.29: "Thanks Ian. Just to make sure we can support and aligned on the bigger picture to win." A. I would say that could be placatory. Q. That's your evidence? A. My evidence is, right, we want a solution for Stobart Capital. Ian clearly needed to be dealt with as part of the Stobart Capital settlement. Right? And our objective was to win our case. I'm not necessarily that's absolutely aligned to Mr Soanes because he wanted to win his own case. Q. You see, you say in paragraph 68: "This is a further example of Mr Soanes making an unsolicited approach." Remind yourself, please, of your text at 19.08 on the 3rd, where you start the conversation: "How is your thinking going?" That is not an unsolicited approach by anyone's yardstick, is it? A. In general there was a lot of unsolicited approach by Ian, of course. In this case, of course I've reached out to him, saying, "What's your thinking on Stobart Capital?" Q. Why does your statement say what it does? A. Because that was my overall -- when I was thinking back, that was my overall thoughts at the time. Q. Hang on, you say, "Mr Soanes' message to

> me on 3 September." This is directed at this particular exchange. And you just made it up. A. I'm not making anything up. Q. Because it suits you. A. No, that's not true. Q. And it is a blatant lie, Mr Brady. A. One thing I'm not doing is lying in court. I want to be very clear. Q. How did this statement get drafted in this way then? A. Well, it was drafted by myself and Anthony Field. Q. And you must have looked at the text message before you gave your explanation, mustn't you? A. I can't remember doing so, to be fair. Q. But you must have done. How could you possibly comment on something if you hadn't looked at it? A. Well, there is hundreds of documents, right, so I've commented on quite a lot of things here without having to go through every single -- Q. That's your answer, is it? A. That's -- Q. It's your evidence that you decided to decide what you wanted to say without looking at the relevant document? A. No, it's playing with words. The bottom line is, of course, during my preparation of my witness statement, of course we went through it thoroughly. Did I check every single nuance of every single text? No, I didn't. Q. But this is a specific text you are commenting on. A. Yes, I am just saying that's my answer because -- that's the truth."

404. I accept Mr Brady's evidence that he was not attempting to deceive the Court in his witness statement. In his written evidence Mr Brady did not point out that he made the initial contact with Mr Soanes on 3 September 2018. But it is clear that he intended the words "an unsolicited approach" to refer to Mr Soanes "offering help and presenting advice". Mr Brady had asked Mr Soanes for his thoughts about SCL but Mr Soanes had replied by offering help on legal strategy and this offer can fairly be described as "unsolicited". But in any event, I also accept Mr Brady's evidence that if he failed to describe the exchange accurately it was not deliberate but a mistake in the preparation of his witness statement.

405. In relation to disclosure, Mr Wardell suggested to Mr Brady that he signed the Disclosure Statement knowing that it was untrue because he must have appreciated that SGL had failed to disclose his Telegram and WhatsApp messages after his phone had been imaged on 2 July 2018:

> "Q. And first of all, if you go back to page 1, {C/12A/1}, when you signed off on this document, you knew that your phone had been imaged at the beginning of July, didn't you? A. Clearly. Q. And you can't have forgotten that, when you signed this, can you? A. I didn't connect the two, but ...Q. You knew you had been messaging Mr Dilworth and Mr Soanes, after 2 July, didn't you? A. Certainly. I mean, I WhatsApp messaged Mr Dilworth and messaged Mr Dilworth daily because we had many other things to message about than Andrew Tinkler. Q. You are the chief executive of a public company. A. Yes. Q. Signing a certificate which was plainly untrue. A. To my knowledge, I was absolutely acting in good faith and signed it

> to my knowledge everything was disclosed. Did I go through the disclosures? No, I didn't, I relied on the Rosenblatt team to make sure everything was disclosed. Q. You couldn't have relied on the Rosenblatt team in respect of messages in Telegram and WhatsApp on your phone after 2 July, could you? A. No, but I didn't connect the two -- I didn't connect that I needed to be disclosing things on my phone post my phone being imaged. That didn't occur to me."

406. I accept Mr Brady's evidence that he did not sign the Disclosure Statement knowing it to be untrue and I find that he did not consciously and deliberately fail to disclose the four WhatsApp messages which he exchanged with Mr Soanes on 3 September 2018. I consider it wholly unrealistic to suggest that Mr Brady should have known that he needed to disclose WhatsApp messages which he exchanged with Mr Soanes long after the dismissal of Mr Tinkler. Mr Leiper made the following written submissions in closing which I accept in their entirety:

> "162. This exchange occurred after both (a) the 2018 Image of Mr Brady's phone was taken and (b) the agreed date range for electronic searches for documents. It is truly difficult to see how an exchange almost two months after the second removal of Mr Tinkler from the Board can be said to have been disclosable in relation to alleged breaches of duty by the Four Directors in the first half of 2018. 163. Indeed, Mr Tinkler's suggestion must be that, having had his phone already imaged prior to these messages being sent, Mr Brady must have: (a) sent and received them; (b) realised (presumably immediately) that they had not been provided to Rosenblatt; (c) consciously considered that they should be disclosed; and (d) then decided not to hand them over to the solicitors. As a general point, even forgetting the sheer irrelevance of these messages, Mr Brady explained in evidence that: "I didn't connect that I needed to be disclosing things on my phone post my phone being imaged. That didn't occur to me" {Day 4/60/16-18}. That is hardly surprising."

(d) Materiality

407. For Issue (9) I approach Limb 2 in the same way as I did for Issues (1), (2), (6) and (7). But again, applying either test, I am not satisfied that the new evidence would have entirely changed the way in which the Judge came to his decision (the *Highland* test) or that there is a real danger that the failure to disclose the new evidence would have affected the outcome (the *Hamilton* test) for the following reasons:

(1) The Judge found that the primary purpose of the transfer of 1,715,000 shares to the EBT on 19 June 2018 was to be able to meet the LTIPs of senior executives even

though Mr Brady was aware of the implications of favourable voting by Jupiter. In my judgment, Ms Brace's email dated 13 June 2018 would have confirmed those conclusions but no more.

(2) If SGL had disclosed Ms Brace's email, it is possible that Mr Tinkler might have taken and succeeded on the point that he was entitled to his 2014 LTIP Award even if the Board validly dismissed him. But in my judgment, this would not have affected the Judge's findings on Trial Issue (9). Mr Tinkler would only have been able to block Mr Ferguson's appointment if the Board had not been entitled to dismiss him and he had taken up both his 2014 LTIP Award and his 2015 LTIP Award: see [925].

(3) Even then, it would have been necessary for Mr Tinkler to demonstrate that he would have changed his mind and taken up his 2015 LTIP Award and that SGL would have transferred the shares to him by the AGM (or that he would have been able to compel it to do so). It would also have been necessary to persuade the Judge to approach the second transfer of 5,320,945 differently: see [928] to [934].

(4) It was also Mr Tinkler's case that the email showed that the Committee was not independent because Ms Brace sent it to Mr Ferguson (who was not a member) but did not send it to Mr Garbutt (who was head of Remco) or Mr Laycock (who was still a director). I am satisfied that this would not have been enough by itself to change the Judge's conclusion that none of the members of the Committee had a conflict of interest which disabled them from making decisions on behalf of SGL. In my judgment, therefore, Ms Brace's email dated 13 June 2018 was not material on either test.

(5) Mr Tinkler's case was that the 3 September 2018 WhatsApp exchange was material for the reasons set out in [397] (above). I disagree. Mr Soanes' state of mind in September 2018 was wholly irrelevant to any of the Trial Issues which the Judge had to determine. Likewise, the fact that Mr Brady and Mr Soanes might have been working together to win both the 2018 Claim and the ET Claim (and were prepared to give evidence for each other) would have come as no surprise to the Judge.

(6) I return to deal with Mr Soanes' evidence about one aspect of the 3 September WhatsApp exchange under Issue (16) (below) in the context of the Loan Agreement and the Consultancy Agreement.

(10) Can it be properly inferred that SGL deliberately failed to give disclosure of other relevant documents in the 2018 Claim?

408. Given the findings which I have made on Issues (1) to (9) and, in particular, on Issues (4), (7) and (8) there is no cogent evidence from which I can properly draw the inference that SGL deliberately failed to give disclosure of other relevant documents in the 2018 Claim.

(11) Was Mr Soanes no mere witness for SGL in the 2018 Claim but heavily involved in the preparation for trial and a man who was – and even now appears to remain – firmly inside SGL's tent?

409. Given my other findings, Issue (11) does not arise. Nevertheless, I consider it briefly. Mr Wardell submitted that Mr Soanes' evidence should be treated as the evidence of SGL because he was involved in the preparation and strategy for the 2018 Claim and had repeatedly been party to SGL's privileged information. He also submitted that Mr Soanes was not an independent witness (as the Judge had clearly thought) but had been substantially remunerated to give his evidence in the form of (at a minimum) the Loan Agreement.

