Neutral Citation Number: [2024] EWHC 1490 (Ch)

BL-2020-002025

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

17 June 2024

Before:

MR JUSTICE LEECH

- -

B E T W E E N:

WILLIAM ANDREW TINKLER **Claimant**

- and –

(1) ESKEN LIMITED **Defendants**
(formerly STOBART GROUP LIMITED)
(2) WARWICK BRADY
(3) IAIN GEORGE THOMAS FERGUSON
(4) IAN DEREK SOANES

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MR RICHARD LEIPER KC and **MR DANIEL ISENBERG** (instructed by **Rosenblatt**) appeared on behalf of the First to Third Defendants

MR SAM WAY (instructed by Direct Access) on behalf of the Fourth Defendant

THE CLAIMANT in person.

Hearing date: 1 March 2024

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APPROVED JUDGMENT

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Mr Justice Leech:

I. The Applications

1. By Application Notice dated 22 June 2022 the First to Third Defendants applied to strike out the Claim Form dated 13 November 2020 (the "**Conspiracy Claim**") issued by the Claimant, Mr Andrew Tinkler, for damages for unlawful means conspiracy, and to be released from certain undertakings. By Application Notice dated 23 January 2024 the Fourth Defendant, who was acting in person, also applied for the same relief. For reasons which will be clear when I have set out the procedural history, the two applications (to which I will refer as the "**Applications**") were not heard until after the final determination of Claim No. BL-2020-002022 (the "**Fraud Claim**").

2. On 21 November 2023 the Fraud Claim was finally determined when the Supreme Court dismissed Mr Tinkler's application for permission to appeal. The Defendants invited Mr Tinkler to agree that given the outcome of the Fraud Claim, the Conspiracy Claim should also be dismissed. Mr Tinkler did not accept this and the Defendants renewed the Applications to strike out the Conspiracy Claim. On 1 March 2024 I heard the Applications. Mr Richard Leiper KC and Mr Daniel Isenberg appeared on behalf of the First to Third Defendants and Mr Sam Way appeared on behalf of Mr Soanes, the Fourth Defendant. Mr Tinkler appeared in person assisted by Mr Trevor Howarth (whose assistance I gratefully acknowledge).

II. Procedural History

3. On 14 June 2018 the First Defendant issued a Claim Form (the "**2018 Claim**") for a declaration that Mr Tinkler had been lawfully dismissed as an employee and removed as a director of the First Defendant, which was then called "Stobart Group Limited" ("**SGL**"). Mr Iain Ferguson CBE, the Third Defendant, was the non-executive chair of SGL and Mr Warwick Brady, the Second Defendant, was an executive director and had succeeded Mr Tinkler as the CEO. The 2018 Claim which was expedited and heard over eleven days by His Honour Judge Russen QC who handed down a reserved judgment on 19 February 2019 (the "**Russen Judgment**"). On 6 June 2019 Flaux LJ (as he then was) refused permission to appeal and on 13 November 2019 Males LJ refused Mr Tinkler permission to re-open that decision.

4. On 10 May 2017 Stobart Capital Ltd ("**SCL**") was incorporated. 50.1% of the shares were owned by Mr Tinkler and 49.9% by Mr Ian Soanes, the Fourth Defendant, who was also an employee and director of that company. On 3 May 2018 Mr Soanes issued a claim for unfair dismissal in the Central London Employment Tribunal (the "**ET Claim**") claiming that he had been dismissed for whistle-blowing and making protected disclosures. On 27 April 2020 the tribunal dismissed the ET Claim on the basis that Mr Soanes had no automatic right to claim unfair dismissal and that he had not suffered any detriment as a result of making the protected disclosures.

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

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

6. On 13 November 2020 Mr Tinkler issued both the Fraud Claim against SGL to set aside the Russen Judgment for fraud and the Conspiracy Claim against SGL, Mr Brady, Mr Ferguson and Mr Soanes as contemplated in paragraph 2 of the Order (above). On the same day he applied for and obtained a without notice injunction against Mr Ferguson, Mr Brady and Mr Soanes requiring them to preserve all documents held by them on their computers, mobile phones and other devices. In a consent order dated 21 November 2020 (the "**Preservation Order**") Mr Ferguson, Mr Brady and Mr Soanes all gave undertakings to Mr Tinkler and the Court to preserve the relevant documents until trial or further order in the Conspiracy Claim and the costs of the proceedings

were reserved to the trial judge. The Preservation Order was endorsed with a penal notice.

7. On 27 November 2020 Chief Master Shuman made an order by consent that all further proceedings in the Conspiracy Claim should be stayed until after the final determination of the Fraud Claim. The trial of that claim was expedited and heard by me in February 2022. On 7 June 2022 I handed down a reserved judgment (the "**Fraud Judgment**") in which I dismissed the Fraud Claim in its entirety: see [2022] EWHC 1375 (Ch). On 29 June 2022 I dealt with consequential matters and on 12 July 2022 I dismissed Mr Tinkler's application for permission to appeal and ordered him to pay the costs of the Fraud Claim on the indemnity basis: see [2022] EWHC 1802 (Ch). I dealt with the Conspiracy Claim in my judgment at [30]:

> "Mr Leiper submitted that I should strike the Conspiracy Claim and make a number of consequential orders including orders for costs. I decline to do so. On 26 November 2020 Chief Master Shuman made an Order that all further proceedings in the Conspiracy Claim shall be stayed until this action had been concluded in its entirety and all rights of appeal had been exhausted. That point in time has not been reached and the stay continues in force until the Court of Appeal finally determine any appeal against the Judgment."

8. The Court of Appeal granted Mr Tinkler permission to appeal but on 9 June 2023 Sir Geoffrey Vos MR, Popplewell and Snowden LJJ dismissed the appeal: see [2023] EWCA Civ 655. Sir Geoffrey Vos MR (with whom the other members of the Court agreed) summarised Mr Tinkler's case at [2]:

> "Mr Tinkler's pleaded case before Leech J (the judge) was that new evidence that had been deliberately withheld from Judge Russen would have been highly material to the issues he had decided. It demonstrated that the witnesses had lied to Judge Russen, and was consistent with the existence of a pre-meditated plan to oust Mr Tinkler, which had been alleged before Judge Russen. Had the new evidence been disclosed, it would inevitably have changed Judge Russen's approach to the evidence and the way he came to his decision. On 7 June 2022, the judge gave a 479-paragraph judgment dismissing Mr Tinkler's claim to set aside Judge Russen's judgment."

9. I add that the new evidence upon which Mr Tinkler relied at the trial of the Fraud Claim included documents which Mr Soanes had disclosed in the ET Claim and which Mr Anderson QC had given Mr Tinkler permission to use for the purpose of both the Fraud

Claim and the Conspiracy Claim. In relation to the appeal, the Master of the Rolls accepted that I had not adopted an orthodox approach to the issues but he did not accept that this had led to the wrong result. He stated this at [17] to [19]:

> "17. As will appear from the rest of this judgment, I have decided that Mr Tinkler's appeal must fail. It is true that the judge approached his task in a somewhat unorthodox way, in that he started his treatment of each factual question by stating what Judge Russen had found as to that question. But he did not do so because he thought himself bound by what Judge Russen had decided, save where there was no new evidence on the point. He did so perhaps because he thought that Judge Russen's findings provided a convenient starting point for each of the factual findings that Mr Tinkler had invited him to make. The judge had anyway to consider Judge Russen's findings in order to determine materiality. Effectively, though, the judge put the cart before the horse. He considered (without retrying) the factual issues that Judge Russen had tried rather than starting with a consideration of the fraud issues that had been pleaded. The factual issues tried by Judge Russen ought only to have been re-considered in detail if the fraud action had succeeded before the judge, if Judge Russen's judgment was set aside, and when a new trial of those issues was ordered (see *Flower* at [13]-[14] above). But it was the parties' fault that this error occurred.
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> 18. The question is whether it now lies in the mouth of Mr Tinkler to seek a retrial of the fraud action on the basis that SGL and the judge acceded to his own request as to the process he should adopt. I do not think it does. The judge was right to baulk at retrying the issues before Judge Russen on different evidence (as he said at [33] set out above). His task, as he said more than once, was "to hear and evaluate the new evidence and then decide whether [Judge Russen's] findings could stand in the light of it".
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> 19. In the event, no damage was done by the unorthodox course urged upon the judge. It can be seen from a careful reading of the judge's treatment of the 16 issues that he fairly considered whether the allegedly critical documents had been deliberately concealed from the court, and whether the witnesses had perjured themselves (which, in both cases, he found they had not). In doing so, he considered the evidence that the parties had asked him to consider, including, where necessary, evidence that had been before Judge Russen. When the court asked Mr Wardell to provide examples of where the exercise the judge had undertaken had led to the wrong result, he was unable to provide a single compelling submission."

10. On 21 November 2023 Lord Reed, Lord Leggatt and Lord Richards dismissed Mr Tinkler's application for permission to appeal on the grounds that it did not raise an arguable point of law. This exhausted Mr Tinkler's rights of appeal and the Defendants invited Mr Tinkler to agree that the Conspiracy Claim should now be struck out. When

he declined to do so, they renewed the Applications. Their primary basis for doing so was that Mr Tinkler's stated position throughout the Fraud Claim was that he had accepted that the Conspiracy Claim was parasitic upon the Fraud Claim and that if he was unsuccessful in setting aside the Russen Judgment, then the Conspiracy Claim was an abuse of process.

11. In a witness statement dated 23 February 2024 Mr Anthony Field, who is a director of Rosenblatt, the First to Third Defendants' solicitors, drew attention to ten occasions on which Mr Tinkler or his legal representatives had made it clear in correspondence or in evidence or directly to the Court that the Conspiracy Claim had been stayed until the outcome of the Fraud Claim because it was an abuse of process whilst he remained bound by the Russen Judgment. For example, in a witness statement dated 23 March 2021 Mr Tinkler dealt with the Preservation Order and the issue of the Fraud Claim. He then continued at paragraph 34:

> "The same day my solicitors issued a second claim in the High Court against Stobart Group, Mr Brady, Mr Ferguson and Mr Soanes (Case Number BL-2020-002025) in which I am seeking damages from them for unlawful means conspiracy ("Conspiracy Claim"). This action has been stayed pending the determination of this Fraud Claim because I accept that pursuit of the Conspiracy Claim would be an abuse of process whilst the judgment in the 2018 Proceedings still stands. The evidence from the Respondents sought by this application is highly relevant to the Conspiracy Claim."

12. In a witness statement dated 19 April 2021 in support of his application for expedition of the Fraud Claim Mr Tinkler repeated this statement. I should also set out the context in which he repeated it:

> "16. To try and get to the bottom of the difference in outcomes between the 2018 Proceedings and the ET Proceedings, I undertook a full review of the 27 files of evidence in the 2018 Proceedings and 11 days of transcripts of the oral evidence and submissions and compared the same with the corresponding material in the ET Proceedings.
>
> 17. Over time, as I conducted this painstaking exercise, it gradually became clear to me that a number of highly relevant documents had been disclosed by Mr Soanes in the ET Proceedings that had not been disclosed by the Company in the 2018 Proceedings (the "Undisclosed Documents") [WAT2/2]. The Undisclosed Documents took the form of emails, attachments, text messages, WhatsApp messages and Telegram messages between Mr Soanes, Mr Brady, and others.

18. This was a huge task to undertake and took a significant amount of time. Initially, I conducted this review in consideration of harm that may have been caused to SCL and so with alternative proceedings in mind; I commenced a claim on behalf of SCL against Mr Soanes on 8 September 2020 where I referred to the Undisclosed Documents (BL-2020-MAN-000083) but at that point I was unclear as to the extent of any fraud against the Court involving the Company. My review was an iterative process and as my analysis developed I realised that the Judgment had been highly tainted by the absence of the Undisclosed Documents.

19. I do not propose to address all of the Undisclosed Documents in this witness statement as they are detailed in the Particulars of claim, served in these proceedings on 17 November 2020. However, in summary the court should be aware that the Undisclosed Documents and Defence issued by the Company reveal that relevant WhatsApp messages had been deleted and messages sent over an encrypted messaging platform (Telegram) were not disclosed and now appear to have been removed. I have also recently obtained expert evidence which demonstrates that Mr Brady (the Company's key witness) was not truthful in his witness evidence regarding a `contemporaneous' meeting note when the Judge heavily relied on Mr Brady's evidence during the proceedings [Exhibit Ref to Russen Judgment, paragraph179 [WAT2/3].

20. For the purpose of my present application, the Court need only be aware that the Undisclosed Documents consist of hundreds of communications, many of which are material and clearly demonstrate collusion by the Four Directors to remove me from the Company in order to further their own objectives. This was despite the fact that on 23 October 2018 (3 weeks before the commence [sic] of the trial) HHJ Kramer granted a Specific Disclosure Order. The significance of the Undisclosed Documents and the extent of the Company's failure to disclose the Undisclosed Documents was such that it is hard to see that the failure was anything other than deliberate, particularly when regard is had to what was disclosed by the Company in terms of documents contemporaneous with the Undisclosed Documents. This issue is fully set out in my Particulars of Claim served in these proceedings, see for example paragraphs 31 to 34.5.

21. In light of my discovery of the Undisclosed Documents, I conducted a further review of the oral testimony of Mr Brady, Mr Ferguson and Mr Soanes by reference to the contents of the Undisclosed Documents. That exercise revealed to me that Mr Brady, Mr Soanes and Mr Ferguson had each given false evidence in the course of their testimony during the Trial of the 2018 Proceedings in a number of material aspects.

22. Accordingly, I issued this Fraud Claim in the High Court (Case Number BL-2020-002022) on 13 November 2020 seeking to set aside the Judgment on the ground that it was obtained by fraud.

23. On same day, I issued a second claim in the High Court against the Company, Mr Brady, Mr Ferguson and Mr Soanes (Case Number BL-2020-002025) in which I am seeking damages from them for unlawful means conspiracy (the "Conspiracy Claim"). This action has been stayed

> pending the determination of this claim because I accept that pursuit of the Conspiracy Claim would be an abuse of process whilst the Judgment still stands."

13. On 14 September 2021 the parties gave disclosure in the Fraud Claim. There was then an intense period of activity leading up to the trial. On 25 January 2022 Mr Tinkler's team produced a note on the supplemental disclosure which SGL had given for the PTR which I heard at the end of January 2022. This note stated that between 9 November 2021 and 14 January 2022 SGL had given further disclosure of substantial numbers of documents on no fewer than fourteen occasions. The note also recorded that between 14 September 2021 and 14 January 2022 Mr Tinkler's then solicitors, Clyde & Co LLP ("**Clyde & Co**"), had sent Rosenblatt no fewer than twenty-two letters raising issues about the adequacy of SGL's disclosure and making repeated requests for further documents.

