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Case No: LM-2018-000113

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 15/02/2019

Before :

HH JUDGE RUSSEN QC
(Sitting as a Judge of the High Court)

- -

Between :

STOBART GROUP LIMITED	**Claimant**
- and -	
WILLIAM ANDREW TINKLER	**Defendant**

- -
- -

Richard Leiper QC and **Daniel Isenberg** (instructed by **Rosenblatt Limited**) for the **Claimant**
John Taylor QC, **Alex Barden** and **Giles Robertson** (instructed by **K&L Gates**) for the **Defendant**

Hearing dates: 12th to 16th, 19th to 23rd, and 29th November 2018

- -

Approved Judgment

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

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HH JUDGE RUSSEN QC

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SECTION 1: INTRODUCTION

1. This is my judgment following an expedited trial over 11 days in November 2018, at which the Claimant ("**the Company**") was represented by Mr Richard Leiper QC and Mr Daniel Isenberg and the Defendant ("**Mr Tinkler**") by Mr John Taylor QC, Mr Alex Barden and Mr Giles Robertson. I am grateful to counsel and their respective teams of instructing solicitors for their considerable effort in getting the case ready for trial within 6 months of its commencement. No small part of that was their clear distillation of the issues to be decided from a dense mix of events making up the internal travails faced by the Company's main board of directors during 2018.

2. Despite its length, this judgment does not attempt to capture every aspect of the exchanges – both between what I might describe as the rival camps and within each camp and the latter often, though not always, revealed to the opposing one only after disclosure in these proceedings – but, instead, only those which are relevant to the determination of the issues identified below. Those material ones are numerous and convoluted enough, and the legal principles with which each side seeks to arm itself are sufficiently well contested, for this judgment to have become quite unwieldy without it being expanded further to cover incidental matters. My level best attempt to act upon the parties' spirit of expedition, which the nature of the dispute obviously encourages, is a further reason why I have not attempted to address every matter that was raised at

trial or, more pertinently, within the parties' voluminous written submissions with their extensive citation of authority.

3. Therefore, in an effort to lend it greater comprehensibility, I have broken down this judgment into the sections indicated by the above Index. The definitional terms used below I have highlighted in bold.

(a) A Thumbnail Sketch of the Dispute

4. This litigation raises some elementary principles of corporate governance. They have been prompted by what I might describe, at least on the Company's case, as a previous state of insurrection within its board of directors. Although the Company says that the unrest and the uncertainty caused by it were resolved, properly and effectively, by steps taken in the summer of 2018 to remove Mr Tinkler from the board, he maintains that his struggle for a presence on the board is not over. His counterclaim in these proceedings extends to an order for his reinstatement to it.

5. It is not easy to summarise, for the purposes of introducing the issues between the parties, the detailed facts giving rise to them. More often than not the relevant events are interconnected and, by the summer of 2018, can be regarded as involving thrust and counter-thrust between the rival camps. I set out the material ones in Section 3(b) below. Reduced to basics, the essential questions stem from what became a confrontation between the majority on the company's main board, on the one hand, and, on the other, a dissenting director who has generated support from shareholders which is (or certainly was at the relevant time, as crystallised by the commencement of proceedings) sufficient, by simple majority vote, to influence the composition of the board.

6. Whether that support was secured or encouraged by fair means or foul is a matter to be determined by the court as the answer could influence the steps that the majority on the board might properly have taken in response and, perhaps, the nature of the relief the court is prepared to grant even if it concludes their own actions are not beyond reproach. The fact that Mr Tinkler not only owed duties to the company as a director but also as an employee under his Service Contract with the Company (as represented and spoken for by the majority) also has a significant bearing upon this aspect of the case.

7. As will appear below, the steps taken by the majority included a decision to approve a transfer of shares (which had been disenfranchised from voting pending their transfer out of the corporate treasury) whose revived voting rights operated, in the event, to reduce the impact of Mr Tinkler's shareholder support; though it is important to note at the outset that the majority maintain their decision was not simply responsive to his dissenting actions. The imminence of the Company's AGM (at which those shareholders backing the minority director and indeed all shareholders with voting rights might express their views upon the composition of the board) and one particular market announcement made by the Company before that meeting (which focussed upon certain actions of Mr Tinkler) are other very significant facts.

8. Like the act of transfer of shares out of the Company's treasury to the trustee of an employees' benefit trust, who then voted them in favour of the majority at the AGM, the terms of that public announcement have led Mr Tinkler to utter his own cry of "foul" against the majority. Indeed, his general position is that these steps by the majority

were neither truly responsive nor reasonable ones but instead formed some of the final pieces in a plan to entrench their own position and secure his removal from office which, he says, they had decided upon some months previously. Against that, the majority say that this ignores what they say was Mr Tinkler's earlier decision in principle to stand down from the board and that, from his discussions with key shareholders which they understood would be about his orderly departure, he undertook a volte-face that carried with it a plot for a boardroom coup.

9. That, then, is a thumbnail sketch of the litigation in which I now give judgment.

(b) The Parties

10. The Company is incorporated in Guernsey and listed on the London Stock Exchange. With other companies in its group ("**the Group**") its business provides infrastructure and support services. Those services involve them owning and managing a range of key infrastructure sites (held by the Infrastructure Division) and, through the three core Operating Divisions of Aviation, Energy, and, thirdly, Rail and Civils (the latter meaning civil engineering projects), providing support services to other businesses in those sectors. The Aviation Division includes London Southend Airport ("**LSA**") and, until recently, also included Carlisle Lake District Airport (which has now been moved into its separate Infrastructure Division).

11. The Company is a FTSE 250 company whose market capitalisation over the period under scrutiny in this judgment has fluctuated between just over £1 billion and in excess of £800 million. At the year end of 28 February 2018 the Company had revenues totalling approximately £242 million on which it made a profit before tax of over £117m, though this reflected its disposal of investments including a profit of £123.9m profit on a partial disposal of its shareholding in Eddie Stobart Limited ("**ESL**"). The Company's 2018 Annual Report stated that the Group then employed a total of 1,584 employees, though in evidence the CEO said it was now more like 1,700.

12. The Company's name reflects its earlier acquisition of the well-known road haulage company, ESL, though its sale of shares in that company in 2014 (when it relinquished its majority stake) and again by the disposal in 2017 means that the Group now retains, through its Investment Division, a minority 12.5% stake in ESL. The Company owns the "Eddie Stobart" brand which it licenses to ESL.

13. At the beginning of 2018 the Company's main Board of Directors ("**the Board**") comprised Mr Iain Ferguson CBE ("**Mr Ferguson**", the non-executive Chairman), Mr Warwick Brady ("**Mr Brady**", Chief Executive Officer), Mr Andrew Wood ("**Mr Wood**"), Mr John Coombs ("**Mr Coombs**") and Mr John Garbutt ("**Mr Garbutt**") (with each of the last three being a non-executive director), Mr Richard Laycock ("**Mr Laycock**", initially as Group Finance Director and then Chief Financial Officer from 1 February 2018), and Mr Tinkler (who by then was employed part time as an Executive Director).

14. By the time of the trial before me in November 2018 the composition of Board had changed through the removal of Mr Tinkler (whose challenge to that step is at the heart of these proceedings), the resignation of Messrs Garbutt and Laycock (through their decisions not to stand for re-election at the July AGM) and the appointment of Mr Nick Dilworth ("**Mr Dilworth**", who, having been the Company's Commercial Director,

was appointed as Chief Operating Officer on 1 September 2018 to fill Mr Laycock's role) and Mrs Ginny Pulbrook (who was appointed as a non-executive director one month later).

15. Mr Tinkler is one of the founders of the Company which was incorporated in 2002. He had previously established a business of providing contracting services on civil engineering and railway infrastructure projects through a company which had traded as WA Tinkler Building Contractors. It was another "WA" company of his (and of Mr William Stobart) which had acquired ESL in 2004.

16. Mr Tinkler remains a substantial shareholder in the Company, now holding 7% of its issued share capital (a reduction from a holding fractionally short of 8% as at May 2018 as a result of him selling some shares). Mr Tinkler is one of the Company's larger shareholders. He would have been entitled to yet further shares on 22 June 2018 under an employees' incentive plan but for his recent dismissal from employment referred to below. In these proceedings he seeks declaratory relief to the effect that his dismissal was invalid and an order that "the Tinkler EBT" shares be transferred to him.

17. Mr Tinkler is also the sole director and one of two shareholders of Stobart Capital Limited ("**Stobart Capital**"). That is a new corporate vehicle which was incorporated on 10 May 2017. It is not part of the Group and operates, or at least operated for a while, independently of it. Stobart Capital was established with the intention that it would generate entrepreneurial ideas and investment opportunities for consideration by the Board. Mr Ian Soanes ("**Mr Soanes**") is the other shareholder in Stobart Capital, holding 49.9% to Mr Tinkler's 51.1%. The Company holds class C shares in Stobart Capital but these do not carry any voting, income or dividend rights but, through circumscribed rights to convert into A shares (the class held by Mr Tinkler) or class B (those held by Mr Soanes), may provide some economic protection to the Company in the event of Stobart Capital being sold.

18. Between 21 September 2007 and 1 July 2017 Mr Tinkler was the Chief Executive Officer of the Company. There is no dispute that he was replaced in that role by Mr Brady who had acted as Deputy CEO between January and July 2017. It is common ground between the parties that, following his stepping down as CEO, it was agreed that Mr Tinkler would spend half of his time working as an Executive Director of the Claimant (at 50% of his previous salary) and half for Stobart Capital.

19. Between March 2008 and 14 June 2018 (on the Company's case that he was then validly removed from office) Mr Tinkler was also a director of the Company and, before that latter date, had become a director of other companies within the Group (which directorships the Company also says were terminated on that date).

20. Whether or not, despite events of June and July 2018, Mr Tinkler also continues as a director and also as employee of the Company are key questions in these proceedings between them. The particular issues for trial, identified by the parties for the court's determination (and set out in Section 2(b) below) both inform and include those central questions.

(c) The Issues in More Detail

21. As I explain below, the trial before me was upon the existence or otherwise of causes of action, or grounds for relief, rather than any question of quantum.

22. As I have already noted, a central issue I am required to determine at this stage of the proceedings, against a background of substantially contested facts, motives and commercial aims of the individual protagonists over the period between November 2017 and July 2018 (inclusive) is whether or not Mr Tinkler was validly removed from office on 14 June 2018. Or, if not on that date, then later, on 7 July 2018, when, in the light of a majority of members having voted at the Company's AGM the previous day to elect (or, on his case, re-elect) Mr Tinker to the Board, the other four directors purported to remove him from the Board by a request signed by all of them. The Company says the majority took that valid and effective step in accordance with a provision in its Articles enabling them to do so.

23. Mr Tinkler counterclaims for declaratory relief that his purported removal, first on 14 June by a Committee established by a majority of the Board ("**the Committee**") and later by the co-directors' requisition on 7 July, was invalid and that he remains a director of the Company. He also seeks an injunction restraining the Board from purporting to remove him under the power (under Article 89(5)) which they invoked on 7 July 2018.

24. The issue as to whether or not Mr Tinkler has ceased to be a director is appendant to the question as to whether or not he remains an employee of the Company. This is highlighted by the fact that it was on the same day in June 2018 as his purported dismissal as an employee, for alleged gross misconduct, that the Committee (by reference to that dismissal and relying upon a provision in his Service Agreement) also first acted to secure his removal as a director. Mr Tinkler argues that the provision relied upon (clause 17.4 under the Agreement, as novated by the Company in 2015) does not apply to his directorship of the Company which is not a "Group Company" within the meaning of the clause. He also disputes that grounds for his summary dismissal from employment existed.

25. Mr Tinkler had been employed by the Company as an Executive Director since May 2015 (and prior to that by Stobart Holdings Group from whom his employment was transferred) and this employment became qualified, in relation to working hours, by the 2017 agreement upon the equal division of his time with Stobart Capital. Whereas the Company maintains he was summarily dismissed from that employment on 14 June 2018 and seeks a declaration that the dismissal was lawful, Mr Tinkler also counterclaims for a declaration that he has not been validly dismissed as an employee.

26. Nor is the link between Mr Tinkler's directorship and his employment entirely severed by the events of the following month and his second purported removal from office. The Company's case that the other directors validly invoked Article 89(5) on 7 July 2018, after the shareholders' vote at the AGM, rests heavily upon their power having been properly exercised by reference to the matters which, it says, had justified Mr Tinkler's summary dismissal as an employee on 14 June. In short, the Company says that the matters which prompted that earlier action had not gone away simply because certain shareholders supported his directorship. Against that, Mr Tinkler says his grounds of challenge to his dismissal from employment also infect this later purported removal. In addition, he argues strongly that it was not for the majority on the Board to usurp the will of shareholders expressed only the day before.

27. Indeed, he maintains that the grounds for impugning the actions of the majority on the Board are strengthened by a further challenged act, namely their decision, shortly before the AGM, to cause shares to be transferred from the Company's treasury ("**Treasury**") to the Company's Employee Benefit Trust ("**EBT**"). The result was that the transferred shares could then be voted by the Trustee at the meeting (as opposed to the employees, including Mr Tinker, for whose benefit they would have been destined but for his dismissal). The Trustee's vote did not prejudice his own position (he was appointed with majority shareholder support so that the other directors were faced again with the decision to remove him) but its exercise did mean that the incumbent Chairman, Mr Ferguson, was re-elected against the wishes of Mr Tinkler and his supporters. Mr Tinkler says that the earlier actions of the other directors only serve to show that their decision to transfer shares to the EBT was not made for a proper purpose but was instead made to entrench their own position in the existing dispute of which those actions formed part (Mr Coombs and Mr Wood having by the date of the AGM indicated they would step down if Mr Ferguson was not re-elected). This in turn is disputed by the majority as they maintain that there was proper justification for the transfer to the EBT (in the form of both immediate and short-term employee share entitlements). They also say that the Trustee's vote was a truly independent one.

28. There are other issues between the parties, as I relate below. Not all of them fall within the scope of the expedited trial of matters of liability, declaratory and injunctive relief which HH Judge Waksman QC (as he then was) directed by his Order dated 3 August 2018. Those that do fall within it include the Company's claims (in support of its position that the matters relied upon culminated in a valid removal from office and termination of employment) that Mr Tinkler acted in breach of his duties to the Company and in breach of his Service Agreement and also that, with others, he participated in an unlawful means conspiracy.

29. The pleaded conspiracy is said to have involved the pursuit, from November 2017 at the latest, of "**the Objective**" by Mr Tinkler with Paul Hodges, Allan Jenkinson, Neil Woodford and/or Philip Day. The Objective is said to have been a change in the composition of the Board (in part by the replacement of the Chairman, Mr Ferguson) with a view to ensuring that Mr Tinkler's influence over it was such as to safeguard his personal interests. Those interests are said to have included an increase to his remuneration (including a retrospective one) and his appointment as CEO or as Executive Chairman. By the time the Company's counsel came to make its closing submissions the conspiracy allegation against Mr Jenkinson had been abandoned.

30. Some of the pleaded allegations of breach of duty by Mr Tinkler – namely those which rest upon him having caused the Company to incur excessive or unjustified expenses which could not be said to be for the proper purposes of the Company – were also abandoned after the evidence at trial. The expenses allegation was relied upon by the Company when summarily terminating Mr Tinkler's employment on 14 June 2018. Mr Wood's letter of that date claimed that Mr Tinkler had shown a "*flagrant disregard for your fiduciary and contractual duties*" and did so by reference to the letter sent by the Company's solicitors to Mr Tinkler's solicitors the same day. The solicitors' letter had referred to more time and investigation being needed to investigate and fully substantiate the "*significant sums not just on personal entertaining but the extensive use of aircraft and helicopters*".

31. As the later pleaded allegation of improper expenditure covered numerous expenses in the period from March 2015 to February 2018, it would probably not have been sensible for me to have attempted to capture the detail in the already lengthy chronology of events in Section 3 below. That chronology begins in late 2017 and the events which, with a heavy dose of hindsight, can be said to have marked the genesis of the present dispute. What would have been the problem of how best to address the detail of the expenses claim has now disappeared; and with its disappearance Mr Tinkler is entitled to observe that the expenses allegation had no proper place within the alleged grounds for his summary dismissal or his removal from office, nor in these proceedings. In the light of the abandonment of the expenses claim, it can fairly be said that the pursuit of that claim reflected only afterthought by the Company and there is no reason why the court should not endorse Mr Tinkler's closing submission that "*the allegations should never have been made and have been almost entirely abandoned by the [majority of the Board] in evidence*".

32. For Mr Tinkler's part more generally, his counterclaim extends further than already outlined above in relation to his own status within the Company. He seeks an order setting aside the purported transfer of shares to the EBT and a declaration that Mr Ferguson, the Company's long-standing Non-Executive Chairman, was not validly re-elected at the Company's AGM on 6 July 2018 and has therefore ceased to be a director. These too are issues which fall to be determined by me.

(d) The Proceedings

33. I have said enough in the Introduction above for it to be apparent that these proceedings are the latest step in a boardroom battle within a substantial, publicly quoted company.

34. The proceedings were commenced by the Company by a Claim Form issued on 14 June 2018. This was after the Committee had purported to summarily dismiss Mr Tinkler and remove him from office but before the July AGM and resulting reliance upon Article 89(5). Proceeding upon the assumption that his employment and directorship were at an end, the relief set out in the Claim Form did not extend to any declaratory relief on those fronts but instead only addressed the financial remedies sought by the Company in the form of an account of profits, equitable compensation and/or damages for the alleged breaches of duty and conspiracy.

35. By the time the Particulars of Claim were served on 24 July 2018 (they were later amended at the pre-trial review in October 2018) the Company knew enough of Mr Tinkler's challenge to his dismissal to include a claim for a declaration that he had been validly dismissed. It was Mr Tinkler's Defence and Counterclaim (also since amended) which moved the chronology on from 14 June 2018 and it is that pleading and the Company's now Amended Reply and Defence to Counterclaim which engage on the issues relating to the AGM (including the transfer of shares to the EBT in advance of it and the purported use of the Article 89(5) power after it).

36. At the opening of the trial, objection was taken by Mr Tinkler to the Company advancing (through the witness statement of Mr Wood) its claim in relation to expenses on a ground that, he said, had not been pleaded in the Particulars of Claim. By an extempore ruling on the first day of the trial, I held that it was not open to the Company

to rely upon what, for the purposes of that ruling, I described as the "want of dual authority" point, namely the absence of two directors signing off their approval of the relevant expense. I need not dwell further upon this aspect because I have already noted that, by the end of the trial, the Company had abandoned its expenses claim against Mr Tinkler, in its entirety and whatever the suggested factual and legal basis for it may have been.

37. By another ruling on the first day of the trial I directed, pursuant to CPR 39.2(3)(c) that certain parts of the hearing should proceed in private on the ground that the relevant evidence to be given during the closed session related to the confidential terms upon which the Company and the airline operator Ryanair had agreed that Ryanair flights should operate out of LSA. I was persuaded to do so in circumstances where it was necessary to guard against the confidentiality between them being damaged by disclosure of those terms in open court. My Order dated 12 November 2018 also made provision under CPR 31.22(2) and 32.13(4) to preserve the confidentiality in disclosed documents and witness statements evidencing those terms. It is not necessary for me, for the purposes of this judgment, to refer to the detail as opposed to the existence of those terms.

SECTION 2: MATTERS TO BE DETERMINED

(a) Context

38. In a very general sense, as is illustrated by the decision taken by the majority of the Board to reverse the election of Mr Tinkler at the AGM, the contest in these proceedings (and identifying the protagonists as they were at their commencement) is between the majority of the directors on the Board, on the one hand, and Mr Tinkler, backed by those shareholders whose support he had garnered, on the other. Mr Tinkler's Amended Defence focuses upon the actions of "**the Four Directors**" - Messrs Ferguson, Brady, Coombs and Wood – and, to quote from paragraph 16, impugns the actions taken by them "*to secure the removal of Mr Tinkler from the Board, and to shore up their own positions within the Company, in particular to perpetuate Mr Ferguson's control of the board and the management of the Company*."

39. That general demarcation of the battlefront is reflected in the way the parties expressed their respective positions in their written opening submissions.

40. In their Opening Note the Company's counsel observed that *"[T]his trial concerns the steps that the board of a company may take to deal with a recalcitrant director*" and included within it the submission that *"[I]n relation to the Board's decision to remove Mr Tinkler as a director the day after he had been elected at the AGM, it is plain directors can take decisions against the wishes of the majority of shareholders*".

41. Against that, Mr Tinkler's counsel's Opening Note said (having reviewed some key authorities in relation to the equitable or common law duties to be observed by directors) that *"[T]he essence of all these cases is that directors should not take a decision which purports to pre-empt, bind, or overrule a decision of shareholders*" and that *"[I]n a situation where there is dispute about control, the principal function of the directors is to speak rather than act*." The first sentence of their written opening

referred to the "*golden thread*" that it is for shareholders to decide upon the composition of the company's board and who it is that should manage the company.

42. Faced with an issue presented in these general terms, and mindful of the way that *the Company* presents its position - litigating as it is at the direction of those, including the Four Directors, who now comprise its Board - the court will have well in mind the usual hesitancy in interfering in the internal affairs of companies. Ordinarily, it will not attempt to second-guess the actions of a company's present directorship, acting either unanimously or by an effective majority. Whether or not the company's affairs are being conducted in a way that might cause the majority of shareholders to undertake a review of the board's composition at the next opportunity to do so (including at an EGM requisitioned by a qualifying shareholding) is another matter. As for any complaint by a minority shareholder for whom such self-help redress is not available, and who (either alone or with allies) is confronted by the rule in *Foss v Harbottle*, the court's preparedness to grant either interim or final corrective relief will usually be tempered by its respect for the constitutional divide between the company's executive and its membership, certainly so far as acts by the former in the exercise of matters of commercial judgment are concerned.

43. The wariness with which the court steps forward in such matters is underpinned by the substance of the duties which each director owes to the Company (and for this Guernsey company they are the well-known fiduciary or common law duties rather than the general duties applied to English companies by sections 170-177 of the Companies Act 2006). Those are duties owed by them to the Company and not to its shareholders, and certainly not just some of them who may be dissatisfied with their exercise of executive powers conferred by the Articles. Companies are run by those to whom the members have, for the time being, appointed to the board of directors for that purpose, and not by the courts. More often than not directors may act by a majority (and in the event of them being equally divided the incumbent Chairman has a casting vote) and that is the position under the Company's constitution.

44. More than once during the cross-examination of certain witnesses these points came to mind when it was suggested that Mr Tinkler's unilateral stance on a particular aspect of the Company's business had not been an unreasonable one to adopt. Whether he had in fact sufficiently communicated a dissenting view and then attempted to justify it to his fellow directors was, more often than not, itself a matter of dispute but, putting that question to one side, a determination of who was commercially "right" or "wrong" on such matters is not within the remit of the court. That is so even where it could be shown that Mr Tinkler's own position (assuming it had previously been made clear as a dissentient one) was later vindicated by the decision ultimately taken by the Board exercising its combined business acumen. In circumstances where the members of a public company, at least, can be assumed to have appointed each director by reference to their appreciation of his professional or business acumen or entrepreneurial flair, the court is instead interested to know whether the Board and each member of it has acted constitutionally, as opposed to wisely, and done so in accordance with the fiduciary duties addressed below.

45. The facts that have emerged at trial only serve to highlight what should the clear demarcation between directorial responsibility and investor interest. As the Company's executive, the Board is collectively responsible for making decisions upon business strategy which it believes to be for the good of the company's enterprise. That is the

second strand of Mr Tinkler's "*golden thread*", as it holds good in relation to the power of the Board comprised as it is at any particular point in time. On the other side of the line are the Company's shareholders and employees who have every interest in the outcome of such decisions but no (or no direct) responsibility for them. These same facts highlight the potential harm for the company when one member of the collective not only forms an independent view upon the matter, as is his right, but then seeks involve shareholders and employees in matters of corporate strategy that are not within their direct or immediate remit.

46. As each director owes fiduciary duties to his company, it is obvious that the court may review the actions of any one director against the standards imposed by those duties and not just, therefore, to apply those standards to collective Board decisions. This the Company invites me to do in relation to the actions of Mr Tinkler which, it says, involved him breaching the constitutional divide between management and shareholders (and employees) and going behind the backs of the remainder of the Board so as to undermine it. The breaches of fiduciary duty which the Company says were perpetrated by him doing so form (alongside concomitant breaches of his Service Agreement) the alleged unlawful means for the purposes of its claim in conspiracy. The relevant fiduciary duties are addressed in Section 4 below.

47. The court will also interfere with the internal affairs of a company if the directors (or a majority of them) have presumed to exercise a power which is not vested in them under its constitution, or if they have exercised it otherwise than in good faith and in the best interests of the company or for an improper purpose. So far as the second is concerned, I also address in Section 4 below the approach of the court to an allegation that either infringement has occurred.

48. In this case Mr Tinkler argues that the following are triggers for the court's review of his removal from the Board:

    i) the absence of grounds for his summary dismissal from employment as the trigger for also removing him from office;

    ii) the improper creation of the Committee, on 28 May 2018, and the absence of any power in the Committee to dismiss him;

    iii) (as a discrete point from that just mentioned which is made by the reference to the language of the relevant clause in Mr Tinkler's Service Agreement) the absence of any power in the Committee to remove him from his directorship of the Company, as opposed to that of other companies within the Group, consequent upon such dismissal; and

    iv) the purpose for which shares were transferred to the EBT which, he says, made the difference on Mr Ferguson's re-election to the Board at the AGM (carrying with it the retention of Messrs Coombs and Wood who would otherwise have resigned their directorships).

(b) The Issues

49. The parties' competing invitations to the court to review the actions of the other (in the case of the Company, acting by the Four Directors) have led them to identify the

following key issues for the purposes of resolving the dispute between them so far as matters of liability are concerned.

50. The ten issues – pruned down by the removal of one set of issues relating to the subsequently abandoned expenses claim and by the removal of Mr Jenkinson from the conspiracy allegation – which I must decide are as follows ("**the Issues**"), and I have highlighted in bold the core element of each one:

1. Did Mr Tinkler have and raise with the Board genuine concerns about the management of the Company, in particular in relation to the following? -

a. The alleged lack of focus by the CEO on operational matters.

b. The alleged increased need for Mr Tinkler to spend time on operational matters rather than Stobart Capital.

c. The alleged increasing costs of overheads and third party advisers.

d. Alleged disquiet amongst staff.

e. The proposed acquisition of Flybe.

f. Mr Brady's alleged criticisms of Mr Tinkler's handling of expenditure at Carlisle Airport.

g. The movement in the share price.

2. Did Mr Tinkler reach an agreement with any of Mr Hodges, Mr Woodford and/or Mr Day to take steps in pursuit of the Objective (as identified in paragraph 29 above). If so:

a. Did they intend to use the alleged unlawful means?

b. Did they intend to injure the Company?

c. Were such steps implemented?

d. In the premises did such agreement amount to an unlawful means conspiracy?

3. Was Mr Tinkler in breach of his fiduciary and/or contractual duties (and if so what is the nature and seriousness of the breach) by reason of any or all of the following? -

a. His proposal in relation to the Flybe transaction.

b. Speaking to the Claimant's significant shareholders and criticising the Board's management and the Group's business and agitating for the removal of Mr Ferguson.

c. Entering into an unlawful means conspiracy with any of Mr Hodges, Mr Woodford, and/or Mr Day.

d. Improperly sharing Confidential Information (as specified at paragraphs 21, 22 and 33(c) of the Particulars of Claim).

e. Writing to shareholders and employees on 8 and 9 June 2018 respectively.

f. Orchestrating:

i. The writing of a letter of support from the Executive Leadership Team.
ii. A petition by group employees.

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

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

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

b. Establishing the Board Committee.

c. Issuing the 29 May 2018 RNS.

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

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

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

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

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

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

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

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

5. Was the Committee of the Board properly constituted? If so, did the Committee have authority to dismiss Mr Tinkler?

6. **Was the purported 14 June 2018 dismissal of Mr Tinkler as an employee invalid and/or unlawful** by reason of any or all of the following:

   a. If the Four Directors were acting for improper purposes.

   b. If the Committee of the Board lacked authority to dismiss Mr Tinkler, because (i) it was improperly constituted due to conflicts of interest, and/or (ii) dismissal of Mr Tinkler fell outside its terms of reference.

   c. If Mr Tinkler was not in breach of contract as set out in Issue 3 above, and/or such breaches were not repudiatory in nature.

7. **Did the terms of Clause 17.4 of the Service Contract permit Mr Tinkler's removal as a director?**

8. **Was the purported 14 June 2018 removal of Mr Tinkler as a director invalid and/or unlawful** by reason of any or all of the following? -

   a. If the Four Directors were acting for improper purposes.

   b. If the Committee of the Board lacked authority to dismiss Mr Tinkler, because (i) it was improperly constituted due to conflicts of interest, and/or (ii) dismissal of Mr Tinkler fell outside its terms of reference and/or (iii) the terms of Clause 17.4 of the Service Contract did not permit such a removal.