410. Mr Leiper submitted that Mr Soanes' was not SGL's "vital witness" and little of Mr Soanes' evidence went to any of the Judge's central findings. The principal issue to which his evidence went was whether Mr Tinkler committed a breach of duty by promoting his acquisition structure for Project Wright. But his evidence did not speak to the breaches of duty which the Judge found in relation to "briefing against the Board", disclosure of the Duranta budget and the ELT Letter, the Letter to Shareholders and the Communication to Employees. Mr Leiper also submitted that Mr Soanes was not an employee and provided only informal, unpaid advisory services, that he was not part of SGL's decision-making or strategy team when it came to the management of the 2018 Claim.

411. I accept that Mr Soanes was not a "vital" witness for the reasons given by Mr Leiper. I consider the nature of the services which Mr Soanes provided in more detail under Issue (13) (below). But I also accept that Mr Soanes was not an employee or agent of SGL and

his evidence cannot be attributed to SGL by applying the orthodox principles of attribution under company law. I also accept Mr Leiper's submission that Mr Soanes was not part of SGL's decision-making or strategy team when it came to the management of the 2018 Claim. I have found that Mr Brady committed a breach of confidence on 5 February 2018 but I have not found that he or other Board members did so on other occasions.

412. I accept that Mr Field interviewed Mr Soanes shortly before the issue of proceedings. But there is no evidence to suggest that the Board took advice from Mr Soanes before it decided to commence the 2018 Claim or involved him in the decision to issue proceedings or shared any legal advice with him (apart from on 5 February 2018). Moreover, Mr Soanes' principal purpose in putting forward Project Overlord was to achieve a solution to the deadlock in SCL. It is fair to say that he offered quasi-legal advice to SGL in relation to the termination of the Management Agreement. But there is no evidence that the Board followed it or that it had any effect on the conduct of the 2018 Claim.

413. Again, I consider the communications between Mr Brady and Mr Soanes in October and November 2018 in greater detail under Issue (16) (below). But in my judgment, they show that Mr Soanes was a friendly witness but no more. In my view it would have been better if Mr Brady and Mr Soanes had not communicated directly with each other about their evidence when they were preparing their witness statements or preparing to give evidence. But as I find (below), I do not consider that their exchanges amounted to collusion or provide evidence that Mr Soanes was "inside SGL's tent" in the sense that he was managing or directing the 2018 Claim itself.

414. Nevertheless, if I had found that Mr Soanes demanded the Loan Agreement as the price for giving false evidence in the 2018 Claim and that Mr Brady had agreed to this and had then rewarded him for doing so by entering into the Consultancy Agreement, I would have held that Mr Soanes' evidence should be attributed to SGL on straightforward agency principles. Mr Brady was the CEO of SGL and I would have found that by agreeing to Mr Soanes' demands, he either expressly or impliedly authorised Mr Soanes to give false evidence on behalf of SGL.

415. Mr Wardell did not submit that Mr Coombs or Mr Wood were party to this agreement and Mr Tinkler's position in relation to Mr Ferguson was not clear. It might be said, therefore, that SGL was not bound by the unlawful acts of a single director. But on 26 October 2018 Mr Brady signed the Loan Agreement on SGL's behalf and there was no suggestion that he did not have actual authority to do so. I would, therefore, have found that the Board clothed Mr Brady with ostensible authority to reach agreement with Mr Soanes. But even if Mr Brady did not have ostensible authority to instruct Mr Soanes to commit perjury, I would have been prepared to decide either that the decision in *Odyssey Re* extended to an arrangement of this kind or, alternatively, that Mr Brady had suborned a witness and persuaded him to give perjured evidence: see *Salekipour v Parmar* (above).

(12) Did Mr Brady give knowingly false evidence on behalf of SGL in the 2018 Claim?

416. Given the findings which I have made on issues (1) to (9) and, in particular, on Issues (1), (2) and (9) I find that Mr Brady did not give false evidence on behalf of SGL in the 2018 Claim knowing it to be untrue.

(13) Did Mr Soanes give knowingly false evidence on behalf of SGL in the 2018 Claim?

(a) The Judge's Findings

417. On 14 and 15 November 2018 Mr Soanes gave evidence at the Trial and his evidence was primarily directed at the period before he resigned or he was constructively dismissed.[7] Mr Tinkler's pleaded case was that Mr Soanes gave false evidence in eight separate passages of the transcript. I have dealt with a number of those passages already under Issues (1) and (2) (above). But Mr Tinkler also relied on the following passages as evidence that Mr Soanes was deliberately trying to distance himself from SGL in the 2018 Claim:

> "Q. Now, Mr Soanes, your real purpose coming here today is to vilify Mr Tinkler and assist your claim before the Employment Tribunal. Any comment on that before we look at what you've said? A. That is absolutely not the purpose of me coming here today."[8]

> "Let's agree an outcome for Group and Capital and see if we can do together. I expect he would like to avoid actual payment." That's you and

[7] In a second witness statement he gave some detailed evidence in relation to the SEIP incentive scheme which I deal with under Issue (16) (below).
[8] Day 3, page 180, lines 10 to 15

> Mr Brady plotting, isn't it, to sideline at least Stobart Capital and that you would go and work directly for the group? A. There was absolutely no intention at that time, or in fact in truth any other, of me going to work for Group."[9]

> "Q. Well, the other way of looking at it, Mr Soanes, would be that you were trying to take away the contractual work that was Stobart Capital's work to do? A. Stobart Capital has a contract which provides for remuneration in many ways related to the long-term relationship. This was a suggestion, in truth in the heat of the moment. What the record will show was that there was no discussion after this about the possibility of there being any relationship, there was no relationship. Nothing has happened. We don't have to speculate about what this meant because nothing happened. Q. Well -- A. It was a throwaway suggestion, which you can see was written in the heat of the moment."[10]

> "Q. He didn't support it, no. And then what happened, though, is a large amount of time and money was spent, wasn't it? For example, KPMG were put in to do a due diligence exercise on the company. And by about 25 February, which was several hundred thousand pounds' worth of expenditure down the line, wasn't it, it was eventually decided by the company "Actually, Mr Tinkler was right, this company is an absolute lemon"; isn't that right? A. I can't comment on anything that happened after I was removed from the business on 11 February. Q. But you know full well that this acquisition never went ahead, don't you, Mr Soanes? A. I do know that, yes."[11]

418. I will refer to each of these passages as a "**Passage"** and I label them "**(A)**" to "**(D)**" (inclusive). Although none of this evidence was directly relevant to any of the Trial Issues and the findings which the Judge had to make, he made the following assessment of Mr Soanes' evidence at [71]:

> "Mr Soanes gave evidence for the Company. Mr Soanes' evidence was thoughtful (in a reactive rather than premeditated sense) and struck me as being untainted by any agenda or motive other than that of getting to the truth."

(b) The New Evidence

419. I deal with the Loan Agreement and the Consultancy Agreement under Issue (16) (below). But it is common ground that Mr Soanes did not mention them at the Trial. He

[9] Day 3, page 202, lines 1-9
[10] Day 3, page 208, lines 9-23
[11] Day 4, page 7, line 18 to page 8, line 6

mentioned the loan for the first time in his first witness statement in these proceedings and he also dealt with his consultancy towards the end of 2018 and the beginning of 2019. His evidence was that he tried to offer information and strategy but Mr Brady only asked for assistance when SGL needed it. He continued:

> "By way of example, it was around this time when the Company needed assistance in relation to the SEIP (which was the Stobart Energy Incentive Plan). I advised the Company when the SEIP was first set up, so Mr Brady thought I could advise the Company again now. As an independent financial consultant, I was open to prospective consultancy or advisory projects. As is my normal practice, I did some introductory work on this matter pending engagement but there was no follow up, I was not mandated and did not receive any payment. I believe an alternative adviser was appointed."

420. In his second witness statement, however, Mr Soanes gave a much more detailed explanation about the work which he carried out for SGL. Because of its importance, I set out the relevant passage from his witness statement in full:

> "20. My work for the Company in that period was as follows:
>
> a. October 2018 – Project Mercury: this was initial work in respect of a possible management buy-out by the Company's energy business. I did not get paid for this work nor was I formally engaged.
>
> b. October 2018 – the Company asked me to do a review of its employee benefit schemes, the SEIP and SAIP. The SEIP was maturing in 2019 and John Coombs wanted to prepare for that. My involvement did not extend beyond this initial work. I did not get paid nor was I formally engaged. (I draw the distinction between this work and the work I did on the SAIP for the Company as part of its preparations for the 2018 Proceedings. I was paid nothing for that work either, and was not formally engaged.) I recall being somewhat disappointed to see an announcement later in 2019 that another adviser had been used in connection with the vesting of the scheme and I had not been paid for the work I had done.
>
> c. November 2018 to March 2019 – Project Wright: the project returned to the Company as a possibility in late 2018. Due to my familiarity with the project, I became involved again, albeit this time in the limited capacity of offering due diligence, interpreting data received from PwC, and carrying out financial modelling and forecasting. Barclays Bank fulfilled the role I would have had if I had still been involved with SCL and had Mr Tinkler not made SCL's involvement impossible. I did get paid for this work. The Consultancy Agreement was intended to address this project. I talk about this in more detail below.
>
> d. January 2019 – Air Portr: I gave the Company some ideas and investor feedback, but nothing more. I did not get paid for this work nor was I formally engaged.