14. Thereafter, Mr Tinkler continued to maintain the position that it would be an abuse of process to proceed with the Conspiracy Claim if he was unsuccessful in setting aside the Russen Judgment. In his witness statement for trial dated 22 November 2021 he repeated paragraph 23 of his witness statement dated 19 April 2021: see paragraph 62. In their Skeleton Argument for the hearing on 29 June 2022 Mr John Wardell QC and Mr James McWilliams, who had appeared at trial for Mr Tinkler and were still instructed at that stage, also stated as follows:

> "24. On 22 June 2022, Esken proceeded to issue its application to strike out the Conspiracy Claim and to seek an order that Mr Tinkler pay the defendants' costs of the same on the indemnity basis.
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> 25. Mr Tinkler's position can be shortly stated: he accepts, as he always as done, that he cannot pursue his Conspiracy Claim for so long as this Court's Judgment stands. It does not follow from that fact, however, that it is appropriate at this juncture for the Conspiracy Claim to be struck out. Esken's Application is premature. As set out herein, Mr Tinkler seeks to appeal this Court's Judgment. Unless and until Mr Tinkler has exhausted his rights of appeal, he should be entitled to retain the Conspiracy Claim such that he can pursue the same in the event of his appeal is successful. There is no prejudice to the defendants to that claim in such a course: no substantive steps have been taken in relation to those proceedings and they are and will remain stayed.
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> 26. In the circumstances, the appropriate course is for this Court to adjourn Esken's Application pending the determination of Mr Tinkler's appeal (in the event that this Court accedes to Mr Tinkler's application for permission) or Mr Tinkler's application to the Court of Appeal for

permission to appeal and any appeal if permission is granted."

15. Finally, at the hearing on 29 June 2022 Mr Wardell relied on the order made by Chief Master Shuman but told me unequivocally and to avoid any misunderstanding that if Mr Tinkler's appeal failed, then he would serve notice of discontinuance and I quote from the relevant transcript:

> "My learned friend says he is going to invite you to make an order in respect of the conspiracy claim. I do not see how he can, with all due respect. If we look at the supplemental bundle, tab 7. MR JUSTICE LEECH: Sorry, supplemental bundle. I am looking at the authorities bundle. Supplemental bundle, yes. Yes. MR WARDELL: This is a consent order made in respect of the conspiracy claim at tab 7. It is ordered by consent, that "all further proceedings in this action shall be stayed until such a time as the fraud claim has been concluded in its entirety and when all rights of appeal have been exhausted". That is the beginning and end of it. No justification has been proffered by my learned friend as to the basis on which it is appropriate for them now to say (inaudible) a consent order. I accept that in the event it is all going to be academic, but I will make it absolutely clear on the record so there is no misunderstanding, that in the event of us not getting permission to appeal or in the event of getting permission to appeal but the appeal failing, then notice of discontinuance will be served in the ordinary way. But it is not appropriate for my learned friend to come before you and say you should tear up this consent. MR JUSTICE LEECH: In practical terms, it has no effect on the undertakings given by the individuals? MR WARDELL: No. MR JUSTICE LEECH: Mr Brady and Mr Ferguson. MR WARDELL: So that is all I need to say about that."

16. By email dated 8 December 2023, however, Mr Tinkler stated that he did not accept that the Conspiracy Claim should be struck out and he explained his reasons for taking that position as follows:

> "The order sought by the application is not agreed. There remain significant grounds on which the pleadings in the Conspiracy Claim can be made and evidenced and I intend to progress with this claim. Secondly, the Conspiracy Claim is not predicated on, or conditional on the outcome of the Fraud Claim. It is a standalone cause of action brought in its own right, the stay of this being to avoid duplication with the Fraud claim, but it does not follow that it is bound to fail upon the fraud claim being unsuccessful as the pleaded case in the Conspiracy Claim is far wider than the fraud. As such, I see no reason why Mr Justice Leech should be required to hear the order, and further, the order should be heard by a judge independent of matters between the parties.
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> To confirm, the application will be challenged as there remains more than reasonable grounds for bringing the Conspiracy Claim. With that it

> follows that there is no agreement to discharge the undertakings or consider any costs matters at this juncture. With regards to availability for a hearing, it would not be appropriate to require any response or attendance at a hearing prior to March 2024. As a litigant in person it would be wholly unreasonable and prejudicial to me to require any unnecessary expediency to these proceedings that would prevent me being able to adequately respond and prepare. Furthermore, your client(s) are not in any way prejudiced nor is there any requirement for expedition of matters given that the claim is currently stayed in any event. Any unreasonable timeframes or requests from your client that would prejudice me as a litigant in person will be brought to the attention of the court."

17. Mr Field confirmed in his witness statement that this was the first occasion on which Mr Tinkler had taken this position. He also stated that Mr Tinkler had paid the interim costs of £1,689,490 which I ordered him to pay following the dismissal of the Fraud Claim on 9 June 2023 once his application to the Court of Appeal had been dismissed but that the detailed assessment proceedings have still not been concluded. Mr Tinkler did not challenge this evidence. Indeed, in his own witness statement dated 16 February 2024 in opposition to the Applications he asked the Court to stay any further costs proceedings until after the determination of the Conspiracy Claim.

18. In his witness statement Mr Tinkler also explained that he made the comments in his witness statements (above) before he had received full disclosure and in his capacity as a director of SGL not as a shareholder of the company:

> "The defendants' application is based on comments made during Non-Party disclosure applications in November 2020, as well as the Claimant's witness statements in 2021. These statements are particularly relevant in reference to the former counsel's skeleton in the consequential hearing related to the Fraud Claim in 2022, during which the Claimant was not in attendance. It's important to emphasise that the SGL claim against the Claimant in 2018 was made in his capacity as an employee and director of SGL, not as a shareholder. The comments in the Claimant's witness statements were made before I received full disclosure in the 2022 proceedings, which revealed that the new disclosure changes the narrative and involves further culpable third parties."

19. He also explained the statements made by his counsel and solicitors on the basis that they had been instructed on a narrower basis in relation to the Fraud Claim but that the Conspiracy Claim was much wider in scope:

> "c) It's important to note that the claimant's solicitors and counsel were initially instructed on a much narrower issue within the Fraud Claim. Therefore, any comments they made were made, within that narrow context. As mentioned earlier, the scope of the conspiracy claim is significantly broader than the Fraud Claim. The conspiracy claim operates as a separate cause of action, with broader implications. With the improved understanding of the parties involved in the conspiracy and the dishonest assistance, this broader context becomes clearer. d) Therefore, my solicitors and counsel were not appraised of all the facts that will make up
> the pleadings and evidence for the Conspiracy, as they were instructed on a different matter. This was mainly due to the defendant's non-disclosure. e) Clearly, if the deliberate non-disclosure had been disclosed in 2018, it would have allowed the Claimant to fully understand the narrative and amend the pleadings to include the Conspiracy and Dishonest Assistance, carried out by third parties, assisting the Defendants, and involved the largest minority shareholder, Invesco Asset Management Limited. I have set out in detail, the disclosure I received in the 2018 Proceedings relating
> to Invesco and the Take Over Panel. In the 2018 proceedings, only one email relating to the Take Over Panel submissions involving Invesco was disclosed as set out on [P227-228]. In the 2022 Proceedings a further 80 emails were disclosed as set out on [P229-237]. This I allege was deliberate concealment. This disclosure would have identified the competing groups of shareholders, frustrating actions undertaken, and the instructions given to directors, which the directors acted, overriding their independent mind. All these acts influenced the Board."

20. This summary provides a sufficient background to enable me to introduce the Conspiracy Claim and the Defendants' challenge. The reader of this judgment will find a detailed description of the background to the 2018 Claim in the Russen Judgement at [1] to [37] and the detailed background to the Fraud Claim and the ET Claim in the Fraud Judgment at [180] to [207]. For convenience, I adopt the defined terms and abbreviations which I used in the Fraud Judgment in the remainder of this judgment. It will also be necessary for me to introduce further procedural aspects of both claims in considering the merits of the Applications. It is more convenient for me to do so in that context.

III. The Conspiracy Claim

21. Given these explanations I turn to consider the scope of the Conspiracy Claim itself. As originally pleaded, the claim mirrored the Order made by Mr Anderson QC (above). Mr Tinkler was only given permission to rely on the documents disclosed in the ET Claim "in connection with the 2018 Proceedings and the Applicant's dismissal as an employee

of Stobart Group and removal as a director". It is unsurprising, therefore, that in the Conspiracy Claim Mr Tinkler alleged that he was entitled to damages for an unlawful means conspiracy the purpose of which was to dismiss him as an employee and remove him as a director:

> "The Claimant was a director, employee and shareholder of the First Defendant. The Second Defendant was a director of the First Defendant and its Chief Executive Officer. The Third Defendant was a director of the First Defendant and its Chairman. The Fourth Defendant was a director of Stobart Capital Limited. The Claimant is entitled to and claims damages as against the Defendants in the tort of unlawful means conspiracy in circumstances where:
>
> i. in or around early 2018, the Defendants or some of them combined and conspired together with the intention of injuring the Claimant, their objective being to secure his dismissal as an employee and removal from office as a director of the First Defendant;
>
> ii. the unlawful means by which the conspiracy was carried out included (a) the breach by the First Defendant of the Claimant's contract of employment; (b) the breach by the Second and Third Defendants of their fiduciary duties to the First Defendant; (c) the giving of false evidence by the Second and Fourth Defendants at the trial of proceedings brought by the First Defendant against the Claimant in 2018; and (d) the First Defendant's fraud upon the Court in the proceedings brought against the Claimant in 2018;
>
> iii. the Defendants' conspiracy succeeded in its objective with the result that the Claimant was dismissed as an employee of the First Defendant and removed from office as a director without legitimate justification or lawful basis; and
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> iv. the Claimant suffered loss and damage by reason of the conspiracy in that (a) his dismissal as an employee and removal from office deprived him of the share award that would otherwise have enured to him under the First Defendants Long Term Incentive Plan; and (b) the conspiracy and, in particular, the First Defendants fraud upon the Court pursuant to the same caused him to incur costs in the 2018 proceedings that he would not otherwise have incurred."

22. However, in his witness statement dated 16 February 2024 Mr Tinkler sought to reformulate the Conspiracy Claim. He emphasised the fact that the first paragraph of the indorsement already stated that he was a shareholder of SGL. But he sought to amend the particulars given below the second full paragraph in the following way:

> "(i) in or around early 2018, the Defendants or some of them combined and conspired together with the intention of injuring the Claimant, their objective being to ~~secure his dismissal as an employee and removal from~~

> ~~office as a director of the First Defendant;~~ execute this by using the board's powers, breaching their duties to control and influence the AGM vote, ultimately for self-interest and financial gain, by securing the Third Defendant's seat on the board, a decision designated to the general body of shareholders.
>
> (ii) the unlawful means by which the conspiracy was carried out included (a) the breach by the First Defendant of the Claimant's contract (the Claimant has right's [sic] through the [Article]s of Incorporation) ~~of employment~~; (b) the breach by the Second and Third Defendants of their fiduciary duties to the First Defendant; ~~(c) the giving of false evidence by the Second and Fourth Defendants at the trial of proceedings brought by the First Defendant against the Claimant in 2018~~; ~~and (d) the First Defendant's fraud upon the Court in the proceedings brought against the Claimant in 2018;~~ (and breach of fiduciary and regulatory duties owed by the additional defendants)
>
> (iii) the Defendants' conspiracy succeeded in its objective with the result that the Claimant was dismissed as an employee of the First Defendant and removed from office as a director without legitimate justification or lawful basis (by gerrymandering the vote at the AGM to keep the third Defendant the Chairman's seat on the Board of SGL after the AGM); and
>
> (iv) the Claimant suffered loss and damage by reason of the conspiracy in that ~~(a) his dismissal as an employee and removal from office deprived him of the share award that would otherwise have enured to him under the First Defendant's Long Term Incentive Plan; and (b) the conspiracy and, in particular, the First Defendant's fraud upon the Court~~ as a shareholder of SGL, the Second and Third Defendants breached their fiduciary duties
> to the First Defendant and by acting in self-interest and for personal gain, taking frustrating actions, that were Ultra Vires for an improper purpose while using their powers to influence the outcome of a general meeting. This represents not just an abuse of power for a collateral purpose, but also violates the constitutional distribution of powers within the company. It involves the misuse of the board's powers to control or influence a decision designated to the general body of shareholders as outlined in the company's constitution. pursuant to the same caused him to incur costs in the 2018 proceedings that he would not otherwise have incurred."

23. Mr Leiper and Mr Way did not object to Mr Tinkler putting these amendments before the Court or to the Court approaching the Applications on the basis that Mr Tinkler should be treated as having made an application for permission to amend the Claim Form in the form which I have set out immediately above and I approach the Applications on that basis. But I should also record that Mr Leiper and Mr Way submitted that the Conspiracy Claim was bound to fail even in this amended form.

24. Mr Tinkler also stated in his witness statement that he had served Letters of Claim on

third parties including Mr Anthony Field and Mr Ian Rosenblatt of Rosenblatt on the basis that they were parties to the conspiracy and that, if necessary, he would apply to join them and a company called RBG Legal Services Ltd ("**RBG**") at a later date. In their Skeleton Argument Mr Leiper and Mr Isenberg acknowledged that Letters of Claim had been served on Mr Field and Mr Rosenblatt but also stated that they were not aware that Mr Tinkler had intimated to any other parties that he intended to join them to the Conspiracy Claim. In the Letters of Claim themselves, Mr Tinkler stated that he intended to join a number of other parties, namely, Invesco, Mr Frederick Bouverat, Mr Matthew Frazier, Mr Leon Ferrera, Jones Day, Mr David Arch and Stifel.

25. Mr Tinkler also set out a narrative of events in his witness statement for the period between 1 May 2018 and 14 June 2018 focussing on Project Shelley (the "**Project Shelley Narrative**"). I will have to return to this narrative below but I described Project Shelley briefly in the Fraud Judgment at [154] to [156]. Mr Tinkler's evidence was that in July 2023 he raised concerns about the Defendants' conduct with the Takeover Panel based on the documents which had been disclosed to him in the ET Claim and the Fraud Claim. He then summarised the Project Shelley Narrative as follows:

> "36. I firmly believe the evidence presented above, clearly demonstrates that the Defendants have undertaken a deliberate strategy, established 'Project Shelley' and initiated a "war room" to "fight like tigers" approach, to aggressively secure the re-election of the Third Defendant at the upcoming AGM. It appears that they have overlooked their duties concerning director powers and independence and have undertaken actions that impede my rights as a shareholder of SGL. My intention was to convey to the entire board my decision to vote against the re-election of the Third Defendant at the upcoming AGM, to ensure that the Board was aware of my concerns.
>
> 37. The above demonstrates the commencement of the Conspiracy, and is only a short extract over several weeks, which accelerates over the following months. This is set out in the consolidated book of disclosed and undisclosed material, which I now exhibit to this statement. [P,8-205]. The Fourth defendants' evidence before the Court, was that he had no involvement with SGL. It is submitted that when one reads the written evidence of the Fourth defendant, prepared by Rosenblatt's [sic], and the statement of truth signed by the Fourth defendant, alongside the transcript of the oral evidence in the 2018 proceedings, this evidence undermines the evidence provided, and demonstrates an Unlawful Means Conspiracy along with Dishonest Assistance."