9. **Was the purported re-election of Mr Ferguson as a director at the AGM on 6 July 2018 invalid by reason of the alleged breaches of fiduciary duty as set out in Issue 4?**

10. **Was the second purported removal of Mr Tinkler as a director on 7 July 2018 invalid, if the Four Directors were acting for improper purposes**?

51. I should make it clear that I have added to Issue 1 the words "*and raise with the Board*". It is clear from the way that the evidence and argument developed at trial that whether or not Mr Tinkler aired his suggested concerns about the management of the Company to his fellow directors, before any discussion about them between himself and certain shareholders, is a key area of dispute and one which is relevant to the analysis of a director's duty. If he did not, but instead went straight to shareholders who were loyal to him, then that is likely to inform the decision on Issue 3. My addition to the terms of Issue 1 is consistent with the inclusion within the Company's closing submissions of a section addressing the extent to which Mr Tinkler raised any suggested concerns with the Board. The Company submitted that "*a director plainly cannot abrogate his duties to the Board as a whole, through a series of ad hoc piecemeal conversations with the Chairman*", particularly when there is no evidence that Mr Ferguson told Mr Tinkler that he would pass on his concerns.

52. Although I have not tinkered further with the wording of the Issues, it is also clearly important to consider the Issues in the light of another bone of contention between them,

as flagged in the Company's written opening submissions. That is whether or not Mr Tinkler, in early 2018, led Mr Ferguson to believe that he (Mr Tinkler) was going to step down from his directorship of the Company.

53. I should also add that Issues 5 to 8 and 10 (in relation to Mr Tinkler) and Issue 9 (in relation to Mr Ferguson) raise further issues as to the appropriate remedy to be granted if the court were to conclude that the relevant removal or re-appointment was invalid.

SECTION 3: THE KEY EVENTS

54. In order to identify and understand the issues in the proceedings it is necessary to focus upon the key events, between the latter part of 2017 and the AGM in July 2018, that have given rise to this dispute between the parties (in circumstances where it is, I think, reasonably plain that the expenses element of the Company's claim against Mr Tinkler, which went back over a longer period, would not by itself have resulted in this expedited trial between them).

(a) The Main Participants

55. In order to make sense of my summary of those events it is necessary to identify those who participated in them. Aside from Mr Tinkler, they of course include the other members of the Board as it was comprised on 14 June 2018 and on the date of the Company's AGM the following month, 6 July 2018.

56. Where, in paragraphs below within this section of the judgment, I make broad observations about the evidence of those individuals who gave evidence at the trial then I do so for the purpose of expressing my general views upon them as witnesses. Where there is a plain conflict between the Company and Mr Tinkler on or in relation to a key event then I address later and in greater detail the impact of the competing testimony upon the issue in question.

57. I have mentioned Mr Tinkler's position in the Company in Section 1(b) above. Mr Tinkler gave evidence during 3 days of the trial in what amounted to approximately 2 days' worth of court sitting. Clearly, I need to address in some detail below his evidence upon matters where the happening of an event or conversation is disputed or where the seriousness or implications of it is challenged. By way of general remarks at this stage, I note that some of Mr Tinkler's answers in the witness box did not sit easily with the terms in which he had expressed himself in the contemporaneous documents. Further, it is clear that his position over the last year or so, on what I loosely describe as "management issues", was clearly influenced in large part by what he regarded as a risk to his shareholding in the Company (which at one point he referred to as his family's inheritance). He told me that when he stepped down as CEO his shareholding was worth about £90 million but that it was probably worth about £50 million at the time of trial (allowing, I assume, for his sale of some shares in May 2018). It is also clear that, by the end of 2017, Mr Tinkler had developed a real grumble about what he felt had been his serious under-remuneration – whether in cash or shares – for his time, efforts and results when he had been CEO.

58. I now introduce, in alphabetical order and alongside the members of the Board identified in Section 1(b) above, the other key players in the recent events giving rise to this dispute, many of whom gave evidence at the trial.

59. I have also already introduced Mr Brady. He is an executive director and the CEO of the Company, having taken over that position from Mr Tinkler in July 2017. Before joining the Company, Mr Brady had been Chief Operating Officer of easyJet and (not just through that company) he had acquired considerable experience in the aviation sector. Mr Brady was a member of the Committee established by the majority at the Board meeting, by telephone on 28 May 2018, whose function I address below. He gave evidence on behalf of the Company. I found him to be a straightforward and impressive witness. That said, his evidence in relation to the expenses claim was found wanting, as the Company has itself recognised by not pressing the point to judgment, and there were the other aspects on which he did not yield to a suggestion put to him by Mr Taylor QC when he probably should have. The steeliness of his position on such matters no doubt partly reflected the leadership quality and degree of hard-edged business experience that the Company had, I presume, looked for when recruiting him. Mr Brady had only been in post as CEO for some 9 months before he had to confront what he regarded as the destabilising actions of Mr Tinkler and his attempt to reassert control over the Company and his evidence related to the steps taken by him and others in response. The general theme of Mr Brady's evidence upon the events leading up to these proceedings was one which reflected his point that the Company could not be run by two people (in the sense of final decision-makers) and that, necessarily and as must have surely been contemplated when he was recruited, his management style and aims would in all likelihood be different from those of his predecessor.

60. Mr Mark Barnett ("**Mr Barnett**") is a Fund Manager with Invesco Fund Managers Limited ("**Invesco**", which holds about 25% of the Company's shares on behalf of investors and is its largest shareholder). Mr Tinkler and Mr Brady each spoke to him, separately, in that capacity in late January/early February 2018. Mr Barnett did not give evidence at the trial.

61. Mr Richard Butcher ("**Mr Butcher**") is the Chief Executive of the Company's Infrastructure Division. He therefore sits on the Stobart Group Management Board (previously known as the Executive Management Board, or "**EMB**"). Mr Butcher joined ESL's road haulage business in 1997 and has occupied a number of management roles in the meantime, including Deputy CEO of the Company. He was also its Company Secretary between April 2011 and July 2014. He stepped down from the Company's Board (by which time he was an Executive Director) in July 2017 when Mr Brady became CEO. Mr Butcher gave evidence for Mr Tinkler. It was clear from his evidence that Mr Butcher is a strong supporter of Mr Tinkler and what he has done for the Company over the years and some email exchanges between them during late 2017 and 2018 indicate that Mr Butcher was not wholly content with the approach of the new CEO. Although I do not think it dented his loyalty to Mr Tinkler, there were points during Mr Butcher's testimony where I felt he probably recognised that the actions of others within the Company's management did not, when viewed objectively, provide much cause for grievance. Mr Butcher was present at and gave evidence upon the meeting on 10 January 2018 about which I make findings below.

62. Mr Coombs has been a non-executive director of the Company since 1 July 2014. He gave evidence for the Company. I was impressed by Mr Coombs' testimony. He was

a plain speaking and thoughtful witness whose answers conveyed a clear image of what he considered to be justification for steps taken by him and his colleagues in serving the best interests of the Company and all its shareholders. Whether or not that means the decisions which he supported are to remain undisturbed by the court is, of course, another matter in the light of the applicable legal principles. By late May 2018, Mr Coombs had decided that if Mr Ferguson was not re-elected as Chairman he too would stand down from the Board, and the market was informed accordingly.

63. Mr Philip Day ("**Mr Day**") is the CEO of The Edinburgh Woollen Mill Group and a very successful businessman in the retail sector. He was described in Mr Tinkler's written opening as a billionaire. At one stage Mr Day was proposed by Mr Tinkler to be a candidate for the Chairman's role and indeed a formal requisition that his name be put on the ballot paper for the July AGM was made in early June 2018. Mr Day gave evidence for Mr Tinkler. His testimony gave me cause to be concerned that he was not being entirely frank in his account of dealings with Mr Tinkler in the period leading up to the AGM, in that certain contemporaneous emails (one of which was from Mr Day and which, he recognised in the witness box, may have "*overplayed*" his independence from Mr Tinkler) indicated a closer involvement in Mr Tinkler's aims than he was prepared to let on. The Company alleges that Mr Day was part of a conspiracy with Mr Tinkler.

64. Mr Tom Dobell ("**Mr Dobell**") is the Fund Manager of M&G Investments ("**M&G**") which holds about 5% of the Company's share capital on behalf of investors. As they did with Mr Barnett, Mr Tinkler and Mr Brady had separate conversations with Mr Dobell in late January and early February 2018. Mr Dobell did not give evidence at the trial.

65. Mr Ferguson is a non-executive director and Chairman of the Company. He was appointed as such in October 2013. On 9 July 2018, having just been re-elected at the Company's AGM, it was announced that Mr Ferguson would be stepping down after a suitable replacement had been found. Mr Ferguson gave evidence that, with the process of recruiting a successor underway, he envisaged stepping down from the Board at the Company's next AGM in June 2019. Mr Ferguson gave evidence for the Company. I found him to be an honest and straightforward witness, though his evidence at certain points did seems a little defensive. It was clear to me that there was an undercurrent of real frustration on Mr Ferguson's part over what he regarded as the very serious misconduct of Mr Tinkler, in his capacity as director, by writing to shareholders and employees in connection with boardroom issues, and by what he described as a very difficult time over the last 9 months. These were events that Mr Ferguson said he very much regretted. His observation that he did not feel that, by the end of May 2018 and before Mr Tinkler took the step of writing to shareholders and employees, the Board had reached a "tipping point" with Mr Tinkler, for whom he clearly had previously had a great deal of respect, struck me as a genuine reflection of his view at the time. Mr Ferguson said that, in the course of the events of 2018, he had tried to be guided by doing the right thing for the Company and its shareholders as a whole. In relation to the transfer of shares to the EBT and the manner in which he chose to exercise proxy votes at the AGM, he clearly relied upon legal advice which he believed supported his position. Whether or not good faith on the part of a director and a belief that he is acting in the best interests of the company are by themselves sufficient to put the relevant action beyond the scrutiny of the court is a legal question to be explored further, but it

was clear to me from Mr Ferguson's evidence that he genuinely believed he had the Company's best interests at heart. His evidence upon the developing events of 2018 must be viewed in the light of the point upon which he remained adamant: that it was Mr Tinkler who by early January 2018 was clearly raising the prospect of him (Mr Tinkler) standing down from the Board.

66. Mr Garbutt was a non-executive director of the Company up to July 2018 (it had been announced in February 2018 that he would not stand for re-election at the AGM). At the Board meeting on 28 May 2018 Mr Garbutt had voted with Mr Tinkler against the establishment of the Committee. He had also been unwilling in February 2018 to sign an Article 89(5) resolution for the removal of Mr Tinkler from office. He did approve the Board's decision to transfer shares from Treasury to the EBT which is challenged by Mr Tinkler. Mr Garbutt did not give evidence at the trial.

67. Mr Paul Hodges ("**Mr Hodges**") is a professional stockbroker and a founding member of Cenkos Securities Ltd ("**Cenkos**", later a Plc), a member of the London Stock Exchange and one of the Company's brokers at that time. Mr Hodges gave evidence for Mr Tinkler. He said it was his reaction to the Company's announcement through the London Stock Exchange on 29 May 2018 that caused Cenkos to resign as broker the next day. In the period building up to that event Mr Hodges had greater involvement with Mr Tinkler, and his other backers, than he did with the rest of the Board and he made no secret of the point that by May 2018 he was backing Mr Tinkler's position, not theirs, so far as choice of Chairman was concerned. As with two of Mr Tinkler's other allies (Mr Jenkinson and Mr Whawell, whose loyalty was also built upon them having been involved alongside Mr Tinkler in business operations over the years) Mr Hodges' allegiance seemed to rest upon recognition of Mr Tinkler's past achievements in building up the value of the Company and confidence in his ongoing entrepreneurial drive. Whatever implications there might have been for Cenkos in this allegiance – before the AGM Mr Ferguson had indicated the relationship might have to be reviewed and it seems most unlikely, in the light of what has come out at trial, that Cenkos would still be the Company's broker had it not resigned – I found Mr Hodges' testimony to be frank and straightforward. Mr Hodges is alleged by the Company to have been part of a conspiracy with Mr Tinkler.

68. Mr Allan Jenkinson ("**Mr Jenkinson**") is a substantial shareholder in the Company, holding about 5% of its shares through a nominee, Svenska. He also previously acted as an adviser to the Company's Executive Management Board and therefore had an "insider's" knowledge of some of the Company's affairs. Mr Jenkinson gave evidence for Mr Tinkler. He is a near neighbour of Mr Tinkler in Cumbria and a close confidant of his in business matters. His allegiance to Mr Tinkler was illustrated by a statement he volunteered to the court immediately after having been released from the witness box but not quite having left it. Whilst he was in it, I found his answers to have been generally plain and frank ones. He seemed not to be hiding anything. Mr Jenkinson was alleged by the Company to have participated with Mr Tinkler and others in an unlawful means conspiracy but, in the light of the evidence adduced at trial, the Company no longer seeks to implicate him in that.

69. Jupiter Trustees Limited ("**Jupiter**") is the Trustee of the EBT established by the Company. At the AGM on 6 July 2018 Jupiter voted the Trust's shares in favour of Mr Ferguson's re-election as Chairman.

70. Mr Laycock was a director of the Company and, having previously been Group Finance Director, he became Chief Financial Officer of the Company on 1 February 2018 until his decision to stand down from the Board at the July AGM. Mr Laycock did not give evidence at trial.

71. Mr Ian Soanes I have already mentioned above as Mr Tinkler's co-shareholder in Stobart Capital. He is a long-standing advisor to the Company, having previously worked for Cenkos (whose Corporate Finance Department had been established by Mr Soanes and a colleague) which had provided corporate finance services in connection with the listing of the Company and from which company he had previously been on secondment to the Company (to act as an Interim Director of Finance). Mr Soanes was involved in setting up the Stobart Aviation Incentive Plan ("**SAIP**") which was key to the recruitment of Mr Brady as CEO. He has since fallen out with Mr Tinkler, to the extent that he has commenced proceedings in the Employment Tribunal, against Stobart Capital and Mr Tinkler, arising out of what he says was his constructive and unfair dismissal from Stobart Capital in February 2018. Mr Soanes gave evidence for the Company. Mr Soanes' evidence was thoughtful (in a reactive rather than premeditated sense) and struck me as being untainted by any agenda or motive other than that of getting to the truth.

72. Mr Benjamin Whawell ("**Mr Whawell**") is the Chief Executive of the Company's Energy Division. He therefore sits on the Stobart Group Management Board (formerly the "EMB"). Mr Whawell joined ESL in 2004 following its purchase by the company owned by Mr Tinkler and William Stobart. He had worked with Mr Tinkler for several years previously. Mr Whawell is a former CFO of the Company (a position then filled by Mr Laycock) and in that capacity sat on the main Board between March 2008 and July 2016. He then stepped down from the Board. Mr Whawell gave evidence for Mr Tinkler of whom he is a strong supporter. It was clear from the tenor of Mr Whawell's evidence, and from the terms of the contemporaneous communications between him and Mr Tinkler, that he hankered for the times when Mr Tinkler had more influence within the Company. On that general level, Mr Whawell's position upon the events under scrutiny ran up against one incontrovertible fact: that Mr Tinkler had agreed to step down as CEO in favour of Mr Brady with the prospect, if not indeed the intended result, that the latter's new broom would lead to a markedly different approach to the management of the Company's business. What further points may be read into Mr Whawell's general desire to turn back the clock is a matter for further analysis below. When it came to answering questions directly pertinent to that allegation he appeared to become uncomfortable. I recognise that due allowance must be made for the particular stress, even for a non-party, in giving testimony in response to accusatory questions about his own actions. However, his somewhat reticent answers in this area are to be contrasted with the more effusive ones he gave in relation to what, he felt, had been going wrong with the management of the Company and how it had been wrong for the majority on the Board to cause shares to be transferred to the EBT. He was coy when it came to considering communications which had involved him and Mr Tinkler but not other members of the Board. One thing is clear about Mr Whawell's position so far as those communications are concerned, which is that, unlike each of Messrs Hodges, Day, and Woodford (Mr Jenkinson having now been removed from the list) he is not alleged to have been part of the unlawful means conspiracy with Mr Tinkler. At the Pre-Trial Review before Judge Kramer on 23 and 24 October, the Company

sought to amend its Particulars of Claim to allege that Mr Whawell was a co-conspirator but the judge refused that late amendment.

73. Mr Gervaise Williams ("**Mr Williams**") is a Fund Manager with Miton Group ("**Miton**") who, as investment managers, have a shareholding in the Company of about 3%. As with Messrs Barnett and Dobell, Mr Tinkler and Mr Brady spoke to him separately in late January or early February 2018. Mr Williams also spoke to Mr Ferguson on 9 February 2018 about what Mr Tinkler had said to him. Mr Williams did not give evidence at trial.

74. Mr Wood is a non-executive director of the Company who was appointed in November 2013 and is its Senior Independent Director. He is a member of the Company's Audit Committee and Remuneration Committee ("**Remco**") and has been Chairman of the former since July 2014. Mr Wood became a member of the Committee (as established by decision of the Board on 28 May 2018) alongside Mr Brady and Mr Coombs. Mr Wood gave evidence for the Company. As with Mr Brady, Mr Wood's evidence upon the expenses claim advanced against Mr Tinkler was deficient. As in the case of Mr Ferguson, it struck me that Mr Wood's explanation for his part in the steps taken to dismiss Mr Tinkler and to remove him from office was supported by his belief, genuinely held, that the Company's best interests required that course. Like Mr Coombs, by late May 2018 Mr Wood wished the market to know that if Mr Ferguson was not re-elected as Chairman he too would stand down from the Board.

75. Mr Neil Woodford CBE ("**Mr Woodford**") is the head of investment at Woodford Investment Management ("**WIM**") whose funds under management include a 19.5% shareholding in the Company. Mr Woodford has been a fund manager for 30 years (he left his position as Head of UK Equities at Invesco Perpetual in 2014 to set up WIM) and has known Mr Hodges for most of that time. It was Mr Woodford who had originally caused Invesco (later represented by Mr Barnett) to invest in the Company. I should say at once that Mr Woodford would challenge my inclusion of him within the category of main participants in this dispute. His evidence is that he simply attended a number of meetings (some of them with both Mr Brady and Mr Tinkler present at which a proposal for the acquisition of the Flybe airline was discussed). However, he is alleged by the Company to have been party to a conspiracy with Mr Tinkler. He gave evidence for Mr Tinkler. It was clear that Mr Woodford's recollection of events was patchy but, as he observed, his position is such that he receives hundreds of investment proposals from third parties. I record, as Mr Taylor QC noted at the conclusion of Mr Woodford's cross-examination, that the allegation that Mr Woodford had been party to an unlawful means conspiracy with Mr Tinkler (and possibly others) was not directly put to Mr Woodford in the witness box. That is an allegation which Mr Woodford was shocked to read and which he had firmly denied in his witness statement. My general impression of Mr Woodford, supported by the contemporaneous evidence, is that from the outset he was too wedded to seeing matters from Mr Tinkler's perspective. The result was that he failed to get the balanced understanding of matters that he claimed to have.

(b) Significant Events

Background

76. In this section of the judgment I set out the events building up to the decision to remove Mr Tinkler from office on 14 June 2018 and then again on 7 July 2018. Where the happening of an event or any particular aspect of it is the subject of significant dispute then I note the existence of that dispute, recognising that my conclusions upon the facts is a matter for Section 5 below.

77. Before turning to the events, it is worth noting briefly the circumstances in which Mr Brady joined the Company as well as the pursuit, after he became CEO in place of Mr Tinkler, of two business proposals by the Company which, in the event, came to nothing but which provide relevant context for those events.

78. The announcement in September 2016 of Mr Brady's departure as Chief Operating Officer of easyJet was quite soon after followed by Mr Tinkler contacting him about the possibility of him taking over as CEO of the Company. Meetings followed (including with Mr Tinkler and Mr Jenkinson, and each of them alone) as did exchanges of emails. In those exchanges, Mr Tinkler talked about his own wish to do "entrepreneurial things for the Company" whilst Mr Brady ran the business. The discussion lead to the idea of a Value Creation Committee ("**VCC**"), that might meet on a weekly or monthly basis, and it was from that idea that Stobart Capital was born. The VCC became the forum within the Company where new investment ideas were presented and reviewed. The VCC was intended to serve as the interface between the Company and Stobart Capital.

79. Mr Brady did his own "due diligence" on the Company. This involved him recognising that its published business plan took matters up to 2018 with the approach for energy and airports being one of divestment. Mr Brady says that Mr Tinkler was very happy with his (Mr Brady's) thoughts in relation to the three operating divisions. Those were directed at providing long-term dividend and shareholder value. They included the aim of bringing opportunities to the aviation business and a plan to rapidly increase passenger numbers at the Company's airport, LSA, so that they might exceed 10 million passengers a year.

80. In what, now, might be regarded as a portent, Mr Brady said this in his witness statement:

> *"I also remember having several meetings with Mr Tinkler and Iain Ferguson, the Chairman of the Company. As part of my agreement to accept the role, I made it clear that it was important to me that Mr Ferguson committed to remaining in post until 2020. Mr Tinkler agreed that this was sensible. The reason I asked for that commitment was because I was aware from the due diligence that I had carried out that there had been some tension between Mr Tinkler and the Company's former Executive Chairman, and that Mr Tinkler had effectively forced her out of the job after a short period of time."*

81. The former Executive Chairperson was Ms Avril Palmer-Baunack. In his witness statement, Mr Wood said that she had resigned from office after only 4 months as a consequence of falling out with Mr Tinkler. In his answers in cross-examination, Mr Brady returned to his awareness of what he clearly regarded as a tumultuous event in the Company's recent history. In relation to the later events of early February 2018, described below, he said:

> *"So the fact that Andrew Tinkler is going off speaking to shareholders about the -- about the unhappiness of the management of the company -- the strategy, the performance, is completely unacceptable, and what alarmed me more than anything at this point was that I'd seen this in 2013 before I joined the company and I thought "My God, there's going to be another coup, he's going to remove the management, take control of this business and there's now people supporting him", so I'm not sure what he's saying to them, but, my God, we're now in a difficult situation, and I was quite alarmed."*

82. Mr Brady's witness statement narrative of his pre-appointment discussions went on to explain how (having initially wanted to start straight away as CEO) he came to see the benefit of working alongside Mr Tinkler for a short period whilst he settled into the Company and its business. He accepted the role of Deputy CEO, which was formally announced on 11 May 2017, on the basis that he would take over as CEO after the AGM in June 2017. As for Mr Tinkler's position after he replaced him as CEO, Mr Brady said it was no condition of his that Mr Tinkler should remain as an executive director and he was slightly surprised that a retiring CEO should remain such. But he, Mr Brady, felt the arrangement would be fine because Mr Tinkler would ultimately spend more of his time concentrating on Stobart Capital and, within the Company, he would focus upon infrastructure (both projects and divestment) and investments.

83. One of the matters to which Mr Tinkler and Mr Brady applied their minds during the latter's deputyship was the possibility of the Company acquiring the airline Flybe Group Plc ("**Flybe**"). The perceived advantages for the Company lay in the ability to route more flights through LSA, to raise the value of the airport and "monetise" the Company's airline business ("**Stobart Air**") so that the Company might dispose of a share of it.

84. They had in fact discussed this possibility before Mr Brady joined the Company. On 15 June 2017, before Mr Brady became CEO, they both flew out to visit Mr Day at his residence in Alicante to discuss whether he would be interested in the Flybe deal (the discussions in fact took place aboard Mr Day's boat). Then, on 27 June 2017, Mr Brady and Mr Tinkler met Mr Woodford (and his colleague Mr Lamacraft) on behalf of WIM and Mr Hodges to discuss the same potential investment opportunity.

85. The reason why third party investment was contemplated was because it was an important part of the thinking of Messrs Tinkler and Brady that Stobart Air (into which any acquisition of Flybe would otherwise be wholly absorbed) needed to be taken off the Group's accounts. The seasonality of Stobart Air's business and the sizeable loss predicted for the winter of 2017/18 meant that such de-consolidation held its attractions from the perspective of the Company's accounts and share price. That could be achieved by reducing the Company's holding in Stobart Air to a minority one and doing so would therefore leave it open to private investors to acquire a majority stake in any expanded airline business.

86. Discussions with Flybe began in the late Summer of 2017. Within the Company the proposal was known alternatively as "Project Blue" and "**Project Wright**". To avoid confusion I will refer to it as Project Wright.

87. Flybe engaged the services of a firm called Evercore to act as its adviser and the Company used Stobart Capital, fronted by Mr Soanes (who had been working with the

Board upon the proposal before Stobart Capital became up and running). Speculation over the Company's interest in Flybe led the Takeover Panel to require the Company to make a statement of its intentions to the market. The Company announced its intention to make a cash offer for the airline by an "**RNS**" published on 22 February 2018.

88. An RNS is an announcement issued through the London Stock Exchange's Regulatory News Service when the publication of regulatory or non-regulatory corporate information is required in the interests of market transparency. From my summary of events below it will be seen that the Company's use of other RNS's to announce developments in relation to Mr Tinkler's position within the Company was regarded by him as incendiary action within a developing stand-off between him and his co-directors. The one which he regarded as most inflammatory – that of 29 May 2018 – included (as one of the "challenges" he had presented to the Board) a brief reference to Mr Tinkler's own proposals within Project Wright, before it was finally abandoned by the Company.

89. In the event, Project Wright came to nothing and one month after the initial RNS, on 22 March 2018, the Company announced to the market through another RNS that it would not be bidding for Flybe.

90. Another proposal that came under consideration by the Company was the proposed acquisition of an aviation services business (including aircraft de-icing) labelled "**Project Fort**". The idea was first put forward by Mr Brady in late November 2017 who acknowledged at the outset that the profit figure was "vague". He proposed making an indicative offer in order to gain access to data for the purpose of conducting due diligence.

91. In early January 2018 Stobart Capital presented a report upon Project Fort for consideration by the VCC. On 7 January Mr Tinkler made some observations on the project to Mr Ferguson by an email and accompanying spreadsheet which Mr Ferguson found to be very helpful and to which he responded by saying "*you're not the only one worried about the amount of work that has to be done to get a return on the investment*." The same day, Mr Tinkler and Mr Coombs had their own email exchanges over one particular aspect of the spreadsheet figures (the treatment of depreciation of assets).

92. Stobart Capital's report upon Project Fort was discussed at the meeting of the VCC and by the Board on 25 January 2018. However, by 25 February it had become clear that the valuation undertaken by Stobart Capital called for substantial revision in the light of some double-counting and the value of the business was reduced from £5m to £1.1m. By that date Mr Brady was saying that he would proceed with the acquisition for £1 but not otherwise. In the event, the acquisition did not proceed.

93. With that background in mind, I now turn to the chronology of key events in the build up to the proceedings between the parties. In the light of the hiatus in outward exchanges between the Four Directors (or any of them) and Mr Tinkler during March and much of April 2018, I have grouped the events in the two periods of September 2017 to February 2018 and mid-April 2018 to mid-July 2018.

94. This is an avowedly basic approach to tackling a very dense evidential thicket, where the section of the trial bundle containing the chronological run of documents comprises

24 volumes and several thousand pages of often disparate communications. But I feel that any attempt to produce a more refined breakdown would prove to be counterproductive. The risk of losing the strands of contention between the parties would be even greater in relation to the later of the two periods when the interchanges between and within the opposing camps became more frequent and, in terms of happenings on different fronts, more convoluted.

95. I note that in their compendious opening and closing written submissions the parties tended to concentrate in turn upon discrete topics, no doubt because of the often heady combination of facts, pertinent to different themes, which is encountered on an attempt at a straight chronological run. The relevant part of Mr Tinkler's (helpfully) voluminous written opening approached "The Facts in Ten Stages" and that commendable effort by his counsel took up over 50 pages with numerous further cross-references to documents and passages in the evidence. The Company's equally constructive written opening managed greater brevity by focusing upon the really key events which either represented the cut-and-thrust between the parties or were catalysts for that.

96. Gathering the detail into manageable packets, according to the topic in question, was certainly a profitable exercise in identifying the issues then (or now said to have been) stirring the rival camps into thought or deed. However, I feel that it is only by identifying what was "in the mix" at any particular point in time in the build-up to the 2018 AGM - by which time the Four Directors had decided they must (to use Mr Coombs' phrase) "*fight like tigers*" – that there appears the broad picture of relevant events required for an understanding of the competing arguments now advanced in this litigation.