> 21. As I mention above, the Consultancy Agreement was supposed to provide a formal engagement for my work on Project Wright. It was drafted on 12 December 2018 and backdated to 19 November 2018 11, being the first day of the week I began working in earnest. I prepared the draft of the agreement and sent it to the Company for approval/signing. Although it was never signed by the Company or by Connect Airways, I was paid for the work I did in line with its terms.
>
> 22. I am aware that Mr Tinkler alleges that the rate of £10,000 per week included in the Consultancy Agreement 12 was in excess of my worth and the market rate for the services I was to provide. He offers no evidence to support his assertion and it is not correct. This fee level is far below that which I would historically have charged while I worked at Cenkos Securities, it was at or below the level I have charged other clients for similar work and I believe that a similarly-qualified consultant from an organisation like PwC would have charged far more than I did. Furthermore, I charged the Company for six weeks' work, whereas I actually worked on the project for around eight or nine weeks in elapsed time and 35 working days (including many weekend days) in total. Due to my familiarity with Project Wright, I had a level of knowledge a consultant from outside would not have had, which was obviously valuable. There was no one else at SCL with any meaningful consulting or advisory experience so nobody who could have carried out the work I did after I had left, so it was not a task that SCL could have done had I not done it. The definition of the services I was to provide 13 was perfectly normal in circumstances where the precise nature of the work to be done was not known at the outset, since corporate finance projects typically evolve and are unpredictable and each side was very familiar with the other. In summary, the terms of my arrangement with Connect Airways and the Company were somewhat less attractive than my typical terms for comparable situations and they were more favourable to the Company than to me."

421. Mr Wardell challenged the evidence which Mr Soanes gave in his first witness statement (above). When Mr Soanes stood by his evidence, Mr Wardell took him through a series of documents evidencing the work which he had done on the incentive schemes. He then put the point to Mr Soanes again:

> "Q. So your evidence in your witness statement is that there was no follow-up, you weren't mandated, you didn't receive any payment. The fact of the matter is there was follow-up, you were mandated and you were paid under the consultancy agreement? A. All of those things are incorrect, my Lord. I think what we have seen through this lengthy review of correspondence is that I submitted a request list and was provided with some data and I made some comments on a website text and now I'm going to get to the work, so this is all by way of the introductory work that I talked about in the witness statement, and I wasn't mandated and I wasn't paid. What in fact happened with the SEIP, my Lord, at that time I think Mr Coombs and

> others were anticipating that there would be a crystallisation of the SEIP some time in the following year and they wanted to do some early work in anticipation of that happening. My expectation was that someone, hopefully me, would be appointed to advise on the crystallisation of that scheme in due course. But I wasn't. Someone else was. Q. I'm sorry, you finish. A. That's enough. Q. You also did work on the SAIP, didn't you? A. I think I did, yes. Q. And that was an issue at the trial, wasn't it? A. Yes, it did come up in the trial. Q. And your work wasn't limited to that. It included work on the management buyout, the proposed management buyout of the energy business? A. There was a very, very short exchange of -- I think I was sent some sort of a proposal and I made some preliminary comments. Q. And it extended to Project Wright, which was now called Project Stowe, I believe. A. I don't remember -- I don't recall Project Stowe at all. It was Project Wright as far as I was concerned."

(c) Dishonesty

422. *Passage (A)*: Mr Tinkler's pleaded case was that Mr Soanes' purpose in giving evidence was to vilify him having demanded the Loan Agreement as his price for giving evidence and Mr Wardell put this purpose to Mr Soanes twice in cross-examination. For the reasons which I set out under Issue (16) (below) I find that Mr Soanes did not demand the loan as the price for giving false evidence. There was no other evidence upon which Mr Tinkler relied in support of the allegation that Mr Soanes gave false evidence when he denied that his purpose was to vilify Mr Tinkler and I therefore dismiss this allegation.

423. *Passage (B)*: I have dealt with the question whether Mr Soanes told a lie when he denied that he was plotting with Mr Brady to side-line Mr Tinkler under Issue (1) (above). But insofar as Mr Soanes appeared to be suggesting that there was no intention of him going to work for SGL at any other time, Mr Wardell put the point to Mr Soanes again in the context of his evidence about the 5 February 2018 email:

> "MR WARDELL: Page 50, you were being asked about the 5 February Jonathan Brown email that was sent to you. A. Yes, I must have mis-remembered. Q. So can we go back to {C/97/51}, please. First of all, I suggest you clearly had an intention at the time because that's what your proposal suggests, as did your StobCap buyout email suggest, and I say you are lying about that. I understand you disagree. You also include in that: "... or in fact in truth any other ..." By the time you gave this evidence, you were working for the company. A. As I said, what I thought I was responding to was the allegation that I was plotting with Mr Brady at that time and there was something improper about what I was doing. Q. But "or in fact in truth any other" isn't limited to February, is it? A. That's the period that I was speaking to. Q. Well, you can't possibly be speaking to because you contrast "at that time" with "or in fact in truth any other". A.

> Yes, but I wasn't -- doing work for the company as a consultant, my Lord. I'm now a consultant. You know, I work for clients. I think what I was -- what I was responding to was the accusation that I had done something inappropriate at that time, in seeking to work for Stobart Group as an employee or -- you know, in that regard."

424. I did not find Mr Soanes' evidence in his first witness statement entirely satisfactory. He did not mention the Consultancy Agreement or give a full explanation about the work which he carried out after the Trial. But Mr Wardell did not challenge the factual accuracy of the explanation which he gave in his second witness statement and I accept that evidence. I am satisfied, therefore, that Mr Soanes was not formally engaged or paid as a consultant until after he had given evidence. Indeed, Mr Wardell suggested to him that the Consultancy Agreement was a reward for giving evidence. I am also satisfied that by the time he came to give evidence he had only provided limited services in relation to Project Mercury, the SEIP and SAIP and that he had not been paid for them.

425. I also accept Mr Soanes' evidence that he did not lie to the Judge when he gave evidence that he had no intention of going to work for SGL either in February 2018 or at any other relevant time. In particular, I accept his evidence that when he used the phrase "going to work for Group" he was referring to applying for a job as an employee. Moreover, I am satisfied that it was natural for him to answer the question which was put to him that way. He was asked by Mr Taylor whether he was plotting to go and work "directly" for SGL and it is clear that Mr Taylor was contrasting going to work directly for SGL with providing consultancy services through SCL.

426. *Passage (C)*: Mr Wardell also put to Mr Soanes was not telling the truth when he said that there was no discussion about him having a relationship with SGL after 17 February 2018 and he placed reliance on the Project Overlord proposal:

> "Q. We know that there was discussion about the possibility of being a relationship after this, don't we? A. My Lord, my answer was in relation to the accusation that was being made about my abuse of my position at Stobart Capital. So I was responding to the accusation that I had somehow sought to disadvantage Stobart Capital while I was an employee. Q. The other way of looking at it, Mr Soanes, was you were trying to take away the contractual work and Operation Overlord was all about that, wasn't it? A. Operation Overlord came much later, of course. Q. Yes, but this is a lie, isn't it, a blatant one? A. No, this is not a lie. This is me trying to answer the question that was put to me…So that proposal on the 17th or 18th was not followed up. There was no relationship as a result of it, nothing

> happened as a result of it. Mr Brady ignored that suggestion and moved on. I wasn't seeking to imply that I had no relationship with the company after that point. My response was that nothing happened in relation to that particular initiative as documented by the 17 February email."

427. Again, I accept Mr Soanes' evidence that his answer was not directed at the future generally but at the specific proposal which he was considering in his draft email dated 17 February 2018 and which he was proposing to put to Mr Brady later that day (and, indeed, did put to him). Mr Taylor cross-examined Mr Soanes at length on the draft email and the relevant part of that cross-examination covers four pages of the transcript (pages 206 to 209). The two lines of text which are said to be untrue appear in the middle of the passage (on page 208). Moreover, immediately before those two lines Mr Soanes described the proposal in his draft email as "a suggestion in truth in the heat of the moment" and immediately after those two lines he described it as "a throwaway suggestion" which was "written in the heat of the moment".