26. Finally, in his Skeleton Argument Mr Tinkler identified seven issues or allegations which the Court should try in relation to the Conspiracy Claim. He submitted that His Honour Judge Russen QC was not asked to make and made no findings on those "shareholder" issues, that they were very serious and that they had never been previously brought before the Court. He concluded as follows:

> "The Claimant has undertaken extensive work, in now understanding the wholesale non-disclosure, which the defendants now seek to blame their solicitors Rosenblatt's [sic]. The Court is reminded of the submissions made by counsel Mr Wardell KC at the opening, on 7 February 2022, addressing the issues in respect of disclosure. It can be seen reference was made to the disclosure statement signed by Mr Brady. There was also a second and third disclosure statement produced and signed by Simon Walton [Partner of Rosenblatt] on 26 and 29 October 2018. The second and third disclosure statement was provided following the Specific Disclosure Order of HHJ Kramer dated 26 October 2018. It is also now revealed that all the disclosure statements were deficient, and misleading, when considering the consolidated book of disclosed and undisclosed material. The blue entries are the messages disclosed by D4 in the employment tribunal proceedings. The black entries are what was disclosed by Rosenblatt. The red entries, which I will refer to the "sea of red," are the undisclosed messages/ documents in the 2018 proceedings. The Green entries are what was disclosed in 2018 but not in the Court bundle. The column headed responsive confirms whether the document/message responded to an "Agreed Search Term"."

27. For his oral submissions Mr Tinkler produced a speaking note which he followed closely in developing his argument. He focussed on what he described above as "the consolidated book of disclosed and undisclosed material" (the "**Disclosure Book**"). In hard copy this consisted of an A3 bundle containing five individual tabs (each a "**Tab**"): 11, 22, 42, 43 and 44. Each consisted of a spreadsheet containing emails and other electronic messages colour-coded in the way in which Mr Tinkler explained above. Each spreadsheet also contained an analysis showing when the message was disclosed and whether it was responsive to any of the search terms against which SGL was ordered to search in the 2018 Claim. I consider this evidence in detail when I address each of the seven issues which Mr Tinkler submitted that he was entitled to take to trial below. But before I do so, I consider the legal principles which I must apply.

IV. The Law

A. Admissions

28. CPR Part 14.2(1) provides that after the commencement of proceedings a party may admit the whole or any part of another party's claim or case by notice in writing. CPR Part 14.2(11) also provides that the court's permission is required to amend or withdraw an admission. CPR Part 14.5 provides the following guidance in relation to any application for permission to withdraw an admission:

> "In deciding whether to give permission for an admission to be withdrawn, the court shall consider all the circumstances of the case, including— (a) the grounds for seeking to withdraw the admission; (b) whether there is new evidence that was not available when the admission was made; (c) the conduct of the parties; (d) any prejudice to any person if the admission is withdrawn or not permitted to be withdrawn; (e) what stage the proceedings have reached; in particular, whether a date or period has been fixed for the trial; (f) the prospects of success of the claim or of the part of it to which the admission relates; and (g) the interests of the administration of justice."

29. In *Cavell v Transport for London* [2015] EWHC 2283 (QB) William Davis J (as he then was) cited the judgment of Ward LJ in *Woodland v Stopford* [2011] EWCA Civ 266 at [26] as authority for the proposition that CPR Part 14.5 confers a wide discretion, that the Court should balance each of the factors set out above but that the weight to be attributed to each factor would vary from case to case:

> "Cases will vary infinitely and the weight to be given to the relevant factors will inevitably vary from case to case. Sometimes the lack of new evidence and the lack of explanation may be the important considerations; in others prejudice to one side or the other will provide a clear answer and in all the interests of justice will sway the balance. It would be wrong for this court to circumscribe the manner of the exercise of this discretion or to give any more guidance than is trite, namely, carry out the task set by the Practice Direction, weigh each of the identified factors as well as all the other circumstances of the case and strike a balance with due regard to the overriding objective."

30. In *Cavell* itself the defendant applied to withdraw an admission of liability for personal injury. William Davis J refused permission. He rejected the argument that the admission had been made in error or that it would prevent the defendant from obtaining a contribution from a contractor. He stated as follows at [15] and [16]:

> "Since the grounds relied on by the Defendant have no substance the

> application must fail. In fact it goes further than that. This is a case in which it is said that the admission was made in error. No explanation at all is offered as to how this error was made. The firm which made the error is hugely experienced in the type of claim involved here. An initial denial of liability was followed by a lengthy review of the decision by the firm with at least one senior member of staff being involved. The firm consulted the Defendant in the course of that review. Whilst the review was in train the repair of November 2013 was carried out. All of the external evidence suggests a careful consideration of the available material and a reasoned decision based on that material. I have been provided with no evidence whatsoever to undermine that proposition. In those circumstances the total lack of any explanation coupled with the lack of any new evidence – or at least no new evidence which might support the pleaded Defence – is of very considerable significance. They are the "important considerations" in this instance (to use the language of *Woodland*). The final consideration within the list set out in the Practice Direction is the "interests of the administration of justice." It cannot be in those interests to permit the withdrawal of an admission made after mature reflection of a claim by highly competent professional advisors when there is not a scintilla of evidence to suggest that the admission was not properly made. Were it to be otherwise civil litigation on any sensible basis would be impossible."

31. *Woodland v Stopford* and *Cavell* provide very useful guidance on how the Court should exercise the discretion in CPR Part 14.5. But *Cavell* also demonstrates that a party may be bound by an admission of law in just the same way as an admission of fact. Indeed, this is implicit in CPR Part 14.1 which provides that a party may admit the whole or any part of another party's case. For my part, I can see no reason why a party should not be bound by an admission that their claim is an abuse of process or bound to fail.

B. Abuse of Process

32. CPR Part 3.4 provides that the Court may strike out a statement of case on the following grounds:

> "3.4— (1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case. (2) The court may strike out a statement of case if it appears to the court— (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or (c) that there has been a failure to comply with a rule, practice direction or court order."

33. On 26 June 2018 Mr Tinkler commenced proceedings for defamation against Mr

Ferguson, Mr Brady, Mr Coombs, Mr Laycock and Mr Wood and I will refer to these proceedings as the "**Defamation Claim**". Following the determination of certain issues by Nicklin J, Mr Tinkler abandoned his claim for defamation but pursued a claim for malicious falsehood. When His Honour Judge Russen QC dismissed the 2018 Claim, the defendants to the Defamation Claim applied to strike out the malicious falsehood claim as an abuse of process because it was an attempt to re-litigate the 2018 Claim or a collateral attack on the Russen Judgment. Nicklin J struck out the claim and his decision was upheld by the Court of Appeal: see [2021] 4 WLR 27.

(1) General Principles

34. Peter Jackson LJ began his analysis of the law by citing the earlier decision of the Court of Appeal in *Michael Wilson & Partners Ltd v Sinclair* [2017] 1 WLR 2646 at [48] (upon which Mr Leiper and Mr Way also relied):

> "(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in *Hunter's* case [1982] AC 529, Lord Hoffmann in the *Arthur J S Hall* case [2002] 1 AC 615 and Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter's* case. Both or either interest may be engaged.
>
> (2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse: see *Bragg v Oceanus* [1982] 2 Lloyd's Rep 132; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the *Arthur J S Hall* case.
>
> (3) To determine whether proceedings are abusive the court must engage in a close merits based analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in *Johnson v Gore Wood & Co* and Buxton LJ in *Laing v Taylor Walton* [2008] PNLR 11.
>
> (4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within the spirit of the rules, see Lord Hoffmann in the *Arthur J S Hall* case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies

> in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the *Bairstow* case [2004] Ch 1; or, as Lord Hobhouse put it in the *Arthur J S Hall* case, if there is an element of vexation in the use of litigation for an improper purpose.
>
> (5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in *In re Norris*.
>
> To which one further point may be added.
>
> (6) An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160, para 17 as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of a discretion. Nevertheless, in reviewing the decision the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the *Laing v Taylor Walton* case, para 13."

35. Peter Jackson LJ then continued his analysis by considering a number of examples. He confirmed that the power to strike out for abuse of process is a flexible power unconfined by narrow rules but cautioned that it must be used with care and that it will be a rare case where the litigation of an issue which has not already been decided between the same parties and their privies will amount to an abuse: see [35]. However, he concluded that the Defamation Claim was such a case for the following reasons at [62]:

> "After this broad review of the extensive submissions it is necessary to step back and recall the crucial question: in all the circumstances was Mr Tinkler abusing or misusing the court's process by continuing the Malicious Falsehood Action? Despite Mr Wardell's spirited presentation, which hits the mark in one respect (ground 3— *Aldi*) and gives food for thought in others, the Malicious Falsehood Action was in my view, formed independently of the Judge's reasoning, rightly struck out. It is the rump of the original defamation action and concerns just one element in a sequence of many interconnected elements, all of which (not least the RNS Announcement itself) were exhaustively examined in the Russen Judgment, whose findings have been effectively recognised by both parties in their pleadings as binding. In both sets of proceedings Mr Tinkler is making the same essential complaint about the same individuals. On the specific facts of this case, that amounts to a collateral attack on the previous findings. These features bring the case into the rare group where litigation is abusive although it is not formally between the same parties or their privies. I would reach this conclusion in relation to both Meanings, as (b) is so interconnected to (a) but adds so little to it; but were it necessary I would hold that any residual issues under Meaning (b) that are not directly covered by the Russen Judgment are of

> such small significance that they do not begin to justify the resources that would be necessary to resolve them, and I would despatch them under Jameel. Those residual issues are quintessentially part of "the give and take of business life" and there is no proportionate way in which they could be determined. The RNS Announcement cannot be separated from earlier and later events and the court would have to rehear a great deal of similar evidence from the same witnesses. That would be manifestly unfair to the respondents and an improper use of the court process. In boxing terms, the judges have scored the round and no good private or public interest is served by continuing the argument about a single punch."

(2) Collateral Attack

36. There is a difference between those cases in which a party seeks to re-litigate an issue which the Court has decided in earlier proceedings to achieve a different outcome and those cases in which a party seeks to raise an issue which was not decided at all. The first category of cases involve a collateral attack on a decision of the Court and, as Mr Leiper and Mr Isenberg submitted, are closely related to *res judicata* and other forms of estoppel. The usual reason why they do not engage the doctrine of *res judicata* is that they involve different parties who were not privy to the original decision. It may be an abuse of process to mount a collateral attack on an earlier decision but not necessarily so. It will depend on the connection between the parties to the respective claims and the extent to which the claim involves the unjust harassment or oppression of the new parties: see *Shah v Shah* [2010] EWHC 313 (Ch) at [82] and [83] (Roth J).

(3) Henderson v Henderson abuse

37. But it may be an abuse of process not only to attempt to re-litigate a claim or issue which has been determined in earlier proceedings but also to attempt to litigate a claim or issue which a party could or should have raised in those earlier proceedings. I will refer to this as *Henderson v Henderson* abuse. In *Moorjani v Durban Estates Ltd* [2019] EWHC 1229 (TCC) Pepperall J summarised the relevant principles at [17.4]:

> "Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in *Henderson v. Henderson* where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application: a) The onus is upon the applicant to establish abuse. b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the

> second action is abusive. c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case. d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant."

(4) The Aldi Guidelines

38. In *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748 the Court of Appeal addressed the question whether a party could reserve the right to bring further proceedings in relation to closely related issues. Clarke LJ (as he then was) considered that it was incumbent upon such a party to raise the issue with the Court. He stated this at [30] and [31]:

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

39. The editors of Civil Procedure (2024 ed) describe this passage as the "*Aldi* guidelines": see Vol 1 at 3.4.7. Moreover, in *Clutterbuck v Cleghorn* [2017] EWCA Civ 137 the Court of Appeal held the guidelines were mandatory and that it was incumbent upon a party to put their cards on the table to enable the Court to decide how best its resources could be utilised. The Court also held that an inexcusable failure to comply with the

Aldi guidelines was a relevant factor in assessing whether a party was abusing the process of the court: see [81]. In *Moorjani v Durban Estates Ltd* (above) Pepperall J rejected the submission that the *Aldi* guidelines applied to a County Court action for breach of a repairing covenant but he held nevertheless that it was abusive to bring a second claim: see [38.4] to [38.6].

(5) Strike Out

40. Mr Tinkler cited the decision of the Court of Appeal in *Orji v Nagra* [2023] EWCA Civ 1289 as authority for the proposition that to strike out a claim for abuse of process is a draconian step which the Court should not undertake lightly. In that case, the Appellants brought a claim for trespass. They were subsequently convicted of a number of offences arising out of the same incidents but their convictions were quashed on appeal. About a year later they issued a claim for malicious prosecution. The Respondents applied to strike it out on the basis that the Appellants had earlier applied for permission to amend their trespass claim without adding a claim for malicious prosecution.

41. The Court of Appeal held that in principle the rule in *Henderson v Henderson* can apply to earlier interlocutory decisions in the same proceedings: see [44] to [47]. But they also held that *Henderson v Henderson* abuse had no application to the facts of the instant case. Coulson LJ gave the following reasons at [48] to [50]:

> "48. I am in no doubt that the rule in Henderson v Henderson has no application to the facts of the present case. That is because there was no relevant determination by DJ Stewart which could legitimately prevent the appellants' subsequent pursuit of the malicious prosecution claim.
>
> 49. At the time of the hearing before DDJ Payne, there was a trespass claim which had not got beyond the pleading stage, and a later malicious prosecution claim, arising out of the same incident (but with many different features), which had also not got beyond the pleading stage. There had been no determination by the court of any substantive issue. The appellants could not be accused of trying to go behind some earlier determination of the court, because there had not been one. The only determination that DJ Stewart made was allowing the appellants permission to reamend the trespass claim. On the face of it, that had nothing to do with the existence or otherwise of the separate malicious prosecution claim, which had not even been commenced.
>
> 50. On that basis, therefore, it is impossible to see how the rule in Henderson v Henderson could have any general applicability to this case.

> It might be different if the trespass claim had been fought through to a trial and been determined by the court by August 2020. In those circumstances, the commencement of the malicious prosecution claim in October 2020 may well have fallen foul of the rule, because it could and should have been raised before the trespass trial. But that was all a long way off in August 2020, when the trespass claim had not got beyond the pleading stage, and the only determination was the permission to make some reamendments."

42. Coulson LJ pointed out, however, that the power to strike out a statement of case for abuse of process is not limited to *Henderson v Henderson* abuse. After setting out CPR Part 3.4 he gave the following guidance about abuse of process more generally:

> "56. A party seeking to obtain a finding that there has been an abuse of process faces a high hurdle. Abuse of process has been defined as the use of the court process "for a purpose or in a way significantly different from its ordinary and proper use": *Attorney General v Barker* [2000] 1 FLR 759, DC, Lord Bingham of Cornhill. It needs to be shown that the conduct of the party in question is so objectionable that they should forfeit their right to take part in a trial, such as where that party is determined to pursue proceedings with the object of preventing a fair trial (through the use of forgeries and perjured evidence): *Arrow Nominees Inc v Blackledge* [2000] BCLC 167 , CA.
>
> 57. In the context of more than one set of proceedings, *Dexter Ltd v Vlieland-Boddy* [2003] EWCA Civ 14 at [49] is authority for the proposition that a later action will usually only amount to abuse of process if it involves unjust harassment or oppression. *Aldi Stores Ltd v WSP Group PLC & Ors* [2000] EWCA Civ 1260 at [21] and [39] gives guidance to the effect that a party who learns of a second intended action and considers that it may be oppressive (and therefore an abuse) should say so promptly rather than waiting and then applying to strike out under this ground.
>
> 58. Striking out a claim is a draconian remedy. Even in a case where abuse may be made out, it does not necessarily follow that the claim should be struck out: *Biguzzi v Rank Leisure PLC* [1999] 1 WLR 1926 and *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607. The remedy of striking out must be proportionate in all the circumstances. There are obviously numerous alternative remedies, so the striking out of a valid claim should always be the last option."