97. This approach seems to me to be particularly important where there is an allegation of conspiracy on the part of some whose intentions and actions are under scrutiny. Both parties cited my recent decision in *Palmer Birch (a partnership) v Lloyd* [2018] EWHC 2316 (TCC), [203]-[238], in relation to the components of a claim based upon an unlawful means conspiracy. In that case I offered the view (at [370]) that the court's assessment of the evidence on such a claim required a degree of rigour but not undue rigidity so far as the potential timeframe for wrongdoing was concerned, and my attempt below at a chronological digest is aimed at meeting that aspiration.

98. The result, on this approach, inevitably leaves some parts of the overall picture less heavily pixelated than others but I have attempted to capture the main events.

(i) <u>September 2017 to February 2018</u>

99. After he had stood down as CEO on 1 July 2017, in September 2017, Mr Tinkler's Service Agreement was amended to reflect the arrangement that he would be dividing his time between the Company and Stobart Capital. Stobart Capital entered into a Management Agreement with the Company on 22 September 2017 under which it agreed to provide the Company with services to assist in pursuing the "Investment Objective" of entering into value-creating acquisitions, investments and initiatives to be pursued and overseen by the VCC.

100. At around the same time Mr Tinkler made a proposal that the Company buy back approximately 10 million of his shares (at a cost of approximately £30m). This would

have reduced Mr Tinkler's shareholding from around 8% to 5%. But the advice from Cenkos and the Company's other broker at the time, Stifel ("**Stifel**", represented by Mr David Arch) was that a selected buy-back would have been unlawful and the Company did not proceed with the proposal.

101. Mr Ferguson's evidence was that, even if the brokers' advice had been otherwise, the Board would not have favoured the buy-back because it would have had a materially adverse impact upon the Company's cash reserves and would not have been a proper use of its money.

102. Mr Tinkler says it was in about September 2017 that he realised that Mr Ferguson and Mr Brady had started to take a different approach to the way the Board was being run in that it was taking decisions on corporate strategy and significant business decisions without involving senior executives on the EMB.

103. On 29 September 2017 Mr Tinkler sent Mr Ferguson an email in which he made what he described as some notes reflecting some concerns he had as a director and shareholder but went on to say that he still had confidence in Mr Brady – "*Firstly, I think Warwick is the right man for the job and has a lot of passion & Drive …*" - but that there needed to be focus upon the various priorities which he identified in the email. Mr Tinkler also recognised in his evidence that the email explained that he was thinking of standing back from the Board. The email said:

> "*After talking to Alison [his partner] and looking at my future and returns I will be able to achieve a more balanced life working with other investors and friends and will get far better Job satisfaction from going alone at this point in time in my Life after a 10 year hard slog*."

104. At the time of the email the Company was still engaged in the pursuit of Project Wright.

105. I have already mentioned above how Mr Tinkler and Mr Brady had floated the idea of Project Wright at separate meetings with Mr Day and Mr Woodford in June 2017.

106. On 14 September 2017 a further meeting took place between Mr Brady and Mr Tinkler with Mr Woodford (and his colleagues Mr Lamacraft and Mr Correia at WIM) to discuss Project Wright. Stobart Capital (represented by Mr Tinkler) had prepared the presentation which was made by Mr Brady.

107. Another meeting with Mr Woodford (and colleagues) about Project Wright took place on 7 November 2017 which Mr Tinkler and Mr Soanes (both on behalf of Stobart Capital) attended in the presence of Mr Hodges. Mr Woodford said that WIM could not invest in a private vehicle and any substantial investment would have to be in a listed company. That same day Mr Tinkler sent a text to Mr Day saying: "*Good meeting with Neil. Likes the deal. Only thing needs a listed vehicle to invest*."

108. On 8 November 2017, at a meeting by telephone involving Mr Brady, Mr Soanes and a number of others employed by the Group, Mr Tinkler presented his idea on structure as to how Project Wright might proceed. It included the idea of a consortium of investors comprising himself, Mr Day and Mr Woodford, and the proposal - set out in the form of a spreadsheet - that the Company would sell a majority stake in Stobart Air to a consortium of investors. In general terms, the proposal involved a consortium of

Mr Tinkler, "Mr Woodford" (i.e. WIM) and Mr Day acquiring a controlling 60% stake in Stobart Air. That would achieve the de-consolidation – the taking of the airline business out of the Group accounts – which provided significant impetus to Project Wright.

109. Mr Tinkler's spreadsheet – "Investor Working Step Plan" - showed a price for that stake based on a valuation of Stobart Air of £20m. Mr Tinkler said the figures in the spreadsheet included figures provided by Mr Graeme Buchanan, the Managing Director of Stobart Air based in Dublin. Mr Buchanan had also prepared a pictorial representation of the plan which summarised the key steps of the spreadsheet summarised below.

110. The spreadsheet indicated that a consortium of investors, including Mr Tinkler, would, at Step 1, acquire a 60% stake in Stobart Air from the Company (which would retain 40%) on the basis that Stobart Air was valued at £20m. The contemplated investors within the consortium were Mr Day (acquiring a 48.5% stake in Stobart Air for £9.7m), "NW" (meaning either Mr Woodford or WIM, acquiring 2.5% for £0.5m) and Mr Tinkler acquiring 9% (for £1.8m). Step 1 would result in Stobart Air coming out of the Group's balance sheet. Step 2 on the spreadsheet envisaged that a public company (the "NEX") would be listed on the independent stock exchange NEX Growth Market. At that stage, the listed company would acquire Propius (another company within the Group's air division which owned 3 aeroplanes) and its assets valued at £45m. Together with further anticipated monies to be raised from investors including the Company and the three original investors (the percentage share for "NW" being 29.39% now there was a public vehicle in which to invest) the market capitalisation of that company would be £115m. Step 3 on the spreadsheet involved the listed company buying 49% of Stobart Air (by then owned 40/60 by the Company and the three investors) on the basis that it was valued at 40m.

111. It was the forecasted doubling in value of Stobart Air (from £20m to £40m) between the Company's sale of its 60% stake at Step 1 and the listed company's acquisition, at Step 3, of its 49% stake in the business (from those who had acquired ownership of Stobart Air at Step 1) which meant that the investors at Step 1 would receive back almost all of their initial investment. The return of their investment would still leave them with their combined initial 60% stake in Stobart Air (owning 51% of the business excluding Propius) and – subject to their further injection of cash within Step 2 – a majority shareholding in the NEX (owning the other 49% and all of Propius).

112. When Mr Woodford was taken in his testimony to this spreadsheet about Project Wright he said he could not remember seeing it and that he had little recollection of the detail of the proposal, attributing his lack of recollection in part to the fact he had not wanted to spend too much time thinking about it because "*it wasn't a deal we could finance*" by reason of its private nature. As to that, and looking at the spreadsheet in the witness box, Mr Woodford said: "*I don't even know what NEX is"* and that (when another iteration of the deal was presented the following Spring) *"because it was still a private transaction, it was still not fundable by [WIM]*". Mr Woodford was anxious to clarify that, in any event, it would not have been an investment by him personally but by WIM. In his testimony, Mr Tinkler said that Mr Woodford had indicated at the meeting on 7 November that he could not really invest in a private company ("*he did mention in the meeting maybe a small amount*") which is why his spreadsheet envisaged "NW" acquiring a much greater percentage stake (29.39%) following the listing of the NEX.

113. Mr Day's treatment of the proposal summarised in Mr Tinkler's spreadsheet was even more perfunctory. In response to the suggestion by Mr Leiper QC that the doubling in the value of the initial investment, so as to receive its return whilst still retaining (through "Op Co") a majority stake in Stobart Air, was too good to be true, Mr Day said it "*sounds too complicated to me*" and "*it wouldn't be an investment we would take on*". His witness statement mentioned the meeting with Mr Tinkler and Mr Brady on his boat in June 2017 at which high level ideas for potential investments, including one in relation to Flybe, were discussed, and said "*I did not pursue any of these potential investments because I could not see them actually being delivered*."

114. So far as Mr Brady was concerned, he was anxious to at least implement the first step of de-consolidating the airline business. On 12 November he sent an email to those involved in Project Wright saying it was "*imperative we get Step 1 in the AT model done at latest by the end of November 17*."

115. Mr Brady said that it was in late November that Mr Soanes raised a concern that Mr Tinkler's proposed structure for Project Wright involved the Company relinquishing considerable value (£12m) to the other investors. Whatever the proper quantification of any transfer of value out of the Company might have been, I can see why Mr Soanes would have been prompted to have those concerns based on the doubling in the value of Stobart Air from £20m to £40m, once the three investors had acquired the majority stake, that was contemplated by Mr Tinkler's spreadsheet.

116. Having heard Mr Tinkler's evidence in relation to that predicated increase, it is not clear to me that Mr Soanes' concerns would have been dispelled by an attempt at further explanation. In addition to the brief mention in his witness statement to the work which the consortium would undertake to enhance value by "*increasing the length of franchises and entering into other commercial contracts*", Mr Tinkler mentioned more generally the "synergies" that would flow from the implementation of his steps. He gave the example of what, in hindsight, had happened to the value of ESL when he bought the company for less than £1m and *"[T]hree years later took it to the market and sold it for £138m, making a million pound a week*". What Mr Tinkler was unable to explain satisfactorily, in relation to his spreadsheet on Project Wright, is why the Company should not have been credited, as seller of the 60% interest at Step 1, with some if perhaps not all of what he was identifying as the foreseeable (or at least hoped-for) increase in value in the immediate future. The benefits from Mr Tinkler's "synergies" were in the main longer term ones (including post-Step 3) and appear to have been reflected in the spreadsheet's forecasted reduction in overheads and increase in management fee. By the end of his evidence on this aspect, I got the impression that Mr Tinkler's justification for the immediate (though purely notional) personal gain for himself and the other two investors really rested upon him questioning whether Stobart Air was even worth £20m for the purposes of the price to be paid by them at Step 1. He did say: "*This is me trying to get Mr Day on the hook to invest in this investment, alongside Mr Woodford*." And, of course, Mr Tinkler was able to say with greater conviction that his spreadsheet merely represented a *proposal*, intended to create value both for the Company and the consortium, which the Company was not forced to accept.

117. Mr Brady says that it was in late November that Mr Soanes sent him his own spreadsheet indicating the loss of value. Mr Brady said his reaction was not to reject Mr Tinkler's proposal as he knew he felt strongly about it and did not want to cause a row. He said he discussed with him how "*I would work on my proposal and he would*

work on his and we would see who could create a viable proposal first." Mr Brady's alternative, which he pursued in discussions with Mr Soanes, was to attempt to interest a private equity company, Cyrus Capital, in the acquisition of Flybe. That would have involved a private company rather than a public company. It was Cyrus Capital which was behind the Company's bid for Flybe in February 2018.

118. In relation to the Company's business at a more general level, Mr Ferguson's evidence was that it was around November 2017 – some four to five months into Mr Brady's tenure as CEO – that Mr Tinkler became increasingly critical of Mr Brady's "professionalism" of the Company's management. Mr Ferguson gleaned this from conversations with Mr Tinkler rather than email communications. He said Mr Tinkler was quite direct in voicing his complaints. They were not particularly specific, but instead more general ones about Mr Brady's management style, though Mr Ferguson did recognise that Mr Tinkler said the need for him to spend more time than previously anticipated on the Company's operational issues meant that he had limited time for Stobart Capital. Mr Ferguson says that he reminded Mr Tinkler that they had both agreed to support Mr Brady until he became established in the Company.

119. There is no indication that around this time Mr Tinkler raised with the Board any concerns he may have had about Mr Brady and nothing to suggest that he no longer regarded him as "*the right man for the job*" as he had said in his email of 29 September.

120. In addition to Project Wright, another matter in Mr Tinkler's mind in November 2017 was the level of senior management remuneration, including his own. Mr Ferguson also recalled that Mr Tinkler began complaining about his own remuneration and the fact that he thought the bonus payments should be higher. Mr Ferguson said in his evidence that Mr Tinkler raised on several occasions "*what he believed to have been under-remuneration in the past*". When Mr Taylor QC suggested to Mr Ferguson that Mr Tinkler had asked about further remuneration, which had been turned down and that was the end of it, Mr Ferguson responded (as I understood him by reference to the meeting on 10 January 2018 addressed below): "*Well, I hoped that was going to be the end of it but it didn't appear to be the end of it*."

121. On 4 November, Mr Tinkler sent an email to the Board with an attachment which showed the level of shareholder returns over the 3 years to November 2017 (229%) compared with the anticipated award under the Long Term Incentive Plan ("**LTIP**") which was the Company's performance scheme for rewarding management (which he worked out to be 0.36%). Mr Tinkler forwarded his email to Mr Jenkinson. He also forwarded it (together with a reply from Mr Laycock which said that he had worked out the LTIP award, at least for any award vesting that year, to be 0.44%) to Mr Whawell. The next day, 4 November, Mr Tinkler forwarded to Mr Hodges his developing exchanges with Mr Laycock over the basis of calculating the anticipated LTIP award.

122. On 5 November, Mr Tinkler forwarded to Mr Jenkinson an email exchange that he had had with Mr Laycock expressing concerns about the deficiencies of the LTIP scheme and his opinion that there was "*a divide between Board and management*."

123. Mr Hodges' evidence addressed the fact that Mr Tinkler had raised the question of his (Mr Tinkler's) remuneration with him in around November 2017. He said that Mr Tinkler had told him that he felt he should be properly compensated for the value he had already generated within the Company. Mr Hodges said that, whilst he had some

sympathy for Mr Tinkler's position, he told him that such matters should be dealt with "*ex-ante*" rather than "*ex-post*" and that the compliance departments of institutional shareholders were unlikely to approve a retrospective change of his remuneration. Mr Tinkler had also raised the same issue with Mr Ferguson around November/December with a complaint that his bonus payments should be higher.

124. In addition to his remuneration, Mr Tinkler was thinking more generally about the Company's affairs during Christmas 2017. On Boxing Day, he and Mr Brady exchanged emails about the Company's "8+4" figures in the form of a spreadsheet attached to them. The "8+4" figures were the actual and projected figures for 2018 divided as at the end of August. In his email, Mr Tinkler said he could not comment on overheads "*as I have not seen sight of any breakdown so it seems we are all working in silos and not been copied in to everything in [sic] which used to be the case when Ben [Whawell] was CFO so we can review as a team*." The email referred to the need to get the number presented in a way that worked for the market "*or the share price may be back at a pound*."

125. Mr Tinkler's email went on:

> "*Happy if you don't want my help just need to know one way or another so I have a plan and can move on but will not stand by and see my value disappear for no reason other than bad presentation off [sic] the numbers*."

126. By his response that same day, Mr Brady said that he had been clear in wanting Mr Tinkler's input, that it was not a blame game (as they wanted the same outcome) and that he (Mr Tinkler) had been copied into "everything" and invited to all the budget meetings. Mr Brady said that he had asked for details of the overheads and that there was time to discuss matters in the second week of January.

127. Again with some prescience on his part, given that he was not to know the flavour of communications soon to pass between Mr Tinkler and Mr Whawell and neither did he know Mr Tinkler was copying Mr Whawell into their exchanges, Mr Brady went on:

> "*The Ben story is vey [sic] unhelpful and just not really the way forward. I don't like the "It used to be good approach when Ben and I used to do the numbers" …. I want you to contribute and to use all your knowledge and skills to drive this business forward and this basically means being able to fund the dividend that was set, invest every pound to deliver a return with a clear focus on Energy and Aviation.*
>
> *You have been involved every step of the way and as a rule I have been extremely keen to build a non-silo approach*."

128. Mr Tinkler forwarded Mr Brady's email and his own response to it on to Mr Whawell and Mr Butcher with the message "*Got him rattled*". At that time, the three of them were also, between themselves and in terms which indicate they did not anticipate their views being read more widely, expressing their dissatisfaction over the Brady management style. On 27 December, Mr Whawell wrote: "*We seem to employ someone whose only job is to send constant meeting invitations out. That has two issues. Two [sic] many meetings creating work that isn't needed and a head that isn't needed*." Mr Butcher's input that day was to criticise the approach to the Company's weekly

operational updates by telephone ("*should be renamed Non-Core Time!*") and to say "*Got to get back to basics and to trust people to do their jobs*" which, he assumed, would involve Mr Tinkler being responsible for "Investments" and jointly responsible with him for "Infrastructure".

129. Mr Tinkler's message to Mr Jenkinson, when forwarding his Boxing Day exchanges with Mr Brady to him, was "*He's a bit upset keep the feet in the fire*."

130. For his part, Mr Brady forwarded the same exchanges to Mr Ferguson on 27 December, saying: "*I will sort this out when I get back in the office on 2 January face to face but I need to find a way to allow AT to contribute without creating constant defensiveness, frustration with finance what increasingly looks like it was better when I was CEO. This is [sic] underlying frustration is not going to work for me and will have an open and constructive conversation with AT about how we normalise this company and how we use him as planned in Stobart Capital*."

131. On the subject of remuneration and Company performance, Mr Ferguson says he and Mr Tinkler spoke at the end of December about the £29m bonus package awarded to Ms Palmer-Baunack, the Company's former Executive Chairperson, by her new employer British Car Auctions, as it had been well publicised over the Christmas period. Mr Ferguson's perception was that Mr Tinkler was jealous and envious of her success and that he felt he deserved at least equivalent remuneration. In the witness box Mr Ferguson said Mr Tinkler was "*particularly exercised*" by the comparison between his own remuneration and Ms Palmer-Baunack's award.

132. Over the Christmas and New Year period Mr Tinkler sent a number of emails about this to various persons. On 24 December, he sent an email to Mr Ferguson saying "*Avril defiantly (sic) Knows how to extract money from the Board & Shareholders. Makes my awards look pittance*." He immediately forwarded that email to Mr Whawell with the message "*Might as well*" and then, a little later, separately to each of Mr Jenkinson ("*Must be in the wrong job*") and Mr Laycock ("*Just shows what you can achieve our LTIP scheme is a joke and always will be for our type of business*"). On 27 December, he sent Mr Whawell and Mr Butcher a summary of his salary for the last 9 years or so, saying "*compared to Avril they have had me cheap need to show Shareholder this that what a tight Board we have*." Later that day he sent them revised figures extending to a 10 year period and after inputting the tax rate "*so not worth getting out of bed for*".

133. Mr Tinkler then sent the same analysis to Mr Jenkinson by an email to him on the evening of 27 December ("**the AP-B email**") in terms which the Company contends would alone have justified his summary dismissal given its highly inappropriate and sexist language:

> "*My income from Stobart Group for the last 10years not worth getting out of Bed for Might have been better with a pair of tits like Avril Shocking if we had the old scheme still in place I would of got 16m shares at £2.50 = £40m show Iain Ferguson has a lot to answer for You yourself would of ended up with 5,917851 shares at £2.50 = 14.8m so all down to Avril trying to Shaft us and Iain coming in trying to Shaft us when we were weak this will not happen again*."

134. Whatever issues Mr Tinkler may have had with Ms Palmer-Baunack in relation to the Company were not ones that survived her departure from it. However, it was her well-

publicised achievement at her new employer which seems to have sparked within Mr Tinkler a degree of antagonism against Mr Ferguson. The AP-B email appears to be the first sign of what became Mr Tinkler's outright opposition to Mr Ferguson and the perceived ground for it seems quite clear from its terms: the idea that Mr Ferguson had been responsible for the introduction of a replacement remuneration scheme that left Mr Tinkler significantly under-remunerated.

135. Between 28 and 30 December, inclusive, Mr Tinkler continued to do further work on a comparison between historic shareholder returns and executive pay for comment by Mr Whawell or Mr Butcher. In an email to them on 30 December he said:

> "*I'm going to insist on him making me good on this loss maybe treasury shares or I will move on. Also he needs to get Warwick under control or I will not be the only one selling my shares and moving on, I Think Iain [Ferguson] has given him to [sic] much rope without consulting us ….*"

136. That message on 30 December appears to be the first hint that Mr Tinkler was also holding Mr Ferguson accountable for those aspects of Mr Brady's management style which Messrs Tinkler, Whawell and Butcher had discussed (if only between themselves) as being retrograde ones that needed to be remedied.

137. On the evening of 30 December, Mr Tinkler sent his figures to Mr Jenkinson saying: "*This will make Iain F sit back in his seat and want a whisky*". Mr Jenkinson responded: "*It's big numbers Andrew and Small for you*."

138. On New Year's Eve, Mr Ferguson responded to Mr Brady's message of 27 December about his (Mr Brady's) exchanges with Mr Tinkler. Mr Ferguson said that Mr Brady had the full backing of himself and the non-executive directors in "*regularising the Group*" and then commented upon his (Mr Ferguson's) own exchanges with Mr Tinkler over the comparison with Ms Palmer-Baunack:

> "*I also had a pre-Christmas email exchange with AT. I'll forward a copy to you. Essentially, Avril Palmer-Baunack has just had a share grant of £29 from BCA on top of a £6m payment in 2015/16. This is for creating about 600/700m of shareholder value, on this basis AT feels very under-rewarded---in the past I've reminded him that in the 4 years I've been Chairman his share value has grown by £70m and he been paid around £15m+ of salary, AIB, LTIP etc ----- but there we are, feeling under-rewarded is another well known entrepreneurial trait* ----"

139. Not long after Mr Ferguson sent that message to Mr Brady, Mr Tinkler sent a further email to Messrs Whawell, Butcher and Jenkinson with a further iteration of his shareholder returns figures on the subject of "Rewards for Creating Shareholder value over the last 34 months". His message (which talked of the new LTIP having been "*forced on us*" at the time of Mr Ferguson's arrival) said:

> "*I think Iain Ferguson & Remco need to be ashamed of themselves the way we have been treated and could of [sic] extended the 2012 SEIP and our Shareholders would have been delighted with our outcome compared to BCA ….. I intend to confront Iain & Remco to explain how they are going to come some way to making this more rewarding for our performance over the last 3 Years or I move on immediately*."

140. Mr Tinkler's last email of 2017 on the subject of remuneration was sent to Mr Soanes at 18:07 on New Year's Eve when he sent the comparison of the CEO awards by the Company and British Car Auctions with the message: "*Happy New Year to Avril you can't Knock her for this*."

141. The New Year was but not an hour old before Mr Tinkler, Mr Whawell (who was overseas and two hours ahead) and Mr Jenkinson were back on the topic of Mr Tinkler's "Rewards" email of the previous day. Mr Whawell, referring to Ms Palmer-Baunack, said "*And I bet she got the idea for hers from the one we set up and used ours to get hers over the line!*". Mr Jenkinson said "*Let's pull it all back happy new year*".

142. On 4 January 2018, upon their return to work after the Christmas break, a meeting took place between Mr Brady, Mr Tinkler, Mr Laycock (the CFO) and Mr Nick Dilworth (then the Company's Commercial Director) and Mr Soanes (representing Stobart Capital) to discuss the Company's "8+4" figures, its 2019 budget and forward strategy, and Project Wright. At the end of the meeting Mr Tinkler showed Mr Brady the spreadsheet (or a revision of it) which he had been developing over the Christmas period.

143. On 10 January 2018 a meeting took place between Mr Tinkler, Mr Ferguson, Mr Butcher and Mr Jenkinson (who joined towards the end). What was said or not said at that meeting is a matter of dispute to which I return in further detail below. Mr Tinkler says it included a discussion of his remuneration and his role in the Company, as his communications with Messrs Whawell and Butcher on 30 and 31 December 2017 had intimated. Mr Ferguson agrees that Mr Tinkler raised the question of his remuneration, producing a version of his spreadsheet, and that shares then held by the EBT were mentioned. Mr Ferguson says (but Mr Tinkler disputes) that he asked for a retrospective payment of £30m to bring him on to the level of Ms Palmer-Baunack. Both are agreed that it was recognised that Mr Tinkler would need to speak to the major shareholders. But, whereas Mr Tinkler says it was discuss what they wanted from him going forward with the Company and to explain his history rewards and concerns about the direction of the Company, Mr Ferguson says any such discussion with them would be about Mr Tinkler's personal future and should not extend to any criticism of the Company.

144. They also disagree over whether or not (as Mr Tinkler and Mr Butcher say) Mr Tinkler raised not only the options of him (1) leaving the Board altogether and starting off in a completely new venture and (2) carrying on in an advisory role (for proper remuneration and clear agreement over strategic direction) but also (3) if Mr Ferguson was not able or willing to get a grip on strategic direction, him taking over as Executive Chairman.

145. The day after that meeting on 10 January Mr Ferguson prepared a draft RNS announcing Mr Tinkler's resignation from the Board with effect from 9 February 2018 (and also that of Mr Garbutt who planned to step down and had informed the Company's Nomination Committee of that on 25 January). Mr Ferguson says he prepared the draft RNS because what Mr Tinkler had said at the meeting the previous day had led him to believe one might be required at short notice. Mr Ferguson does not suggest that Mr Tinkler had mentioned a retirement date of 9 February but he included that for the purposes of creating a draft. Mr Ferguson showed the draft to Mr Brady and asked the Company Secretary ("**Ms Brace**") to keep it on file. It never became

public (though an RNS announcing Mr Garbutt's timed departure was released on 2 February 2018).

146. On 11 January 2018 Mr Tinkler wrote an email to Mr Jonathan Brown ("**Mr Brown**", a solicitor with Hill Dickinson who under an arrangement with that firm also served as part-time, in-house counsel to the Company) which referred to the EBT and asked: "*Could you have a read of this to see how easy it would be for the Board to award me as an individual all the shares left in the Trust.*"

147. On 14 January Mr Tinkler sent Mr Hodges a spreadsheet comparing the increases in value and CEO remuneration in the Company and British Car Auctions (the company by whom Mr Tinkler evidently felt that Ms Palmer-Baunack had been so handsomely rewarded in shares). The Company says this involved Mr Tinkler sending Mr Hodges confidential corporate and financial information but their position was that the spreadsheet did not contain anything that was not publicly available. Mr Tinkler referred to 3.2m shares sitting in the EBT and the rules of which "*allow them to be awarded for out-performance at any time and feel if shareholders were willing to support this, it goes a little way to rewarding me against some of my peers in the industry for out-performance. ……. Could really do with your help on this as I think I am been fair & reasonable with shareholders and giving me a fair reward for value created over the last 10Y*".

148. In his evidence Mr Tinkler said that what he had in mind with the possible transfer of shares from the EBT was that it would be a reward for "*senior executives including me*". In the witness box he indicated that what he had in mind was passing on some of the shares transferred to him to other employees who had supported him over the years, including those who might not be directly eligible, having joined since the EBT was established in 2007. He said "*when it comes down to it you'd always look after the people underneath you and that's all I've ever done*." But the terms of Mr Tinkler's spreadsheet and his representations in January 2018 suggest this was all about a personal reward for him. Not knowing whether Mr Tinkler had in fact indulged in such largesse in the past, I also pointed out to him the obvious point that what he was now suggesting would seem him bearing the tax burden of any employees benefited through him. Indicating that this was an additional benefit he was prepared to pass on, Mr Tinkler said "*I would be paying tax on it anyway*."

149. It therefore seems that Mr Tinkler was not wholly discouraged by the rather negative thoughts about the prospect of an increased reward for past efforts which Mr Hodges had expressed the previous year. However, Mr Hodges said in evidence that he did not recall what his reaction was to receipt of the spreadsheet but that, given the view he had expressed to Mr Tinkler the previous November, he took no action in response to the message. Mr Hodges said that after a couple of conversations with Mr Tinkler, including one at a social function a few days later, he did not raise the question of remuneration with him again.

150. On 17 January, Ms Brace made a note to herself (by an email referencing Mr Ferguson - "Iain" - as the subject) to draft a resignation letter for Mr Tinkler and to write to Mr Tinkler about his LTIP entitlement continuing while he continued to work for Stobart Capital and, possibly, other terms of his resignation.

151. On 23 January, Mr Hodges met Mr Barnett on behalf of Invesco. Mr Hodges says that this meeting took place in the context of a number of other meetings that month with various members of the Company's Board (including Mr Tinkler, Mr Brady and Mr Whawell) with the focus of them being upon Project Wright. Mr Hodges emphasised that his role as broker was such that his meeting with Mr Barnett would not just have been about the Company and its stock. However, his evidence was that, during that month, he was aware that "*disagreements between Mr Tinkler and Mr Ferguson were becoming more serious*" and that he did recall suggesting to Mr Barnett that "*if the personal dispute could not be resolved, it would be preferable to retain Mr Tinkler given that Mr Tinkler is of more value to shareholders*." Things had therefore been said to the Company's broker to generate the belief in his mind that some kind of battle of wills had developed between Mr Tinkler and Mr Ferguson.