428. *Passage (D)*: Finally, Mr Wardell put to Mr Soanes his statement that he could not comment on anything that happened after his removal from the business on 11 February 2018:

> "Q. But the language you use is very wide, isn't it? You say, if we go back to the transcript: "I can't comment on anything that happened ..." The use of the words "on anything" is very wide, isn't it? A. I was being asked questions very, very specifically about that one transaction. The question before and the question after and all the other questions before that are about that transaction. I was simply saying I couldn't comment on anything that happened with that transaction, after I was removed. Q. And I suggest it's a deliberate attempt by you to hide the extent of your ongoing involvement with Esken, after 11 February? A. I don't think that can possibly be the case because I'm being asked questions specifically about that transaction."

429. Again, I accept Mr Soanes' evidence that his answer was directed at the specific transaction about which Mr Taylor was cross-examining him. Before the two lines which are said to be untrue, he was being asked about Mr Tinkler's view of a specific investment and it is clear that Mr Taylor understood his answer to be directed at that investment and not at anything else. This is made clear when I quote the entire passage (my emphasis):

> "MR TAYLOR: Yes, we've done very well so far. So paragraph 10, you refer to a business called Airline Services, Mr Soanes, and that was a ground-handling and de-icing business, wasn't it? A. Yes, it was. Q. That

the company, the Stobart Group, was looking into to acquire and you said that Mr Tinkler actively resisted the acquisition of the Airline Services and you say you don't know why. You do know why, Mr Soanes, don't you? That business had numerous problems in it from the financial position that it was in, the age of its equipment and it was just simply not worth acquiring, and that was Mr Tinkler's view, wasn't it? A. Well, certainly Mr Tinkler did not support the acquisition, and those are reasonable grounds. But those grounds could themselves be compensated for by acquiring the business at a low price, and we were providing a professional service to the company, as required by the company agreement, to get to that position. Q. Well, Mr Soanes, let's look at what happened. I'm not going to take you to it, but Mr Tinkler raised concerns directly with Mr Ferguson and we took you to an email where Mr Tinkler sent an email to Mr Ferguson raising his concerns about this proposed acquisition and Mr Ferguson agreed with him that there were some difficulties with it. Mr Tinkler said that in 2017. He was always of the view that this was a business which was holed beneath the waterline, wasn't he? A. I don't recall it being put as strongly as that. I know he didn't support it. Q. He didn't support it, no. And then what happened, though, is a large amount of time and money was spent, wasn't it? For example, KPMG were put in to do a due diligence exercise on the company. And by about February, which was several hundred thousand pounds' worth of expenditure down the line, wasn't it, it was eventually decided by the company "Actually, Mr Tinkler was right, this company is an absolute lemon"; isn't that right? A. I can't comment on anything that happened after I was removed from the business on 11 February. Q. But you know full well that this acquisition never went ahead, don't you, Mr Soanes? A. I do know that, yes. Q. Well, shall we just see what Mr Brady said about it at E19, page 214F. (Pause). A. Sorry, could you repeat the reference? Q. Yes, it is 214F. And it's about half way down and -- these are WhatsApp exchanges between Mr Brady and Nick Dilworth, who is the chief operating officer, and it its entry which is half down saying: "Nick gave chairman heads-up on Project Fort." Which is the one we're talking about, isn't it? Do you see that? A. Yes, I do. Q. Do you have that, Mr Soanes? A. Yes. Q. So this is Mr Brady Q. Do you have that, Mr Soanes? A. Yes. Q. So this is Mr Brady in the middle of -- at 25 February: "... gave chairman heads-up on Project Fort. Do you think we will have rough numbers tonight before I speak to him at 6.00 pm? Do they have the P&L by airport yet? Looks like it may be worth walking away from this one. Not a clean business unless they give it to us for pound." And beneath that Mr Dilworth responds, third line down: "Financial info not great, Warwick." And indeed that acquisition never went ahead for the very good reason that business was not financially sound. That's what those WhatsApps show, don't they? A. What these -- what these messages show is that we were in a process of due diligence to try to ascertain what the value of the acquisition might be to the company and if necessary adjust the terms. What this exchange says if they give it to us for a pound, it could be a very sensible acquisition."

430. None of the new material upon which Mr Tinkler relied provided compelling evidence that Mr Soanes gave knowingly false evidence at the Trial in the 2018 Claim and I find that he did not do so. Indeed, I am satisfied that Mr Tinkler's case involved taking one or two line answers given by Mr Soanes out of context and attributing a meaning to them which they did not have when the relevant passages are read in full.

431. Nevertheless, I cannot leave Mr Soanes' evidence without pointing out that it would have been far better if Mr Soanes had been open and had disclosed both the Loan Agreement and the Consultancy Agreement in his principal witness statement for trial. It would also have been better if he had disclosed that he had remained in contact with Mr Brady and Mr Coombs after his suspension by Mr Tinkler on 22 February 2018. As Mr Wardell pointed out to him, this gave the impression that he had not had any involvement or contact with SGL since that date and led the Judge to conclude that Mr Soanes was an independent witness "untainted by any agenda or motive". I formed a different opinion of Mr Soanes although I make it clear that I am satisfied that he was not guilty of any dishonesty when he gave evidence either in the 2018 Trial or before me.

(d) Materiality

432. Even if I had found that Mr Soanes had lied to the Court in each of Passages (A) to (D), I would not have found the new evidence to be material. The fact that Mr Soanes did have an ongoing relationship with SGL and did provide some services to the company would not have had any effect on the Judge's findings. It is not relevant to consider how the Judge's findings would have been affected if he had known that Mr Soanes was not a straightforward or frank witness: see *Coghlan* (above). But even if it had been, it would not have been material to any of the findings which the Judge made apart from Trial Issue (1) and on that issue SGL lost.

(14) Did Mr Ferguson give knowingly false evidence on behalf of SGL in the 2018 Claim?

(a) The Judge's findings

433. Mr Ferguson's evidence was relevant to all of the principal findings which the Judge had to make. The Judge also gave a detailed description of his assessment of Mr Ferguson at [65]:

> "I found him to be an honest and straightforward witness, though his evidence at certain points did seems a little defensive. It was clear to me that there was an undercurrent of real frustration on Mr Ferguson's part over what he regarded as the very serious misconduct of Mr Tinkler, in his capacity as director, by writing to shareholders and employees in connection with boardroom issues, and by what he described as a very difficult time over the last 9 months. These were events that Mr Ferguson said he very much regretted. His observation that he did not feel that, by the end of May 2018 and before Mr Tinkler took the step of writing to shareholders and employees, the Board had reached a "tipping point" with Mr Tinkler, for whom he clearly had previously had a great deal of respect, struck me as a genuine reflection of his view at the time. Mr Ferguson said that, in the course of the events of 2018, he had tried to be guided by doing the right thing for the Company and its shareholders as a whole. In relation to the transfer of shares to the EBT and the manner in which he chose to exercise proxy votes at the AGM, he clearly relied upon legal advice which he believed supported his position. Whether or not good faith on the part of a director and a belief that he is acting in the best interests of the company are by themselves sufficient to put the relevant action beyond the scrutiny of the court is a legal question to be explored further, but it was clear to me from Mr Ferguson's evidence that he genuinely believed he had the Company's best interests at heart. His evidence upon the developing events of 2018 must be viewed in the light of the point upon which he remained adamant: that it was Mr Tinkler who by early January 2018 was clearly raising the prospect of him (Mr Tinkler) standing down from the Board."

(b) The New Evidence

434. Mr Tinkler's pleaded case against Mr Ferguson was that he gave false evidence at the Trial in six respects. He also alleged that Mr Ferguson was an active participant in the plan to remove Mr Tinkler:

> "93. Mr Ferguson's evidence included the following statements: 93.1 There had been no discussion of a third option at his meeting with Mr Tinkler on 10 January 2018 which was to the effect that Mr Tinkler would replace Mr Ferguson as chairman. 93.2. The draft RNS was produced as a mere contingency and (inferentially) not as part of any plan to oust Mr Tinkler. 93.3. He had had a conversation with Mr Tinkler on about 24 January 2018 during which Mr Tinkler had told him he wanted to stand down as a director. 93.4. The content of that conversation was recorded in a note he had produced the next day which he denied that he had fabricated. The first time Mr Ferguson and Mr Brady had considered removing Mr Tinkler was after they discovered the alleged content of his conversations with the principal shareholders. 93.6. He regarded Mr Tinkler as an asset until very late in the day.
>
> 94. This evidence was false as Mr Ferguson must have appreciated since the events in question had only occurred a few months before trial and

> since the Critical Undisclosed Documents demonstrate that there was a plan to remove Mr Tinkler from as early as January 2018 in which Mr Ferguson was an active participant."