C. Conspiracy

43. Mr Tinkler also relied on a number of authorities in relation to breach of section 171(b) of the Companies Act 2006 and the proper purpose rule: see, e.g., *Eclairs Group plc v JKX Oil & Gas plc* [2016] BCLC 1 and *TMO Renewables Ltd v Yeo* [2021] EWHC

2033 (Ch). He placed particular reliance on the decision of Joanna Smith J in *TMO Renewables* because of the particular facts of that case, in which the liquidator of a company alleged that directors had acted for an improper purpose, recklessly, in bad faith in engineering the outcome of a general meeting (although I should record that the claim was ultimately dismissed).

44. Mr Tinkler also relied on *Canada Square Operations Ltd v Potter* [2023] UKSC 41 in which the Supreme Court considered the scope of deliberate concealment within section 32(1)(b) of the Limitation Act 1980 and a number of authorities dealing with the deliberate destruction of documents or the suppression of evidence: see *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167, *Royal Bank of Scotland plc v Highland Finance Partners LP* [2013] EWCA Civ 328 and *Active Media Services Inc v Burmester Duncker and Joly GmbH* [2021] EWHC 352 (Comm). I am prepared to accept for the purposes of these Applications (without deciding) that directors who commit a breach of their duty under section 171 and then combine with their solicitors to destroy documents or evidence of their breach of duty may be liable for the tort of unlawful means conspiracy.

V. CPR Part 14.2

D. The Admission

45. In my judgment, Mr Tinkler made a clear and unequivocal admission that it was an abuse of process to pursue the Conspiracy Claim if the Fraud Claim failed and the Russen Judgment remained binding on him. He made that admission expressly in his witness statements dated 19 April 2021 and 22 November 2021. Mr Wardell and Mr McWilliams repeated that admission in their Skeleton Argument for the hearing on 29 June 2022 and Mr Wardell repeated it orally in his submission to me. Although he did not use the words "abuse of process" he gave an assurance to the Court that Mr Tinkler would serve notice of discontinuance if the Fraud Judgment stood and Mr Tinkler's rights of appeal were exhausted. It was implicit in his submission that he accepted that it would be an abuse of process to pursue the Conspiracy Appeal if the Mr Tinkler's appeal failed and he remained bound by the Russen Judgment.

E. Withdrawal

(1) Grounds

46. In my judgment, this is sufficient to dispose of the Applications by itself because Mr Tinkler made no application for permission to withdraw this admission either in his Skeleton Argument or in his oral submissions. He did not advance any grounds for withdrawing the admission beyond the evidence which I have set out (above) and I cannot attribute any weight to grounds which were never put forward. However, given that Mr Tinkler was acting in person I go on to consider whether I should allow him to withdraw the admission on the basis of the explanations which he gave.

(2) New Evidence

47. Mr Tinkler's evidence was that he made the statements in his witness statement before disclosure in the Fraud Claim. He also stated that he initially instructed solicitors and counsel on a narrow basis in relation to the Fraud Claim only. I accept this evidence. It is obvious that Mr Tinkler instructed his solicitors and counsel to obtain permission from the Court to rely on the documents which Mr Soanes had disclosed in the ET Claim for the narrow purpose set out in the Order dated 6 November 2020 and that the Conspiracy Claim was issued on that basis.

48. Indeed, the instructions which Mr Tinkler gave to his legal team make perfect sense. As Mr Leiper submitted, the purpose of the Conspiracy Claim was to preserve Mr Tinkler's right to recover the costs of the 2018 Claim and any consequential losses which he had suffered if the Fraud Claim was successful and the Russen Judgment was set aside. He was no doubt advised that he would be entitled to recover the costs of the Fraud Claim in those proceedings but that he might need to issue a separate claim to recover the costs of the 2018 Claim and any consequential losses which he had suffered even if the costs orders which His Honour Judge Russen QC had made in the 2018 Claim were ultimately set aside. Finally, he was obviously advised that this would preserve his position against the individual Defendants who had participated in the fraud on the Court.

49. Mr Tinkler also gave evidence in his witness statement that he firmly believed that the Conspiracy Claim enabled him to pursue a separate claim as shareholder irrespective of the success of the Fraud Claim. He also gave the impression that he had only recently appreciated that he was entitled to do so. For example, he introduced his description of

the Conspiracy Claim in paragraph 6(c) with the words: "It has become evident"; and in paragraph 8(f) with the words: "It is now revealed". He also referred to concerns which he had about the conduct of the Defendants following the consultation paper issued by the Code Committee of the Takeover Panel on 15 May 2023. This no doubt explains why Mr Tinkler focussed on the submissions to the panel which formed part of Project Shelley.

50. However, Mr Tinkler did not give evidence about when he decided to pursue the Conspiracy Claim whether or not the Fraud Claim succeeded. Nor did he explain why he did not give immediate instructions to his solicitors and counsel to apply to withdraw the admission in his witness statements and to inform the Defendants that he intended to pursue the Conspiracy Claim even if his rights of appeal were exhausted. I accept that I should not draw any adverse inference from Mr Tinkler's decision not to waive legal professional privilege. But he could have provided a clear explanation of these matters without doing so. I therefore attribute little weight to Mr Tinkler's evidence that he originally made the admissions before full disclosure had been given in the Fraud Claim and to his evidence that he originally instructed his legal team on a limited basis.

51. Moreover, even if Mr Tinkler did not take the decision to pursue the Conspiracy Claim until after his appeal to the Supreme Court was dismissed, he did not identify any new evidence which came to light after 21 November 2023 which would justify the withdrawal of the admission. Nor did he identify any documents which had come from a different source other than SGL's disclosure in the Fraud Claim. Accordingly, I am not satisfied that there is any new evidence which was not available when the admission was made by Mr Tinkler in his evidence or repeated by Mr Wardell.

(3) Conduct

52. By contrast, I do attribute significant weight to Mr Tinkler's failure to take any action to withdraw the admission until 8 December 2023. SGL gave disclosure in the Fraud Claim on 21 September 2021 and further disclosure which was completed on 14 January 2022. In my judgment, Mr Tinkler ought to have taken steps to withdraw the admission by the PTR which took place before me on 26 January 2022. I am also satisfied that the Fraud Claim and the Conspiracy Claim involved "complex

commercial multi-party litigation" and they fell squarely within the *Aldi* guidelines. Accordingly, it was incumbent upon Mr Tinkler to draw the Court's attention to the Conspiracy Claim and invite the Court to consider what case management directions to give if he wished to pursue the claim separately from the Fraud Claim.

53. If Mr Tinkler had applied to withdraw the admission at the PTR and complied with the *Aldi* guidelines, it is likely that I would have refused him permission to withdraw the admission. But even if I had been prepared to permit him to do so, I would have insisted that the Conspiracy Claim and the Fraud Claim were heard together and that it would be necessary to adjourn the trial of the Fraud Claim. I would then have put Mr Tinkler to his election whether to stand by the admission or to pay the costs thrown away by the adjournment of the trial (which was due to start within four weeks). I have very little doubt that faced with this choice Mr Tinkler would have chosen the former option and the trial would have gone ahead.

54. Finally, I also attribute significant weight to the fact that Mr Tinkler has made no application for permission to rely on the documents which Mr Soanes disclosed in the ET Claim for the purpose of the Conspiracy Claim (as currently formulated). In his Order dated 6 November 2020 Mr Anderson gave him permission to use those documents in connection with the 2018 Claim and his dismissal as an employee of SGL and his removal as a director. He did not give Mr Tinkler permission to use those documents for the purposes of a standalone claim in his capacity as a shareholder of SGL. If Mr Tinkler had wanted to use the documents for that purpose and, indeed, for the purpose of opposing the Applications, he ought to have applied promptly for permission to do so. He has still not done so.

(4) Prejudice

55. In my judgment, it would involve significant prejudice to the Defendants if I were to permit Mr Tinkler to withdraw the admission. Whether or not the Conspiracy Claim is an abuse of process, the Defendants will be vexed with a second claim which is very closely related to the 2018 Claim, the Fraud Claim and the Defamation Claim. They will also be unable to recover the outstanding costs of the Fraud Claim (assuming I accede to Mr Tinkler's application that I stay all further costs proceedings). Moreover, if Mr Tinkler had applied to withdraw the admission promptly and complied with the

Aldi guidelines when he should have done, then the Defendants would have avoided this duplication of proceedings. Mr Tinkler should not be able to rely on his own delay to avoid the effect of the election to which I would have put him.

(5) Stage of Proceedings

56. I attribute little or no weight to the fact that this issue has arisen at a very early stage of the Conspiracy Claim. On 27 November 2020 it was stayed by consent. Moreover, Mr Tinkler accepted in terms in his witness statement dated 21 March 2021 that it was stayed because he accepted that it would be an abuse of process to pursue the Conspiracy Claim whilst the Russen Judgment still stood. If Mr Tinkler is correct and he is entitled to pursue it as a standalone claim, then it should not have been stayed for almost four years.

(6) Merits

57. I deal with the seven issues which Mr Tinkler invites the Court to decide in section VI (below). However, Mr Tinkler failed to persuade me that the merits of the Conspiracy Claim were strong enough to outweigh the considerations which I have already set out. In the Fraud Claim he invited me to make 16 individual findings of fact on the basis of many of the documents upon which now relies. However, I refused to make any of those findings of fact and I dismissed the Fraud Claim in its entirety. In particular, I dismissed the allegation that Mr Brady and Mr Ferguson devised a premeditated plan to remove or neutralise Mr Tinkler: see [355].

58. Moreover, it was unnecessary for me to make findings of fact in relation to Project Shelley or the Stifel Engagement Letter because Bacon J refused him permission to amend on 18 November 2021. She did so on the basis that Mr Tinkler had all of the relevant documents available to him and that His Honour Judge Russen QC had squarely addressed these issues in the Russen Judgment. She stated as follows in her ex tempore judgment at [30] to [32]:

> "30. The fifth set of amendments concern the Stifel contract, which I will address alongside a further issue referred to as Project Shelley. These two issues concern a contract entered into between the defendant and its corporate broker Stifel, which purported to provide a success fee for Stifel in the event that Mr Ferguson was re-elected as the defendant's chairman. The involvement of Stifel was an issue addressed at the 2018

> trial, and the proposed amendments rely on material disclosed in July 2019.
>
> 31. It is common ground that this point does not turn on any new material that was not received before the action was brought. It is a significant new point developed over three pages of the amended particulars of claim, which is likely to require considerable work to respond to in defence and may well also require evidence from Mr Archer who was acting for Stifel at the time. I consider that this could and should have been pleaded from the outset.
>
> 32. Mr Wardell says that the claimant did not realise that the documents in his possession on this point were relevant to his fraud case. I do not accept that that is a good enough explanation, in circumstances where the involvement of Stifel was squarely addressed in the 2018 proceedings and referred to at numerous points in the judgment, and the claimant has been represented by solicitors throughout. It seems to me this is a point which, if it was going to be taken, should have been investigated and addressed in the pleadings from the outset; it is too late to raise this now."

(7) Administration of Justice

59. Finally, I am not satisfied that it is in the interests of the administration of justice to devote further judicial resources to the Conspiracy Claim at the expense of other court users. Mr Tinkler made the admission on the basis of mature reflection and the legal advice of solicitors and counsel. Moreover, he clearly considered it in his interests to maintain that position for four years and until his rights of appeal had been exhausted. *Carvell* is on all fours with the present case. In my judgment, it is not in the interests of the administration of justice or other court users to permit Mr Tinkler to withdraw an admission after mature reflection by highly competent professional advisors when there is not a scintilla of evidence to suggest that the admission was not properly made.

<u>VI. Strike Out</u>

60. If this decision is wrong, however, I go on to consider whether I should strike out the Conspiracy Claim. Mr Leiper and Mr Way accepted that Mr Tinkler was not bound by any cause of action or issue estoppel because (at the very least) Mr Soanes were not parties to either the 2018 Claim and the Fraud Claim. I, therefore, move to consider whether it would be an abuse of process to permit Mr Tinkler to pursue the Conspiracy Claim (whether in its original or amended form) either on the basis that it involves the re-litigation of issues which were determined in earlier proceedings or on the basis of

Henderson v Henderson abuse. I also remind myself of the general guidance of Coulson LJ in *Orji v Naga* at [56] to [58] (above).

61. Mr Tinkler identified seven new issues in his Skeleton Argument which he submitted that he was entitled to take to trial ("**Issue (1)**" through to **"Issue (7)**"). I set out each one as formulated by him in the headings to each of the seven sections below. In relation to each issue, I consider first whether that issue would involve a collateral attack on an existing decision of the Court and, if so, whether it would be an abuse of process to permit Mr Tinkler to relitigate it against the Defendants. I also consider whether it would be a *Henderson v Henderson* abuse to permit Mr Tinkler to raise it now. In addressing these two issues I consider the Conspiracy Claim in its original form. I then go on to consider whether Mr Tinkler has a real prospect of succeeding on the Conspiracy Claim (as amended). Finally, in relation to each issue I consider whether it would be an abuse of process to permit Mr Tinkler to proceed with the Conspiracy Claim in its amended form.

Issue (1): Breach of the Specific Disclosure Order 26 October 2018, by failing to disclose Text messages after 26 October 2018 between D1 and D4. Unlawful Means Conspiracy, and Dishonest Assistance between D1-D4 and Anthony Field and RBG Legal Services Limited.

62. On 24 October 2018, and only a few weeks before the trial of the 2018 Claim was listed for hearing, His Honour Judge Kramer made a specific disclosure order which provided as follows:

> "6. By 4pm on 26 October 2018, the Claimant shall electronically image, search, disclose, and give inspection of messages on the mobile devices of Ms Brace, Mr Ferguson, Mr Coombs and Mr Wood.
>
> 7. By 4pm on 24 October 2018 Mr Field shall serve a witness statement: a. Providing an explanation of the process by which disclosure has been given of documents (including SMS and WhatsApp messages) on Mr Brady's telephone and handheld devices, including why documents exhibited to Mr Field's first witness statement (including messages with Mr Day and with Mr Soanes) had not previously been disclosed (insofar as that question is not dealt with in his first witness statement); b. Providing an explanation as to why Mr Brady's forwarding email to Mr Soanes of Mr Brown's email dated 5 February 2018 (including the underlying chain) was not disclosed and as to how it was represented that part of that chain had in fact been disclosed; and c. Stating whether there are any further disclosable documents concerning actual or proposed communications with the trustees of the EBT shares concerning the giving of an indemnity or other comfort to influence their vote at the AGM on 6 July 2018 (and if there are, providing disclosure thereof and

> explaining why they were not previously disclosed).
>
> 8. By 4pm on 24 October 2018 the Claimant shall disclose and give inspection of all minutes and/or 'agreed actions' of the Board of the Claimant and the 'Core Time' meetings from September 2017 to July 2018 inclusive."