152. On 24 January, Mr Ferguson and Mr Tinkler spoke on at least one occasion, though the number of times they did so is a matter of dispute. Mr Ferguson corrected his witness statement to say that the first occasion when they spoke was not at a meeting of the VCC but before it. Mr Ferguson said that when just the two of them were present Mr Tinkler said that he wanted to pursue Project Wright on the basis that he participated in a private deal and, to that end, he wanted to resign from the Company as soon as possible. Mr Ferguson said that he cautioned against Mr Tinkler's departure being announced to the market straightaway and that they agreed that Mr Tinkler would wait until 16 February (the date set for the announcement in relation to Mr Garbutt) before stepping down. Mr Ferguson says that he was not authorised to reach a final agreement with Mr Tinkler and that the matter would have to be discussed with the Company's Nomination Committee the next day. Mr Ferguson said he told Mr Tinkler he would show the draft RNS to him at the Board meeting also scheduled for the next day. Mr Tinkler disputed all of this. He said they may have had a brief conversation before the VCC meeting but, because he had not yet discussed matters with shareholders, he did not say he was stepping down or that he wanted to do so because of his proposed interest in Project Wright.

153. Mr Tinkler did not attend the dinner with the other Board members on the evening of 24 January. At that dinner Mr Ferguson told Mr Brady, Mr Wood, Mr Coombs and Mr Garbutt that Mr Tinkler intended to stand down.

154. On 25 January 2018 two relevant meetings took place within the Company's executive (with an Audit Committee meeting taking place in between). The first was a meeting of the Nomination Committee at 8.30am. The second was a meeting of the Board at 11.30am.

155. The Nominations Committee was attended by those who had dined together the night before. Mr Tinkler was not present as he was not a member of that committee. Mr Ferguson, Mr Brady, Mr Wood and Mr Coombs gave evidence that the committee discussed Mr Tinkler's intention to stand down with effect from 16 February so that he might participate personally in Project Wright.

156. The RNS which Mr Ferguson had drafted on 11 January briefly saw the light of day when Mr Ferguson showed it to Mr Tinkler on 25 January in advance of the Board meeting at 11.30am that day. As I have noted above, Mr Ferguson said he had mentioned to Mr Tinkler the existence of a draft RNS to announce Mr Tinkler's retirement at the Company's offices the previous day, 24 January, but Mr Tinkler

disputed that. When shown the draft RNS, Mr Tinkler expressed his shock and said that Mr Ferguson was trying to force him out. Mr Ferguson said that Mr Tinkler indicated he wanted more time to consider his position and that he may have mentioned his wish to discuss it with shareholders.

157. In the light of their discussion, Mr Ferguson agreed to amend the RNS to delete the reference to Mr Tinkler's resignation and they agreed to discuss the matter again at a later date. Mr Ferguson then went to the meeting room, without Mr Tinkler, and reported to those present that Mr Tinkler had become upset and that his proposed resignation would be reviewed over the next few days. Mr Tinkler joined the Board meeting later, by which time the discussion had moved on to other matters.

158. In the early hours of 26 January 2018 (at 01.33) Mr Tinkler emailed Mr Ferguson to thank him for the discussion regarding the Board changes and, having reflected, he went on to say:

> *"Before any decision is made or announcement made regarding me stepping down from the Board, I would like the opportunity to speak to our main 4 investors regarding this and will not be pushed or rushed into making announcements until I have a clear understanding from them on their thoughts".*

159. In the email Mr Tinkler went on to say that he needed "*a full understanding of the Boards [sic] view on the outturn on the year-end numbers before I can make this decision as I may be seen as an escape for badly presented numbers*."

160. He also made mention of the need to understand from shareholders (as I read the email) "*what is required from me going forward regarding any role to play in Stobart Capital or [Project] Wright as all things are in the air at the moment and things are totally different to what I agreed to when signing up when standing down and letting Warwick take position as CEO and what our intending roles would be when it came to new investments* ….". In his witness statement Mr Tinkler said this was a reference to his perception that he was being drawn into more and more operational matters while Mr Brady (rather than Stobart Capital) was chasing deals.

161. The email said that he would endeavour to get meetings with the shareholders set up for the following week, diaries permitting, and that he would report back to Mr Ferguson.

162. Mr Tinkler forwarded his email of 26 January ("fyi") to each of Mr Jenkinson and Mr Whawell. It elicited a response from Mr Whawell: "*Well said. Is Wright the full consolidation?*" Mr Ferguson forwarded it to Mr Brady and Mr Wood, saying *"not we wanted from him but not unexpected either*".

163. On 27 January 2018, Mr Brady emailed Mr Ferguson, copying Mr Wood, and in connection with Mr Tinkler made reference to "*the coming off the Board*". Mr Brady went on to say that "*We are at a cross roads and I am not sure we can continue much longer in this current situation…."*.

164. On 29 January 2018 Mr Ferguson replied to Mr Tinkler's message of 26 January, saying he would call him later in the week "*to see how you're getting on with your shareholder calls/meetings*".

165. Mr Tinkler did have meetings with representatives of major shareholders on 30 and 31 January. He met Mr Dobell (of M&G), Mr Williams (of Miton) and Mr Barnett (on behalf of Invesco).

166. Allowing for the fact that none of the funds' representatives gave evidence at trial, there is a dispute between the parties as to what Mr Tinkler said during those meetings. Mr Tinkler said he spoke to the shareholder representatives about his remuneration, without pushing for an additional retrospective award. He also said that he shared with them his concerns about the management of the Company and indicated that, although he had no particular proposal or immediate plans, a change at the top might be needed though he had no specific plan or timescale. He mentioned that he was not happy with the direction and Board strategy. In the witness box he was anxious to make it clear that he only made these remarks about management and strategy in response to being asked questions. The Company says these conversations amounted to him briefing the shareholders against the Board.

167. On 1 and 2 February 2018 Mr Brady himself made telephone calls to the three shareholder representatives. He did so using pre-prepared notes. The notes made reference to Mr Tinkler having approached Mr Ferguson with a request to resign from the Board so that he can spend more time with Stobart Capital.

168. It was during the first call with Mr Barnett that Mr Brady says he learned that Mr Tinker had not spoken about him standing down from the Board, nor only about remuneration, but had (as the Company puts it) been briefing against the Board by expressing concerns about the Chairman, the Board and the strategy of the Company. Mr Brady understood that Mr Tinkler had expressed particular reservations about Mr Brady's approach to Project Wright. Mr Brady says he mentioned that Mr Tinkler had asked to speak to shareholders to sound them out about his proposed resignation. He says Mr Barnett expressed surprise at this because Mr Tinkler had not mentioned that at their recent meeting.

169. Mr Brady's calls to Mr Dobell and Mr Williams were to the same effect so far as concerned Mr Tinkler's concerns about the Company. Mr Brady says that they too were surprised when Mr Brady mentioned Mr Tinkler's plan to resign from the Board.

170. Mr Brady immediately telephoned Mr Ferguson to tell him what he had discovered during his calls with the shareholders. Mr Ferguson then telephoned Mr Wood and probably Mr Coombs. The four of them agreed to seek legal advice in relation to Mr Tinkler's conduct.

171. On 2 February the RNS announcing that Mr Garbutt would stand down at the Company's AGM in the summer was published. Obviously, nothing was said about Mr Tinkler.

172. On 5 February, Mr Brown provided Mr Brady with contact details for Mr Tony Foster of solicitors Travers Smith ("**Mr Foster**") and also drew Mr Brady's attention to Article 89(5) of the Company's Articles. Article 89(5) was the provision enabling a director to

be removed from office at the unanimous request of his co-directors, as ultimately deployed on 7 July 2018.

173. On 7 February 2018 a meeting took place between Mr Tinkler, Mr Ferguson, Mr Brady and Mr Hodges. Mr Hodges said he had originally convened the meeting to "*clear the air*" between Mr Ferguson and Mr Tinkler but that his concern about the Company's share performance had become his primary point for discussion.

174. The parties are agreed that there was a discussion of proposed share buybacks by the Company in circumstances where its share price had plummeted in recent weeks. That appears to have been the result of fund managers shorting stocks in which Mr Woodford's WIM held a significant stake, including the Company's. There was also a discussion about Mr Tinkler's concerns in relation to Project Wright and Project Fort and about his conversations with shareholders in relation to management concerns and remuneration. The topic of remuneration extended to a discussion of the EBT. Mr Ferguson and Mr Brady say that Mr Tinkler suggested that all the shares then held by the EBT be issued to him (about 3 million shares which were worth around £8m) which was rejected on the spot. Mr Tinkler said that, having been raised by him at the meeting on 10 January (as an idea of remunerating senior executives including himself) the EBT shares were only touched upon and not pressed in this later meeting. Although he had no clear recollection, Mr Tinkler thought it might have been Mr Ferguson who made reference at the meeting to the previous month's request. Mr Hodges' evidence in relation to the 7 February meeting was that Mr Tinkler mentioned the possibility of using the shares sitting in the EBT to remunerate executives but made no demands. Whether Mr Tinkler might sell at least some of his existing shares in the Company, when the share price improved, was also raised a matter discussed at the meeting.

175. In fact, either side of that meeting, Mr Tinkler had acquired more shares in the Company. On 5 February he bought £250,000 worth (at 247.78 pence per share) and on 8 February he bought a further £100,000 worth (at 238.8 pence). Mr Tinkler's evidence was that this was an attempt by him to support the Company's share price. The Company also proceeded with share buy-backs over the following month in a total sum of about £17.5m. RNS's issued by the Company in respect of the transactions in its own shares referred to the purchased shares being held in Treasury to meet the obligations under employee share award schemes. The share price which had been 227 pence at the meeting on 7 February rose to 255 pence by 22 February.

176. It is also common ground that Mr Hodges said, at the meeting on 7 February, that it was undesirable to "*air dirty laundry in public*". This was in the context (as Mr Tinkler accepted in his testimony) of Mr Brady and Mr Ferguson expressing dissatisfaction at Mr Tinkler speaking to shareholders and "*briefing against the Board*". But, whereas Mr Ferguson and Mr Brady say this remark was directed at Mr Tinkler, who acknowledged that his actions were "*unacceptable*", Mr Tinkler in his witness statement disputed that and said the remark was made by reference to the Board generally. In his testimony, Mr Tinkler was less certain about this aspect of the meeting and, although he did not think he had made an acknowledgment in those terms, he appeared to recognise the "dirty laundry" remark was directed at his discussions with shareholders but mentioned "*to all three of us*". Mr Tinkler accepted during the meeting that he had expressed to shareholders his unhappiness with direction and Board strategy ("*we were weak at the top*") but had done so in response to them asking him for his

views. Mr Hodges said Mr Tinkler acknowledged that it would be "*superior to have discussions in private without going off to the shareholders on your own*."

177. Mr Ferguson and Mr Brady say that Mr Tinkler stated at the meeting on 7 February that he either wanted to be fully involved in the management of the Company and its businesses or he wished to divest himself of his shares and leave the business. Mr Brady said this was in the context of the discussion of Project Wright and the idea that Mr Tinkler might be part of the private consortium (which Mr Brady said Mr Hodges had described as "*double-dipping*"). He said that Mr Hodges observed that some shareholders would prefer Mr Tinkler to remain involved but he was happy to help Mr Tinkler sell some of his shares at the appropriate time.

178. Mr Brady's "near contemporaneous" note of the meeting on 7 February said Mr Tinkler "*acknowledged that his actions were unacceptable but did say he was unhappy with the board, unhappy with Stobart Capital as WB was driving the agenda and not AT*." The note also referred to "*AT basically then started talking about selling all his shares and existing [sic] entirely. Discussion circled round selling down to 5% and then AT should step down from the board, focus on Stobart Capital and be an "Adviser to the Group"*." The note ended: "*The meeting concluded with all agreeing to keep these discussions private and agreeing that all directors have a fiduciary duty to support the agreed board strategy in external conversations*."

179. Mr Brady said he made notes of the meeting on his phone on a plane to Dublin the following morning. He was twice challenged in cross-examination about the accuracy of his note, when the metadata showed the document was created on 19 February (and it was described as a file note prepared by Mr Brady and Mr Ferguson on that date), but his answers indicated that the metadata related to a different electronic format than the memo app on his phone that he had first used to make the notes. I accept that the file note accurately reflects what was discussed.

180. Although Mr Hodges' witness statement was supportive of Mr Tinkler's written evidence, he accepted in his own testimony that "*[W]hat he [Mr Tinkler] did acknowledge is that it would be superior to have discussions in private without going off to the shareholders on your own*."

181. On 7 February, Ms Brace sent Mr Ferguson a draft of the minutes of the Board Meeting on 25 January. Mr Ferguson added text to the draft indicating that Mr Tinkler would step down on 16 February and was going to inform the four key shareholders accordingly. The Board minutes, as approved, contained the following reference: "*NOTE: In a discussion following the Board meeting it has been agreed that AT would personally meet the 4 key shareholders to discuss options around his future with SGL*".

182. The meeting on 7 February (involving as it did a discussion of Project Wright) was one which it was contemplated Mr Soanes might also attend on behalf of Stobart Capital. In the event he did not do so. Mr Soanes says he was requested by Mr Tinkler not to do so whereas Mr Tinkler points to a text message from Mr Soanes the day before, 6 February, in which he said: "*I'm in two minds. I'm not directly involved in your issues with the Board but there are outcomes to all of this which mean that there is no viable future for Stobart Capital, or at least not one which is of much interest to me*." Mr Soanes' evidence was that, by this date, he was aware of what he described as "*serious differences*" between Mr Tinkler and the Company. They included a dispute over a tax

liability which might result in litigation, Mr Tinkler seeking an *ex-gratia* award of shares from the EBT and that, after meeting leading shareholders of the Company to discuss the award of shares to himself, "*he had told at least some of the shareholders he had met that he wanted them to support his becoming Executive Chairman of the Company, replacing Iain Ferguson*." By an email to Mr Tinkler on 1 January, Mr Soanes wrote: "*I can't believe that you and the Board would end up in any form of litigation but it would be terminal for Stobart Capital if that were to happen …*".

183. What is clear is that from November 2017 Mr Tinkler and Mr Soanes, representing Stobart Capital, had certainly not been as one in relation to Project Wright. In November, Mr Soanes had raised with Mr Tinkler the same concerns about his proposal that he (Mr Soanes) had mentioned to Mr Brady. By an email to Mr Tinkler of 20 November, Mr Soanes had noted down the issues which he had with his "step plan" and they included the point that the "*idea of Group selling a business and investing in an entity to (effectively) buy it back at a higher price will be difficult for the Board to accept*." Although Mr Soanes did not attend the meeting on 7 February, he and Mr Tinkler had exchanged text messages that day (in advance of the meeting) in which Mr Soanes had mentioned the conflict which Stobart Capital faced through "*your various connections with the Stobart Group*" and Mr Tinkler had responded "*Where do you think the conflict is?*".

184. By late January, Mr Soanes was distracted, understandably, by a serious illness of a close family member. Mr Brady had sent him an email on 29 January suggesting that he take a few days off while he (Mr Brady) worked further on certain aspects of Project Wright.

185. It is clear that, by February, Mr Soanes, believing that Mr Tinkler's proposal for Project Wright was creating regulatory issues for Stobart Capital (authorised by the FCA) so far as client conflicts were concerned, was confiding with Mr Brady more than he was with Mr Tinkler. On 5 February, Mr Brady had forwarded to Mr Soanes the email by which Mr Brown had recommended Mr Foster, and referred to Article 89(5), under the rubric "LPPIAOL" (Legal Professional Privilege in Anticipation of Litigation). Then, on 10 February, Mr Brady emailed Mr Soanes, proposing to "*agree an outcome for Group and Capital and see if we can do it together*".

186. On 9 February, Mr Ferguson and Mr Brady met Mr Williams on behalf of Miton. They say they learned from Mr Williams that Mr Tinkler had told him that he wanted to remove Mr Ferguson as director and Chairman. This was said by Mr Williams to Mr Ferguson alone, after Mr Williams had asked Mr Brady to leave the meeting so that they could speak privately.

187. Matters between Mr Tinkler and Mr Soanes over Project Wright appear to have come to a head as a result of Mr Soanes, acting at the request of Mr Coombs as Chair of the VCC, preparing a presentation on it for the Board. Mr Coombs felt a poor job had been done by Stobart Capital in Mr Soanes' temporary absence. It was Mr Soanes' act of sending through to members of the Board (and representatives of Stobart Capital) a paper in relation to the Cyrus Capital based proposal for Project Wright, in the early hours of 11 February, that prompted Mr Tinkler to respond that day as follows:

> "*I have read through and got to admit I am disappointed. That I and the team at Stobart Capital have not had a chance to review before it has gone to the Stobart Group Board. Let's discuss Tuesday how we take things forward*."

188. Mr Tinkler, in his capacity as Chairman of Stobart Capital, sent Mr Soanes a formal letter dated 16 February 2018. This said:

> "*I am currently taking legal advice on this matter; however, my position still stands in terms of you taking the next 4 weeks off (which is now 3 weeks). I made this suggestion in your best interests with all you have been going through personally at the present time. I would like to confirm you are not being suspended*."

189. Mr Tinkler's letter was written in response to a lengthy letter from Mr Soanes dated 12 February in which Mr Soanes, amongst other matters, had referred to a text message from Mr Tinkler on 11 February ("…. "*And while on leave have a think about your future involvement with Stobart Capital and what that may be and likewise I will*" ….), said that Mr Tinkler's reference to taking time off work was not a suggestion but an instruction, and went on to say he had "*become increasingly concerned about the damage your conduct is doing to [Stobart Capital]*". That last point was a reference to Mr Tinkler's potentially conflicting interests having materialised into actual conflict where Mr Tinkler had "*now escalated and widened the conflict by purporting to instruct me not to work, putting your personal interests ahead of those of [Stobart Capital] and its client*".

190. In his evidence, Mr Soanes said this about these exchanges and that the idea that Mr Tinkler had done no more than suggest a longer break than Mr Brady had himself proposed:

> "*That's the point I'd like to respond on, my Lord, if I may. On the evening of 11 February when Mr Tinkler first gave me this instruction, the comments that are referred to are preceded by Mr Tinkler saying "This is the end for Stobart Capital", in a most aggressive manner, in a disjointed telephone conversation. He then said I would be taking four weeks off. When I said I didn't need to take four weeks off, and asked him what would happen if I didn't take four weeks off, he said he would convene a meeting and remove me*."

191. Over the weekend of 17-18 February Mr Tinkler discovered on Mr Soanes' email account at Stobart Capital the forwarded email from Mr Brown of 5 February (about obtaining legal assistance from Mr Foster) and a draft message which made various proposals. It was this discovery which alerted Mr Tinkler to the contemplated reliance by the majority upon the provisions of Article 89(5).

192. Mr Soanes' proposals, in draft, included Mr Soanes' resignation from Stobart Capital, and an immediate move to the Company, and that he be appointed by the Company to oversee Stobart Capital business ("*AT would enjoy that! It would show AT which of you was calling the shots!*"). The draft went on to make proposals to "take control" of Stobart Capital. Mr Tinkler read the draft on the basis that it was written to a very senior person at the Company. Mr Soanes confirmed in evidence that the intended recipient was Mr Brady.

193. On 22 February the Company announced, through an RNS, its intention to make an offer for Flybe. This was a consequence of the Takeover Panel requiring the Company to make a statement of its intentions in relation to Flybe.

194. Later that day, 22 February, Mr Tinkler and Mr Brady had a telephone call. Mr Brady made a note of it. It records that Mr Tinkler expressed dissatisfaction with the Chairman; the way the Board was being run; the fact that there was "*no proper Exco of the Company*"; the Flybe announcement; and Mr Ferguson having taken advice on the use of Article 89(5). Mr Tinkler emphasised that he was not taking any objection to Mr Brady. Mr Brady's evidence was that Mr Tinkler did say, a number of times during the call, that he was not happy with the Chairman and the Board, and that he told Mr Brady in no uncertain terms that "*there would be change*", that he was working with two other shareholders to achieve this and that he "*would have the full force of the city on to me.*"

195. On 26 February, Mr Ferguson obtained signatures on an Article 89(5) notice for Mr Tinkler's removal from all the other directors save Mr Garbutt who was unwilling to sign it.

196. Mr Brady and Mr Tinkler did meet Mr Woodford in Oxford on 5 March, with others present on behalf of Stobart Capital and WIM, to discuss Project Wright. By that stage, to use Mr Hodges' language, Mr Tinkler's proposal for a multi-step deal was long since dead.

197. Between the latter half of February and late April there came a period of relative quiet between the Board and Mr Tinkler, so far as any further outward developments of the kind to prompt consideration of Mr Hodges' "dirty laundry" remark were concerned. The issue of Mr Tinkler's remuneration seems to have disappeared from the radar after the meeting on 7 February 2018 and there was something of a hiatus in exchanges between Mr Tinkler and other members of the Board during March and much of April.

198. However, it is the Company's case that Mr Tinkler continued to plot, behind the back of the Board, in pursuit of his own ends. The Company also points to Mr Tinkler's contact with Mr Day at the Dubai Gold Cup in March. On 27 March, Mr Tinkler sent Mr Whawell a link (from the Business Law Donut website) about "Shareholder and boardroom disputes FAQ's".

(ii) Mid-April to mid-July 2018

199. On 16 April 2018, Mr Tinkler and Mr Day (who was accompanied by his son and son-in-law) flew by helicopter from Battersea to Oxford to meet Mr Woodford. Mr Hodges was also there. Mr Day and Mr Woodford had not met in person before and Mr Tinkler and Mr Hodges had made the introduction. The purpose of the meeting was for them (Mr Day and Mr Woodford) to discuss a potential investment in House of Fraser. Mr Woodford said that, after the meeting had ended and as Mr Tinkler was leaving, he mentioned to Mr Woodford that the Board, including Mr Ferguson, had been taking steps to try to remove him. Mr Woodford said that he should try to reach an amicable solution to the problem. In his witness statement, Mr Tinkler said that he told Mr Woodford of tensions between Mr Ferguson and himself but not that Mr Ferguson had tried to remove him or any mention of the suggestion that Mr Ferguson should step down. Mr Day said there was no discussion of the Company in his presence.

200. Mr Tinkler and Mr Day also travelled together after the meeting, taking the helicopter from Oxford back to their neighbouring homes in Cumbria. On that flight Mr Tinkler and Mr Day first discussed the business of anaerobic digestion and the idea of a Green Energy Fund. Mr Day has an interest in an anaerobic digester in Cumbria, as well as in farming businesses. The Company has a 25% interest (through Stobart AD1 Ltd) in a joint venture which owns and runs a wood-burning incinerator plant located in Teesside, known as Duranta ("**Duranta**"). The stake forms part of its Energy Division. Their discussion related to whether there might be merit in creating a natural energy business (a "green energy fund") based upon a biomass incinerator system. Mr Day told Mr Tinkler that he thought the idea had potential.

201. Mr Day said in his evidence that, at some point in April before the meeting in Oxford, Mr Tinkler telephoned him to say that there had been some disagreement between himself and Mr Ferguson and that there was a proposal for a change of Chairman. His witness statement said that Mr Tinkler mentioned that there had been some disagreement between himself and Mr Ferguson. Mr Day provided Mr Tinkler with the contact details of John Herring as someone who might be interested in the role of Chairman. Mr Herring was Chairman of Edinburgh Woollen Mill Group who had worked with Mr Day for over 20 years. On 18 April, Mr Tinkler and Mr Hodges met Mr Herring. They met him to discuss whether Mr Herring might be interested in becoming the new Chairman of the Company. Nothing came of that meeting because Mr Herring was too busy with other commitments.

202. On 23 April a meeting took place between Mr Brady, Mr Ferguson and Mr Tinkler. Mr Brady criticised the expenditure at Carlisle Airport, the developing infrastructure project for which was largely Mr Tinkler's responsibility (though it should be noted that, in the witness box, Mr Brady accepted that not all of the issues then affecting the airport could be laid at Mr Tinkler's door). Various criticisms were levelled in different directions.

203. This meeting on 23 April became heated. However, Mr Tinkler denies that he began to shout and swear first at Mr Brady, and then in protest at being treated like a small boy when Mr Ferguson asked him to calm down, as both Mr Brady and Mr Ferguson recalled. Mr Ferguson remained firm in the face of cross-examination that Mr Tinkler had done so: "*Well, that's not accurate but I don't wish to go into that in a huge detail.*" Mr Tinkler accepted that voices were raised on both sides and that he was infuriated by what he described in his witness statement as their "*patronising*" and "*intimidating*" approach (though Mr Tinkler said in the witness box that he was unfamiliar with the meaning of the latter term). In his testimony, he added that he had felt "*ambushed*" by them.

204. Mr Ferguson and Mr Brady say that during the meeting Mr Tinkler said that either Mr Ferguson had to resign or he would do so. This was therefore the start of the open airing of the "Tinkler or Ferguson" issue which Mr Tinkler had created (and of which Mr Ferguson had got wind when he spoke to Mr Williams on 9 February).

205. A Board meeting then took place on 24 April. At that meeting Mr Tinkler presented a spreadsheet prepared by him which reflected the five-year plan against actual performance. He pointed out how the Company was departing from it. He also referred to the fact that his work at Stobart Capital included looking into establishing a Green Energy Fund. Mr Ferguson referred to that in an email to Mr Tinkler sent the next day.

206. During the last weekend in April a rugby sevens event took place in Cumbria, hosted by Mr Day's company Edinburgh Woollen Mills. In the evening Mr Day hosted an event for many hundreds of people at his home. Mr Tinkler and Mr Hodges attended (Mr Hodges was staying with Mr Tinkler that weekend). During his evidence, Mr Hodges said that it was probably that weekend that he heard from Mr Tinkler that there had been "*some explosive encounter*" with Mr Brady and Mr Ferguson, though he had understood it had been during a telephone conversation rather than at the meeting between the three of them on 23 April.

207. On 1 May 2018 there was a meeting between Mr Tinkler, Mr Ferguson, Mr Brady and Mr Hodges. Mr Tinkler's position was that Mr Ferguson should stand down. Mr Ferguson said this was the occasion on which a change in Mr Hodges' attitude, since their last meeting on 7 February, became clear and that he appeared now to be firmly on Mr Tinkler's side and united with him in wishing to get rid of Mr Ferguson.

208. In relation to this meeting, Mr Hodges openly expressed the view that he thought shareholders would choose Mr Tinkler over Mr Ferguson, given the value Mr Tinkler had previously created in the Company. Mr Hodges also accepted that Mr Ferguson said that if Mr Tinkler wanted to resign, he would not stand in his way; and that Mr Ferguson said that he would speak to shareholders and reflect. Mr Hodges asked him to hold off speaking to shareholders so that he (Mr Hodges) could have an opportunity to sort it out.

209. After Mr Brady and Mr Hodges left the meeting, Mr Ferguson and Mr Tinkler had a private chat. Mr Ferguson says he asked Mr Tinkler where he was in terms of his future and that he responded by saying "*I do not believe that we can work together*." Mr Ferguson says he responded by saying that he was prepared to continue to try to work together but "*if it was his decision that he couldn't work with me, that would have to be his decision*".

210. On 5 May, Mr Tinkler sent Mr Ferguson a text message saying:

> "*After our call today and meeting on Tuesday you said you would contact shareholders over the next 3 days regarding whether they want me or you to stay on the board and you would report back on your findings. As I have put my life and soul in to growing shareholder value and as third largest I have concerns on governance and independence under your chairmanship over the last 3 months and after discovering you taking actions to remove me from the Board. It is now up to shareholders to decide what they need going forward and I have come to the conclusion it is untenable to work with you going forward and believe it is the shareholder's right to decide what they require from this impasse and I'm happy to respect their decision and move forward*"

211. The reference to the discovering actions to remove him and concerns over the last 3 months must have been to what Mr Tinkler had discovered in mid-February when he had seen within Mr Soanes' emails at Stobart Capital the forwarded "LPPIAOL" email and the reference to Article 89(5).

212. Later that day, 5 May, Mr Tinkler sent Mr Whawell by email a document about corporate governance and directors' duties in Guernsey. Mr Whawell responded: "*not*

sure why you are looking at this? Solution clear." In the witness box Mr Whawell said he had no idea what he meant when he wrote that.

213. After the meeting on 1 May, Mr Brady and Mr Ferguson did take steps to contact shareholders.

214. On 7 May, Mr Brady spoke to Mr Hodges who told him it was likely to end up with a general meeting of shareholders. The same day, in what he noted to be a "good call", he spoke with Mr Jenkinson, who explained that: "*He is in Stobart for the long term and would prefer to see AT sit along side him at circa 5% share*". On 8 May 2018 Mr Ferguson and Mr Wood emailed Mr Woodford seeking a meeting, which was arranged but subsequently cancelled. Mr Woodford's PA responded to the email saying that "*he wants you to know that he is very supportive of Andrew Tinkler*".

215. Meetings were also arranged with Miton, Invesco and M&G. Mr Wood later spoke to Mr Barnett of Invesco by telephone on 16 May. Mr Ferguson and Mr Wood emailed Mr Woodford (of WIM) to arrange a meeting. One was arranged with Mr Woodford for 21 May but later cancelled by him.