435. However, although it was Mr Tinkler's pleaded case that the critical undisclosed documents established that there was a plan to remove Mr Tinkler as early as January 2018, the only one of those documents which Mr Wardell put to Mr Ferguson was Mr Brady's email dated 8 February 2018. I have already found that Mr Ferguson did not give false evidence in relation to the first Article 89(5) notice in the light of that email.

(c) Dishonesty

436. I share the Judge's assessment of Mr Ferguson's evidence. I found him to be an honest and straightforward witness and to be acting in what he believed to be the best interests of SGL (even when he was found to be acting for an improper purpose). I had no hesitation in accepting Mr Ferguson's evidence about the "end goal" to which Mr Brady was referring in his email dated 8 February 2018 and I am satisfied that it would have taken compelling new evidence to reach the conclusion that Mr Ferguson had lied deliberately and consistently to the Judge. In the event, no such material was available to Mr Wardell and he was forced to rely on the material which was available at the Trial. I find, therefore, that Mr Ferguson did not knowingly give false evidence at the Trial in the 2018 Claim.

(d) Materiality

437. Even if I had found that Mr Ferguson lied to the Court about the "end goal" referred to in Mr Brady's email dated 8 February 2018, I would not have found his new evidence material. It is not relevant to consider how the Judge's findings would have been affected if he had known that Mr Ferguson was not a straightforward or frank witness: see *Coghlan* (above). The only question is whether his findings would have been affected if he had heard evidence that by 8 February 2018 the "end goal" of Mr Brady and Mr Ferguson was to remove Mr Tinkler.

438. In my judgment, it is highly improbable that this evidence would have affected the Judge's findings. He found that the proper purposes rule had no application to the attempt to remove Mr Tinkler under Article 89(5): see [780]. He also found that when he signed the notice, Mr Ferguson had a genuine belief that he was acting in the interests of SGL

(because Mr Tinkler had already been briefing against the Board): see [782]. Accordingly, even if Mr Ferguson's evidence had caused the Judge to take the view that the "tipping point" had come much earlier, it would not have affected his findings on Trial Issue (4).

(15) Did Mr Brady know that Mr Soanes had given knowingly false evidence on behalf of SGL in the 2018 Claim?

439. Mr Wardell suggested to Mr Brady that he knew that Mr Soanes was not telling the truth. He put a number of passages in the transcript of Mr Soanes' evidence to Mr Brady and I have dealt with those in context under Issues (1) and (2). However, Mr Wardell also suggested to Mr Brady that he knew that Mr Soanes was not telling the truth in Passages (C) and (D) (above):

> "Q. And you were in court when he made it clear to the judge, weren't you, that he had had no dealings with the company since February? A. I can't remember that, my Lord. Q. And you were in court, weren't you, when he told the judge that his proposal to work for you, that he sent in February, was done in the heat of the moment and nothing had ever happened? A. Again I can't remember that from the court case in 2018. Q. But you were in court every day, weren't you? A. I was in court every day."

440. I accept that Mr Brady was telling me the truth when he said that he could not recall this evidence and I find that he did not know that Mr Soanes had given knowingly false evidence in the 2018 Claim. I have found that Mr Soanes did not give knowingly false evidence and so the issue does not strictly speaking arise. But in any event, I am satisfied that Mr Brady would in all probability have understood Mr Soanes to be answering the questions which were put to him in cross-examination in the way in which I have found under Issue (13) (above).

(16) Was the Loan Agreement on uncommercial terms and was it demanded by Mr Soanes as the price of his evidence and assistance in the 2018 Claim?

(a) The Judge's Findings

441. There were no findings of fact to which the Loan Agreement (or the Consultancy Agreement) were directly relevant. However, they were directly relevant to the credibility of Mr Brady and Mr Soanes. I have already set out the Judge's assessment of Mr Soanes and he also found that Mr Brady was "a straightforward and impressive witness": see [59].

(b) The New Evidence

442. SGL did not disclose the Loan Agreement and the Consultancy Agreement in the 2018 Claim. In his witness statement Mr Brady gave the following evidence about the purpose of the Loan Agreement:

> "Also around this time, I had been discussing with Mr Soanes a request he had made for the Company providing him with a loan to help him pay for the ET Proceedings. This was something which he had raised with me and I considered it to be in the best interests of the Company to support Mr Soanes because I thought it would be y [sic] helpful to have Mr Tinkler tied up with another court case which might distract him from his on-going disputes with the Company. I did not agree to the Loan in return for Mr Soanes giving evidence for the Company, the thought never crossed my mind."

443. Mr Wardell put five contextual points to Mr Brady about the Loan Agreement, its terms and rationale. I summarise those points and the answers which Mr Brady gave in evidence as follows:

(1) Mr Wardell suggested to Mr Brady that his rationale for the Loan Agreement (to tie up Mr Tinkler with the ET Claim) had disappeared by October 2018 when the Trial of the 2018 Claim was expedited. Mr Brady's evidence was that it made sense at the time.

(2) Mr Brady refused to accept that the Loan Agreement was not on commercial terms although he accepted that the SCL shares (out of which the loan was to be repaid) had no value to SGL and that the Loan Agreement was to help Mr Soanes.

(3) Mr Wardell suggested to Mr Brady that Mr Soanes was a wealthy man (as Mr Soanes ultimately accepted himself) and that a public company should not have entered into the Loan Agreement. Mr Brady's evidence was that he was not aware that Mr Soanes was wealthy, he saw Mr Soanes as the underdog and that the Board wanted to support Mr Soanes because it was the right thing to do.

(4) Mr Brady refused to accept that it would not have been possible to borrow at a rate of interest of 2.5% and that this was not a commercial rate.

(5) Mr Brady could not recall whether the Loan Agreement had been approved at Board level although he accepted that it had not been mentioned at "Core Time"

which was a management meeting which took place each Monday at which financial matters were discussed.

444. Mr Wardell suggested to Mr Brady that the Loan Agreement was the price which SGL agreed to pay for Mr Soanes' co-operation and that the agreement went back to Mr Coombs' email dated 20 August 2018: see [187] (above). Mr Brady's evidence was that there was no connection between them and that the Board genuinely wanted to help Mr Soanes. One of Mr Wardell's final questions to Mr Brady and his answer were as follows:

> "Q. And going back, final question -- two final questions -- first of all, it's clear, I suggest to you, that the loan agreement was not just to get his cooperation but to get his cooperation to give the same false narrative as you were planning to give? A. That's untrue (inaudible)."

445. When Mr Soanes gave evidence, Mr Wardell put a similar series of points to him about the formation and terms of the Loan Agreement. Those points and Mr Soanes' evidence in answer to them were as follows:

(1) Mr Wardell took Mr Soanes through his email exchanges with Mr Coombs about the terms of the proposed loan and suggested that they were no more than window dressing. Mr Soanes did not accept this.

(2) Like Mr Brady, Mr Soanes would not accept that the Loan Agreement was on uncommercial terms although he accepted that he would not have been able to obtain a rate as low as 2.5% even for a secured loan.

(3) Mr Soanes would not accept either that he did not need the money. He said that he was not in a position to spend a lot of money speculatively on the case even though he accepted that he had spent almost £90,000 on the third party disclosure application.

(4) Mr Soanes agreed that he expected the loan to be written off but he would not accept that his shares in SCL had no value although he accepted that his expectations of their value had decreased considerably since February 2018. He explained that he hoped that Mr Tinkler would exercise his rights of pre-emption rather than see Mr Soanes sell his shares to SGL and that would provide sufficient funds to repay the loan.

446. Mr Wardell described the idea that Mr Tinkler would buy Mr Soanes' shares as "pure fantasy". He also put to Mr Soanes that Mr Brady had made it clear months earlier that SGL was not interested in being a minority shareholder in SCL. The following exchange then took place:

> "Q. And that hadn't changed, had it? A. It hadn't changed but I kept trying. Q. So this loan agreement wasn't a genuine loan, I suggest, and it was all part of your plan that you were pursuing in close collaboration with Mr Brady and Esken? A. Could you just repeat the first part of that question. You -- did you say it wasn't a real loan? Q. No. A. It was a real loan. Q. I overstated it. It would only be repayable, at best, if you won? A. No, I saw Stobart Group having value for the loan in either circumstance. Q. And I can tie it right back to your email of 20 August, and this was the condition of you being aligned. You made it clear that if they wanted your help, they would have to pay you and the payment was in two forms. First of all, the loan agreement and the second, the consultancy agreement. A. There was no link between the three things that you've just described. Q. And on the back of that, you agreed to give false evidence to the court, whereby your involvement was written out of the script? A. That is most certainly not true."