63. On 22 October 2018 and 24 October 2018 Mr Field made witness statements dealing with SGL's disclosure in the 2018 Claim. In the first one he explained that he had manually reviewed 3,937 documents taken from Mr Brady's mobile phone, that he had searched against a number of search terms including "mark barnett", "bouverat", "brazier", "paul hodges", "invesco", "m g investments" and "woodford" and that these searches had returned 105 documents which he had reviewed personally. In the second witness statement Mr Field complied with paragraph 7 of the Order (above) and gave his explanation why certain documents had not previously been disclosed. I make it clear that I was taken to both of these witness statements in the course of the Fraud Claim.

64. Mr Tinkler submitted that SGL had committed multiple breaches of the Order dated 24 October 2018. He also submitted that the Defendants had conspired with Mr Field and Mr Rosenblatt to commit them. He pointed out that in their written opening submissions in the Fraud Claim Mr Wardell and Mr McWilliams were highly critical of SGL's disclosure and that they had raised concerns with the Court about Rosenblatt continuing to act. They also addressed Mr Tinkler's concerns about SGL's disclosure more generally:

> "7. It is a matter of regret and concern that, in a case that is in large part concerned with the manifest inadequacy of a disclosure exercise, this case too has been bedevilled by serious disclosure failings.
>
> 8. Disclosure has had to be extracted from Esken through protracted correspondence and multiple applications for disclosure. The result has been a drip-feeding of supplemental disclosure list after supplemental disclosure list by Esken, the most recent of which - the 7th - arrived as recently as 31 January 2022 but should have been provided on 14 September 2021.
>
> 9. Even at this late stage, serious concerns remain as to Esken's disclosure in circumstances where:
>
> (1) There appears to have been widespread deletion of relevant documents by key individuals, none of whom can give a credible explanation as to why (and, in many cases, when) they did so to the extent that they are willing to admit it at all. We now know that Mr

Brady deleted WhatsApp messages from Mr Soanes on multiple occasions; that he deleted large numbers of relevant WhatsApp messages with Mr Dilworth; and that he deleted Telegram messages with Mr Soanes, despite denying ever having done so as recently as 30 January 2022. We also know that Mr Dilworth deleted all his text and WhatsApp messages with Mr Brady over a wide search period. Finally, we also know because it is the only plausible explanation - even if Mr Ferguson continues to deny it - that Mr Ferguson deleted all of his Wilton Park emails relating to Esken pre-dating 3 May 2018. The fact of these deletions has only ever been admitted by Esken when it has been confronted with evidence of the same. There is little that can give Mr Tinkler or this Court confidence that any thorough attempt has been made by Esken to understand what documents that were in its control have since been deleted. It no doubt does not want to know.

(2) We know that from around January 2018 onwards, key individuals at Esken used their personal email addresses for Esken matters relating to Mr Tinkler. The result is that their emails are much less amenable to capture than they would be had they been sent to or from Esken email addresses as they plainly should have been. The problems caused by this decision were compounded by the fact that these individuals were all permitted to harvest Esken-related emails on their personal email accounts themselves, leaving ample scope for relevant documents to be missed (at best) and deleted (at worst).

(3) The steady drip-feeding of disclosure long after it should have been first provided gives one no reason to be confident that the exercise has now finally been completed - and completed properly.

(4) Privilege has been asserted without any sensible basis for doing so. The Court will recall the extensive argument on Mr Tinkler's disclosure application at the PTR in December 2021 about the Operation Overlord document. As the Court will see when it considers the document, it is plainly not privileged. Worse still, Mr Tinkler now knows that Esken's lawyers met with Mr Soanes to ensure that he did not disclose the Operation Overlord document in response to the third-party disclosure order made against him. There is a real concern as to what other relevant and disclosable documents privilege may wrongly have been asserted over, particularly given the early involvement of lawyers in the dispute with Mr Tinkler in 2018.

(5) Large numbers of relevant documents that respond to search terms have inexplicably been missed. That was a problem in the 2018 Proceedings as Mr Tinkler's Particulars of Claim shows and it remains a problem in these proceedings. The most recent example of this phenomenon came with the disclosure on 25 January 2022 when Esken disclosed some 29 such messages passing between Mr Brady and Mr Dilworth. Their unexplained disclosure was of course particularly troubling because Mr Tinkler's solicitors have been complaining about the apparent absence of messages passing between those two men since 10 November 2021. Mr Tinkler simply has no confidence that, even where they do survive because they have not been deleted, relevant

> documents have been identified as such and disclosed to him.
>
> (6) Multiple important queries raised by Mr Tinkler's solicitors of Esken's
> disclosure, most recently in a lengthy letter of 19 January 2022, remain unanswered. Esken's apparent inability or unwillingness to answer the same is troubling."

65. In opening his case at trial Mr Wardell specifically referred to the evidence of Mr Brady and other witnesses that they had left the disclosure process to Rosenblatt and that no solicitor from Rosenblatt had seen fit to make a witness statement dealing with disclosure. Mr Tinkler set out these passages in full in his Skeleton Argument and referred me to them orally:

> "MR WARDELL: That's all I say about that case. I was then going to -- final bit about the law. I was going to say something about disclosure. And this is all trite material but, of course, we say the disclosure and the duties that surround it have a very important bearing on the issues my Lord has to decide and that's because a large part of Mr Tinkler's case is that Esken first of all deliberately failed to disclose documents it was under a duty to disclose, deleted documents it anticipated it would have to disclose, and then, thirdly, failed to mention the fact it had in fact deleted those documents on the disclosure statement. We have set out the relevant principles relating to disclosure at paragraphs 201 to 206 of our skeleton argument. They are trite and the court will be familiar with them so I don't propose to address them orally. What I do wish to emphasise, however, is this: it's the duty of the lay client, when it comes to disclosure. As the court will see, a rather consistent refrain in the defence and of Esken's witnesses is that they left the matter to their solicitors in 2018, Rosenblatt, who rather troublingly have seen fit to also act in this action. The proposition they left it to their solicitors just won't wash. It doesn't work on a practical level because it's the lay client who knows what documents it does and doesn't have. A solicitor can try and understand the universe of documents for the purposes of collecting and reviewing them but, in the final analysis, unless the lay client gives accurate and honest instructions, the process doesn't work. And it doesn't work on a principled level either because in this case it was the lay client, Mr Brady, to be precise, who signed the disclosure statement for and on behalf of Esken. He was the person to whom the board delegated authority to run the litigation. We will find the disclosure statement at {C/12A/1}. And you will see on page 1 under the disclosure statement."
>
> "But no one at Rosenblatt has seen fit to make a witness statement explaining how the disclosure process worked, what in fact happened, on what was, in any view, a deeply unsatisfactory disclosure process. If you are going to blame your solicitors, bluntly, you have to put your solicitors up to explain what happened, what went wrong and to make it clear that what went wrong wasn't any failure of instruction on behalf of the lay client. My learned friend, in his skeleton argument, seeks to draw some

> comfort from the evidence put in by Mr Field in October 2018. He can't do that. He hasn't served a hearsay statement. He hasn't sought to adduce any evidence from the solicitors. So you will be left to speculate as to what in fact happened. And there are so many permutations. At one very bad extreme, the solicitor could be involved in wrongdoing. At the other extreme, the solicitor could be completely innocent and entirely misled by his client."

66. Mr Tinkler took me next to a number of passages in the cross-examination of Mr Brady in which Mr Wardell had put the allegation to him that he had not given proper instructions to Rosenblatt or provided them with the relevant documents and Mr Brady had answered each time by saying that he had given everything to Rosenblatt and that he was "relying 100 per cent on the Rosenblatt team". Mr Tinkler also undertook a similar exercise in relation to the evidence of Mr Soanes who also stated that he had redacted documents on the advice of Rosenblatt.

67. Mr Tinkler then embarked on a detailed analysis of the Disclosure Book. After explaining the way in which it had been complied, he took me to Tab 11 to show that SGL disclosed only one email dated 31 May 2018 from Mr Bouverat of Invesco but that there were three critical emails which also responded to the search for his name which SGL did not disclose until the Fraud Claim. He also did a similar exercise in relation to Mr Brazier and produced a schedule of documents relating to the Takeover Panel which SGL did not disclose in the 2018 Claim. He submitted that if these emails had been disclosed they would have demonstrated that Invesco was making submissions to the Takeover Panel of which he was not aware.

68. Mr Tinkler also pointed out that Mr Field had accepted that a few emails to or from Mr Bouverat had been in the trial bundle for both the 2018 Claim and the Fraud Claim and in reliance on them, he submitted that the failure to give proper disclosure could not have been a platform error. Mr Tinkler then continued his analysis of the Disclosure Book by showing that documents which responded to the search terms "Bouverat", "Brazier", "Mark Barnett" and "Paul Hodges" were not disclosed by SGL in the 2018 Claim but only in the Fraud Claim.

69. Mr Field responded to a number of these points in his witness statement dated 23 February 2024. He stated that on 6 July 2021 Mr McWilliams had told the Court that Mr Tinkler was not saying that Rosenblatt was a party to the deliberate non-disclosure

of documents. He also drew attention to a submission made by Mr Leiper in the course of the trial (which I set out below). Mr Tinkler's answer to this evidence was that: "But this was before I had realised what had occurred in respect of what I allege [is] the deliberate concealment." He also submitted that he was not sure "how any firm of solicitors or barristers and KCs can prepare any case for me with disclosure or deliberate concealment of documents [as] I have just demonstrated".

70. Although Mr Tinkler formulated Issue (1) by reference to text messages between Mr Brady or Mr Ferguson and Mr Soanes, he did not focus on these messages in his oral submission. Instead, he directed his analysis towards messages passing between the Defendants and Invesco relating to the submission to the Takeover Panel. Furthermore, the Order dated 24 October 2018 was limited to the handheld devices of Mr Brady, Mr Ferguson, Mr Coombs and Mr Wood and it was unclear to me which of the emails or messages in the Disclosure Book to which he took me were taken from their handheld devices (as opposed to other sources). Nevertheless, I will assume in Mr Tinkler's favour that SGL owed a duty to disclose all of those documents under the Order dated 24 October 2018 and I approach Issue (1) on that basis.

(i) Abuse of Process: Collateral Attack

71. In dismissing Mr Tinkler's case that Mr Brady had begun to devise a premeditated plan to remove him I held that Mr Brady was not guilty of the deliberate non-disclosure of a number of key documents: see the Fraud Judgment, [256] to [285]. I also held that he did not delete his WhatsApp exchanges with Mr Soanes consciously and deliberately or with the purpose of preventing its disclosure either in the 2018 Claim or in litigation more generally: see [317] and [333]. Further, I decided that he did not consciously or deliberately choose not to disclose the Laycock Messages, the Laycock Note and the Second Side Letter or deliberately delete his Telegram messages: see [356] to [359] and [361] to [370]. I also decided that SGL did not deliberately fail to disclose documents which it was under a duty to disclose: see [390] to [407]. Finally, I refused to find that it could be properly inferred that SGL deliberately failed to give disclosure of other relevant documents: see [408].

72. Mr Wardell and Mr McWilliams did not invite me to find that Mr Brady had deliberately committed breaches of the Order dated 24 October 2018. But, in my

judgment, this was implicit in the findings which they were asking me to make. The Order was primarily directed at Mr Brady's handheld devices and if I had found that he had deliberately deleted WhatsApp and Telegram messages from those devices, this would have been a deliberate breach of paragraph 6 of the Order. It would also have demonstrated that the explanation which Mr Field was ordered to give under paragraph 7, was false.

73. It was also necessary for me to decide whether individual documents responded to the search terms set out in Mr Field's witness statement dated 22 October 2018. For example, I had to decide whether 19 January Text Message Exchange would have responded to those search terms and decided that it would not: see [260]. I also had to consider whether the StobCap Buyout Email and Attachment were responsive to the agreed search terms and decided that they were not either: see [267]. Finally, I had to decide whether Ms Brace's email dated 13 July 2018 was protected by legal professional privilege and held that Rosenblatt were entitled to take the view that it was: see [401]. If I had decided otherwise on any of these issues, then I might well have been persuaded that Mr Field had not complied with paragraph 7 of the Order.

74. It is fair to say that at the trial of the Fraud Claim Mr Tinkler was not asking the Court to decide whether SGL had committed deliberate breaches of the Order dated 24 October 2018 by failing to disclose the individual emails and messages in the Disclosure Book to which he took me in his oral submissions in answer to the Applications. For instance, I was not asked to decide whether SGL had failed to disclose any communications with Mr Bouverat and Mr Brazier. However, in his closing written and oral submissions Mr Wardell invited the Court to make the widest possible findings of fact against SGL, namely, that SGL had deliberately failed to disclose documents which it was under a duty to disclose and that it could be properly inferred that SGL had deliberately failed to give disclosure.

75. In my judgment, the Court decided Issue (1) against Mr Tinkler in the Fraud Claim and by asking the Court to decide that issue in his favour he is mounting a collateral attack on the findings which I made in the Fraud Judgment at [390] to [408]. All of the documents to which he took me in the Disclosure Book were disclosed by SGL in the Fraud Claim and Mr Tinkler could have relied on any of them at trial to justify the finding that SGL had deliberately failed to disclose documents or to support the

inference that it had deliberately failed to give disclosure. He and his legal team no doubt chose what they considered to be the most damaging documents. There would be no finality in litigation at all if, after a long trial, he was entitled to have a second bite at the cherry by trawling through SGL's disclosure for new documents which leading counsel and a large legal team did not consider sufficiently important or even relevant at the time.

76. Mr Leiper and Mr Way did not argue that the findings which I made in the Fraud Judgment at [390] to [407] gave rise to an issue estoppel as between Mr Tinkler and SGL itself and I do not consider that issue further. But in my judgment, it would an abuse of process to permit Mr Tinkler to proceed against SGL on Issue (1) because his essential complaint is exactly the same. His complaint now (as then) is that SGL deliberately failed to comply with its disclosure obligations in the 2018 Claim. He tried to persuade the Court to decide that issue in his favour in the Fraud Claim in the widest possible terms and that attempt failed. It would be an abuse of process to permit him to litigate that issue again.

77. I am also satisfied that it would be an abuse of process to permit Mr Tinkler to proceed further with Issue (1) against Mr Ferguson and Mr Brady. In my judgment, there is a very strong degree of identification between SGL and them. Although they were not named as parties, they were the directors of SGL whose actions were under scrutiny and if I had made findings adverse to them in the Fraud Claim it would have had serious personal consequences for them (as I recognised at the time and in the Fraud Judgment). It would be oppressive to require them to defend the same allegations again with the same potential consequences.

78. There is not the same degree of identification between SGL and Mr Soanes. He was no more than a witness and I rejected Mr Tinkler's case that his evidence should be attributed to SGL: see [413]. But in my judgment it would be oppressive and amount to unjust harassment to permit Mr Tinkler to proceed on Issue (1) against Mr Soanes alone. He gave evidence at the trial of the 2018 Claim. But he had to give evidence again at the trial of the Fraud Claim when he had to defend himself against a direct attack on his integrity as a witness and if I had made findings adverse to him, they would have had similar consequences for him as for Mr Brady and Mr Ferguson. In my judgment, there is a sufficient degree of identification between Mr Soanes and the other

Defendants that it would be oppressive to require him to go through that process again with the same potential consequences.