216. Meanwhile, on 7 May, Mr Tinkler sent to Mr Jenkinson an article about an earlier boardroom coup within another company that had involved Mr Woodford and Mr Hodges. Mr Tinkler told the court that he knew that Mr Hodges had been involved but said that he had never discussed this matter with him. On the same day Mr Tinkler sent Mr Hodges an analysis of voting rights within the Company. Mr Tinkler said he had not discussed this with Mr Hodges. Mr Hodges told me that he had no idea why Mr Tinkler had sent him the document.

217. On 8 May, Mr Whawell sent Mr Tinkler an email with a list of fourteen bullet points reflecting his facetious summary of Mr Brady's achievements during his first year in charge as CEO. The list began "*My first year in charge by:*" and, although the matters enumerated by him make it clear that it is if Mr Brady is speaking, it is only an otherwise identical email in the trial bundle (with the sender's details redacted) that mentions Mr Brady's name. One of the points in the list was "*I've been at the forefront of an attempt to remove the man who has built this business to where it was today*."

218. On 9 May, Mr Tinkler spoke to Mr Dobell of M&G and Mr Williams of Miton. The same day he wrote to Mr Ferguson formally requesting him to agree to stand down "*with your reputation intact; a position consistent with protecting shareholder value*." The letter gave Mr Ferguson until the end of the day to confirm he would resign which, as Mr Jenkinson agreed in evidence, was pretty unrealistic in terms of timing. Mr Tinkler said he was writing "*as a custodian of shareholder value*" but, in his evidence, Mr Ferguson said he believed Mr Tinkler's actions had the opposite effect and that he was acting in his own interests and not those of the Company.

219. Mr Ferguson replied to Mr Tinkler's email on 15 May. He reminded Mr Tinkler that he owed fiduciary and other duties to the Company, including a duty of confidentiality, and of obligations in relation to Market Abuse. He concluded: "*The Board fully expects you to comply with such duties and responsibilities in any discussions you may have with shareholders or otherwise*."

220. On 15 May 2018, Mr Tinkler sent Mr Day an email with an attachment marked "Private and Confidential" which concerned the potential consolidation of the Group and a company known as Eddie Stobart Logistics Plc (a proposal known as **Project Park**). The document was dated April 2018 and in his evidence Mr Tinkler said that it was private and confidential to Stobart Capital, whose role was to generate such ideas, and that he "*did ask [Mr Day's] opinion on that, and what he thought, as so that was in the capacity of Stobart Capital, because he was looking to be investing in that, and I just wondered what his thoughts would be on measuring something like putting the two companies back together, was there any merit in that?"*. Mr Day responded to the email by saying he would read it and an hour or so later wrote to say: "*Just read project park and it looks very interesting, can see why you would want to combine! Win\Win. We can chat tomorrow night when we meet up*." However, when giving evidence Mr Day said that he did not read the document. Yet Mr Tinkler thought it was discussed during the site visit the following day, if only for a few minutes. Project Park never came to be put to the Board.

221. Mr Whawell joined Mr Tinkler at his home to stay there on the night of 15 May. That evening they had dinner with Mr Day at his home.

222. On 16 May, Mr Tinkler and Mr Whawell met up again with Mr Day to tour the anaerobic digester plant. They were accompanied by Mr Jenkinson, although he said in evidence that he went round the plant on his own. Allowing for the point that Mr Tinkler thought that Project Park might have been discussed in general terms (with Mr Tinkler asking for Mr Day's opinion on it) Mr Tinkler and Mr Day each told me that no other business beyond anaerobic digestion was discussed that day.

223. The Company's AGM was originally scheduled to take place in Guernsey on 28 June 2018.

224. Draft AGM papers were circulated on 16 May 2018. These included the requisite resolutions for re-appointment of each of the directors standing for re-appointment (all retiring annually at the AGM) and the statement that the Board recommended re-election.

225. On 17 May, Mr Tinkler wrote to Mr Ferguson making the point that he could not sign up to his re-election and offering him a further chance to step down consensually. He attached a draft requisition for a resolution to remove Mr Ferguson. Mr Tinkler encouraged Mr Ferguson to announce in the imminent AGM documentation that he would stand down and indicated that, if Mr Ferguson was standing for re-election, he would neither vote in his favour nor recommend that other shareholders should do so. The same day, Mr Tinkler also sent Mr Ferguson a text message to the same effect and saying: "*I have SH support to carry this decision to a conclusion, and want it to happen in a way that protects you and company's values, without having to embarrass you and cause Shareholders revolt against your actions in the Public eye*."

226. On the same day as Mr Tinkler's requisition, 17 May, Mr Brady prepared a draft RNS to announce that notice had been given to terminate Mr Tinkler's employment and that he had ceased to be a director. Mr Brady said that this was to be issued if Mr Tinkler proceeded with his proposed requisition. He copied the draft to the Company's PR agency ("**Redleaf**"), Travers Smith and the brokers Stifel.

227. Also on 17 May, Mr Tinkler sent to Mr Day the 2018-19 budget for Duranta (the wood-burning incinerator in Teesside). The budget was marked "*Strictly Private and Confidential*". Mr Tinkler says that he was entitled to disclose this acting on behalf of Stobart Capital and in his capacity as a director of Stobart AD1 (the company which held the 25% stake in Duranta) in order to explore a potential disposal and to seek advice about running the plant. Mr Day's evidence was that he had invited this information with a request to know more about the "feed in" tariffs for Duranta (which used the same engine as his biomass burner) and that both Mr Whawell and Mr Tinkler told him the previous day that they were able to share the information with him under the guise of the agreement between Stobart Capital and the Company.

228. On 18 May Mr Tinkler emailed Mr Day and said:

> "*Today is de-day [sic] for the Chairman. I sent a email yesterday telling now is a good time for him to step down or I will have to call a EGM which is not in the best interest of him or the company, will keep you updated as it unwinds.*"

229. In their testimony, both Mr Tinkler and Mr Day denied having discussions about the Board around this time.

230. On 18 May Mr Hodges sent a text message to Mr Barnett of Invesco. Its terms relayed the point that Mr Hodges had been advised by Ms Michelle Moran ("**Ms Moran**") of K& L Gates ("**K&L Gates**", Mr Tinkler's solicitors) that "*although I am free to advise shareholders on the appropriate course of action, I should not involve myself any further in the underlying dispute at Stobart Group for regulatory reasons.*" His message went on to say that if, after seeing Mr Ferguson, Mr Barnett was uncertain of the right course then he recommended speaking to Mr Whawell or Alex Laffey (who, though now outside the Group, "*is very knowledgeable and very aware of the importance of the various individuals*") whose mobile numbers he provided. Mr Hodges said: "*Obviously, if u do call them, treat their comments in the strictest confidence. I can get u William Stobart's number if u need it*."

231. Mr Ferguson responded to Mr Tinkler's email of 17 May (and proposed requisition) on 18 May. He said he had no intention of standing down and that if Mr Tinkler were to proceed to serve the requisition then "*we would expect you to acknowledge your position on the Board as clearly untenable, and to offer your immediate resignation.*" Mr Tinkler forwarded the message to Mr Whawell.

232. Mr Brady spoke with Mr Tinkler on 18 May. A few days later, on 21 May, Mr Brady sent Mr Tinkler a lengthy email which followed on from their conversation. He sought to persuade him that the better course would be not to invite a binary decision between Mr Tinkler and Mr Ferguson and said: "*I personally cannot see the logic or rationale behind your campaign to get rid of the Chairman*." Mr Tinkler forwarded Mr Brady's email to Mr Hodges, copying Mr Whawell and Ms Moran.

233. On 20 May, Mr Tinkler sent emails to each of Mr Williams (of Miton), Mr Woodford and Mr Jenkinson explaining that he was writing at the suggestion of Mr Dobell (of M&G) with a request that shareholders should write a letter to Mr Ferguson confirming that, if necessary, they would vote against him at the AGM. On the same day he wrote an email to Mr Dobell in identical terms save that he said to him: "*I am writing after our phone call on Friday to ask that you sign a letter to Iain confirming your intention*".

As with his other messages, he went on to say he hoped that Mr Dobell would be able to countersign the letter as a matter of urgency. Contrary to the more likely interpretation of his emails to the other three recipients, this indicates that the sending of a letter in such terms was Mr Tinkler's idea, not Mr Dobell's.

234. On 21 May, Mr Wood sent an email to Mr Woodford (in the light of the cancelled meeting with WIM that had been scheduled for that day) saying the Board considered it important that "*we meet with you as soon as possible to discuss an ongoing serious governance matter in your capacity as a significant shareholder.*" Mr Wood went on to propose a meeting between himself, Mr Ferguson and Mr Woodford to engage in a purposeful dialogue over the governance issue in the context of "*the possible risks to shareholder value if the matter is not addressed appropriately*." Although Mr Woodford said in his evidence that he recalled receiving this email, no such meeting took place.

235. Mr Wood spoke to Mr Tinkler on 22 May, speaking to a script which Mr Brady had prepared. Mr Tinkler repeated his position to them. Mr Wood summarised his conversation with Mr Tinkler in an email dated:

> *"His response was measured and calm and he was courteous throughout our discussion. The key points he made were:*
> *1. His relationship with lain had broken down. He felt that the issues could have been resolved when he first raised them months ago. He felt that his concerns had not been addressed and we were where we were.*
> *2. He had no animosity to any of the other Directors. In the event that lain stepped down and they decided to resign, that was a personal matter for them and he would respect their decision.*
> *3. He had discussed the situation with shareholders and had offered to resign from the Board. They had made it clear to him that they wanted him to remain involved. He said he felt an obligation to them as they had been so supportive over the years. He said that he believed he had their support.*
> *4. If the shareholders decided to opt for the status quo he would accept the decision and go off and make money elsewhere.*
> *5. He would not remain involved with Stobart if lain remained as Chairman. This was the key issue for him and there was on other way to resolve the matter. I am not surprised at his response but think it was worth a try. I think this firmly shuts the door on any final meeting between lain and Andrew to try and resolve the dispute.*"

236. In his witness statement Mr Tinkler said that was an entirely accurate summary of what he had said and of his position.

237. On 21 and 23 May 2018, Mr Ferguson and Mr Wood met separately with Mr Dobell of M&G and Mr Barnett and his colleague Mr Bouverat at Invesco. Mr Ferguson said that Invesco indicated strong support for the Board and Mr Brady and that M&G expressed their thanks to the non-executive team for what had been achieved over the last four years but indicated a strong wish that the problems with Mr Tinkler "*would just go away*".

238. On 21 May, in an email to Mr Ferguson, Mr Wood raised the idea of postponing the AGM (scheduled for 28 June) in order to give more time for the Ryanair deal to come through "*which would be a major blow for the opposition*." The Company had been negotiating with Ryanair over the airline's use of LSA.

239. On 22 May, WIM wrote a private and confidential letter to Mr Ferguson saying that they understood Mr Tinkler would be requisitioning a general meeting to vote upon Mr Ferguson's removal and that, should he decide not to step down, they would be voting against him. The terms of the letter reflected the content suggested by Mr Tinkler's email of 20 May (as Mr Woodford had responded to say it would) and its terms and manner of delivery were the subject of discussion between WIM's General Counsel and Ms Moran.

240. Mr Dobell of M&G emailed Mr Tinkler on 22 May saying that any change should be done "privately", adding "*if pressed, I continue to believe your own ongoing contribution to the company remains very important for the future*". Mr Tinkler responded noting that "*Iain does not seem to be taking shareholder concerns seriously and so I do need your support in order to persuade him that this should not be played out in the public domain*". This is a further indication that the idea of shareholders writing to Mr Ferguson, to urge him to step down, came from him (Mr Tinkler) not Mr Dobell and that Mr Tinkler was pressing for an indication of Mr Dobell's willingness to sign such a letter.

241. During the afternoon of 23 May Invesco sent Mr Wood a letter indicating they were supportive of Mr Ferguson. Their covering email said: "*We have purposefully not included the CEO in our letter as it would only serve to single out Andrew [Tinkler], which we felt may be unnecessarily incendiary*." That same day Mr Arch of Stifel, the brokers, had sent a draft RNS to Invesco which they confirmed (the following day) they were content to see reference within it to Mr Ferguson having the support of "the major shareholder".

242. In the evening of 23 May the Four Directors decided to convene an urgent Board meeting by telephone for 8am the following day.

243. Mr Tinkler's response to the email convening the Board meeting was to say that he wanted to have any document in relation to it 12 hours in advance. He was only provided with a draft RNS after midday on 24 May and the Board call was put back to 25 May.

244. On the morning of 24 May, Mr Wood raised in an email to Mr Arch, Mr Ferguson and Mr Brady the idea of transferring shares from Treasury to the EBT so that they might be voted in favour of Mr Ferguson.

245. Mr Tinkler noted by email on the afternoon of 24 May, and repeated during the Board meeting call at 2.30pm the following day, that he had concerns about the proposed RNS. He said it contained tendentious statements against him in relation to his expected resignation and that, if they remained, he reserved the right to insist it should include a dissenting statement from him. A further draft of the RNS on 25 May had referred to Mr Coombs and Mr Wood standing down if Mr Ferguson was not re-elected.

246. On 25 May, Mr Tinkler sent letters from WIM (Mr Woodford) and Svenska (Mr Jenkinson's company) requesting that Mr Ferguson step down. These were in materially identical terms and were of the type that Mr Tinkler had requested, he says, as Mr Dobell had suggested. Mr Dobell, on behalf of M&G, did not write such a letter himself.

247. The 25 May RNS, as published to the market at 4.51pm that Friday, showed that Mr Tinkler's concerns had been acted upon in that it read in more neutral terms and took a form which, he accepted in his evidence, was in the end a balanced one. That was in contrast to the objection he took to it having been issued at a Board meeting on 28 May (and the objection to it in the ELT letter referred to below). The published RNS reported that Mr Tinkler would be voting against the re-election of Mr Ferguson and that he held 7.7% of the voting rights and that there were two other shareholders, together holding 25.5%, who would also be voting against him. It stated that all of the other directors standing for re-election (Mr Garbutt was therefore excepted and said not to have participated in the Board's recent deliberations) confirmed that they had full confidence in Mr Ferguson, as a director and Chairman, and would be recommending a vote in his favour. It went on to say that Mr Wood and Mr Coombs would resign if Mr Ferguson was not re-elected. Reference was made to Invesco (holding 24.8% of voting rights) having provided written confirmation of their support for the non-executive members of the Board including Mr Ferguson.

248. So far as shareholders in the Company were concerned, outside the group of major shareholders who had already been made aware of the issue, the RNS was the first inkling they would have had of Mr Tinkler's position that Mr Ferguson should step down.

249. Mr Brady provided Mr Tinkler with a draft of the message to the Group's employees that he intended to send after the publication of the RNS. It was sent to them in neutral terms, which reassured them it would not impact upon the day-to-day operations of the Group or its strategy and that the focus remained on delivering to customers and shareholders and building upon strong results.

250. Further significant events then took place over that late May Bank Holiday weekend.

251. On Saturday 26 May Mr Arch emailed the Four Directors apologising for interrupting the Bank Holiday to say that he had been "*thinking further about how we might play this matter*" and recommended that "*we should go out hard on Tuesday morning to seize the moral high ground and the initiative. This would involve serving notice on AT on Monday evening and issuing a hard-hitting announcement on Tuesday*". On the same day Mr Brady sent an email explaining that "*We are all thinking about the strategy for ensuring we win this very difficult battle and get on the front foot*". Mr Brady referred to gaining "*leverage*" over Mr Woodford and to "*pile on the pressure*" on him. He wanted to know "*information that can be released and on what grounds*".

252. On Sunday 27 May there was a telephone call between Mr Tinkler, Mr Hodges, Mr Woodford, Mr Day and Ms Moran (of K&L Gates). There was no note of the meeting in evidence. Mr Day's testimony was that he joined the call utterly ignorant of its subject matter and that Mr Woodford had asked him if he would join a call to give him some advice on one of his investments. Mr Woodford says it was "*to assess Mr Day as a potential director. Specifically, to assess Mr Day's candidacy his reasons for*

wanting to join the board and what he could bring to Stobart and the Board." He thought Mr Day was a good candidate because he had some knowledge of energy, and because, as Mr Woodford put it, he had run some big companies including some whose business had needed to be turned around. Mr Woodford says he explained his concerns in relation to Mr Ferguson and that he felt that the Company needed a strong chairman who could steer the business properly. Mr Day says he confirmed that he would consider standing in an independent non-executive capacity, if he had the support of the majority of shareholders.

253. At 6.13 pm on Bank Holiday Monday, 28 May, a Board meeting by telephone took place. It was at this meeting that a proposal to establish the Committee was put to the Board.

254. The Board meeting was chaired by Mr Wood at the suggestion of Mr Ferguson as he was an "interested party" and did not feel it was appropriate for him to chair it. The Board minutes record Mr Wood opening the meeting by stating "*that there was only one matter to be discussed which was the establishment of a committee of the board as a result of AT advising the board that he would vote against the re-election of IF as Chairman, and gathering shareholder support for that position, and the remainder of the continuing directors supporting the re-election of IF as Chairman.*" The Committee's proposed terms of reference had been set out in the notice of the meeting. Mr Wood said it was "*difficult to be absolutely precise as to what the committee would need to do as it was impossible to know how this matter might evolve over the coming weeks*." It was noted that Mr Ferguson and Mr Tinkler obviously could not serve on the Committee, as they were interested parties, and that Mr Garbutt had been unable to contribute to the debate so far and in any event was stepping down at the AGM.

255. The transcript of the meeting records Mr Garbutt as saying: "*it seems appropriate to have a decision-making forum which comprises only non-interested directors, so that would obviously include, erm not include Iain and Andrew Tinkler*". Mr Garbutt responded: *"…the point about independence of the members of that committee, yourself [Mr Wood] and John [Coombs] have clearly signed up with Iain and that's of course your choice … and I don't know Warwick's position but clearly erm its not independent…*".

256. It is clear from the minutes that Mr Wood adjourned the meeting to take legal advice in response to Mr Tinkler's objection to the formation of the Committee. Mr Wood's evidence was that the advice was taken by telephone during a ten minute interlude between two parts of the meeting. The transcript shows that the initial call lasted just under 13 minutes. After the need to break to seek legal advice on the points raised, the directors other than Mr Laycock dialled back in at 18:35. Mr Wood then stated: "*We've taken legal advice and we believe we are within our rights to establish this committee*". The Committee comprising Mr Wood, Mr Coombs and Mr Brady was therefore established.

257. In the course of finalising the Committee's terms of reference, a reference to them including "*the future position of Andrew Tinkler in relation to the Company and its subsidiaries, whether as a director or an employee*" was subsequently removed. The revised terms were approved at a later Board meeting (by telephone) on 5 June referred to below.

258. Mr Day also spoke to Mr Brady on that Bank Holiday Monday, 28 May. It appears that there were two telephone calls and that some text messages also passed between them (Mr Tinkler's counsel made the point that the messages had not been disclosed and neither had Mr Brady's witness statement mentioned his communications with Mr Day). One of the messages revealed Mr Brady's view that they should "*see how we can bring a strategic plan together to see how to recover for all shareholders*".

259. Mr Brady accepted in his testimony that his conversation with Mr Day was very constructive and that it was not improper for him to be put forward as Chairman. In his evidence, Mr Day said that Mr Brady asked him why he would be interested in being put forward and he responded by saying he felt he could bring stability to the Board and, given his familiarity with the energy business, that he could help with the Company's energy division.

260. On Tuesday 29 May the Company, at the instigation of the Committee established at the Board meeting the previous evening, sent out a further RNS to the market. A draft of the further RNS was circulated to the Board late in the evening (at 10.32pm) of Bank Holiday Monday.

261. The evidence of Mr Wood was that the 25 May RNS provided the "*bare minimum*" to satisfy regulatory requirements. He said that, over that Bank Holiday weekend, the Company was truly in "*uncharted waters*". Mr Brady's email of 26 May to the Four Directors, Stifel, Travers Smith and Redleaf, had also said: "*I have already had the CEO of CAA asking me what is going on re the founder*".

262. On the morning of 29 May, Mr Coombs sent an email noting that "*the intent of issuing is to help shareholders reach a voting decision*". In cross-examination Mr Coombs said that what drove the 29 May RNS was putting shareholders – especially smaller shareholders with more limited access to information – in the picture, given that "*they are going to be expected to vote at an AGM*". There was, as he put it, an "*obligation of the directors to keep all shareholders informed*". Mr Ferguson's evidence was: "*I didn't feel we'd had the opportunity to give enough context to this or enough background information. But I was also conscious that we absolutely had to issue that RNS as we'd had the requisitions…I didn't believe we'd done enough in terms of setting the context and setting the background*" and that the 25 May RNS had not been "*sufficient in terms of communication*" and that "*some shareholders may have more information than others*".

263. In his evidence Mr Brady explained that "*we had numerous calls with our legal advisers from Travers Smith...From my understanding…it was really our duty as directors to provide shareholders with what on earth was going on in the business*". Referring to Mr Arch's email of 26 May, Mr Brady said "*I'm not sure this email is – summarises a weekend's work and advice from both the legal advisers and the broker*". In his evidence, Mr Coombs pointed out that the advice received by the Board was a "*verbal update – I'm not sure it's written down there – was that you've told the shareholders the bare minimum of what is going to happen; now you to need to explain to them why*".

264. The 29 May RNS contained statements to which Mr Tinkler took and continues to take great exception. He also says there was absolutely no need for the RNS to be released the next working day after the Board meeting.

265. As to the objection Mr Tinkler took at the time, his response to the draft circulated late in the evening of the Bank Holiday was made by an email timed at 00.37am on 29 May. In that message he said that he was taking legal advice, that he considered the RNS not to be in the best interests of the Company and to be misleading. His solicitors, K&L Gates, emailed the Board at 02.29am, noting that the announcement was misleading and defamatory.

266. Before the RNS was issued, Mr Whawell (who was on holiday at the time) also sent a text message to Mr Laycock, at 01:21 (CET) on 29 May, seeking in strong terms to persuade him into withdrawing the RNS. The text said:

> *"I know the D&O [Directors' and Officers Indemnity] policy and you aren't covered. You need to make sure you have enough money to fight this claim when it comes. I'm not sure what game you lot are playing but a statement like that hasn't been verified, is misleading and is incredibly poor corporate governance."*

267. Mr Whawell denied in cross-examination that the text message was intimidating, claiming instead that he said it to Mr Laycock as a "*long-time friend*", who he did not want "*to get into any sort of difficulties*". His message had the desired effect upon Mr Laycock as further communications that day reveal that Mr Ferguson was reporting Mr Laycock to be "*very shaky*". Within 30 minutes of receiving the text Mr Laycock had, in the middle of the night, sent an urgent email to Mr Foster, Mr Geller of Redleaf and the Four Directors saying: "*I think we should withdraw the statement until we have checked the D&O cover and a defamation lawyer has checked the statement*."

268. However, neither the overnight messages from Mr Tinkler and Mr Whawell, nor Mr Wood discerning from Mr Garbutt that he "*did not appear completely convinced*", served to dissuade the Four Directors from proceeding with the RNS.

269. At 2.10pm on 29 May Mr Laycock emailed the Board asking for the RNS to be amended. He said that he should not have been included in the definition of "Ongoing Board", which had been defined to mean all the directors other than Mr Tinkler (and where only Mr Garbutt's decision to step down at the AGM was indicated).

270. The 29 May RNS ran to four pages. It was published at 2.41pm and was said to be an "Update on Annual General Meeting and possible Board Changes". It referred to the 25 May RNS and, in the context of repeating the majority's support for Mr Ferguson, included the following statements:

> "*The Ongoing Board would like to provide shareholders with some context for this regrettable situation. It is committed to the highest standards of corporate governance and believes that challenge, scrutiny and robust debate in boardrooms are part of the effective oversight of management and the decision-making process."*
>
> *"Under this commitment the Board has been forced to address a number of challenges posed by Mr Tinkler in the recent past. The Board has, throughout these challenges, sought to balance the benefits of harnessing Mr Tinkler's entrepreneurial talent whilst maintaining strong corporate governance on half of, and in order to create significant shareholder returns for, all investors*."

271. The statements within it to which Mr Tinkler and his solicitors took particular exception were those which referred to the "*challenges*" said to have been posed by Mr Tinkler "*in the recent past*" and the expression of regret that "*Mr Tinkler has destabilised the Group at this crucial time for the business by his stated intention to vote against the Chairman at the Annual General Meeting*."

272. The RNS elaborated upon those challenges as:

> *"... including:*
>
> - *settlement of contractual issues arising from a previous related party transaction when Mr Tinkler was CEO;*
> - *a proposed selective buy-back of part of his stake in the Company;*
> - *a proposed additional ex-gratia bonus for him of shares then worth some £8m;*
> - *a proposed buy-out of the Company when the share price was in the range of 100p to 120p;*
> - *a proposed related party transaction associated with the recent aborted airline transaction."*

273. As well as elaborating upon the "*serious risks*" presented by Mr Tinkler's challenge to the Chairman, the RNS also said that Mr Tinkler was no longer key to the delivery of the current management's operational strategy and that his focus, during the 50% of his time spent on the Company, was on the non-operating divisions.

274. That evening, 29 May, Mr Brown sent an email to Mr Whawell and Mr Tinkler expressing his unfavourable views upon the RNS. He said how it described financial successes was "*misleading*" and that the references to "challenges" was "*emotive and insinuates a fight, a dispute, a confrontation*." He generally questioned the accuracy of the announcement and concluded with: "*Of course there is no paragraph on the other view*".

275. On 30 May, Cenkos resigned as the Company's broker. I have already mentioned that this was Mr Hodges' reaction to the terms of the 29 May RNS.

276. Mr Tinkler and Mr Day exchanged text messages on 31 May. Mr Tinkler's said: *"Philip, Good stuff looks like they are getting desperate. Kind Regards Andrew."* Mr Day responded *"Let's hope!"*. That same day Mr Day met Mr Barnett of Invesco and his evidence was that Mr Barnett indicated that they were less supportive of Mr Tinkler and wanted to know Mr Day's intentions. This was to discuss his proposed chairmanship. Mr Day says he told Mr Barnett that, while he thought it important that Mr Tinkler should be retained as an executive director his return to the role of CEO was not on the agenda.

277. Later that day, 31 May, Mr Tinkler sent a text message to Mr Woodford which appeared to reflect a conversation between himself and Mr Day about Mr Day's meeting with Invesco:

> *"Neil, Just finished my call with Philip on debriefing on Mark & Philip's meeting. If you don't mind Philip is going to try & ring you in the morning around 8am for you and him to work out next steps. Kind Regards Andrew."*

The reference to "Mark" appears to have been a reference to Mr Barnett (of Invesco).

278. Mr Day says that Mr Woodford had arranged his meeting with Invesco and that he also arranged meetings for him with Mr Dobell of M&G and Mr Williams of Miton, at which Mr Day said much the same as he had said to Mr Barnett.

279. On 1 June, in his capacity as CEO, Mr Brady issued a message to the Group's employees which made oblique reference to the RNS's. Mr Brady had forwarded the terms of this "*straightforward*" message to Mr Tinkler for his comment. Mr Tinkler had responded that it was best to say nothing at present as "*it does not tell them anything more than they already no [sic] and we don't want to mislead or patronise them*". On that aspect, Mr Brady's circular said:

> "*You may also be aware of the recent press coverage surrounding matters concerning the Board which will be resolved over the coming weeks. In the meantime, it is important that we continue on a "business as usual" basis, as the matters referred to should not have any impact on our day to day operational activities. Should you find yourself engaging with any external stakeholders, such as customers or suppliers, I'd very much appreciate you relaying the same message. We are on a great trajectory for a positive noteworthy performance this year and there's no reason why these matters should alter that course*."

280. Also on 1 June, Ogier ("**Ogier**", Guernsey advocates retained by Mr Tinkler) wrote a letter to Travers Smith in terms which, as summarised by its recipient Mr Foster, questioned the legitimacy of the Committee and claimed that it was stifling debate and denying Mr Tinkler his right to participate in Board matters and that the members of the Committee were conflicted.

281. On 4 June a formal requisition signed by Mr Tinkler, Mr Jenkinson and on behalf of WIM (but not by Mr Williams of Miton as the form of letter anticipated) was submitted to the Board. It referred to the earlier requests, made on 25 May, that Mr Ferguson stand down and (by reference to the qualifying 10% shareholding that would support a shareholders' requisition of an EGM) confirmed that the signatories would be voting against Mr Ferguson at the 2018 AGM. It notified the Board of an intention to move a resolution for the appointment of Mr Day.

282. An RNS announcing the requisition for the election of Mr Day was issued on 5 June.

283. I have already mentioned above how the terms of reference for the Committee (the establishment of which was decided upon at the Board meeting on 28 May) were revised before being considered during a Board meeting, by telephone, in the afternoon of 5 June. The legal advice from Travers Smith at the time was (on 3 June) that the reference to Mr Tinkler's future as a director and employee "*could increase the already present risk of a constructive dismissal claim which we rehearsed in the context of the establishment of the Committee*"; and (on 5 June) that "*the deleted point does not need to be considered until the results of the AGM are known, at which point the terms can be revised again if considered necessary*". Within the words that remained was the

statement that "*the remit of the Committee includes authority to exercise all powers of the Board (without limitation)*".