447. Mr Coombs also gave evidence about the terms of the Loan Agreement. Mr Wardell suggested to him that funding the ET Claim would have made no difference because nothing was going to happen until after the Trial had taken place. The following exchange then took place:

> "Q. And, looking back at it, it was quite clear that this loan agreement was on uncommercial terms, isn't it? A. It was highly commercial. Q. Highly commercial? A. Yes. Q. Right. So the shares in Stobart Capital -- A. So what's your definition of "commercial"? Q. I don't answer questions, Mr Coombs. A. Okay. Q. So the shares in Stobart Capital were worthless by then; agreed? A. Just about, yes. Q. Yes. Even if they weren't worthless, you would have absolutely zero interest in holding a minority interest? A. Correct. Q. Right. So the only way that that loan was going to be repaid was if Mr Soanes won in the employment tribunal; agreed? A. Well, the prim -- let's talk about -- the primary reason was to try and get a settlement in one of the other cases, and the savings to us and the lack of distraction to us of getting a settlement would have been enormously greater than an £80,000 loan. So the fundamental commercial reason for doing it was to push to get a commercial settlement on one of the other cases that we were involved in. Q. You never sought to charge any interest? A. What's the difference? Had it been 2.5 or 7.5, I think that's about £4,000 a year on the capital sum. It's neither here nor there. Q. You are a public company. You are lending money to a third party. Your rationale for entering into it doesn't make the terms commercial, it just gives us a rationale as to why you thought it might be in your interests to enter into it. A. No, I think the

> shareholders stood a good chance of benefiting financially had we managed to get Mr Tinkler to settle early on one of the other claims and that the financial benefit to the shareholders of a settlement would have dwarfed the £80,000 we put at risk. Q. And has it been written off, the loan? A. It has been provisioned against but remains as an asset of the company. Q. Have you taken any steps to enforce it at all? Have you written any letters of demand to Mr Soanes? A. I think I cover in my witness statement it hasn't yet risen to the top of the pile. Q. Right. Thank you very much."

448. Finally, Mr Wood was also asked about the terms of the Loan Agreement. He accepted that he was not directly involved in the negotiations for the Loan Agreement and relied on the rationale given to him by Mr Coombs. When Mr Wardell challenged the rationale, his evidence was as follows:

> "Q. I accept what you've just told me about the relevance of the timing of all this. The context was that we felt that Ian deserved some help, had been badly treated, and we did feel that possibly getting the employment tribunal properly fought on his behalf could potentially be of some benefit to us in trying to resolve all the issues we had had with Andrew Tinkler. And the commerciality of this, I think, is more in the impact that that could have had on legal costs and time-saving and everything else. I mean, there has been 7 millions and millions of pounds spent on this -- on these proceedings and compare that to £80,000 for a loan, whether you write it off or whether you get it back or whether you don't, I mean, there is potentially -- if we could have found a way of resolving the problem without going to court, there could potentially have been a really big saving for the company. But if you are asking me do I believe it's really commercial, no, I don't."

449. Mr Tinkler relied on the WhatsApp exchanges between Mr Brady and Mr Soanes on 1 October 2018 and 29 October 2018 in support of his case that Mr Soanes and Mr Brady were guilty of collusion in relation to the evidence which they gave at the Trial. Mr Wardell referred Mr Brady to the exchange on 29 October 2018 and suggested that Mr Soanes should not have been in direct communication with him. He then put to Mr Brady Mr Soanes' message timed at 20.01:

> "MR WARDELL: So Mr Soanes then says to you: "I can now see a clear trail through the correspondence. AT portrayed his proposal as gains for everyone. You supported it but said to me by email it's ok 'only as long as Group benefits at least as much as AT'. I showed you that Group was paying for AT's gain so you withdrew your support. I'll get it down on paper and send it to you tomorrow." That's collusion, isn't it? A. It's definitely not collusion. It's just making sure I had all the information that was required. Q. What do you call it then, if it's not collusion? A. Mr

> Soanes is a witness in the case of 2018. We are preparing for a case of 2018. In my view, overall he didn't actively participate in preparing for the whole trial. He was not a core part of the trial, right? He was a witness in the trial. There were certain intricacies that Mr Soanes was involved with, including, as we remember from yesterday, the kind of plan of Mr Tinkler's of how to take off balance sheet our business. MR JUSTICE LEECH: Just pause there. I give you a moment to complete your answer, you have just given quite a long answer. A. Okay. In summary, my Lord, it was me checking my facts on the FlyBe transaction because Ian Soanes was in the middle of that and that was very helpful. But it's not -- I can't see how that could be deemed as collusion. MR WARDELL: His assistance wasn't limited to this, was it? A. Mr Soanes' assistance extended to the incentive schemes, both the energy incentive scheme and the aviation incentive scheme."

450. Mr Brady also accepted that Mr Soanes helped with supplemental witness statements, that he was in court most days, that he offered to help with the cross-examination of Mr Hodges and that he also offered more help to Mr Ferguson. When he came to give evidence Mr Soanes confirmed his involvement at trial. Mr Wardell also put the WhatsApp messages on 29 October 2018 to him:

> "Q. So you have been asked to look for a route through the correspondence with a view to sending Mr Brady a note. Do you agree? It's clear from: "I'll get it down on paper and send it to you tomorrow." A. I think I'm trying to set that up for Anthony Field. 18 Q. You are saying you are going to send it to Mr Brady, aren't you? You have been asked to do it by Mr Field but you are planning to send it to Mr Brady? A. Well, I did say that that's what I would do, yes. Q. And were supplemental witness statements still being prepared at this stage? I'm afraid I haven't got the date at my fingertips. Perhaps you can help me. If you don't remember, we will leave it. A. Sorry, if you are asking me, no, I don't remember. Q. Yes, I'm told the supplemental witness statements were being prepared. And the explanation you give about this is, frankly, ludicrous, and I must put it to you, I'm afraid. We find that at paragraph 80 on page 23. {B/5/23}. Do you want to read that to yourself. A. Yes. Q. And the explanation you give is that this wasn't being done for the purpose of the trial or supplemental witness statements, you were preparing for a preliminary hearing in the employment tribunal proceedings, and that preliminary hearing was on 16 November, wasn't it? Yes, 16 November, as I understand it. A. I don't recall the precise date. Q. And you say you were reviewing documents in order to clarify in your own mind: "... certain aspects of the protected disclosures I had made." A. Yes, that's true. Q. It's not what the text message says, is it? A. I think I was looking at it through both of those lenses. Q. Why don't you acknowledge that here? A. Yes, perhaps I should have added that. Q. Yes. If we go back to the text message, I mean, you say: "I can now see a clear trail through the correspondence." And you also say, immediately above that: "So if we need to we can say that there is

> good evidence ..." That's clearly material for the trial, isn't it? A. Yes, I think so. MR JUSTICE LEECH: Could you just look at the: "AT portrayed his proposal as gains for everyone. You supported it but said to me by email it's okay 'only as long as Group benefits at least as much as AT'." That's Mr Tinkler's initial proposal in relation to the acquisition of FlyBe, is it? The off balance sheet, where it's sold to a company in which he was interested and then sold on to the group. A. Yes."

451. I have dealt with the 3 September 2018 WhatsApp exchange and Mr Tinkler's allegation that Mr Brady deliberately chose not to disclose it under Issue (9) (above). I asked Mr Soanes about his message timed at 20.11 at an earlier stage of his cross-examination and, in particular, about the "end game" and the "right result" referred to in that message:

> "MR JUSTICE LEECH: Could I just ask you about the email timed at 20.11, please, Mr Soanes. You say this, in the middle of that -- message, I beg your pardon, message, not email. It says: "The role the tribunal plays in your bigger picture is now very clear to me. We use it to help you towards the end game." Doing the best you can, can you explain to me what you meant by "the end game" in that context? A. My Lord, I'm struggling a bit myself. There are those two sentences beginning: "The role ..." And then "Otherwise ..." And I can't quite reconcile them. But my end game at this time was trying to get a settlement. MR JUSTICE LEECH: You refer to the tribunal: "The role the tribunal plays in your bigger picture is now very clear to me. We use it to help you towards the end game." So that's an end game which involves both Stobart Capital and Stobart -- or your employment tribunal and the dispute between Mr Tinkler and Stobart Group. Would you accept that? A. Yes. MR JUSTICE LEECH: Can you just explain to me what you meant by "the end game". A. I think the end game is the negotiated solution. As we see from later messages, throughout that period I was looking to Stobart group -- I assumed that there would be a settlement rather than the trial in 2018, and I wanted to be part of that settlement. MR JUSTICE LEECH: Just one more question, if I may: immediately below that, or two lines, you say: "... we definitely need to coordinate to get the right result." Again, could you explain to me what you meant by the "right result" in that context? A. I think that I thought that the right result was a negotiated outcome, and I thought we needed to coordinate to bring as much pressure to bear to achieve that."