79. Finally, I make it clear that in reaching these conclusions I have taken into account the fact that Mr Tinkler's case has changed since the conclusion of the Fraud Claim. He alleges now that Mr Field and Mr Rosenblatt were parties to a conspiracy to delete or conceal documents. This was not an allegation which he ever pleaded in the Fraud Claim or which he advanced at trial. In my judgment, this makes no difference to my conclusion that Issue (1) is a collateral attack on the Fraud Judgment. The findings which Mr Tinkler asked the Court to make at the trial of the Fraud Claim were based on inference and the position remains the same. The only difference between the Fraud Claim and the Conspiracy Claim is that Mr Tinkler invites the Court to draw a different inference now, namely, that Mr Field and Mr Rosenblatt must have assisted the Defendants to conceal or delete documents. A change in the inference which he asks the Court to draw cannot determine whether the Conspiracy Claim is an abuse of process or should be permitted to proceed.

(ii) *Henderson v Henderson* abuse

80. Nevertheless, if this conclusion is wrong, then it would in my judgment be a *Henderson v Henderson* abuse of process to permit Mr Tinkler to pursue the allegation that the Defendants conspired with Rosenblatt to conceal documents from Mr Tinkler which SGL was required to disclose under the Order dated 24 October 2018. I have reached this conclusion for the following reasons:

(1) Even if SGL failed to disclose a substantial number of documents in the 2018 Claim, all of these documents were available to Mr Tinkler in the Fraud Claim. He did not give evidence or explain to me when he first realised that the Defendants and Rosenblatt had been guilty of deliberate concealment. But at the very least he must have suspected this during the Fraud Claim and raised this suspicion with his legal team.

(2) It is clear from their Skeleton Argument and oral submissions at the trial of the Fraud Claim that Mr Wardell and Mr McWilliams had considered SGL's disclosure very carefully and they made a number of very serious criticisms both of the Defendants and Rosenblatt. Indeed, it is clear that they had considered

whether Rosenblatt might be implicated because Mr Wardell complained in his oral submissions that SGL had not called a solicitor from Rosenblatt to give evidence.

(3) It is also clear from the extracts from the Skeleton Argument and Mr Wardell's oral submissions – the very extracts upon which Mr Tinkler himself relied – that Mr Wardell, Mr McWilliams and Clyde & Co were not prepared to make the serious allegation that Rosenblatt and the Defendants conspired together to delete or withhold documents. In particular, they drew back from making the serious allegation that Mr Field or Mr Rosenblatt or any other fee earners at Rosenblatt was guilty of destroying documents or deliberately withholding them from Mr Tinkler.

(4) Moreover, if there had been any doubt about this Mr Leiper made it clear that this was the position as he understood it and he challenged Mr Wardell to correct him if he was wrong (which Mr Wardell never did):

> "One further point, and I make this clear: at no point has there been any suggestion that those instructing me acted inappropriately. There is absolutely no reason for them not to act in this claim and that has been made explicitly clear by and on behalf of Mr Tinkler in these proceedings from the start. Just dealing with another -- no, Mr Tinkler has not made any allegation against Rosenblatt and that has been made clear on his behalf from the very start. There is no allegation against the firm."

(5) If Mr Tinkler had made such an allegation, it would have been necessary for him to apply to amend to plead it. He would also have had to satisfy the Court that such an allegation had a proper basis in fact and that it a real prospect of success. If his legal team had made such an allegation without any proper basis and it had failed, then Mr Tinkler's solicitors and counsel were themselves at risk of disciplinary proceedings.

(6) It is clear, therefore, that the position which Mr Tinkler took at the trial of the Fraud Claim was a considered position on the part of Mr Wardell and Mr Tinkler's wider legal team. Mr Wardell put it to Mr Brady and Mr Ferguson that they had deliberately destroyed or withheld documents themselves. But he did not suggest to them that Rosenblatt had been privy to their actions. Indeed, Mr

Wardell invited me to make five findings of fact that Mr Brady, Mr Ferguson and SGL had deleted messages or deliberately failed to disclose documents. But he did not ask me to make any finding that Rosenblatt had also deleted or deliberately concealed documents.

(7) I dismissed each one of those allegations against Mr Brady, Mr Ferguson and SGL: see the Fraud Judgment at [317], [333], [370], [386] to [388], [401] and [408]. In my judgment, it would be an obvious abuse of process for Mr Tinkler to put these same or very similar allegations to SGL, Mr Brady and Mr Ferguson again but this time on the basis that Rosenblatt assisted them to delete or suppress the relevant documents. If Mr Tinkler had wished to advance such a case, he could and should have raised this at the PTR or at the trial of the Fraud Claim. But he took the decision not to do so on advice.

(8) Mr Tinkler also advanced the case that Mr Brady and Mr Soanes deliberately failed to disclose the StobCap Buyout Email and Attachment shortly before the trial of the 2018 Claim and I dismissed that allegation too: see the Fraud Judgment at [266] to [278]. Mr Tinkler did not suggest that there was any new evidential basis for Mr Soanes' involvement in a conspiracy to commit breaches of the Order dated 24 October 2018. In my judgment, it would also be an abuse of process for Mr Tinkler to put the same allegations to Mr Soanes again on the basis that Rosenblatt also participated in this conspiracy.

<u>(iii) The Conspiracy Claim (as amended): prospect of success</u>

81. To meet many of these objections Mr Tinkler presented the Conspiracy Claim as a new standalone claim which he was bringing in his capacity as a shareholder of SGL rather than as a director or employee. Because he made his detailed submissions about the new claim in dealing with Issue (2) I deal with those submissions in detail in that context. However, the problem for Mr Tinkler was that if he intended to pursue the Conspiracy Claim in its amended form, then the question whether SGL complied with the Order dated 24 October 2018 would have become irrelevant. It would have become irrelevant because Mr Tinkler no longer alleges that the unlawful means by which the Defendants conspired against him involved the giving of false evidence or obtaining the Russen Judgment by fraud. The determination of Issues (1) and (2) do not, therefore,

assist Mr Tinkler to prove the Conspiracy Claim in its amended form and Mr Tinkler's submissions on that issue did not persuade me that he had any real prospect of success on his amended claim.

(iv) Abuse of Process: The Russen Judgment

82. But if I am wrong and he has a real prospect of succeeding on the Conspiracy Claim (as amended) it would be an abuse of process to permit Mr Tinkler to proceed with Issues (1) and (2) because Mr Tinkler's new amended case amounts to a collateral attack on the findings made by His Honour Judge Russen QC in the Russen Judgment. I explain my reasons for reaching this conclusion in considering Issue (2) (below).

(v) RBG

83. Finally, I deal with the position of RBG, the company which Mr Tinkler proposed to join to the Conspiracy Claim. In his witness statement dated 23 February 2024 Mr Field explained the relevance of this company as follows:

> "Mr Tinkler names RBG Holdings plc and RBG Legal Services Limited as proposed defendants. At the material time in 2018, RBL Law Limited (formerly known as Rosenblatt Limited) was instructed on behalf of Esken. RBG Legal Services Limited was not incorporated until 23 March 2021. RBG Holdings plc is the parent company of RBL Law Limited and RBG Legal Services Limited. RBG Holdings plc has no involvement with Esken save for being the owner of the law firm instructed by Esken."

84. Mr Tinkler did not challenge this evidence and I accept it. It follows that RBG was not in existence when the Order dated 24 October 2018 was made and could not have been a party to the conspiracy which Mr Tinkler alleges. But even if it had been in existence, it would only have been liable if any breach of duty committed by Mr Field or Mr Rosenblatt could be attributed to that company. Mr Tinkler did not address me on that issue. Nor did he rely on any acts or omissions by officers or employees of RBG other than Mr Field or Mr Rosenblatt. For these reasons I do not consider the position of RBG further or separately either in relation to Issue (1) or any other issue.

Issue (2): Failure to disclose emails obtained from the Company server by Anthony Field in respect of D3 Wilton Park email account. D3 and Anthony Field failed to mention on the disclosure statement, any missing emails on D3's email account or the company's own server from any other directors or Third Parties, especially in respect of issues relating to the Take

Over Panel and Invesco's involvement. Anthony Field and D1-D3 acted in an Unlawful Means Conspiracy, and Dishonest Assistance was provided by Anthony Field, and RBG Legal Services Limited.

85. Mr Tinkler took me next to Tab 42 of the Disclosure Book. He submitted that Mr Ferguson sent or received or was copied into 640 emails on his Wilton Park account but had only disclosed 238 emails (only a few of which were included in the trial bundle for the 2018 Claim). He also submitted that a large number of the emails which Rosenblatt had disclosed to him in the Fraud Claim were not provided by Wilton Park from its server to the supervising solicitor and by the supervising solicitor to Clyde & Co.

86. Mr Tinkler took me next to a series of email chains dated between 4 June 2018 and 10 July 2018 and which Rosenblatt had disclosed in October and November 2021. Many of these emails related to the EBT and to the votes cast at the EGM. He also took me a series of emails dated 11 and 12 June 2018 which Rosenblatt also disclosed in October or November 2021 but which were not disclosed by Wilton Park from its server or by the supervising solicitor to Clyde & Co. He submitted that all of these emails responded to the search terms against which SGL was required to search in the 2018 Claim and that their subject matter was the submissions by SGL or Invesco to the Takeover Panel.

87. Mr Tinkler then took me to a cache of emails relating to Mr Soanes which were sent or received between May and August 2018 all of which had been redacted. He submitted that there was no justification for the redactions and that this was yet another example of the way in which Mr Field covered his tracks. For example, he took me to an email chain where the subject line was "Stobart Capital and Ian Soans [sic]" and submitted that the contents of each email could not have been privileged and that redactions had been improperly made. He also submitted that Mr Field's description of the involvement of Mr Soanes in the litigation in his most recent witness statement was not fair or balanced.

88. Mr Tinkler had to accept that SGL had disclosed all of the Wilton Park emails in the Fraud Claim. But he justified the failure to advance the claim against Rosenblatt on the following basis:

> "It was unfortunate that the full extent of the Wilton Park disclosure had not been fully unravelled by the time the hearing commenced in 2022.

> However, what I allege in the Conspiracy Claim is that Mr Ferguson along with the Dishonest Assistance of Mr Field both deleted and concealed the Wilton Park Disclosure. I am now in a position to show this court the exact position in respect of the Wilton Park Disclosure. You will recall and has [sic] Mr Field points out now there was no allegation against Mr Field in the 2022 Proceedings, in respect of this matter, but there certainly are allegations now."

89. Finally, Mr Tinkler reminded me of the conclusion which I had reached in the Fraud Judgment at [478] and that I expressed the view that I would have set aside the Russen Judgment if I had been satisfied that Mr Ferguson had deleted his emails and he invited me to do so now. To justify the trial of this issue he made the following submission (original emphasis):

> "I accept your Lordship made the finding on the evidence before you at that time. It is my case that I should not be shut out in bringing a claim in which I can now show that Mr Field (even on the evidence of his clients) "**we gave everything to our solicitor**" has a case to answer alongside Mr Ferguson with this material. The Claim in respect of Mr Field and Mr Ferguson and this evidence, has never been pleaded or decided by a Court. It is "**Fresh Evidence**" only now obtained."

(i) Abuse of Process: Collateral Attack

90. In my judgment, the Court decided Issue (2) against Mr Tinkler in the Fraud Claim and by asking the Court to decide that issue in his favour he is mounting a collateral attack on the findings which I made in the Fraud Judgment at [388]. I say this for the following reasons:

    (1) In the Fraud Claim Mr Tinkler pleaded that Mr Ferguson deliberately failed to disclose emails from his Wilton Park account and deleted emails pre-dating 3 May 2018: see the Fraud Judgment, [377]. Mr Wardell put these allegations to Mr Ferguson and I addressed them in considerable detail by reference not only to Mr Ferguson's evidence but also to the evidence of the supervising solicitor and the inherent probabilities based on my assessment of all of the evidence: see [379] to [388].

    (2) The case which Mr Tinkler advanced against Mr Ferguson was based on inference only. He invited me to draw the inference that Mr Ferguson must have deleted or concealed emails from his Wilton Park account in the 2018 Claim

because otherwise the supervising solicitor should have been able to locate and disclose them to Clyde & Co in 2021. Mr Tinkler invites me to draw a different inference now, namely, that Mr Ferguson either deleted or concealed the relevant documents with the assistance of Mr Field.

(3) Moreover, he invites me to draw this new inference on the basis of the same evidence which I considered at the trial of the Fraud Claim. I reject Mr Tinkler's submission that there is fresh evidence available to him now which was not available to him then. All of the evidence upon which Mr Tinkler invited me to draw the inference that Mr Ferguson deleted or concealed Wilton Park emails was disclosed to him in October and November 2021. It may be that Mr Tinkler has carried out a further and more detailed analysis and focussed on different factual issues or sub-issues (such as the submissions to the Takeover Panel). But this cannot disguise the fact that all of the raw material was available to him in the Fraud Claim. Nor did he provide any evidence that he or his legal team could not have carried out the same analysis for the trial of the Fraud Claim.

(4) In my judgment, therefore, Mr Tinkler is attempting to mount a collateral attack on the findings of fact which I made on Issue 8 in the Fraud Judgment. In substance, he asks the Court to decide the same issues again, namely, whether Mr Ferguson deleted or suppressed documents but to decide those issues differently by attempting to implicate Mr Field or Mr Rosenblatt.

(5) For the reasons which I have set out in dealing with Issue (1) I am satisfied that there is a sufficient degree of identification between SGL and the other Defendants to make it oppressive to require them to defend themselves against the same allegations again.

(ii) *Henderson v Henderson* abuse

91. Again, Mr Tinkler attempted to meet these objections by presenting the Conspiracy Claim as an entirely different and freestanding claim which he was bringing in his capacity as a shareholder rather than as a director or employee and by focussing on the submissions made to the Takeover Panel:

> "I intend to pursue this Claim as a shareholder. In this Claim, the

> defendants with the assistance of the majority shareholder, Invesco Asset Management Limited, made submissions to the Take Over Panel, misleading the Take Over Panel as to who was making the submissions, which resulted in me, and my fellow shareholders being restricted from purchasing shares. I have already shown you the sea of red with Bouverat and Brazier which was deliberately concealed. This information was known to both Ian Rosenblatt and Anthony Field who at the time were copied into the email exchanges into the submissions being made to the Take Over Panel. However, these important emails were never disclosed in the 2018 Proceedings. Even though many were responsive to the agreed search terms, and certainly relevant to the issues."

92. Contrary to the impression which Mr Tinkler gave in his oral submissions, however, this issue was not a new one. As Mr Tinkler himself accepted, His Honour Judge Russen QC dealt with the submission to the Takeover Panel in the Russen Judgment at [304] and [349]:

> "304. On 8 June, Stifel wrote a detailed email to the Takeover Panel on behalf of the Company seeking guidance as to whether or not, in circumstances where Mr Tinkler, Mr Jenkinson and WIM had submitted their 4 June requisition for the appointment of Mr Day and held in excess of 33% of the voting capital, they had made a control-seeking proposal for the purposes of the Takeover Code which, taken with their historical relationship, might evidence the existence of a concert party. The email referred to Mr Tinkler's share purchases in February and to the Company's belief that "a concert party exists between Messrs Tinkler and Jenkinson and WIM and that it existed even before they started discussing a proposal to change the Board." On the basis that the Panel agreed, it was asked to investigate a number of matters, including when it was that Mr Jenkinson and WIM first agreed to support Mr Tinkler."
>
> "349. On 28 June 2018, or thereabouts, the Takeover Panel communicated its view upon the alleged concert party between Mr Tinkler, Mr Jenkinson and WIM. According to Stifel (who were given an opportunity to provide their comments before the Panel pronounced) the Panel was "very clear" that there had been no concert party between them from February but by reference to the "board control-seeking resolution" - Mr Coombs and Mr Wood had indicated they would resign if shareholders did not re-elect Mr Ferguson - there was now a presumed concert party between those persons objecting to Mr Ferguson's re-appointment. Stifel told the Company that this would mean the three would be precluded from buying any further shares. In fact, K&L Gates (acting by their John Elgar) had already asked each of Mr Tinkler, Mr Jenkinson and WIM to confirm that they had not acquired any shares in the Company" since coming to their understanding regarding making changes to the Company's board (i.e. no later than the date of their first letter)" and the first two had confirmed they had not."