284. I will return to the Committee's powers in my findings in Section 5 below. The outcome of the Board call on 5 June, in circumstances where Mr Tinkler had not yet reviewed the terms of reference, was that they were put off for later consideration during a Board call arranged for 7 June.

285. Over the two days of 5 and 6 June an offsite meeting of the Company's Executive Leadership Team ("**ELT**") took place in Manchester. The event had been organised by Xinfu, management consultants retained by the Company. Mr Brady opened the event with a question and answer session. His evidence was that, during the Q&A's, Mr Whawell stood up and made what Mr Brady described as a scripted statement. Indeed, Mr Whawell later, on 22 June, sent an email to Ms Brace and Joanna Secular-Hall (then the Company's HR officer) which quoted what he had said at the event. However, in his evidence, Mr Whawell said his statement at the meeting had not been prepared. The gist of what Mr Whawell quoted on 22 June was that the statements made in the May RNS's had been made to promote self-interest, rather than the interests of the Company or those in the room, and that if he had still been on the Board they would not have been released.

286. Mr Brady says that none of the other members of the ELT expressed concerns to him. Mr Whawell said that, during the course of the first day of the event, a number of other members of the ELT spoke to him and expressed support for the views he had expressed.

287. One of the members of executive management who attended the ELT event was Mr Stephen Grimes ("**Mr Grimes**") who had recently been appointed as the Managing Director of Stobart Jet Centre Limited. Mr Grimes took up his role as Managing Director of Stobart Jet Centre Limited (based at LSA) on 1 July 2017. He gave evidence on behalf of Mr Tinkler at the trial. Despite Mr Grimes' period of service commencing alongside Mr Tinkler's assumption of a part-time executive role within the Company, by the end of his first year he had allied himself to Mr Tinkler's cause. In a private email to Mr Tinkler of 2 July 2018, he said "*I hope you are well and ready to take back your control. I fear there will not be much left if the current regime are left for too long …*" and "*I will resign if you don't win and return to the business and I am sure there are many others who feel the same*." His loyalty to Mr Tinkler stems from their shared interest in jets and enthusiasm for the Southend Jet Centre. In his witness statement, Mr Grimes said Mr Brady told those assembled at the ELT event that it was "*untenable for Mr Tinkler to continue on with the business*", though this was not put to Mr Brady and Mr Whawell's evidence did not support that piece of testimony.

288. Mr Whawell's evidence was that on the evening of 5 June he drafted a letter (the "**ELT letter**", as it came to be sent to the Board on 9 June). By the small hours of 6 June 2018 Mr Tinkler was in possession of the draft. It is not clear how he received it and the draft in question appears to have been a second draft. In his testimony, Mr Whawell said: "*I did a second draft. Both went to Mr Tinkler, I think, or the second one did, anyway …*". Mr Whawell also said: "*I don't think I discussed anything with Andrew … I'm pretty sure I didn't discuss anything with Andrew*".

289. Mr Tinkler sent Mr Hodges the draft of the letter in the first hour of 6 June, noting that "*Ben is going to get senior management to sign this tomorrow at a event… he has been receiving feedback from management all day on their views and feels he will get a majority to sign it*." The version sent to Mr Hodges contained references to Mr Tinkler and to the anticipated signatories being "*in support of Andrew Tinkler with his vote against the current Chairman, Iain Ferguson, and support the election of Phillip Day as the new Chairman of Stobart Group*." In these proceedings the Company described that version as a "petition", given that the words were followed by a table of names of the senior executive management and their respective positions. The reference to Mr Tinkler and the identity of the signatories did not appear in the final version of the ELT Letter.

290. Also in those early hours of 6 June, Mr Tinkler forwarded to his solicitor, Ms Moran of K&L Gates, a list of email addresses of the attendees at the ELT event. He said in evidence that this followed a discussion with Mr Whawell which led to him to do so. He sent Ms Moran the list of attendees "*for the letter*".

291. One of the members of the ELT was Michael Conlon ("**Mr Conlon**"), a director of Stobart Air based in Dublin. Mr Conlon made a witness statement in these proceedings but no challenge was made to it and he was not cross-examined upon it. Mr Conlon explained that he had been present at the ELT event, heard Mr Whawell's statement, during the Q&A session, criticising the way in which the Board was dealing publicly with its dispute with Mr Tinkler. He had a conversation with Mr Whawell who said he would like to speak to the airline executives about the public announcements at the end of May. Mr Whawell then telephoned Mr Conlon on 6 June saying there was a letter for the ELT to sign and hoping the airline executives would sign it. Mr Whawell sent through a draft letter that afternoon. Mr Conlon said that the Stobart Air team did not want to be party to the letter as it stood and that remained their position, as communicated to Mr Whawell in two or three further telephone conversations, despite them discussing possible changes to it. Mr Conlon said it was on 7 June that Mr Tinkler called him about the ELT letter and the conversations with Mr Whawell. His evidence was that Mr Tinkler said *"something like he understood if we were reluctant to show our hand given it was too early to tell which way the cards would fall*" and that this was "*a genuine attempt by Mr Tinkler to reassure me there was no pressure from him if we did not want to be seen to endorse Mr Day.*" Mr Tinkler told Mr Conlon that he would forward Mr Day's biography and duly did so.

292. On 7 June a further Board meeting took place by telephone, lasting just under an hour. The transcript of the meeting records that a number of matters which are material to the present dispute were discussed during the call.

293. The first matter was that the Board approved the transfer of the first tranche of shares from the Company's Treasury to the EBT. At that time, 7,035,235 shares were held in Treasury and the EBT held 2,503,527 shares (and £1.2m cash).

294. The day before the Board meeting, on 6 June, Ms Brace had produced a memorandum for the Board. It showed that:

    i) on 22 June 2015 senior management and executive directors were awarded LTIP grants on 22 June 2015 and 6 November 2015 respectively;

ii) in accordance with a schedule approved by the Remuneration Committee, it was anticipated that entitlement to at least 4,089,352 shares would therefore vest on 22 June 2018. That number specifically excluded Mr Tinkler's 2015 award, since he had indicated that he would not be exercising his right to those shares in June 2018.

iii) as of 11 May 2018, there were only 2,503,537 shares in the EBT;

iv) if all the shares and cash in the EBT were used to satisfy awards (i.e. fully exhausting it), there would remain a shortfall of 1,110,578 vesting shares;

v) 7,035,425 shares were available in Treasury that could be used to satisfy awards, making up any shortfall.

295. Reverting to the discussion of the LTIP awards at the 7 June Board meeting, the transcript of the meeting records Ms Brace introducing her memorandum in response to Mr Ferguson saying: "*2015 L-tip vesting. The reason for this is that we're obviously at the point where there is a vesting about to happen*." Ms Brace said the memo was to inform the Board of "*the amount of shares that we'll be vesting*" and that "*the proposal is that we exhaust the EBT and then use the treasury shares*". I return below, in the context of my findings upon the evidence, to the parties' rival contentions as to what was in mind and what should have happened in relation so far as the size and destination of any transfers out of Treasury are concerned.

296. So far as his own entitlement was concerned (and not taking it on 22 June) Mr Tinkler said:

> "*Louise, just I know it makes reference to me exercising mine there. Right? But on the 2014, I know I've got the two year* [holding period] *on the 15/16, but I'll come to you on the 14. I'm still reviewing that*."

297. Mr Tinkler's reference to "*the two year*" was to a holding period during which any LTIP shares should be retained, in order to cover the possibility of a clawback in the event of there being some cause to re-visit the Company's financial performance during the period for which the shares had been awarded. Mr Tinkler explained in his evidence that Remco had introduced the 2 year holding period for the 2015 LTIP. In February 2018 Ms Brace had written to Mr Tinkler in connection with the holding period, saying that it would not apply if he left the Board (which he had then discussed with Mr Whawell and Mr Butcher saying it was further evidence of unfairness and an indication of an attempt to get him to leave the Board).

298. Mr Tinkler also mentioned Mr Brady's bonus terms: "*it would be understanding what the SAP* - [the Stobart Aviation Incentive Plan under which only Mr Brady stood to benefit] - *would be as well, because that's cash and it's sort of get a better understanding where that would be, if you know what I'm saying? Because it's cash, it's the same thing*".

299. The Board minutes for the meeting on 7 June (signed later, on 18 July, but not at odds with the transcript of the meeting) record that Mr Tinkler was reviewing his position in relation to his exercise of his 2014 LTIP award (526,495 shares) and that he would not in 2018 be exercising his 2015 LTIP award (1,327,332 shares) and also noted the risk

of "dilution" in the event of the Stobart Energy Investment Plan performing particularly well. So far as the Board's decision was concerned, the minutes record:

> "*3. 2015 LTIP Vesting Procedure*
>
> *The Board noted that Louise Brace had produced a 2015 LTIP Vesting memo to consider and, if thought fit, approve that the options be satisfied by shares held by the Stobart Group Limited Employee Benefit Trust established on 21 September 2007 and operated by Jupiter Trustees Ltd and to also approve the transfer from Treasury of sufficient ordinary shares of £0.10 each in the capital of the Company for this purpose.*"

300. The second matter discussed during the Board call on 7 June having been deferred from 5 June (and Mr Wood again taking the Chair from Mr Ferguson for this business) was the Committee's terms of reference. The minutes record that there was discussion of an extension of the Committee's powers "given the potential for litigation against certain Directors of the Company." Mr Tinkler objected to this and to the establishment of the Committee but, with Mr Garbutt voting alongside him, he was outvoted by the Four Directors and the revised terms of reference were approved by majority.

301. The third relevant matter discussed by the Board on 7 June was the Ryanair deal. Mr Brady announced that in the coming week Ryanair would be announcing a deal with the Company to fly into LSA.

302. Mr Wood asked a question about the "*real headline commercial terms*" of the Ryanair deal. Mr Brady noted that the terms were in the Board pack. Those terms were also in the trial bundle but, consistent with the Order I made on the first day of the trial and have mentioned in Section 1 above, it is not necessary and therefore not appropriate (even with the potential for redaction of this judgment in mind) for me to relate the principal ones in this judgment. At the meeting, Mr Tinkler pointed out that a financial model was needed to show the effect of the written terms, especially the "*cash flow to support"* Mr Brady's summary of some of them, and the "*Capex*" (i.e. capital expenditure) and the timing of it. Mr Tinkler noted "*It's cash drain on the business*" and Mr Brady agreed to provide a further financial model showing the cash flow and expenditure. In relation to the deal generally and the need for planning for further infrastructure at LAS, Mr Tinkler said that there were risks "…. *because we are predetermined that we'll get planning and all this, but end of day we are where we are. We can't not go forward with this, Warwick, but I think we need a proper projects team that can really deliver for us, so that we don't end up in the same position as we have at Carlisle Airport where we've had our licence suspended from the CAA*."

303. On 8 June the Company gave notice to its shareholders of the AGM to be held on 6 July 2018. The resolution to elect Mr Day, as requisitioned on 4 June, was not on the agenda.

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.

305. On the morning of 8 June, Mr Whawell was copied (at his private email address) into a chain of email communications between Mr Tinkler and Mr Tinkler's PR agency, Lansons, on 8 June written in connection with the approach of writing to all shareholders. Mr Tinkler had sent him a draft of the letter just after 2am (though Mr Whawell was an hour ahead and may still have been in Mallorca where he had been over the Bank Holiday weekend). At breakfast time, Mr Whawell offered some input into the letter:

> *"Is it just a disagreement over strategy? You found a plot to oust you from the Board by IF. Major governance concerns etc. Concerns of Directors properly carrying out their fiduciary duties."*

306. No doubt because of his intervention at the ELT event in Manchester, the view of at least some of the Four Directors was that Mr Whawell was behind the ferment within the management. Mr Coombs had sent a text message to Mr Brady who in turn had forwarded it by WhatsApp to Mr Dilworth on 8 June in the following terms:

> *"Here's love note …. from JC I suggested to Warwick that on Monday somebody needs to take ringleader Ben behind the bikesheds and point out to him just how much of a gamble he is taking with his SEIP. I am happy that if Nick were to do this he says that AT is not the only person who is tribal ….."*

The reference to the "SEIP" was to the Stobart Energy Incentive Plan ("**the SEIP**"), from which Mr Whawell stood to benefit in the form of a management bonus.

307. After Mr Whawell's input that morning, on 8 June Mr Tinkler refined his 3 page letter to shareholders dated 8 June 2018 "*in my capacity as an Executive Director, significant shareholder and founder of the Company*" ("**the Letter to Shareholders**"). The Letter to Shareholders was headed "*To the Shareholders, Stobart Group Limited – Letter from Andrew Tinkler, Executive Director and Shareholder of Stobart Group Limited*."

308. By the terms of the Letter to Shareholders Mr Tinkler expressed himself to be horrified by the "*recent announcements issued and action taken in the name of the Company, and by the public mud-slinging in which some of my fellow directors have seen fit to engage without any regard to the waste of the Company's resources involved or the impact on employees, customers, and suppliers*". His letter urged shareholders to vote against Mr Ferguson and in favour of Mr Day and concluded by saying "*a change of Chairman would help to uphold the agreed company strategy, to stabilise operational management and to deliver the best returns for shareholders*." Mr Whawell's suggestion found reflection in a reference to "*a critical point in early 2018 when I became aware that Mr Ferguson, without any discussion or consultation with shareholders, was attempting to remove me from the Board*." Mr Tinkler criticised the establishment and composition of the Committee and the process and the contents of the 29 May RNS, noting that it was in his view defamatory. He referred to his own track record, the fact that the share price of 296 pence when he had ceased to be CEO had since fallen 28% to 214 pence per share. He said he was saddened by "*the impact*

this disagreement amongst directors is having on the Company's operational management."

309. As to that disagreement, the Letter to Shareholders contained the following earlier statement:

> "*It is clear that there is a fundamental disagreement amongst the directors of the Company over the implementation of the future strategy of the Stobart Group. My objective in all my dealings has been to ensure that the Company pursues the agreed strategy and does not deviate from this, as pursuing the agreed strategy will deliver the best return to shareholders. That strategy is best executed and underpinned by strong corporate governance, which has been sadly lacking of late, and that is why, in my view and that of a number of other significant shareholders, it is in the best interests of the Company that Mr Ferguson should not be re-elected as a director, and that Mr Day should be appointed as a director and should take Mr Ferguson's place as Chairman of the Company*."

310. Mr Tinkler began sending the Letter to Shareholders late on the night of Friday 8 June and into the early hours of the next day.

311. Mr Woodford was pleased to see the letter. By an email on Sunday 10 June, he wrote: "*Great letter Andrew – very pleased to see it*."

312. On 8 June Mr Tinkler also issued libel proceedings in the High Court against the Four Directors and Mr Laycock in respect of the 29 May RNS.

313. Also on 8 June, the Committee resolved that the Company should instruct Rosenblatt Limited ("**Rosenblatt**") with immediate effect to "*advise the committee on the legal strategy in relation to Mr Tinkler and specifically for shareholders to ensure the right outcome to deliver a winning vote at the AGM on 6 July 2018*" (as its decision was minuted).

314. So far as the ELT letter was concerned, Mr Whawell said that that he approved that letter at about 10pm on the evening of 8 June.

315. Two significant communications then took place within the first hour of 9 June. The Company invites me to conclude that both were instigated by Mr Tinkler with the involvement of Mr Whawell. At 00:16 that morning Mr Tinkler sent to the Board a copy of the Letter to Shareholders. Two minutes later, at 00:18, K&L Gates sent the ELT letter to the Board, titled "An Open Letter to the Stobart Group Board." In his evidence, Mr Tinkler refused to accept that these actions were coordinated. He said they were not and were "*totally independent*".

316. The identity of the signatories to the ELT letter did not appear from the copy sent to the Board. Ms Moran agreed to receive the signed letters on the basis that she would not disclose the identity of the signatories, including to Mr Tinkler. K&L Gates informed the Board that a "*substantial majority of the senior management team*" had signed it. The ELT letter itself said that over 80% of the ELT who had over 2 months service and who were not on the Board (I understand that means 27 of the ELT were asked to sign) had signed the letter.

317. The ELT Letter contained the following statement by the undisclosed signatories:

> "*We refer to the content and the release of the two announcements which entered the public domain on Friday 25th May and Tuesday 29th May respectively. We believe the announcements contain statements that are not only misleading but highly selective and incomplete and that the release of these statements into the public domain shows a lack of care and foresight as to the impact that these announcements have on the day to day operations of the business."*
>
> *We believe the content and release of the announcements was neither in the best interests of the Stobart Group nor the day to day operations of the business.*
>
> *It is imperative that we restore orderly day to day operations and believe that the best course of action for the Stobart Group is for its current Chairman to resign.*
>
> *By signing, we acknowledge our support for the election of Philip Day as the new Chairman of Stobart Group*."

318. Mr Grimes' evidence was that his main aim in signing the ELT letter was to show his support for Mr Tinkler and his concern with the actions of Mr Brady. However, the ELT letter, as sent, did not refer to Mr Tinkler or to Mr Brady, as opposed to the two May RNS's and the choice of Chairman. Only the earlier draft, in the form that Mr Tinkler had sent to Mr Hodges, had referred to supporting Mr Tinkler (and then in relation to voting for Mr Day over Mr Ferguson).

319. The ELT Letter had concluded with the statement: "*It is the ELT's position that the information contained in this letter constituted a protected disclosure for the purposes of the Employments Rights Act 1996*". Later, on 11 June 2018, Penningtons Manches (instructed by Mr Whawell but not identifying him by name) wrote to Ms Brace saying that they had been instructed by a member of the ELT and referring to their understanding that over the weekend "*various enquiries were made by the CEO as to the identity of the whistleblowers*" and that *".... the imposition of penalties for being involved in the [ELT Letter] was intimated*." It appears that they were writing by reference to what Mr Tinkler had himself said in an email to the Board on 10 June; that it had been brought to his attention that Mr Brady had approached two members of the ELT in connection with the letter. The solicitors asked that all "*such inquiries and intimidation*" should immediately cease and reserved their client's rights. In referring to a press comment by the Company, expressing disappointment that Mr Tinkler had sought the support of employees on what was a shareholder vote, Mr Whawell's solicitors said the ELT letter was "*not driven by Andrew Tinkler*."

320. At 07:52 on 9 June Mr Tinkler forwarded the Letter to Shareholders to all employees of the Company or, rather, to all of those with a company email address ("**the Communication to Employees**"). His covering email said:

> "*Dear All*
>
> *As valued employees of Stobart Group, I am sending you the attached letter that sets out my position. This letter was just sent out to shareholder's [sic] and thought its only right that you also have sight of this information.*

Kind Regards Andrew"

321. Amongst other reactions on the part of the other directors, the Communication to Employees prompted Mr Brady into the following WhatsApp exchange with Mr Dilworth on 9 June:

"WB *See AT has hit the employee button ! With mistruths*

ND *Just reading now but this is wholly unacceptable*

WB *Starting a employee revolution is what he is trying to do…*

ND *Indeed. This is terrible behaviour. Not suggesting there's a response putting the other side forward but you are now in difficult position as named. Mull over the bau discussion to shelter employees from taking any sides as wrong to do so...You are the CEO and it's disappointing that it was not discussed before being sent."*

322. By an email sent to his fellow directors and the Company's lawyers on the morning of 9 June, Mr Brady began: "*Unfortunately, Andrew has effectively tried to start an internal revolution by sending this to all staff ….*".

323. On 10 June, Mr Brady wrote an email ("Note to all employees") in his capacity as CEO in relation to the Communication to Employees. He said that the Company had not wanted the internal discussion with Mr Tinkler to become public but that his "*intractable decision*" meant there was no choice but to inform shareholders through a public announcement. The message concluded with a statement of the Company's belief that it was in the best interests of "*everyone at Stobart that Iain be allowed to continue in his role and for us all to focus on delivering our strategy*."

324. At the Board meeting on 7 June Mr Tinkler had agreed to provide Mr Ferguson with Mr Day's contact details. On 10 June, Mr Ferguson sent an email to Mr Day referring to the requisition received on 4 June 2018 and inviting him to submit a letter indicating his willingness to stand and a brief CV or biography for the members of the Company's Nomination Committee. Mr Ferguson also asked for a date between 11th and 21st June when they might meet. Mr Ferguson provided Mr Day with details of the members of the Nomination Committee (himself, Mr Coombs, Mr Garbutt and Mr Wood).

325. On 11 June, Ms Brace sent an email to Mr Foster and Mr Tony Lane ("**Mr Lane**" of Carey Olsen, Guernsey lawyers), copying the Four Directors, saying "*I have this evening had confirmation that the EBT will accept the transfer of all Treasury shares and will vote in accordance with the recommendation of the Chairman*". Mr Brady then sent a WhatsApp message to Mr Dilworth saying: "*Will you sort the shares that need to go into EBT – 2% is a lot in our game" and "we need to move treasury shares into the employee benefit trust so that we can vote them*."

326. On 12 June the Company and Ryanair signed their Agreement for the airline to operate out of LSA from 31 March 2019 (the start of the IATA 2019 summer season). The Ryanair deal ("*on our standard commercial terms*") was announced by an RNS the next day.

327. On 13 June, Mr Day responded to Mr Ferguson's email of the 10th, to express his disappointment that they had to meet under such circumstances and asking, before he responded in full, for the names of those on the Nominations Committee. Mr Ferguson provided details of the Committee (Messrs Coombs, Garbutt and Wood, with himself as Chair) by email the following day, 14th June.

328. At 8.55am on 14 June 2018, during a short meeting lasting 10 minutes, the Committee (Messrs Wood, Coombs and Brady) proposed and then formally approved Mr Tinkler's summary dismissal from employment and removal from office. Mr Ferguson, Ms Brace and Mr Foster were in attendance.

329. The minutes of that meeting record that Mr Foster had discussed the remit of the Committee with Mr Lane and they were in agreement that it was "*within the Committee's remit (set out in its terms of reference) to terminate the employment of Mr Tinkler, in light, in particular, of his actions over the weekend of 9th and 10th June (in communicating directly with major shareholders and employees ….)*". They also record that the Committee noted that the "*actions that had been taken by the Company over the past weeks*" had been taken because the Board (by a majority) and the Committee considered them to be in the best interests of the Company and in the interests of maintaining strong corporate governance by the current non-executive team. The Committee considered a draft letter before action from Rosenblatt as a precursor to bringing proceedings against Mr Tinkler for breach of contract and fiduciary duty. Mr Tinkler's actions were considered to be "*a very significant threat to that corporate governance which in turn would be likely to lead to instability of the Company.*" The Committee unanimously resolved, on the basis it was in the best interests of the Company, to summarily terminate Mr Tinkler's employment and directorship.

330. The Committee then convened for a second time at 1.30pm that day (with the same persons present or in attendance save that Mr Dilworth attended but Mr Ferguson did not). At that second meeting, the Committee considered further draft documentation relating to Mr Tinkler's dismissal, including a draft RNS, and also noted that "*a communication would be sent to all employees explaining the dismissal*."

331. That same day, 14 June, Rosenblatt sent an 8 page letter to K&L Gates intimating a substantial claim against Mr Tinkler and stating that the Committee had decided to terminate his employment and was writing to him to that effect. The various sections within the letter foreshadowed the matters in issue within these proceedings and also the Claims launched by the Company against him: "Subverting the Board" (including through pursuit of "the Common Objective" involving Messrs Woodford, Jenkinson, Hodges and Day), "Destabilising the Staff" and "Expenses". The letter attached undertakings for Mr Tinkler to provide by 5.30pm on 18 June, failing which the Company would apply for injunctive relief against him. Those proposed undertakings were aimed at Mr Tinkler not contacting employees or director of the Group, retaining or accessing Group property and not misusing Confidential Information (as defined in his Service Agreement).

332. Mr Wood sent to Mr Tinkler a shorter 2 page letter dated 14 June from the Committee, summarising (in a full first paragraph which included reference to him orchestrating a campaign to destabilise the ELT and staff generally and seeking to advantage himself at the expense of shareholders) the grounds for his alleged dismissal. The letter gave notice of immediate termination under clause 17.1 of his Service Agreement. It

concluded with a reference to clause 17.4, requiring him to resign forthwith from "*all offices which you currently hold in the Company or any Group Company*" and asked him to execute and return a resignation letter as a director of the Company. A draft "Resignation Letter", for his signature, in respect of the Company and 36 others within the Group was provided.

333. The Company's actions, the Rosenblatt letter and Mr Tinkler's response (denying any claims of inappropriate expenses and saying the letter contained malicious falsehoods) were widely reported in the online press that day. By an email sent at 6.30pm, Mr Brady made an announcement to employees of the Group which referred to "*the very difficult decision to dismiss Andrew Tinkler from his employment with Stobart Group and remove him from our Board of Directors*". In explaining the background, the announcement said that, as the employees would be aware, Mr Tinkler, having enrolled two other shareholders, had engaged in "*a campaign to attack our Directors with a view to replacing our Chairman with his own choice*."

334. On 15 June the Company issued the present Claim.

335. On that day, 15 June, Mr Lane sent an email to Ms Brace and Mr Foster noting that he had discussed the transfer of shares to the EBT with a litigation colleague at Carey Olsen in connection with possible action that Mr Tinkler could take in Guernsey to disrupt the AGM. He said: "*We would not be surprised if AT brought an action in Guernsey against the Company alleging that the transfer to the EBT and the voting recommendation to the trustee were an improper use of powers, together with seeking an injunction preventing the trustee from exercising the vote*."

336. On 18 June, Mr Woodford made a public announcement in which he said that he had recently become aware, with other shareholders, of Board instability and had sought to address this privately. He went on to say "*Once I became aware of these governance issues, I took extensive due diligence in order to establish the cause of this instability*", that his considered view was that the Board needed a new Chairman and that Mr Day was his preferred candidate. He said WIM was exercising his legitimate right as a shareholder and questioned the motivation of some members of the Board in "*seeking to frustrate the appropriate behaviour of a responsible shareholder*."

337. K&L Gates wrote to Rosenblatt on 19 June, by their own detailed 7 page letter, setting out Mr Tinkler's position in relation to his purported dismissal and removal, noting that both were invalid and (saying that "*the way forward is clear*") the dispute about "*which of Mr Tinkler, Mr Ferguson and Mr Day they wish to have on the Board, and which they do not*" should be decided by the shareholders. They said that, as Mr Tinkler had not been validly dismissed, he should not be required to give the requested undertakings though they went on to propose alternative ones to hold the ring "*until his status is resolved at the AGM*". To that end, the solicitors said that if the Company did not agree the alternative proposals by 4pm the following day, 20 June, then they had instructions to seek injunctive relief preventing the Company from acting on the purported termination, or taking any further steps to remove Mr Tinkler, pending the AGM.

338. On 19 June, the Company transferred 1,715,000 ordinary shares from Treasury to the EBT. An RNS was issued accordingly on 20 June (with a subsequent correction on 25 June as to the Company's issued ordinary share capital).

339. Also on 19 June, Ms Brace sent an email to the Four Directors, Mr Garbutt and Mr Laycock which asked for a decision by email on the following:

> "*As you will recall, the Board approved (7 June call) the transfer of sufficient shares from Treasury to the EBT to cover the 2015 LTIP vesting on 22 June 2018. The Board is now asked to approve the transfer of the balance of the Treasury Shares to the EBT, this being 5,320,425 ordinary shares, to satisfy future LTIP or other share based incentive awards*."

340. Approval was given to the further transfer by a Board decision (initially by email and then by way of "formal approval and ratification" at a Board meeting by telephone) on 21 June. It was at that meeting that the Board resolved (with Mr Garbutt abstaining) not to put forward Mr Day's name for election at the AGM on the basis that he had not responded fully to Mr Ferguson's requests for information and yet the documents for the AGM had to be approved that day in order to meet the printing and posting deadline of 25 June.

341. On 20 June, Carey Olsen provided advice to the Company upon the effectiveness of Resolution No. 4 (the "re-election" of Mr Tinkler) circulated in the Notice of the AGM in circumstances where Mr Tinkler had been removed from office. The advice was that, on balance, the argument that the resolution was ineffective was stronger than the counter-argument that it remained effective.

342. On 22 June the share entitlement under the LTIP vested and was able to be "exercised" by those entitled to a 2015 LTIP award. Had he not been summarily dismissed in the meantime, Mr Tinkler would have benefited from a vesting that day of a further 1,327,332 shares (having already benefited from the vesting under the 2014 LTIP of 526,495 shares in November 2017 and May 2018).

343. After a polite chasing email from Mr Ferguson on 20 June, to follow up his last one of 14 June, Mr Day did respond by an email of 22 June suggesting that he might meet only Mr Garbutt ("*who appears to be the remaining independent director on the board able to carry out the said process*").