452. Finally, it was Mr Tinkler's case that the Consultancy Agreement was not on commercial terms either and Mr Wardell suggested to Mr Brady that it was a reward for giving false evidence at the Trial:

> "Q. We then have the consultancy agreement at {I17/1/1}. And that's an agreement -- proposed agreement between the company and Tellus, and you will see, if you go to the next page, {I17/1/2}, it's to last until -- sorry, I should have stuck on page 1. It was to last until either the company or

> Tellus terminated it. We get that from clause 2. Do you see that? A. Which part am I looking at? Q. I'm looking at clause 2, "Commencement and duration": "Will continue unless or until the company or the consultancy gives notice." Do you have that? A. Yes. Q. And then if you go over the page, {I17/1/2}, "Fees and expenses". He is going to get £10,000 a week. Do you see that? A. Yes. Q. And that compares with his salary for Stobart Capital of £120,000 a year. Did you know that? A. Yes, I've heard that yesterday. Q. And you paid your own finance director, as I understand it, £120,000 per annum? A. I can't remember. I think it was more than that but, yes. I'm assuming you are correct. Q. And this was a reward for the assistance he had given you up to and during the trial, wasn't it? A. No. Q. As was the loan agreement? A. No. Q. And you knew the loan agreement was not just a reward for assistance but it was also a reward -- or part of the deal whereby you knew he was going to give false evidence to the court. A. That's not correct either."

453. Mr Wardell did not cross-examine Mr Soanes at length about the purpose of the Consultancy Agreement but only because time was short. But at the conclusion of his cross-examination Mr Wardell put Mr Tinkler's case squarely to Mr Soanes:

> "Q. So I suggest you deliberately and dishonestly underplayed your role when you gave evidence in the 2018 proceedings. A. That's absolutely not true. Q. You set out to give the impression, in collusion with Mr Brady, that you really had nothing to do with Esken after 11 February? A. I did not. Q. When the contrary was the case. And you deliberately and dishonestly gave false evidence at that trial? A. I did not. Q. And you were rewarded for your cooperation by the loan agreement and the consultancy agreement? A. That is not true."

(c) Dishonesty

454. In my judgment, the Loan Agreement was not on commercial terms in the sense that they could be justified objectively on an arm's length basis and for the reasons which Mr Wardell gave. The interest rate was low, the SCL shares had little value and if Mr Soanes lost the ET Claim, the loan would be written off. Moreover, Mr Wood accepted that the terms of the Loan Agreement were uncommercial in cross-examination and I found him to be both a fair and reliable witness.

455. Mr Brady and Mr Coombs did not accept that the terms of the Loan Agreement were uncommercial. But it does not follow from this that I reject their evidence. I am not satisfied that there was a difference in substance between their evidence and the evidence of Mr Wood. They both gave evidence that Mr Soanes had been badly treated and it was SGL's responsibility to help him. They also said that they were prepared to assist him

because there was a commercial advantage to SGL. If the added pressure of the ET Claim had made it easier to settle the 2018 Claim, then this was of commercial value to SGL.

456. Mr Wardell challenged this rationale on the basis that there was no value to SGL in funding the ET Claim once the Trial had been expedited because it would not be decided until later. But I am not satisfied that this made a material difference to the way in which Mr Brady and Mr Coombs perceived the commercial advantage to SGL and I am not prepared to reject their evidence on that basis. The logic was that the costs of funding the 2018 Claim, the Defamation Claim and the ET Claim all at the same time would have driven Mr Tinkler to the table to achieve a global settlement and Mr Coombs gave evidence that he had without prejudice discussions with Mr Tinkler before the Trial took place.

457. Although I have found that the terms of the Loan Agreement were not commercial in the sense that they could be justified objectively on an arm's length basis, there is no cogent evidence that Mr Soanes demanded the loan as the price of his agreement to give false evidence in the 2018 Claim and I find on a balance of probabilities that he did not do so for the following reasons:

(1) Apart from the Loan Agreement and the Consultancy Agreement (and any inferences to be drawn from the documents themselves) there was just no documentary evidence to support the allegation that Mr Soanes conspired with Mr Brady to give false evidence in the 2018 Claim. It seemed possible that Mr Soanes was referring to such an agreement in guarded terms in his WhatsApp message on 3 September 2018 timed at 20.11 by using the "end game" and "right result". But I questioned Mr Soanes myself about the meaning of those terms and I am satisfied that Mr Soanes was telling the truth.

(2) The only pleaded allegation of collusion related to the exchange of WhatsApp messages on 29 October 2018. I accept that Mr Soanes should not have been discussing his evidence with Mr Brady. But even so, these messages did not provide cogent evidence that Mr Brady and Mr Soanes were conspiring together to concoct a false story to present to the Court. In his message timed at 20.01 and in which he rehearsed his evidence, Mr Soanes was dealing with Mr Tinkler's proposal for the acquisition of FlyBe, as he confirmed. But SGL lost on this issue

at trial. Moreover, in deciding this issue against SGL the Judge relied on Mr Brady's evidence.

(3) This is hardly compelling evidence of collusion. But apart from this example, Mr Tinkler was unable to point to any other evidence to show that Mr Brady and Mr Soanes concocted false evidence to present to the Court. There is no question that Mr Soanes was eager to help at the Trial, made offers to assist with preparation and cross-examination and attended Court each day. In my judgment, this was all part of his overall strategy to make himself useful to SGL but it goes no further.

(4) This is unsurprising because Mr Soanes' evidence was of very limited relevance to any of the other Trial Issues. On 24 October 2018 Mr Tinkler amended his Defence and Counterclaim to allege that he raised concerns about the valuation of the SAIP incentive scheme at the Board meeting on 7 June 2018 and again at the AGM. Mr Soanes made a second witness statement dated 5 November 2018 dealing with the valuation of the SAIP incentive scheme. But this hardly provided Mr Brady with a motive to reward Mr Soanes.

(5) I find it highly improbable that Mr Brady would have entered into a private arrangement with Mr Soanes without the knowledge of Mr Ferguson, Mr Coombs or Mr Wood and there was no documentary footprint to suggest that he discussed such a proposal with them. Moreover, Mr Brady would have been running a serious, personal risk by agreeing to pay Mr Soanes to give false evidence without the authority of the other members of the Board. Like Mr Ferguson, I found Mr Brady to be an intelligent man. I have little doubt that he would have seen the risk and would not have taken it.

(6) Finally, although I have criticised aspects of Mr Soanes' evidence, I found him to be a fundamentally honest witness. Although he was not as open with the Court as he might have been, I am not satisfied that he would have been willing to perjure himself on behalf of SGL or that £80,000 and the Consultancy Agreement provided a strong enough incentive to do so. As Mr Wardell put to him, he was already a wealthy man by the standards of many people.

458. I turn, therefore, to the Consultancy Agreement. I accept Mr Brady's evidence and I find that it was not a reward for Mr Soanes giving false evidence at the Trial. I am not satisfied

that the consultancy fee of £10,000 per week was uncommercial for a short-term consultancy providing sophisticated financial services and there is no suggestion that Mr Soanes did not actually do the work which he claimed to have done in his second witness statement. But in any event, I am not satisfied that Mr Brady had a motive or incentive to reward Mr Soanes for giving evidence on behalf of SGL for all of the reasons which I have given in relation to the Loan Agreement. His evidence was not instrumental in SGL achieving success and SGL lost on the only point on which his evidence was material.

(d) Materiality

459. If I had found that Mr Soanes demanded the Loan Agreement as the price for giving false evidence and that Mr Brady had agreed to pay it and then to reward Mr Soanes with the Consultancy Agreement, I would have found Limb 2 satisfied applying either the *Highland* test or the *Hamilton* test. Moreover, I would have found Limb 2 satisfied even though Mr Soanes' evidence was not relevant to any of the issues apart from Trial Issue (1) on which SGL lost. In the normal case, I accept Mr Leiper's submission that the Court should approach Limb 2 on the basis adopted by Tugendhat J in *Coghlan*. However, I take the view that a conspiracy between a party and a witness to commit perjury is so fundamental to the integrity of the Court process that it would have entirely affected the way in which the Judge approached his decision. However, this issue does not arise either.

K. Summary

(1) By the start of 2018 had Mr Brady concluded that Mr Tinkler could not remain on the Board as an executive director and had he begun to devise a plan to remove or otherwise neutralise him?