93. Moreover, SGL disclosed documents in the 2018 Claim which provided evidence that Ms Brace prepared a submission to the Takeover Panel with the assistance of Mr Leon Ferrera of Jones Day, Invesco's solicitors. Those emails also provided evidence that Mr Ferguson and Mr Coombs were involved in the preparation of that submission. Indeed, at the trial of the Fraud Claim Mr Wardell cross-examined both Mr Ferguson and Mr Brady extensively on those documents and in answer to his questions Mr Ferguson accepted that Invesco was asked to become involved in the submissions to the Takeover Panel. I quoted both the documents and his cross-examination in the Fraud Judgment: see [148] to [150]: see [151].

94. Mr Tinkler did not, however, plead in the Fraud Claim that Mr Ferguson had deleted or concealed the dozen or so emails relating to the Takeover Panel to which he took me. Nor did he place any reliance upon them at the trial. Indeed, I found that Mr Wardell was unable to point to any obvious gaps in the evidence presented in the 2018 Claim which could only be explained by Mr Ferguson deleting or concealing emails on his Wilton Park account: see [385](4). I am satisfied, therefore, that Mr Tinkler and his legal team did not consider these emails to be of any real significance in the Fraud Claim because they were fully aware from the 2018 Claim that the board had enlisted the support of Invesco in making submissions to the Takeover Panel.

95. For these reasons, therefore, I am satisfied that Mr Tinkler could have raised Mr Ferguson's failure to disclose emails relating to the Takeover Panel in the Fraud Claim if he or his legal team had considered it to his advantage to do so and he should not be permitted to do so in the Conspiracy Claim now. If Issue (2) does not involve a collateral attack on the Fraud Judgment, then in my judgment it would be a *Henderson v Henderson* abuse of process to permit Mr Tinkler to pursue that issue now.

(iii) The Conspiracy Claim (as amended)

96. It is important to bear in mind that the conspiracy which Mr Tinkler explored in his speaking note and oral submissions before me in answer to the Applications was not that Mr Ferguson conspired with Invesco to prevent Mr Tinkler from acquiring more shares to vote at the AGM by making false or misleading representations to the Takeover Panel but that Mr Ferguson conspired with Mr Field and Mr Rosenblatt to conceal evidence in the 2018 Claim that they had orchestrated their submissions to the

Takeover Panel with Invesco. For these reasons I consider that it would be an abuse of process to permit him to proceed with Issues (1) and (2). In substance his essential complaint is exactly the same as the complaint which he made in the Fraud Claim: see the observations of the Court of Appeal in the Defamation Claim (above) at [62].

97. However, Mr Tinkler's oral submissions and, for that matter, his formulation of Issues (1) and (2) did not reflect the amendments which he proposed to make to the Conspiracy Claim. In the Claim Form (as amended) he no longer alleged that the unlawful means which the Defendants used to conspire against him was the giving of false evidence or a fraud on the Court. The unlawful means which he now alleges are the breach by SGL of his rights under the Articles and breaches of fiduciary and regulatory duty by Mr Brady, Mr Ferguson and Mr Soanes to control and influence the AGM for their own self-interest and financial gain.

98. For Mr Tinkler to persuade me that he had a real prospect of succeeding on these allegations, it would have been necessary for him to show me the submissions which Invesco made to the Takeover Panel and the relevant emails passing between the alleged conspirators in order to persuade me that Invesco made a false representation to the Takeover Panel, that it was their author and that SGL, Mr Ferguson and Mr Brady encouraged or authorised Invesco to do so. It would also have been necessary for Mr Tinkler to satisfy me that this representation caused him actionable damage given the judge's finding that the Takeover Panel rejected SGL's submission that there was a concert party. Finally, it would have been necessary for him to establish that Mr Soanes participated in this conspiracy.

99. Mr Tinkler did not take me to any of the underlying documents to prove that Mr Brady or Mr Ferguson put words in the mouth of Mr Bouverat or Mr Brazier or instructed Mr Arch of Stifel to do so. Nor did he explain why a representation by Invesco that it was the author of a submission (when it was not) would have prevented him from acquiring further shares in SGL. For example, he did not suggest that SGL had no standing to make its own submission to the Takeover Panel or that Invesco did not in fact believe the representations that it was being asked to make.

100. Indeed, this was not the case which Mr Wardell put to either Mr Brady or to Mr Ferguson. The case which he put to both of them was that it was not appropriate to

involve the single largest shareholder in the preparation of submissions or the campaign in the press and to the Takeover Panel: see the Fraud Judgment at [150] and [151]. But he did not suggest to either of them that they combined together to mislead the panel. Moreover, Mr Ferguson did not accept that there was anything unlawful in enlisting the assistance of Invesco and Mr Wardell and Mr McWilliams did not suggest otherwise in their closing submissions. Mr Tinkler failed to persuade me, therefore that he had any real prospect of persuading the Court that any submissions made to the Takeover Panel by either SGL or Invesco gave rise to an actionable conspiracy.

(iv) Abuse of Process: The Russen Judgment

101. But even if he had persuaded me that this allegation had a real prospect of success, I am also satisfied that it would be an abuse of process to permit Mr Tinkler to pursue the Conspiracy Claim as he formulated it now given the findings made by His Honour Judge Russen QC in the Russen Judgment. Mr Tinkler's case at the trial of the 2018 Claim was that there was an orchestrated plan to secure Mr Ferguson's appointment rather than his own. The judge described the case which was put to him at [769] to [771]:

> "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.
>
> 770. On 10 June 2018 Ms Brace sent an email in the form of an "action tracker" document which included as "Shelley actions" such steps as eliciting the voting intentions of Jupiter in the event of shares being transferred to the EBT. The announcement of the Ryanair deal was also on the action list. The creation of the action list coincided with the Company's recent instruction of Rosenblatt, on 8 June 2018, to devise a legal strategy in relation to Mr Tinkler and to deliver a winning vote at the AGM. The other advisers involved were Travers Smith and Carey Olsen, Redleaf, DF King (a "proxy solicitant"), Stifel and the Company's other new broker, Canaccord.
>
> 771. Mr Tinkler's counsel argued that Project Shelley was a codename for what amounted to a "war on Mr Tinkler". It involved going on the offensive for the purpose of "seeking to maintain Mr Ferguson's position and control". Mr Ferguson, on the other hand, said that " Project Shelley was a project which came into being to try to defend the good governance of the Company." Mr Brady said that there was no "Project Shelley" and the name was used to describe a particular PR workstream. He said it was a campaign to make sure that they had shareholder support

for the support of the current management and board."

102. The judge found against Mr Tinkler at [772] to [777] and, in my judgment, the allegation which he now makes in relation to the submission to the Takeover Panel is yet another attempt by him to make good the case which the Judge rejected. Indeed, this is clear from the summary which Mr Tinkler gave in his witness statement of the allegations which he now wishes to advance in the Conspiracy Claim. In the passage which I have quoted (above) he described Project Shelley as a deliberate strategy to secure the re-election of Mr Ferguson at the upcoming AGM. In my judgment, this is almost identical to the case which he put to the judge in the 2018 Claim and which the judge dismissed.

103. Further, in the 2018 Claim the judge had to resolve a significant number of issues which overlapped with the allegations which Mr Tinkler now wishes to advance in the Conspiracy Claim:

(1) The judge held that Mr Brady, Mr Ferguson, Mr Coombs and Mr Wood had not committed a breach of duty by invoking Article 89(5) of SGL's Articles of Association: see [779] to [782].

(2) He also held that they did not act in breach of duty by establishing a committee of the board of directors: [783] and [784].

(3) He also held that although the 29 May RNS was unwise and inappropriate, the directors did not commit a breach of duty by making the announcement: see [785] to [794].

(4) He also held that they did not commit a breach of duty by failing to put forward the name of Mr Philip Day as a chairman in place of Mr Ferguson: see [795] and [796].

(5) He also held that the members of the committee did not commit a breach of duty by the dismissal of Mr Tinkler: see [797] to [801].

(6) He also held that Mr Brady, Mr Ferguson, Mr Coombs and Mr Wood had not acted for an improper purpose in breach of section 171(b) of the Companies Act 2006 by transferring 1.7 million shares to the EBT on 19 June 2018: see [802] to

[845].

(7) However, he held that they authorised the transfer of 5.3 million shares to the EBT for an improper purpose, namely, to secure the trustee's favourable vote at the AGM: see [846] to [878].

(8) But he dismissed the claim that they acted in breach of duty by holding up the transfer of shares to the relevant employees in whom they were to vest: see [878] to [883].

(9) He also rejected the claim that Mr Brady, Mr Ferguson, Mr Coombs and Mr Wood acted in breach of duty by failing to put forward a resolution for Mr Tinkler's re-election to the board: see [884].

(10) He also held that Mr Ferguson did not commit a deliberate breach of his duties as a director by voting the shares for which he held proxies against a further resolution for the re-election of Mr Tinkler: see [885] and [886].

(11) Finally, he held that the committee consisting of Mr Brady, Mr Coombs and Mr Wood did not commit a breach of duty by resolving to remove Mr Tinkler from office after he had been re-elected at the AGM: see [887] to [890].

104. The judge dealt next with the authority of the committee to take the decision to dismiss Mr Tinkler before addressing the question whether the dismissal of Mr Tinkler was invalid or unlawful. He held that they were not acting for an improper purpose and that the decision to dismiss him was not a pretext for denying him his LTIP entitlement. Because of their importance I set out the relevant passages from the Russen Judgment at [903], [904] and [911]:

> "903. The first question within this issue is whether the Four Directors were acting for an improper purpose which might impugn the Committee's decision to dismiss Mr Tinkler (the Committee comprising all of them bar Mr Ferguson). As appears from my findings under Issue 4, the only element of improper purpose on their part which I have found to be established relates to the decision in relation to the transfer of the 5.3m shares to the EBT, made on 19 and 20 June 2018 and therefore after his dismissal. My findings under Issue 2 show that, by 14 June 2018, Mr Tinkler had given them cause to consider his dismissal. I have already mentioned Mr Brady's belief that Mr Tinkler's actions in early June were "the tipping point" so far as the destabilising effect of his actions was

> concerned. Mr Brady's WhatsApp exchange with Mr Dilworth on 9 June ("Starting an employee revolution is what he is trying to do") records his view at the time. Mr Coombs said that the events of early June were "the cumulative effect of a number of things that he had done, and the last straw, though it was somewhat bigger than a straw, to break the camel's back was what happened that weekend."
>
> 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."
>
> "911. It was also alleged by Mr Tinkler that the decision to dismiss him was in part a pretext for denying him his 2015 LTIP entitlement, which would have vested on 22 June 2018, so that he was unable to vote those shares at the AGM. However, I am satisfied that this did not feature in the Committee's thought process when deciding to dismiss him. There is no evidence that it did. Quite apart from anything else, he had indicated at the Board meeting on 7 June 2018 that he would not be exercising his award at that time because of the two year holding period. Even if this had been a consideration in the minds of the Committee members it would still not have supported the conclusion that they had been substantially motivated by it. Such an argument would only begin to gain traction if the grounds on which they purported to act were established to be spurious. As I explain next, that is not the position, so Mr Tinkler's loss of his 2015 LTIP entitlement can be safely pigeonholed as an "effect" rather than a "cause"."

105. Finally, Mr Tinkler accepted that he was bound by the findings which the judge made in the Russen Judgment. In his witness statement dated 16 February 2024 he stated: "The Claimant fully acknowledges Judge Russen's findings in the 2019 Judgment, which still apply to my roles as a director and employee". But given the evidence which the judge heard and the detailed findings which he made, I do not see how Mr Tinkler could advance the allegations in the Conspiracy Claim (as amended) without challenging the findings set out in [903], [904] and [911] (above) and, in particular, the finding that Mr Brady, Mr Ferguson, Mr Coombs and Mr Wood did not act for the improper purpose of retaining their control of the Company and making it more likely that Mr Ferguson would be elected. In my judgment, the Conspiracy Claim (as amended) amounts to a collateral attack on those findings.

106. Even if this analysis is wrong, I am fully persuaded that Mr Tinkler could have advanced the allegation that the Defendants conspired with Mr Bouverat and Mr Brazier to mislead the Takeover Panel in the 2018 Claim. Given the similarity between the over-arching case which he advanced in the 2018 Claim and the overlap between the issues which the judge decided and the issues which Mr Tinkler wishes to raise in the Conspiracy Claim, I am also satisfied that he should have advanced that case at the trial of the 2018 Claim if he had wished to pursue it and that it would be a *Henderson v Henderson* abuse of process to permit him to do so now. For these reasons, therefore, I am not satisfied that the Conspiracy Claim can be saved by the amendments which Mr Tinkler proposes to make and I strike it out both in its original and in its amended forms.

Issue (3): Further Breaches of the Specific Disclosure Order, by D1-D3 and Anthony Field, in the failure to disclose documents in respect of the EBT, and the AGM. Unlawful Means Conspiracy, and Dishonest Assistance between D1-D3 and Anthony Field, Ian Rosenblatt, and RBG Legal Services Limited.

107. Mr Tinkler took me to an email dated 18 July 2018 from Mr Simon Savident to Ms Brace and he submitted that this demonstrated that 658,456 shares had been "over voted" because they should have been transferred by the EBT to their ultimate recipients by 22 June 2018. He also submitted that this email responded to the search term "EBT" and should have been disclosed in the 2018 Claim. He also took me to a series of emails and other documents all dated between 4 July 2018 and 6 July 2018 when the AGM took place to demonstrate that the vote was "gerrymandered". In particular, he took me to the legal advice which SGL obtained and he submitted that the EBT was threatened with litigation to vote in favour of the appointment of Mr Ferguson rather than to abstain. Finally, he also submitted that none of the relevant documents were disclosed in the 2018 Claim.

(i) Abuse of Process: Collateral Attack

108. In my judgment, it would also be an abuse of process to permit Mr Tinkler to pursue the allegation that the Defendants conspired with Rosenblatt to deliberately conceal these documents from Mr Tinkler in the 2018 Claim for the reasons which I have given in relation to Issue (1). I say this for the following reasons:

(1) Mr Tinkler had all of the documents upon which he relied on Issue (3) available

to him by the time of the trial in the Fraud Claim apart from a letter which he submitted that Mr Field was continuing to conceal and which Mr Field gave evidence did not exist.