344. On 22 June, Mr Tinkler made an affidavit for the purposes of legal proceedings brought by him against the Company in Guernsey. These were not exactly of the kind anticipated by Mr Lane in his email of a week earlier but took the form (as appears from Mr Tinkler's affidavit) of an "*application for an injunction in Guernsey to prevent the Company from taking any steps that would prevent a resolution that proposes I be re-elected to the Board of the Company from being voted upon by shareholders at the Annual General Meeting*." In essence, therefore, it was an application to prevent Resolution No. 4 (the re-election of Mr Tinkler) from being removed from the ballot paper at the AGM.

345. The further 5,320,425 shares were transferred from Treasury to the EBT on 25 June. Jupiter, as trustee, had on 21 June accepted the "offer" of the transfer of the 5.32m odd shares made by the Company's letter dated 20 June. I address this letter further in the context of my findings under Issue 4 in Section 5 below. The letter recognised the full discretion enjoyed by Jupiter in relation to the manner in which the shares might be voted but contained a voting recommendation in relation to those shares and the 4,218,527 shares (including the 1.7m odd just transferred) already held by the EBT.

That recommendation, by the majority of the Board, was to re-elect Mr Ferguson. This was said to reflect what they considered to be in the best interests of the Company and the recommendation to the trustee was expressly made on that same basis. Jupiter was asked to countersign the letter if it resolved "*in its absolute discretion*" to act upon the recommendation.

346. Mr Ferguson responded to Mr Day's suggestion (that he meet only Mr Garbutt) on 25 June, assuring him that the members were aware of their duties and responsibilities and proposing that Mr Garbutt and one other Nomination Committee member should meet with him. He informed Mr Day that the documents necessary for proper notice of the AGM to be given to shareholders had been sent to the printers. Nothing further came from the exchanges between them, though Mr Day did say in evidence that he met Mr Garbutt briefly for lunch on 27 June, as I relate below. The upshot is that Mr Day, having previously spoken to Mr Brady and having again met Mr Garbutt briefly, never met the rest of the Board or other members of the Nomination Committee. Nor did he ever respond to Mr Ferguson's request for an indication of his willingness and eligibility to stand for election by providing the information requested of him.

347. On 25 June, by an email with the subject matter "Duranta Budget leak", Mr Richard Leighton of Perscitus LLP (the Company's co-investor in the Duranta anaerobic digester) wrote to Mr Butcher, Mr Whawell and Mr Brady, saying:

> "*Over the weekend we have received information from various sources which strongly suggests that the Duranta Budget and operational plan has been shared with Philip Day by Andrew Tinkler. Allowing such commercially sensitive information to be shared with any third party, let alone a third party who is also an owner of another AD plant, is a serious breach of the legal duties we have as directors of Shuban Power Ltd and also of the confidentiality provisions contained within the Shareholders Agreement signed by Stobart AD1 Ltd, Livingston Estates Ltd and Shuban Power Ltd*."

Mr Leighton referred to the necessary trust being seriously damaged and asked for any information the recipients might have as to how the leak had come about and confirmation that none of them was personally involved.

348. On 27 June, Mr Day met Mr Garbutt over a brief lunch to discuss his potential chairmanship. Mr Day says that Mr Garbutt offered his support for him to become Chairman and said as much in a follow-up text message. Mr Garbutt's later public statement in early July (made in response to an article about the Company in the Sunday Times) said he had confidence in Mr Day "*were he to become the new Chairman*".

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.

350. Mr Tinkler's application to the Royal Court of Guernsey for injunctive relief was heard by Judge Finch O.B.E. on the morning of 28 June. The Judge refused it. As appears from his reserved judgment of 5 July 2018, the application was made on the basis that it was in aid of these English proceedings and the Judge noted that the relief sought in the Guernsey proceedings was to restrain the Company from preventing a vote on Resolution No. 4 (Mr Tinkler's re-election) and it did "*not extend to challenging his removal as a director or dismissal as an employee*." As well as being influenced by the Company's agreement to convene an EGM over Mr Tinkler's election if a valid shareholder's requisition was made, the Judge said (at his paragraph 13):

> "The duty of the Guernsey Court is to rule on the issue before it. At present, on the face of the documents, it was lawful for R to appoint a Committee (whoever comprised it) and A remains removed/dismissed. If the English court finds this unlawful, and it may do so, then A has a remedy there. Any "investigation" carried out by the Guernsey court must be limited to the due nature of the case, with unchallenged affidavit evidence and fundamentally different views of the facts. In short, this court cannot properly resolve the issue of A's service as a director and employment on what is before it, as well as being circumscribed by the legal principles to be followed."

His reference to "the legal principles" was, as I read it, to the second and third elements of the *American Cyanamid* test which he had set out earlier.

351. On 28 June, Ogier served notice on the Company that Mr Tinkler intended to propose himself for election under Article 75(2) of the Company's Articles.

352. On 29 June K&L Gates, on behalf of Mr Tinkler, wrote to Jupiter seeking confirmation that the trustee would not vote the shares held in the EBT (confirmation was also sought of their precise number) in favour of the re-election of Mr Ferguson. The purpose of the transfers from Treasury was questioned ("… *appears to be to provide additional votes which can be cast in support of the re-election of the current chairman* ….") and the suggestion was made that Jupiter might be in breach of trust in exercising the vote, either way, "*attaching to any of the shares that you hold*". That suggestion was made by reference to the potential damage to the EBT's assets and to the support of over 80% of the ELT ("*who are all potential beneficiaries of the Trust*") for Mr Day over Mr Ferguson. The solicitors set a deadline of 5pm on 2 July (the next working day) for that confirmation, failing which Mr Tinkler reserved "*the right to commence legal proceedings against you to prevent you joining in this attempt to manipulate the result*" of the resolution to be put to shareholders at the AGM.

353. Jupiter's initial response to K&L Gates' letter of 29 June was to say, on Monday 2 July, that it had not been read until the late afternoon of that Friday and that there was very little time to consider its contents ahead of the deadline of 5pm. The following day, Tuesday 3 July, Jupiter wrote stating that it intended to abstain on the proposed resolutions at the AGM as there was no other reasonable alternative in circumstances where it was unable to verify the competing allegations before the Friday AGM. Jupiter's letter of 3 July said its duty was to act in the best interests of the beneficiaries

of the EBT, that its wish was for the Company to continue in good standing and that must be in their best interests.

354. On the same day, K&L Gates also wrote to other institutional shareholders (such as Royal London Asset Management, Legal & General Investment Management and Blackrock) to express concern about the public position they were taking on the forthcoming vote "*despite mounting evidence in the public domain which evidences serious corporate governance failings by the remaining members of the board of the Company other than our client and Mr John Garbutt*". Each letter made reference to the allegation that the Committee was improperly constituted and had lacked the power to remove Mr Tinkler, Mr Garbutt's view about Mr Tinkler's continued involvement being essential to the Company's progress, the ELT's wishes, the allegedly defamatory RNS, the transfer of shares to the EBT and the alleged breach by the Company of its whistle-blower policy by searching emails of employees.

355. The cut-off date for lodging proxies for voting at the AGM was 4 July. That day, two leading (Mr Coombs' said they are the most prominent) proxy advisory services – Institutional Shareholder Services ("**ISS**") and Glass Lewis & Co ("**Glass Lewis**") - produced their reports upon the proxy contest. Their respective reports were produced in the light of K&L Gates also having written to each of them on 3 July in terms materially the same as their other letters to institutional shareholders summarised above.

356. ISS's Report noted that Mr Tinkler and two other shareholders had committed their combined 33% to voting against Mr Ferguson and in favour of Mr Day whereas Invesco had confirmed its 24.8% in favour of Mr Ferguson. They noted that Mr Wood and Mr Coombs had indicated their intention to resign if Mr Ferguson was not elected. ISS's recommendation was to follow the recommendation of the current Board on all the resolutions and to abstain on Resolution 4, which had been for the re-election of Mr Tinkler. The reasoning behind that abstention was that the resolution was "*void due to Andrew Tinkler being no longer on the Board with effect from 14 June 2018*".

357. By their Report, Glass Lewis noted that "*the Dissidents disagree with the incumbent board regarding the implementation of the future strategy of the Company*" whereas "*the incumbent board argues that the Company has the right leadership team and strategy to continue to deliver value to the shareholders and that the Dissident's action threaten to disrupt the Company's progress*". Amongst other matters, they observed:

> "*Having evaluated the arguments presented by the Dissidents and the incumbent Board's response, we do not believe the Dissidents have presented a credible and convincing case in favor of board representation at this time. In particular, we note that the Dissidents have not provided shareholders with substantive information regarding the nature of their concerns at the Company. To the best of our knowledge, the Dissidents have not disclosed any specific concerns regarding the strategic direction of the Company or discussed in substantive detail how the Dissidents' view of the Company's future strategy differs from that of the incumbent board and management. ……"*
>
> And:

> "*Furthermore, in our view the Dissidents have not explained how appointing Mr Day to the board would improve corporate governance at the Company or lead to a more favorable outcome for all shareholders ….*"

358. By 5 July Jupiter had resolved to vote in favour of the resolutions proposed by the Board. In its letter of that date, written to Ms Brace on behalf of the Board and to K&L Gates, Jupiter said it had by then had an opportunity to consider its position "*in more detail and to review further materials and correspondence*." That appears to have been a reference to either or both of the ISS and Glass Lewis Reports, the tenor of which was reflected in the trustee's letter.

359. The reaction of Mr Tinkler, and of Mr Whawell, to the change in Jupiter's voting intention was to instruct Collas Crill, another firm of Guernsey lawyers. That firm wrote to Jupiter on 5 July, on behalf of both of its clients, seeking an undertaking that the trustee would abstain from voting at the AGM, in the absence of which they were "*instructed to seek an injunction from the Royal Court tomorrow morning before the AGM requiring the trustee to abstain as per its previous stated position in its letter of 3 July 2018*". In the event, no undertaking was given by Jupiter and an urgent application was made on the morning of 6 July. The judge refused that application (inter alia)because the AGM had already started.

360. The AGM took place on Friday 6 July at St. Peter Port, Guernsey. Mr Ferguson described it in his witness statement as probably the most difficult AGM he had ever chaired.

361. The transcript of the meeting runs to 30 pages. It records that, after his welcome and preliminary remarks, Mr Ferguson stated that the Group remained on track to deliver its medium-term objectives of growing LSA to welcome 5 million passengers a year by 2022, supplying 3 million tonnes of renewable energy by the same time and realising non-operating assets to support the payment of a dividend. Mr Ferguson then made reference to the recent Ryanair contract and to Mr Laycock's decision to step down from the Board. He also said that Mr Tinkler's proposed resolution to be elected would be dealt with as part of "Any Other Business".

362. It was when Mr Ferguson handed over the Chair temporarily to Mr Wood, so that his own re-election might be voted upon, that there were then interjections from Mr John Elgar, Mr Whawell and Mr Tinkler. As I have already noted, Mr Elgar is a partner with K&L Gates (Mr Tinkler's solicitors) who, as a corporate lawyer, had assisted Ms Moran the previous month in addressing the inquiries of the Takeover Panel that had been prompted by Stifel. However, as appears from the transcript of the meeting, he confirmed twice that he was appearing as a "representative" or "corporate representative" of Cenkos (Mr Hodges' firm which had resigned as the Company's broker).

363. The initial questions (and interruptions) from those three were directed to the transfer of the shares to the EBT. Mr Whawell questioned why shares had been transferred from Treasury to the EBT and whether Jupiter had been offered any sort of indemnity in return for its vote. Mr Ferguson said that the transfer had been reviewed at Board and Remco level and no such indemnity had been offered. Mr Elgar asked whether, if Mr Ferguson just won the vote with support from the 2% shareholding in the EBT ("*possibly [a] tiny amount over half*"), he would be standing down "*in order to make*

way for a candidate who has the support of all the shareholders". Mr Ferguson said: "*I will not be standing down*."

364. Whatever the support for Mr Day (as an alternative Chairman) might have been, his election was not put forward as a resolution at the AGM. Mr Day had not followed up his exchanges with Mr Ferguson the previous month with an indication of his willingness to act. Further, by a later letter to shareholders of 10 July, Mr Tinkler also confirmed that "*following conversations with Philip Day, I have reluctantly come to the conclusion that there is little point in putting him forward for election at the general meeting convened for 18 July. The board would only disregard your wishes and remove him from office, as it has purported to do following my election as a director*."

365. However, despite his lack of success on the interim application in Guernsey, to compel Resolution No. 4 being put to shareholders, a further Resolution No. 14 - to elect Mr Tinkler to the Board - was put forward, as Mr Ferguson had said at the outset of the meeting it would be, under "AOB".

366. All the resolutions that were put to the meeting passed, including Resolution No. 2 (the re-election of Mr Ferguson which was passed) and the "AOB" Resolution No. 14 (the election of Mr Tinkler). The re-election of Mr Ferguson was passed by 51.21%, that of Mr Brady by 60.23%, Mr Woods by 59.05%, Mr Coombs by 60.08%, and the election of Mr Tinkler by 51.44%.

367. In relation to Resolution No. 14, Mr Ferguson exercised proxy votes given to the Chairman at the AGM. Where a shareholder had indicated an intention to vote in favour of Resolution No. 4, Mr Ferguson voted those shares in favour of Resolution No. 14 and, similarly, he voted against it where there was a stated intention to vote against. Where the proxy stated an intention to abstain on Resolution 4, Mr Ferguson used the discretion otherwise conferred by it to vote against Resolution No. 14. Had he carried through the stated abstention to that new "AOB" resolution and abstained on that, the withheld "vote" would not have been a vote in law and would not have counted either for or against the resolution. In the event, Mr Tinkler was elected to the Board despite the fact that the relevant votes were put in scales against him.

368. On 7 July, in the light of Mr Tinkler's election at the AGM, the Four Directors (themselves re-elected the previous day) served Mr Tinkler with a notice under Article 89(5), signed by each of them, requesting his resignation from office with immediate effect and announcing: "*Accordingly, pursuant to such article 89(5) you have been removed from office with immediate effect*." The wishes of the 51.44% voting in favour of Mr Tinkler therefore prevailed for no more than a day.

369. On 8 July, Mr Brady sent Ms Brace a short text message: "*Also you need to send us the result ex EBT so we know properly won*." As appears in Section 5 below, the parties have advanced their own rival analyses of the voting position had Jupiter not voted.

370. After the results of the AGM became clear, Mr Ferguson reflected and decided that he would stand down, at least by the time of the next AGM in June or July 2019, and would plan for an orderly transition of the Company's chair. During his cross-examination, Mr Ferguson was adamant that he had not reached a decision to stand down (as opposed to something that was "*in his mind to reunify the shareholder base*") by the time of the AGM.

371. On 9 July the Company announced, through an RNS, the Board's plans and actions following the AGM. The first proposal (on which it was said significant shareholders would be consulted as part of the process) was:

> "*Through the Nominations Committee, the Company will appoint a leading independent search firm to undertake a thorough and rigorous process to identify suitably qualified and independent persons to be appointed as Non-Executive Chairman, as Senior Independent Director and one or more additional Non-Executive Directors*."

372. I have already mentioned Mr Tinkler's letter to shareholders of 10 July in relation to the abandonment of the idea that Mr Day might become Chairman. The letter also mentioned "*the board's extraordinary volte-face*", confirming the intention of the non-executive directors to stand down by the next AGM, and its decision "*contrary to all normal principles of company law and good corporate governance*" to remove him from office notwithstanding his election on 6 July. The letter also questioned the transfer of shares to the EBT and Mr Ferguson's exercise of proxy votes and said that "*these latest events raise new and important issues for shareholders to consider*." Mr Tinkler urged shareholders to find a way forward that would see order restored to the Company's affairs and which would provide the change of leadership which the Company so desperately needed and said: "*I fully intend to be part of that process*."

373. Mr Woodford read Mr Tinkler's letter that day and sent him a text to say:

> *"It is absolutely excellent. It strikes the right tone and will go down really well with employees and management. We will be with you to a successful end on this Andrew. You will at times feel very lonely on this journey but rest assured that you are supported by me and a group of talented and honourable people. We will prevail. Rest up in the Med and will look forward to seeing you soon. Best wishes, Neil"*

374. That lengthy narrative of events brings me to the legal arguments which the parties have deployed in urging me to reach certain conclusions as to their consequences.

SECTION 4: LEGAL PRINCIPLES

375. In order to see what wrongdoing, if any, was perpetrated in the course of the events narrated above, for the purposes of determining the Issues identified in Section 2 above, it is necessary to address the relevant principles of company and employment law and (for the purposes of the Company's tortious claim) of unlawful means conspiracy.

a) Company Law

i. The Company's Articles

376. The Company's Articles of Incorporation contain the agreement by which it and its members collectively are bound. In this case, three provisions within the Articles are relevant to the proper purposes rule addressed below.

377. Article 7(1) is the provision which most directly bears upon the decision of the Four Directors to cause the shares held in Treasury to be transferred to the EBT, even though its language does not cover the power to do so in the clearest terms. Article 4(2) provides that the Company may purchase its own shares and hold the purchased shares as "treasury shares". For the purposes of the pre-emption rights conferred by Article 7(2), references to the "issue of equity securities" includes the "sale" of treasury shares (though as the holder of them the Company obviously does not enjoy a right of first refusal). Although Article 7(1) does not refer to the "issue of equity securities", it does provide that:

> "…the unissued shares shall be at the disposal of the Board which may issue them, or grant rights to subscribe for or to convert any security into them, to such persons and on such terms and conditions as the Board determines …."

378. If there is any significant doubt as to whether Article 7(1) covers the power to transfer treasury shares to the EBT, in anticipated satisfaction of the Company's own LTIP obligations, then the power (in the Board) to effect the transfer would be covered by Article 81 which talks of the Board exercising "all such powers of the Company as are not required to be exercised by the Company in general meeting".

379. Article 76 provides for the election or re-election of a director to the Board by an ordinary resolution of members in general meeting.

380. Article 89(5) permits one director to be removed by the unanimous vote of the others and is in the following terms:

> "The office of a Director shall ipso facto be vacated:
>
> …….
>
> (5) if he is requested to resign by written notice signed by all his co-Directors
>
> ……."

381. There was no issue between the parties (who addressed me on the decisions discussed below in *Howard Smith v Ampol* and *Lee v Chou* and their broadly similar situations to the present case) that the members of the Board responsible for transferring the shares to the EBT and for expelling Mr Tinkler from office were exercising a fiduciary power.

ii. Directors' Duties: General Considerations

382. The parties are agreed that under the law of the Company's incorporation, the laws of Guernsey, the duties owed by its directors are fundamentally the same as those established by the English common law before the passing of the Companies Act 2006: see *Carlyle Capital Corporation Limited (In Liquidation) and others v Conway and others*, Royal Court of Guernsey, 38/2017 (4th September 2017) at [349]-[351]. I note that many of the cases relied upon by the parties in this case formed part of the vast number referred to by the Lieutenant Bailiff (HH Hazel Marshall QC) in that Guernsey decision.

383. Individual directors owe their fiduciary duties to the company (and for directors of English companies it is now expressly provided by section 170(1) of the Companies Act 2006 that the general duties under that statute are owed to the company). They do not, absent some "special factual relationship", owe particular fiduciary duties to any shareholder. The exception was recognised in what might be described as an old perennial; the influential and often cited decision of the New Zealand Court of Appeal in *Coleman v Myers* [1977] 2 NZLR 225. In that case the existence of a duty to shareholders was established on the facts. The exception was also recognised by the English Court of Appeal in *Peskin v Anderson* [2001] 1 BCLC 372, at [33] and [59] per Mummery LJ, where one was not.

384. The long-established principle which supports the general rule that the sole beneficiary of the directors' duties is the company, when there is no relationship, dealing or transaction sufficient to create a duty of loyalty to particular shareholders, reflects the company's separate personality. The principal authorities on this point, including the two above, were reviewed by Nugee J noted in *Sharp v Blank* [2015] EWHC 3220 (Ch), [9(3)], a decision to which I referred the parties in relation to the "sufficient information duty", addressed below, at the end of the evidence at trial (mindful as I by then was about what the majority had said in relation to the 29 May RNS and Mr Tinkler's evidence about his letter to shareholders of 8 June). In *Sharp v Blank*, the judge noted that the policy considerations which support it include the desirability of not undermining the collective nature of the shareholders' association in the company.

385. The duty upon a director to act in the best interests *of the company* therefore means just that. They are its human agents and have been entrusted by the shareholders to manage its affairs and protect *its* property in accordance with the collective agreement contained in the Articles of Association. It is the fact that they are directors of the company's affairs which gives rise to this and the other well established fiduciary duties in its favour. Likewise, a director is the steward of the company's property and it is that fact which has led to the courts distinguishing directors from other types of fiduciary, and to treat them as akin to trustees, when it comes to limitation issues on proprietary claims arising out of a breach of the core fiduciary duty of loyalty and fidelity.

386. When the directors act they do so collectively as part of the board of directors. The Company's Articles defines the Board as meaning "the Directors at any time or the Directors present at a duly convened meeting at which a quorum is present or, as the case may be, the Directors assembled as a committee of such Board." As is to be expected, Article 81 provides that the business of the Company shall be managed by the Board. Article 91 provides for the Board to decide matters by a majority of votes and, in the event of equal votes, that the Chairman has a second or casting vote. Article 96 provides for the Board to "delegate any of their powers to committees consisting of such one or more Directors as they think fit."

387. Under the Articles, and allowing for the provisions in relation to the appointment of Executive Directors and (possibly) the Company Secretary out of their number, with further contemplated powers or responsibilities, the position of individual directors is really only addressed in the context of their appointment or removal from the Board and sitting out of Board decisions where there is a personal interest.

388. I have made these basic observations about the collegial function of the Board, and the Company being the beneficiary of the duties owed by each director sitting on it, because

they bear upon a significant issue between the parties. Whereas the Company maintains that Mr Tinkler acted quite improperly in "*briefing against the Board*" in discussions with certain of its major shareholders, he maintains that he had a duty to reach his own independent judgment on matters arising for the Board's consideration and was entitled (certainly if asked) to impart his view to those shareholders. The observations also have a bearing upon the Company's case that Mr Tinkler misused its confidential information when his case (in relation to the disclosure of the Duranta budget to Mr Day) is that he was performing his duty as director in so doing.

iii) Relevant Fiduciary Duties

389. The directors' duties that have been invoked in the present case are:

i) The duty of a director to act in good faith in what the director believes to be the best interests of the Company.

ii) The duty upon a director not, without the fully informed consent of the Company, to place himself in a position where his own interests might potentially conflict with those of the Company.

iii) The duty of a director to exercise independent judgment.

iv) The duty only to exercise a power delegated to them by the Company for the proper purpose(s) for which it was conferred.

iv) The Duty to Act in Good Faith and in the Company's Best Interests

390. A director owes a duty to act in good faith in what he considers to be the best interests of the Company.

391. The Company alleges that Mr Tinkler acted in breach of this duty through his actions in relation to Project Wright and in pursuing the Objective. The alleged breach of this duty in relation to expenses is no longer pursued.

392. In *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, at [41], Arden LJ said:

> "The duty is expressed in these very general terms, but that is one of its strengths: it focuses on principle, not on the particular words which judges or the legislature have used in any particular case or context. It is dynamic and capable of application in cases where it has not previously been applied but the principle or rationale of the rule applies. It reflects the flexible quality of the doctrines of equity. As Lord Templeman once put it "Equity is not a computer. Equity operates on conscience …." (*Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512, 1516.)"

393. The Company relies upon that passage in *Item Software*, and at [44], to say that the duty extends to disclosing one's own misconduct. It was on the basis that the "fundamental duty" of "loyalty" was flexible enough to cover such conduct that Arden LJ eschewed

the notion of there being a separate and independent duty upon a fiduciary to disclose his own misconduct. The defendant's failure to do so was alleged and made good in that case as a breach of the director's duty to act in the best interests of the company.

394. In keeping with what I have said above about the company being the true beneficiary of the director's fiduciary duties, the interests of the company are usually associated with those of its members as a whole without discriminating between the interests of any majority and minority factions that may exist: see *Lee Panavision Ltd v Lee Lighting Ltd* [1991] BCC 620, at 634F, per Dillon LJ. In *Re Southern Counties Fresh Foods Ltd* [2008] EWHC 2810, at [52], Warren J observed that the modern formulation of the duty in the Companies Act 2006, expressed by reference to "benefit of its members as a whole", gives a more readily understood definition of what is meant by the duty to act bona fide in the interests of the company.

395. This is a potentially important point in the present case. The Company says, in relation to the Board's decision to remove Mr Tinkler from office the day after he had been elected at the AGM, that it is clear that directors can take decisions against the wishes of the majority of shareholders. The Company relies upon what Lord Wilberforce said in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, at 837, about considerations of management being within "the proper sphere of the directors" (I return to this decision below in the context of the proper purposes rule operating so that the directors may not act so as to undermine the existence of such a majority). It also points to the observation of Greer LJ in *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 K.B. 113, that where management powers are vested in the directors, they and they alone can exercise these powers. The manner in which the shareholders can control the exercise of powers vested by the articles in the directors is, the Company says, "by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove" (per Greer LJ at 134). However, given the importance placed by Mr Tinkler upon the members' vote the previous day, it is right to note that Greer LJ went on to say: "They [the shareholders] cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders."

396. The duty to act in the best interests of the company is expressed in subjective terms and not so as to impose an objective standard of managerial competence (which would be covered by a separate duty of care and skill not relied upon by the parties). Consistent with the general point that the court will not, speaking hypothetically, step too eagerly into the confines of the boardroom, it is unlikely that the court will doubt the director's honesty and professed support for the company's bests interests unless substantial detriment to the company has resulted from his act or omission: see *Regentcrest Plc (In Liquidation) v Cohen* [2001] BCC 494, at [120], per Jonathan Parker J.

397. The legal burden of establishing a breach of this duty is upon the party asserting the breach and, allowing for any shift in the evidential burden, it is not for the director to vindicate his own position: see *Charles Forte Investments v Amanda* [1964] Ch 240, 260-1. However, where his decision is one that no reasonable director could have considered to be in the best interests of the company then reliance upon his own suggested contrary belief will not avoid a finding of breach: compare *Re Southern Counties* at [53].

v) The Duty to Avoid Potential Conflicts of Interest

398. There is no issue between the parties that a director is under a duty to avoid putting himself in a position where his personal interests conflict with his duties to the company (the most obvious one being the above duty of fidelity). In *Aberdeen Railway Co v Blaikie Brothers* (1854) 17D (HL) 20 the House of Lords provided the definitive statement that this "rule of universal application" in relation to trustees extended to directors in the light of the fiduciary duties they owe to the company. In that case the rule was applied so as to invalidate a contract between the company and its supplier of iron railway chairs where Mr Blaikie was both chairman of the company's board and a member of the supplying firm. It is clear from the way that the House expressed the rule, so that "no investigation could be allowed as to the fairness or unfairness of the contract", that it is concerned with avoiding a potential as well as any actual conflict of interests.

399. However, that statement was made in circumstances where the company had entered into the contract which carried with it the potential for a disadvantageous bargain. In the present case, the Company contends that Mr Tinkler was acting in breach of duty in proposing a transaction, within Project Wright, which it says would have been detrimental to its own interests. Against that, Mr Tinkler says that this ignores the point that the strictness of the rule in *Aberdeen Railway Co v Blaikie* is mitigated by the inclusion within the Company's Articles (at Article 85) of a familiar provision which expressly contemplates that there may be put to the Board or any committee formed by it "a contract, arrangement, transaction or proposal" in which a director has a material interest provided that the director discloses his interest to the Board and does not vote upon it. Even a trustee may be relieved of the consequences of the "no conflict" or "no profit" rules with the fully informed consent of the beneficiaries. Mr Tinkler's counsel submit that no conflict of interest arises in merely proposing a transaction but only where the Company is deciding whether or not to enter into it.

400. In my judgment, the inclusion of that provision within the Company's Articles reinforces the Company's point that a conflict of interest may exist in the context of a mere proposal. It is on that basis that Article 85(1) requires, in relation to a proposed contract, that the director shall disclose the nature of his interest to the Board "at the meeting of the Board at which the question of entering into the contract or arrangement is first taken into consideration". However, I believe the same provision undermines its further point that the essence of the breach lies in the director effectively shifting his personal fiduciary responsibilities on to the Company. That is precisely what Article 85 contemplates should happen, with the Company - acting by the Board or relevant committee from whose vote and quorum the self-interested director is to be excluded – then proceeding to consider the proposal.