460. In my judgment, the new documents upon which Mr Tinkler relied do not demonstrate that by the start of 2018 Mr Brady had begun to devise a plan to remove or otherwise neutralise him. I also find that Mr Brady did not consciously and deliberately decide not to disclose his New Year's resolution note, the 19 January text message exchange between himself and Mr Soanes, his note dated 29 January 2018, the StobCap Buyout Email, Attachment and Presentation, Mr Brady's email dated 8 February 2018 and the 12 February 2018 email exchange.

461. I find that Mr Brady and Mr Soanes did not give false evidence at the Trial about Mr Brady's text saying "AT being sorted as well" and I also reject the allegation that Mr Brady knew that Mr Soanes' evidence about this text was false. I also find that Mr Brady and Mr Soanes did not give false evidence at the Trial about Mr Brady's text dated 10 February 2018 and the statement "Let's agree an outcome for Group and Capital and see if we can do it together." Finally, I find that Mr Ferguson did not give false evidence in relation to the first Article 89(5) notice in the light of Mr Brady's email dated 8 February 2018.

(2) Did Mr Brady make Mr Soanes privy to his plans regarding Mr Tinkler and over the course of 2018 generally and did both Mr Brady and Mr Ferguson share confidential information regarding Mr Tinkler with Mr Soanes?

462. I find that Mr Brady committed a breach of confidence by forwarding Mr Brown's email dated 5 February 2018 to Mr Soanes. But apart from this I am not satisfied that either Mr Brady or Mr Ferguson disclosed confidential information to Mr Soanes either about the Board's plans (whether to remove Mr Tinkler or otherwise) in the period between February and the end of May 2018.

463. On 28 May 2018 Mr Brady deleted the WhatsApp messages which he had sent to, and received from, Mr Soanes by that date. I find on a balance of probabilities that he did not do so dishonestly and with the purpose of preventing their disclosure either in the 2018 Claim or in litigation more generally. I also find that Mr Brady and Mr Soanes did not mislead the Judge when they rejected Mr Taylor's suggestion that they were working together to undermine Mr Tinkler and that Mr Soanes was telling the truth when he said that he had no nexus with SGL at 5 February 2018 apart from his interest in SCL. Finally, I reject the allegation that Mr Brady knew that this evidence was false.

(3) Did Mr Brady and Mr Ferguson intend to use Article 89(5) in February 2018 to remove Mr Tinkler from the Board (whether by using it to persuade Mr Tinkler to step down voluntarily to save face or forcibly removing him against his wishes) and would they have done so but for Mr Garbutt's refusal to sign the Article 89(5) letter?

464. If it is necessary for me to decide Issue (3), then I find that if Mr Garbutt had signed the first Article 89(5) notice, the Board would have used the notice as leverage in one last attempt to negotiate with Mr Tinkler. I also find that if those negotiations had been unsuccessful, the Board would have served the notice.

(4) Did Mr Brady deliberately deleted his WhatsApp messages with Mr Soanes on 28 May 2018 at a time when he appreciated that litigation was in prospect and did he deliberately not mention that fact to SGL's solicitors?

465. For the reasons which I have set out in answer to Issue (2) I am satisfied that Mr Brady did not deliberately delete his WhatsApp messages on 28 May 2018 or deliberately withhold that information from Rosenblatt.

(5) Did the Committee as formed in May 2018 lack independence and was this intended?

466. I find that the Committee did not lack independence. None of the members of it had a conflict of interest which prevented them from performing their duties to SGL or acting in what they considered its best interests to be. I also reject the allegation that in delegating their powers to the Committee the Board intended it to lack independence. I also find that Mr Brady did not consciously and deliberately choose not to disclose the Briefing Note.

(6) Was Mr Laycock induced to step down as a director of SGL in July 2018 in order to permit Mr Tinkler's removal using Article 89(5) following his anticipated re-election at the AGM on 6 July 2018?

467. I find that Mr Brady asked Mr Laycock to step down as a director of SGL in July 2018 because he was concerned that Mr Laycock was not prepared to support the remainder of the Board at the AGM. But I also find that Mr Laycock's resignation from the Board was not part of a preconceived plan to buy off Mr Laycock and exercise Article 89(5) and that the bonus which SGL paid to Mr Laycock was not a bribe and that Mr Brady had a number of other reasons for asking Mr Laycock to step down. I also find that Mr Brady did not consciously and deliberately chose not to disclose the Laycock Messages, the Laycock Note and the Second Side Letter.

(7) Did Mr Brady deliberately delete his Telegram messages with Mr Soanes prior to his mobile telephone being imaged by HSF on 2 July 2018 and deliberately did not mention that fact to SGL's solicitors?

468. I find that Mr Brady did not delete the Telegram messages which he had sent to, or received from, Mr Soanes before 2 July 2018 from his phone.

(8) (i) Did Mr Ferguson fail to draw Rosenblatt's attention to the fact that he realised he had not captured all of his SGL-related emails for the purposes of the 2018 disclosure exercise? (ii) Did he deliberately delete emails pre-dating 3 May 2018 from his Wilton Park email account and fail to mention this to Rosenblatt?

469. I find that Mr Ferguson did not consciously and deliberately choose not to disclose emails from his Wilton Park email account pre-dating 3 May 2018 or consciously and deliberately delete any of those emails. If it is necessary for me to do so, I also find that he did not fail to disclose or delete emails from his Wilton Park email account not caring whether they were relevant or whether SGL or he personally was under a duty to disclose them.

(9) Did SGL deliberately fail to disclose documents which it was under a duty to disclose in the 2018 Claim?

470. I find that Mr Brady did not consciously and deliberately choose not to disclose Ms Brace's email dated 13 June 2018 and his exchange of WhatsApp messages with Mr Soanes on 3 September 2018. I also find that Mr Brady did not give false evidence at the Trial when he said that it did not cross his mind that Mr Tinkler's dismissal would provide a basis for refusing his LTIP Awards when he was giving instructions to Mr Dilworth to make the first transfer of 1,715,000 shares to the EBT.

(10) Can it be properly inferred that SGL deliberately failed to give disclosure of other relevant documents in the 2018 Claim?

471. Given my other findings, there is no cogent evidence from which I can properly draw the inference that SGL deliberately failed to give disclosure of other relevant documents in the 2018 Claim.

(11) Was Mr Soanes no mere witness for SGL in the 2018 Claim but heavily involved in the preparation for trial and a man who was – and even now appears to remain – firmly inside SGL's tent?

472. This issue does not arise. But if I had found that Mr Soanes demanded the Loan Agreement as the price for giving false evidence in the 2018 Claim and that Mr Brady had agreed to this proposal and had then rewarded him for giving false evidence by entering into the Consultancy Agreement, I would have held that Mr Soanes' evidence should be attributed to SGL.

(12) Did Mr Brady give knowingly false evidence on behalf of SGL in the 2018 Claim?

473. Based on my earlier findings of fact, I find that Mr Brady did not give false evidence on behalf of SGL in the 2018 Claim knowing it to be untrue.

(13) Did Mr Soanes give knowingly false evidence on behalf of SGL in the 2018 Claim?

474. I find that Mr Soanes did not give knowingly false evidence on behalf of SGL in the 2018 Claim in any of the four Passages (A) to (D) set out in [417] (above).

(14) Did Mr Ferguson give knowingly false evidence on behalf of SGL in the 2018 Claim?

475. I find that Mr Ferguson did not knowingly give false evidence in the 2018 Claim.

(15) Did Mr Brady know that Mr Soanes had given knowingly false evidence on behalf of SGL in the 2018 Claim?

476. Although this issue does not arise, I find that Mr Brady did not know that Mr Soanes had given knowingly false evidence in the 2018 Claim.

(16) Was the Loan Agreement on uncommercial terms and was it demanded by Mr Soanes as the price of his evidence and assistance in the 2018 Claim?

477. I find that the Loan Agreement was not on commercial terms in the sense that its terms could be justified objectively on an arm's length basis. However, I find on a balance of probabilities that Mr Soanes did not demand the Loan Agreement as the price for giving false evidence in the 2018 Claim and that Mr Brady did not reward him for doing so by arranging for Connect Airways (or SGL) to enter into the Consultancy Agreement.

478. I add that I have also found none of the new evidence which Mr Tinkler adduced would have been material to the Judge's findings in the 2018 Claim on either the *Highland* test or the *Hamilton* test. If I had found that Mr Ferguson had deliberately deleted emails from his Wilton Park email account or that SGL had entered into the Loan Agreement as the price for Mr Soanes giving false evidence (and then rewarded him for giving false evidence after the Trial), I would have found that evidence material and set aside the Judgment.

VII. Disposal

479. I, therefore, dismiss Mr Tinkler's claim to set aside the Judgment for fraud and his claim for restitution of sums paid by him to SGL under the terms of a Tomlin order and for the repayment of his costs of the 2018 Claim. Once I have handed down this judgment, I invite the parties to list any consequential matters arising out of this judgment for hearing at a convenient date.