(2) Mr Tinkler chose to plead and rely on an email dated 13 June 2018 from Ms Brace to Mr Ferguson, Mr Wood, Mr Coombs and Mr Brady in which she pointed out that she had taken advice and attached a table of LTIPs for Mr Tinkler: see the Fraud Judgment at [164]. Mr Wardell put this email to Mr Brady and suggested to him that he deliberately misled His Honour Judge Russen QC in answering questions from Mr Taylor QC about Mr Tinkler's LTIP awards. I did not accept this or that Mr Brady had deliberately concealed the email: see [394] to [401].

(3) In my judgment, it would be a collateral attack on that finding for Mr Tinkler to put the same allegations to SGL and Mr Brady again but this time on the basis that Rosenblatt assisted them to delete or conceal documents relating to the votes cast at the AGM for the reasons which I have given in relation to Issue (1).

(ii) *Henderson v Henderson* abuse

109. Alternatively, it would be a *Henderson v Henderson* abuse of process to permit Mr Tinkler to do so. If he had wished to advance such a case, he could and should have pleaded Mr Savident's email dated 18 June 2018 and the other documents to which he took me in addition to Mr Brace's email dated 13 June 2018 and then put them to Mr Brady and Mr Ferguson at trial. Mr Tinkler and his legal team clearly took a conscious decision to rely on Ms Brace's email on the basis that it showed that Mr Brady had deliberately lied at the trial of the 2018 Claim. Having failed to establish this at trial, it would be an abuse of process to permit Mr Tinkler to have another bite of the cherry.

(iii) The Conspiracy Claim (as amended)

110. But in any event Mr Tinkler failed to persuade me that he had any real prospect of success on Issue (3) and, in particular, in establishing that the Defendants' breach of duty enabled them to control and influence the votes cast at the AGM. His Honour Judge Russen QC found that Mr Brady, Mr Ferguson, Mr Coombs and Mr Wood had authorised the transfer of 5.3 million shares to the EBT for an improper purpose but

dismissed all of the other allegations of breach of duty: see the analysis above. Even so, he was not persuaded that this rendered the decision at the AGM invalid: see the Russen Judgment at [923] to [934].

111. I am not satisfied that it would have made any difference to those conclusions if Mr Tinkler had been able to put Mr Savident's email dated 18 June 2018 or the other new documents to Mr Brady or Mr Ferguson at the trial of the 2018 Claim for the reasons which I gave in the Fraud Judgment at [407]. In my judgment, none of the documents upon which Mr Tinkler relied in answer to the Applications came anywhere to near to disturbing the judge's conclusions at [930] and [931]:

> "930. This involvement and deliberation on the part of Jupiter provides a good illustration as to why an infringement of the proper purposes rule cannot justify the court proceeding on the basis that the transfer to it was wholly void. It also highlights the point that there may be intervening bona fide dealings with the subject matter of the transfer that make it wholly impractical for the court to declare a state of affairs on the footing that, without more, the improper purpose behind the transfer determined the ultimate effect of it. As I have said, although expressed in terms of "purpose", the rule focuses upon motive rather than effect. In many cases (including the leading authorities on share issues considered in Section 4(a)(vii)) the motive behind the transfer may be established by considering what was known to be its inevitable effect, or purpose. In this case, however, despite my finding that the Four Directors were primarily motivated by a wish to secure Jupiter's favourable vote and had done their best to secure it, the casting of that vote was not an inevitable or foregone conclusion. The vacillation on the part of Jupiter, after the transfer, demonstrates as much.
>
> 931. In my judgment it would be wrong, and an affront to the trustee, to grant declaratory relief predicated on the false premises that Jupiter did not owe its own fiduciary obligation to consider how to exercise its vote and that it did not apply its independent mind as to how to do so. Jupiter's letter of 3 July 2018 (then indicating the intention to abstain from voting) shows that both were firmly in the trustee's mind."

(iv) The Russen Judgment: Abuse of Process

112. But in any event Mr Tinkler accepted that he was bound by those findings. Given the evidence which the judge heard and the detailed findings which he made, I do not see how Mr Tinkler could advance the allegations in the Conspiracy Claim (as amended) without challenging them. In my judgment, this also amounts to a collateral attack on His Honour Judge Russen QC's findings in the Russen Judgment.

Issue (4): Dishonest Assistance provided by D1-D3 to D4 in which Anthony Field deliberately concealed *all documents in respect of an Unlawful Means Conspiracy, relevant to the involvement of D4 with D1-D3 from the period of 1 May 2018 onwards, between D1-D4. Anthony Field and RBG Legal Services Limited, provided Dishonest Assistance.*

113. Mr Tinkler submitted in his Skeleton Argument that Mr Soanes failed to disclose the Loan Agreement in the 2018 Claim, that SGL failed to disclose it voluntarily in the Fraud Claim and that he had to obtain a third party disclosure order against Mr Soanes (who strenuously opposed it). He submitted, therefore, that the Defendants deliberately concealed the Loan Agreement and numerous other documents to keep secret Mr Soanes' involvement in the 2018 Claim and the events to which it gave rise.

(i) Abuse of Process: Collateral Attack

114. In the Fraud Claim Mr Tinkler alleged that Mr Soanes was not a mere witness but heavily involved in the preparations for the trial of the 2018 Claim. He also alleged that Mr Soanes gave knowingly false evidence at the trial. He also alleged that Mr Brady knew that Mr Soanes had given false evidence. Finally, he alleged that the Loan Agreement was the price which Mr Soanes extracted for his assistance and evidence. I dismissed all of these allegations after considering the terms of the Loan Agreement and the Consultancy Agreement and a number of other documents which SGL did not disclose in the 2018 Claim: see [409] to [415], [417] to [431], [439] to [440] and [441] to [459].

115. Moreover, it formed a critical plank of Mr Tinkler's case that the Defendants did not disclose the Loan Agreement in the 2018 Claim and although I was critical of their failure to disclose it, I was not satisfied that Mr Soanes was guilty of dishonesty as a consequence. I stated this at [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."

116. In my judgment, the Court decided Issue (4) against Mr Tinkler in the Fraud Claim and by asking the Court to decide that issue in his favour now he is mounting a collateral attack on the findings which I made in the Fraud Judgment at [431]. It would be an abuse of process to permit him to proceed with Issue (4) against all of the Defendants for the reasons which I gave in dealing with Issue (1).

(ii) *Henderson v Henderson* abuse

117. Alternatively, all of the other documents to which Mr Tinkler took me were available to him in the Fraud Claim and he could have deployed them all to persuade me that by failing to disclose the Loan Agreement the Defendants conspired to keep Mr Soanes' involvement secret. He and his legal team clearly selected what they considered to be the most damaging documents (such as Project Overlord). It is not open to him to challenge the findings which I made or the conclusion which I reached at [431] on the basis of a new selection of documents.

(iii) The Conspiracy Claim (as amended)

118. But in any event Mr Soanes' participation in Project Shelley was very limited and Mr Tinkler did not seek to persuade me that Mr Soanes had a wider involvement than I described in the Fraud Judgment at [410] to [413]. I am satisfied, therefore, that Issue (4) is entirely irrelevant to the Conspiracy Claim (as amended) and that he has no real prospect of succeeding on that claim even if I were to permit him to take it to trial.

Issue (5): The redactions of emails provided in disclosure by D4 on the instruction of Anthony Field. Unlawful Means Conspiracy, and Dishonest Assistance between D1-D4 and Anthony Field, Ian Rosenblatt, and RBG Legal Services Limited.

119. Mr Tinkler took me to 21 pages of emails which SGL had disclosed in the Fraud Claim relating to Mr Soanes and the Loan Agreement and many of which were redacted. Mr Tinkler challenged the redactions and he showed me one email dated 14 August 2018 from Mr Coombs to Mr Brady which SGL disclosed twice and in which the following sentence had been redacted in one but not the other: "The inside view from SC is that AT believes we will have to pay him the 4 x £500k management fee and is not paying any attention to the unit."

(i) No real prospect of success

120. Mr Tinkler submitted that these redactions were not concerned with legal advice and could not have been justified by legal professional privilege. Having examined the documents, I do not accept that submission. Apart from the inconsistency in the redaction of the email dated 14 August 2018, it seemed to be arguable from their context that SGL was entitled to redact the documents on the basis of legal professional privilege. But in any event, none of these emails assisted me in deciding whether Mr Tinkler had a real prospect of demonstrating that Mr Soanes improperly redacted documents himself on the advice of Rosenblatt.

(ii) *Henderson v Henderson* abuse

121. But in any event Mr Tinkler did not take me to any evidence which had emerged since the conclusion of the Fraud Claim which justified him challenging the redactions made by Mr Soanes now. In my judgment, he could and should have challenged them in the Fraud Claim and it would be a *Henderson v Henderson* abuse of process to permit him to do so now. In his oral submissions for the hearing on 29 June 2022 Mr Wardell acknowledged that Mr Tinkler and his legal team had concerns and suspicions that Rosenblatt had assisted Mr Soanes to make redactions to documents. It is clear, therefore, that they had this point well in mind and if they considered that those redactions were not justified, it was incumbent upon Mr Tinkler and his advisers to take action immediately and before trial.

Issue (6): Rosenblatt, D1-D4, Further Substantial Disclosure Failures, as set out in the book of Consolidated Disclosed and Undisclosed Documents, and Dishonest Assistance between D1-D4 and Anthony Field, Ian Rosenblatt, and RBG Legal Services Limited.

122. Mr Tinkler did not address me orally on Issue (6) but in his Skeleton Argument he invited me to read the Project Shelley Narrative in paragraphs 10 to 37 of his witness statement dated 16 February 2024 and I have done so. Mr Wardell took both me and also the witnesses to many of the documents in this narrative at trial including the Stifel Engagement Letter. The Project Shelley Narrative did not persuade me that any of my conclusions on Issues (1) to (5) were wrong or that it would not be abusive to permit him to continue to advance a general and unparticularised allegation of conspiracy against the Defendants and Rosenblatt.

(i) Abuse of Process: Collateral Attack

123. In particular, Mr Tinkler invited me to make a finding of fact at the Fraud Trial that Mr Brady made Mr Soanes privy to his plans regarding Mr Tinkler and that both Mr Brady and Mr Ferguson shared confidential information with him. I dealt extensively with the period covered by Mr Tinkler's narrative in deciding that issue and I was not prepared to find that Mr Ferguson discussed Project Shelley with Mr Soanes on 17 May 2015 or that Mr Arch of Stifel encouraged the Board to issue the 29 May RNS before 26 May 2015: see [301] to [311].

124. In my judgment, the Court decided Issue (6) against Mr Tinkler in the Fraud Claim and by asking the Court to decide that issue in his favour now he is mounting a collateral attack on the findings which I made in the Fraud Judgment at [310]. It would be an abuse of process to permit him to proceed with Issue (6) against all of the Defendants for the reasons which I gave in dealing with Issue (1).

(ii) *Henderson v Henderson* abuse

125. Furthermore, on 18 November 2021 Bacon J refused to grant Mr Tinkler permission to amend to rely on Project Shelley and the Stifel Engagement Letter. She described the proposed amendments as "developed over three pages of the amended particulars of claim" and refused permission because the documents had always been available to him. She stated that this was a point which should have been taken from the outset and that it was now too late to raise it. There was no appeal against that decision and it is certainly too late now. In my judgment, it would be a *Henderson v Henderson* abuse to permit Mr Tinkler to proceed with Issue (6) in the Conspiracy Claim.

126. I am prepared to accept that not all of the documents in the Project Shelley Narrative were available to Mr Tinkler at the outset of the Fraud Claim. But it is clear from Bacon J's judgment that he had ample material available to him to advance a case that the Defendants misled the Court about Project Shelley and the Stifel Engagement Letter and that he did not need these documents to do so. Moreover, if these documents had genuinely been critical, Mr Wardell could have been expected to say so to Bacon J. However, he accepted that Mr Tinkler did not realise that the documents in his possession were relevant to the Fraud Claim.

(iii) Abuse of Process: the Russen Judgment

127. But in any event Mr Tinkler advanced almost exactly the same allegations in the 2018 Claim and his Honour Judge Russen QC dismissed them: see the Russen Judgment at [772] to [777]. In my judgment, the Project Shelley Narrative involves a collateral attack on the Russen Judgment for the reasons which I have set out in dealing with Issue (2) (above) and it would be an abuse of process to permit Issue (6) to proceed.

Issue (7): D2 Disclosed falsified documents. In addition to Anthony Field redacting documents that were not legally privileged. Unlawful Means Conspiracy, and Dishonest Assistance between D1-D4 and Anthony Field, Ian Rosenblatt, and RBG Legal Services Limited.

128. Again, Mr Tinkler did not address Issue (7) in his oral submissions. In his Skeleton Argument he submitted that Mr Brady had "falsified" the Laycock Note which I set out in the Fraud Judgment at [174] by deleting the sentence: "Stepping off board for health reasons would be a [sic] easy solution." He did not give any other examples in support of the general allegation that SGL disclosed falsified documents either with or without the knowledge of Mr Field.

(i) No real prospect of success

129. In my judgment, Mr Tinkler has no real prospect of success on Issue (7) whichever form the Conspiracy Claim takes. Mr Tinkler was not comparing two versions of the same document one of which had been falsified to present a false narrative to third parties or the Court. He was comparing the Laycock Note itself (which was an aide memoire which Mr Brady prepared on his mobile phone on 30 June 2018) with an email (which Mr Brady sent later that day to Mr Adam Wyman of Travers Smith). Mr Brady had obviously copied or cut and pasted parts of the Laycock Note into the notes which he sent to Mr Wyman. But they were two separate documents. He also made a number of changes and amplified a number of his notes. Moreover, there was no change of substance. The Laycock Note contains the words "stepping off the board for health reasons" and the email contains the longer sentence set out above.

(ii) *Henderson v Henderson* abuse

130. But in any event Mr Wardell put the Laycock Note to Mr Brady at the trial of the Fraud Claim and suggested to him that he deliberately chose not to disclose it. I dismissed that allegation because it was not a damaging document: see [344], [358] and [359]. If Mr

Tinkler had wished to advance a case that the document was not authentic or that Mr Brady had falsified it to lay a false paper trail, he could and should have instructed Mr Wardell to put that case to Mr Brady. But then this would have been inconsistent with the case which Mr Tinkler chose to advance at trial. It would be a clear abuse of process to permit Mr Tinkler to pursue this allegation further.

VII. Disposal

131. For the reasons which I have set out in sections V and VI I refuse to permit Mr Tinkler to withdraw the admission that it was an abuse of process to pursue the Conspiracy Claim if the Fraud Claim failed and the Russen Judgment remained binding on him and I strike it out in its entirety on the basis of that admission. Alternatively, I strike out the Conspiracy Claim both in its original and its amended form either because it would be an abuse of process to permit Mr Tinkler to proceed with any of Issues (1) to (7) or because he has no real prospect of success on six of those seven issues. I will, therefore, make an order dismissing the Conspiracy Claim and ordering Mr Tinkler to pay the costs of the claim. I will also release Mr Brady, Mr Ferguson and Mr Soanes from the undertakings which they gave in the Preservation Order. Finally, I invite the parties to agree a minute of order for submission to the Court. If they are unable to do so, I will deal with any outstanding issues on the hand down of this judgment. Alternatively, if the parties agree, I will deal with them on paper.