401. Of course, Mr Tinkler's proposal for Project Wright did not lead anywhere and it is no doubt for that reason that the parties have not focussed upon the present duty as heavily as the others. There is no contract or material interest (in favour of Mr Tinkler or connected persons) which falls to be considered in the light of alleged non-compliance with Article 85. In these circumstances, and knowing what Article 85(1) required in terms of prior disclosure, it seems to me that the Company's complaints about Mr Tinkler's proposal for Project Wright are best considered as part of the wider allegation

that he failed to act in the Company's best interests. I believe this approach is entirely consistent with what Arden LJ said in *Item Software v Fassihi* about the flexibility in application of that fundamental duty.

vi) The Duty to Exercise Independent Judgment

402. It is common ground between the parties that each director is subject to the duty to exercise independent judgment. Although not directly relevant to this case, the duty is now reflected in section 173 of the Companies Act 2006. However, the parties disagree as to what proper observance of this duty entails.

403. Mr Tinkler relies upon this duty to justify his action in speaking separately to shareholders. The Company says that his conduct on that front was not consistent with what was required of him as a director and, as noted above, involved a transgression of the duty to act in the best interests of the Company.

404. Although the dispute between them involves (on the Company's argument) consideration of the implications of the duty to act in the best interests of the Company, discussed above, I think my summary of the argument between the parties is best made in the context of the duty now under consideration. That is because Mr Tinkler submitted that the Company advances an unsustainable duty: what his counsel describe as "*a duty to adhere to the majority view*". If that is the correct analysis of the Company's argument then it would run up against the duty to exercise independent judgment. To quote from Mr Tinkler's closing submissions, where reference is made to passages in the evidence given by one or more of the Four Directors from the witness box, "*the Majority's case against Mr Tinkler appears to rest on an almost military-style conception of corporate authority*."

405. In fact, the Company's contentions are a little more nuanced than that so far as they concern the behaviour expected of an individual director in his dealings with fellow directors. Its contentions are as follows:

i) Part of a director's duty acting in the best interests of a company is to listen to the views of his fellow directors and to take account of them: *Madoff Securities International Ltd (In Liquidation) v Raven* [2013] EWHC 3147 (Comm), at [193]. In that passage of his judgment, Popplewell J referred to the entitlement of a director to rely upon the judgment, information and advice of any fellow director (whose integrity, skill or competence there is no reason to doubt) and to the "give and take" within the boardroom.

ii) Where there is disagreement amongst directors, there is a duty "at least to put before their doubting fellow directors the case for the action they wished to see taken": *Re Southern Counties* at [437] per Warren J. In *Secretary of State v Taylor* [1997] 1 W.R. 407, 414H-415A, Chadwick J expressed the view that the duties of a director include "the duty to inform himself as to the company's affairs and the duty to make his views known to the other directors." In the same passage in *Madoff v Raven* as that just mentioned, I note that the court recognised (as do the Company's Articles in providing for a majority vote) that

the result of such dialogue may be continuing disagreement as to what is best for the company:

> "A board of directors may reach a decision as to the commercial wisdom of a transaction by a majority. A minority director is not thereby in breach of his duty, or obliged to resign and to refuse to be a party to the implementation of the decision. …… He may legitimately defer to those views [of his fellow directors] where he is persuaded that his fellow directors' views are advanced in what they perceive to be the best interests of the company, even if he is not himself persuaded."

iii) Courts consider it "improper" when directors "[go] behind the backs of other directors": *Re: Assured Logistics Solutions Ltd* [2012] BCC 541, at [32] per HH Judge Purle QC, who had earlier observed that, where decisions are deliberately made behind the backs of some directors, "the board had never properly resolved to do anything, and the company had been deprived of a considered decision by the board acting as such." Instead, when acting in the company's interests, a director will make appropriate disclosures to the Board: see *Wey Education Plc v Atkins* [2016] EWHC 1663 (Ch), at [109] and *Secretary of State for Trade and Industry v Mark Goldberg* [2004] EWCA Civ 1292, at [45]. I note that in the Guernsey case of *Carlyle Capital Corporation Limited (In Liquidation) and others v Conway* mentioned above the court said, at [482]: "… a duty to exercise an independent judgment does not mean a duty to act entirely alone, nor to act without taking into account any views expressed or even decisions made which are made by his fellow director."

iv) A director cannot seek to impose his will on the conduct of a company to the exclusion of other directors: see *In re H R Harmer Ltd* [1959] 1 WLR 62, 90, and *Super-Max Offshore Holdings v Malhotra* [2017] EWHC 3246 (Comm), at [116(2)-(4)] and [118]. The first of these decisions concerned a petition under section 210 of the Companies Act 1948 (with the old test of "oppressive" conduct of the company's affairs for the grant of alternative relief to a just and equitable winding up) which was in part based on the belief of the chairman of the board (appointed for life) that he was entitled to disregard decision of the board because he enjoyed shareholding control. In *Super-Max v Malhotra*, Popplewell J found that the defendant had acted in breach of his employment contract and his duties as a director in seeking by his actions to undermine the senior management.

406. The Company also points to *McGuinness & Anor., Petitioners* (1988) 4 BCC 161(a Scottish case also involving an unfair prejudice petition), at 163-4, as an illustration of what it describes as the healthy functioning of the principles that it relies upon:

> "Following his appointment the first petitioner quickly came into conflict with the other directors on the board. At meetings the first petitioner contended vigorously that, apart from himself, the board lacked the capacity to implement the company's declared policy of diversification. During the latter part of 1987 the first petitioner and the other directors disagreed sharply over the merits of two rival take-over proposals which were under discussion. The first petitioner did not convince the other directors of their inadequacy for the task. He therefore decided to requisition an extraordinary general meeting of the company at which resolutions would be

> voted upon for the removal from the board of the second, third and fourth respondents, and the appointment as directors of the second petitioner and of a Mr. Michael Hamilton."

407. In response to that last authority, Mr Tinkler says it is in fact no such thing; that it is just a factual description of what happened in that case which did not even receive judicial endorsement. That is a fair comment. I do not derive from that case much assistance as to what proper observance of the present duty compels in terms of required behaviour.

408. As for the other authorities relied upon by the Company, it is submitted on behalf of Mr Tinkler that the Company is guilty of doing that which Arden LJ (in the context of the duty to act in the company's best interests) warned against in *Item Software*; elevating judicial phrases to a legal test. For example, he says that *Re Assured Logistics* establishes nothing more than that an important, formal corporate decision (in that case relating to the appointment of an administrator) should be made by the board, not by a single director. He points out that *Wey Education Atkins* was a case of the director acting clandestinely, without making proper disclosure, in the context of a diversion of a corporate opportunity and that *Secretary of State for Trade and Industry v Mark Goldberg* involved the board being misled over various points when approving a major contract. More generally, he says that none of the authorities relied upon by the Company support the proposition that a dissenting director cannot object to a course of action being taken by the rest of the board and ventilate his concerns.

409. As to that last point, and in support of his argument upon the director's duty to exercise his independent judgment, and to advise shareholders accordingly, Mr Tinkler relies upon three authorities which show that observance of the duty may justify a director departing from a course upon which the board has previously decided.

410. In *Rackham v Peek* [1990] BCLC 895 the court rejected a claim for damages against a company, which on the recommendation of its directors had agreed to use "best endeavours" to procure shareholder approval of a share purchase from the plaintiffs, on the basis that subsequent legislative changes in relation to property companies made the acquisition unattractive. Templeman J observed that the duty upon the directors to advise shareholders that the purchase had therefore become unacceptable did not mean the company was in breach of its covenant. However, in my judgment, the decision says as much if not more about the duty to act in the company's best interests and does not assist on what non-collective entitlement the duty now under consideration might confer upon any individual director.

411. *Re Dawson International Ltd* [1991] BCC 276 is a Scottish case, decided by Lord Prosser in the Court of Session, which also involved a change in circumstances following a non-binding agreement for the merger of two companies. The court observed that even if there is a contractual obligation to recommend a particular course of action, there should probably be a "let out", in the form of an implied term, which would allow directors to speak their mind and give their honest bona fide view as to the correct course of action. Again, the focus was upon the qualification that falls to be made in relation to any contemplated recommendation of a transaction at some point in the future, by reference to what the board (acting as such) might feel can no longer be supported in good faith. As with *Rackham v Peek*, the decision seems to say more about

the continuing nature of the directors' obligation to act in the company's best interests than an individual director's independence of mind.

412. The third authority relied upon by Mr Tinkler is a decision of the Court of Appeal of New Zealand in *Rothmans Industries v Floral Holdings Ltd* [1986] NZLR 480. There the court upheld the grant of an injunction preventing the sale of a substantial part of the Company's business which had required shareholders' approval but where the directors had purported to commit the Company contractually to recommend the transaction to shareholders. The directors had provided information to shareholders which was intended to influence shareholders in favour of the transaction and was arguably misleading as to the extent to which the company was already committed to it. The observations of the court, in the context of that interlocutory appeal, seem to go no further than highlighting the "formidable logical and practical difficulties" in the way of any suggestion that the directors could impose upon the shareholders in general meeting an obligation to use best endeavours.

413. In my judgment, the authorities cited to me by each side support the unsurprising proposition that the duty to exercise independent judgment is one that operates upon each director in the context of him operating as a member of the board of directors. This obligation comes with the office of director and does not carry with it some kind of entitlement or licence for an individual director to go off and do his own thing, independently of the board, in relation to matters that fall within the sphere of management of the company's business. It is only as a member of the board that the director has been entrusted within information about management matters in the first place. Therefore, any discussion by him of those matters with shareholders should either be in the presence of the rest of the board or with the prior approval of the board. If the latter, I would think it generally unlikely that the board would delegate to him the task of speaking on such matters only to some shareholders, but not all, or do so without agreeing the terms of his message to them. As it is difficult to see a case for discriminating between shareholders, the former scenario will usually involve the board presenting its views in a general meeting or in a circular to all shareholders.

414. The individual director should therefore (as appropriate) raise, debate, reflect upon and then decide upon his own position on such matters at the level of the board, either as part of the majority or as a dissenting voice. Only by doing so will he facilitate his fellow directors' compliance with their own duties to exercise an independent judgment and to act in the best interests of the company. The duty upon each director to exercise an independent judgment exists in order to support *the board's* management of the company's business in an efficient and competent manner. By invoking it to justify what might be, or border upon, freelance activity on his part, a director is likely to hinder rather than contribute to the board's management of the business.

415. As Popplewell J recognised in *Madoff v Raven*, the exercise of an independent mind and a dissenting voice against the wish of the majority need not necessarily lead to resignation even where the majority's decision is a momentous one. Article 91 of the Company's Articles requires decisions to be made by a majority of the Board and does not aspire to unanimity and complete harmony (which might require a constantly changing body of "yes" men according to the business presently under consideration). But where a dissenting director does feel sufficiently strongly about a proposed course of action to justify his resignation, having sought unsuccessfully to dissuade the majority from pursuing it, then by that action he will have relieved himself of both the

obligation and any notion of entitlement which the duty to exercise an independent mind supports. For so long as a person occupies the office of director, I do not see how the duty to exercise an independent mind can carry with it any entitlement to speak or act as if he were not a member of the board without responsibilities to that collective decision-making body.

416. Articles 91 to 98 (contained in the section headed "Proceedings of Directors") fully support this basic point about the context in which any one of the director's duty regulates his conduct as such. Likewise, their definition of the "Board" and "Director" show that the director really has no voice otherwise than as a member of the Board. I have already mentioned Articles 81 and 91 above in connection with the delegation of the management of the Company's business to the Board. Even where the Board forms a committee of only one director (as Article 96 contemplates might be done) that director is still acting on behalf of the Board.

417. Therefore, to the extent that the Company draws a justified distinction between independence of mind and independence of action on the part of an individual director it is not, in my view, seeking to exert a military style conception of corporate authority as Mr Tinkler suggests. On the contrary, it is correctly pointing out that the existence of the duty does not justify renegade action being taken by an individual director in a manner inconsistent with proper management of the Company's business by the Board.

418. The parties referred me to some textbook authority which bears upon the practical implications of the duty to exercise independent judgment. I believe it supports what I have said about the duty operating upon the individual director as a member of a properly functioning board.

419. In describing the role of the chairman at a board meeting, *Shackleton on the Law and Practice of Meetings* (14th), at para. 23-07, refers to his duty, where disagreement exists amongst board members, to make an effort to secure consensus and, if the disagreement surfaces at the board table, to ensure that the views of each director are fairly heard. If a dissentient director asks for it, his name and comments should be recorded in the minutes of the meeting.

420. The relations of directors with one another are addressed in *Loose, Griffiths & Impey on The Company Director: Powers, Duties & Liabilities* (12th ed) at paras. 9.4ff. The authors address the steps an individual director might take if he finds himself in disagreement with the policy of his colleagues. Recognising that his next steps will reflect the degree of importance he attaches to the matter in issue, the "remedies" open to him begin with the first and obvious one of raising it at a board meeting. And, subject to him reflecting upon the point that deferring to the wishes of the majority may be in the best interests of the company, he may ask for his continuing opposition to be minuted.

421. Mr Taylor QC emphasised the following statement at paragraph 9.20 of *Loose, Griffiths & Impey*: "If his opposition is unsuccessful, and he feels that the question is so serious as to justify an open conflict with the rest of the board, a director can also ventilate the matters in dispute at a general meeting of the company." That is the authors' first suggestion in relation to "action in general meeting" and it does not strike me as at all controversial provided it is recognised, firstly, that it contemplates the dissentient expressing his views to all shareholders (or at least all of those who attend the general

meeting) and, secondly, that the suggestion follows on from a lack of consensus following all they have suggested should first be done by way of "action in board meeting". The statement provides no support for the idea that a director may take any grievance he may have about management matters straight to the shareholders, and still less only to some of them through private conversations.

422. The same textbook also identifies resignation from the board as an option for the dissenting director, according to the seriousness of the matter in dispute (and perhaps sooner rather than later if he fears that there is a risk of him being held accountable for any resulting harm to the company or its creditors).

423. It may be that the Company was encouraged to add to its closing submissions the further case of *McGuinness* (mentioned above) by something I said during the cross-examination of Mr Ferguson by Mr Taylor QC on the second day of the trial. Counsel had put to the witness that Mr Tinkler had raised concerns with him, as Chairman, and had been given the green light to go to see shareholders. This prompted me to say:

> "*What concerns do you have in mind in your question, Mr Taylor? I mean, it seems to me that on the hypothetical, standing back from the facts of this case, the proper way to proceed in terms of corporate governance may depend upon what the expressed concern is. If, for example, it's "I'm right and the rest of you on the board are wholly wrong", then one might see a situation developing when, you know, it comes to a crunch and the question is whether or not there ought to be an EGM. But when you put to this witness that concerns were expressed, I think I need to understand what the nature of those concerns was*."

424. Although that was my instinctive reaction at the time and, although I do not regard the case of *McGuinness* itself as particularly influential simply because that is the kind of thing that happened there, my subsequent consideration of the other authorities relied upon by the parties, confirms the view I then expressed. It was a rather simplistic summary by me of how a resilient dissenting director, standing firm on an important management matter, should proceed, not least because it took no account of the provision for majority voting at board level nor the possibility of the dissenting director treating the matter as a resignation issue. But, on the assumption that the issue under consideration was considered by the board to be sufficiently important to justify the views of shareholders being sought, the appropriate venue would be a meeting of members where the rival views within the Board could be expressed (and, ideally, where all shareholders will have already have a précis of them in the papers circulated for the meeting).

425. There is, in my judgment, therefore no place for an individual director seeking to "pick off" particular shareholders, in advance of any EGM, by making private approaches to them, individually, and then airing his own views upon board management matters. The risk of a resulting imbalance of information amongst shareholders, especially if communicated orally at private meetings with only some of them, becomes obvious if that course is adopted. That risk carries with it a real danger that the director will fall foul of his duty to act in the best interests of *the company* (i.e. for the benefit of its members as a whole) and, at least in terms of the expression of what is in his mind, his duty to *the company* to exercise an independent mind. That would be so even if the director's views have been properly aired by him at board level, without them making a sufficient impression on his colleagues. Obviously, something has gone very

seriously wrong if the director seeks to short-circuit the board by taking his "issues" over management direct to just some of the shareholders. A director who does that will have forgotten that the company (again, the members as a whole) has delegated management matters to the board of which he forms part.

vii) The Duty to Act for Proper Purposes

426. Mr Tinkler invokes the proper purposes rule in relation to the decision of the Four Directors to make the transfer of shares from Treasury to the EBT in advance of the AGM and their exercise of the Article 89(5) power.

427. As now stated as a proposition of English law in section 171(b) of the Companies Act 2006, the duty upon directors to exercise their powers for a proper purpose is expressed in terms that they must "only exercise powers for the purposes for which they are conferred." However, as appears from the discussion of the authorities below and by way of summary for the purposes of the present case, the presence of an alien purpose will not lead the court to act upon a breach of this duty unless it substantially motivated the exercise of the power.

428. It is no answer to an alleged breach of the proper purpose rule for the directors responsible for the decision to say they were acting in the best interests of the company: see *Regentcrest Plc v Cohen*, at [123]. Whether or not the decision was or was thought to be beneficial to the company would be a distraction from the inquiry as to whether it was or was not made for its proper purpose (or primarily for a proper purpose amongst other purposes). In the three cases of *Hogg v Cramphorn*, *Howard Smith Ltd v Ampol* and *Eclairs v JKX*, discussed below, the court was not distracted from reaching a conclusion that the directors had acted for an improper purpose even though they believed they had done so in the company's best interests.

429. So far as the first matter is concerned, there were two transfers of shares to the EBT on 19 June (of 1.7m odd shares) and 21 June 2018 (5.3m odd). These were not allotments of new shares but instead the transfer of previously issued shares – treasury shares within the meaning of the Articles - which were "warehoused" in the Treasury and, for so long as they were held there, disenfranchised and disentitled from dividends.

430. The decision of the Privy Council in *Howard Smith Ltd v Ampol Petroleum Limited* [1974] AC 821 concerned the issue and allotment of new shares. The directors responsible for the allotment had, so the trial judge found, been motivated by the primary purpose of diluting the shareholdings of two shareholders who opposed a takeover bid favoured by the directors. In giving the judgment of the court, Lord Wilberforce said, at 835F-G that when considering the proper purposes rule:

> "…… it is necessary to start with a consideration of the power whose exercise is in question, in this case the power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the

> bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls."

431. Lord Wilberforce had already remarked, at 832E, that "[T]here is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at." However, in the light of the trial judge's finding as to the directors' primary purpose, the Privy Council upheld the decision of the Supreme Court of New South Wales that the allotment was invalid and should be set aside. On those findings, the case did not involve any considerations of management, within the proper sphere of the directors, as their purpose was simply and solely to dilute the majority voting power of the two shareholders. The trial judge had found that this was their "primary", "immediate" and "ultimate" purpose; and that was more than sufficient to meet the substantial (or primary) purpose test identified by Lord Wilberforce. Once that was established, "honest behaviour" on the part of the directors was not, by itself, sufficient to save their decision.

432. Lord Wilberforce said, at 832G, that where the directors are acting for more than one purpose the court is "entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been."

433. In the more recent decision of the Supreme Court in *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] Bus LR, Lord Sumption (with whom Lord Hodge agreed) said, at [24], that, although Lord Wilberforce did not express himself in terms of causation, this approach meant that the court was applying a "but for" test to identify which purpose accounted for the board's decision.

434. Lord Sumption observed, at [21], that the presence of *any* improper purpose would mean the proper purposes duty had been broken but, as a matter of causation, the consequence will not be the setting aside of the decision unless the decision would not have been made in the absence of that improper purpose. In a statement upon which the Company relies, he went on in the same paragraph to say:

> "Correspondingly, if there were proper reasons for exercising the power and it would still have been exercised for those reasons even in the absence of improper ones, it is difficult to see why justice should require the decision to be set aside."

435. The Company relies upon that statement to say that the question is therefore whether or not the power would have been exercised but for the improper purpose. This – the application of the "but for" test – was not an issue in *Eclairs v JKX*. Just as the trial judge in *Howard Smith v Ampol* had found as a fact that the primary motivation for the exercise of the power was one outwith its proper purposes, so too in *Eclairs v JKX* Mann J had found that the primary purpose of the board had been to influence the outcome of resolutions at the AGM; even though he said "the bona fides of those directors, and the genuineness of their desire to benefit the company as a whole, was not challenged, and in my view cannot be challenged."

436. In those circumstances, Lord Mance (with whom Lord Clarke and Lord Neuberger agreed), considered, at [48]-[55], that, for a case where mixed purposes were in play

and an inquiry into the real purpose or ground for the decision was required, the questions of whether there had been a breach of duty and, if so, whether or not the decision should be set aside applying the "but for" test were best left for legal argument. On the first aspect, Lord Mance said he "would wish to have submissions on the scope of duty under section 171(b)." In relation to the application of a "but for" test, he said "I am not persuaded that we can or should safely undertake what all parties consider would be "a new development" of company law, without having heard argument."

437. As the present case does not involve applying the precise language of section 171(b) (as opposed to the English common law and equitable principles that have come to be reflected in the subsection) and the majority in *Eclairs v JKX* expressly reserved their position as to its true import, I conclude that Lord Wilberforce's "substantial or primary purpose" test (and his approach to it) is the correct one to apply. As to that, a decision could be said to be substantially motivated by a purpose without it being the primary one, but Lord Wilberforce (using the definite article) clearly referred to "the substantial or primary purpose" on the basis that "substantial" and "primary" were alternative expressions amounting to the same thing, which is a purpose more significant than any other lesser or (as he put it) relatively "insubstantial" one. The passage from his judgment quoted above shows that the court is required to identify "the substantial purpose for which [the power] was exercised".

438. The authorities show that the power to issue shares (with which the parties equate the power to transfer Treasury shares to the EBT) should not be exercised by directors for the purpose of defeating the wishes of the existing majority of shareholders or manipulating or influencing the outcome of a general meeting. To do so involves the directors failing to respect the different domains of decision-making by the executive and membership as reflected in the company's constitution (as illustrated, for the purposes of the present case, by Article 76). If that is shown to have been the substantial purpose behind the exercise of the power, it is not for the court to investigate the suggested merits for the Board having done so in what they consider to have been the best interests of the Company. These propositions emerge from *Hogg v Cramphorn* [1967] Ch 254, at 268B-F; *Howard Smith Ltd v Ampol* at 827C; and *Eclairs v JKX* at [16], [37] and [49].

439. However, the Company contends that the propositions are tempered by what the Privy Council went on to say in *Howard Smith Ltd v Ampol* (by reference to the decision of the Supreme Court of Columbia in *Teck Corp Ltd v Millar* (1973) 33 DLR (3d) 288)) and the decisions in *CAS (Nominees) Ltd v Nottingham Forest Football Club Plc* [2002] 1 BCLC 613 (per Hart J) and *Byng v London Life Association Ltd* [1990] Ch 170 (the Court of Appeal). In *Howard Smith v Ampol*, at 837F, the court emphasised that directors, so long as they remain in office, may exercise their management powers against the wishes of the majority of shareholders. To paraphrase the Company's submissions, it argues that the Four Directors were able to go against the wishes of the majority if justified in doing so by "considerations of management" (with the court recognising the presence of Lord Wilberforce's "fairly broad line" between such considerations and the improper ones mentioned above).

440. Relying upon *Byng*, the Company says that the standard of review to be applied to the exercise of the directors' discretion in this regard is akin to that of *Wednesbury* unreasonableness in the context of judicial review. However, in my judgment, the decision in *Byng* is not really to the point. That case concerned a challenge to a

chairman's decision to adjourn a general meeting on the ground that there had been no valid meeting (to support his power to adjourn under the articles) and that any implied or inherent power to adjourn the "meeting" had not been properly exercised when he adjourned it to the afternoon, at a time when he knew many members who had been present in the morning would be disenfranchised through not being able to attend in the afternoon or to submit a proxy in time. I do not see how the application of the *Wednesbury* test to that situation has any bearing upon the task of the court, when applying the proper purposes rule, to conduct an objective assessment of the evidence in order to ascertain the purpose or (in a mixed motive case) the substantial purpose of the directors (and each of them) when exercising their fiduciary power. That is the second step in the court's approach, when applying the rule, outlined by Lord Wilberforce in *Howard Smith v Ampol* (at 832F and 835F-G).

441. As for *Teck Corp Ltd v Millar*, this Canadian decision was cited in *Howard Smith Ltd v Ampol* and it would therefore be surprising if it had the effect of qualifying the substantial or primary purpose test laid down by the Privy Council. In fact, it is clear from the analysis of *Teck Corp Ltd v Millar* that Lord Wilberforce regarded it as an illustration of the test being applied. In that case the directors' primary purpose in entering into an agreement (which carried with it the counterparty's right to shares that would displace the existing majority shareholding of Teck) was not to undermine the existing majority shareholding but, instead, to thwart Teck's plan to replace the board with its own nominees so that it could secure the alternative "ultimate deal" for itself. In referring to Berger J's conclusion that the aim of foreclosing Teck's opportunity to secure that deal for itself was "no improper purpose", Lord Wilberforce clearly regarded it as an illustration of the court showing respect for the judgment of the directors as to matters of management when applying the primary or substantial purpose test to the facts of the case.

442. In *CAS v Nottingham Forest Football Club* the proper purposes rule was considered in the context of an unfair prejudice petition where the minority shareholder in the club's holding company was complaining about the directors' decision to allot to an investor a controlling shareholding interest in the club having realised that the petitioner could have blocked the lifting of pre-emption rights so as to enable that to be done at the level of the holding company. In circumstances where it was understood that the investor would then "flip up" his controlling interest in the club for an equivalent controlling interest in the holding company (with no hindrance through the pre-emption provisions on such a non-cash purchase) this was alleged by the petitioners to be unfairly prejudicial to their interests. For present purposes, it is sufficient to note that Hart J made findings to support the conclusion that the issue of shares in the holding company would have been "for the entirely proper purpose of raising capital" and that the only obstacle to the achievement to that proper purpose was the requirement to get rid of the pre-emption rights by special resolution. Nothing in the decision undermines the application of the test in *Howard Smith v Ampol* from which the judge quoted at length.

443. I therefore do not read into these further authorities relied upon by the Company any qualification to the approach summarised in paragraph 436 above, though I do recognise that *Teck Corp Ltd v Millar* provides a salutary reminder that an objective assessment of the facts of the particular case may lead to a different conclusion upon the propriety of the primary purpose from that reached by the trial judge on the facts in each of *Hogg v Cramphorn*, *Howard Smith Ltd v Ampol* and *Eclairs v JKX*.

444. As to the consideration of the facts, in his oral closing submissions Mr Leiper QC also referred me to the decision of the Court of Appeal in *Lee Panavision v Lee Lighting* which I have already mentioned above, in the context of the first duty, on the question of what is meant by "the company's" best interests. The case did not concern the interference with the balance of shareholder control through the issue of shares but, instead, action by the directors which inhibited the existing shareholders' right to have any new board of their choice in control of management matters. Mr Leiper submitted that the observations of Dillion LJ in that case, particularly at 634F, show that the crucial question to be asked, when applying the proper purposes rule, is whether or not the directors are exercising the powers to discriminate between the majority and the minority and, he further submitted, what needs to be asked is "*whether the purpose was self-interest [and] the majority keeping themselves in control for the sake of being in control" or "as we suggest it was …. to defeat the machinations of a recalcitrant director who had in fact turned his back on the board, his back on governance by the board, in favour of campaigning with the group of what he perceived to be supporting shareholders*".

445. The difficulty with this argument, as I see it, is that it risks conflating the duty to act for proper purposes with consideration of the actions that due observance of the entirely separate duty to act in the company's best interests might be said to support. In the relevant passage of his judgment Dillon LJ appears to be addressing both duties but, importantly, he noted (at 634B, with my emphasis) that "the crucial question is whether, in the circumstances trenchantly summarised by the judge, it was *within the directors' powers at all* to commit Lighting to the second management agreement, however much they may have thought it in that company's best interests, as well as Panavision's, to thwart the intention of the 100 per cent shareholders."

446. To read into the cases cited by the Company a qualification to the approach summarised above would, in my judgment, therefore bring one close to falling into the trap of saying that the duty to act for proper purposes is somehow conditioned by the duty to act in the company's best interests when in truth each reflects a distinct duty upon the directors. Although compliance or non-compliance with either duty will invariably be tested in the light of the actual consequences of any steps taken by the directors, the first will prompt an objective assessment of the motivation (or purpose(s)) behind their action. The second will involve a review of their own prior, subjective assessment of its likely consequences. Transgression of the first duty may lead to their act being held to be invalid (I say more about the "may" below) whereas the result of any infringement of the second is likely to mean that it was effective but harmful to the company and that they are potentially accountable for its consequences.

447. Therefore, as a matter of principle, there is no scope for an otherwise invalid decision on the application of the proper purposes rule being upheld simply because it can be shown to have been (still less only thought to have been) beneficial to the company. I believe that the quote above from the judgment of Dillon LJ in *Lee Panavision v Lee Lighting* shows that he had this point well in mind. He went on to refer to it being "unconstitutional" for the directors to have committed the company to the second management agreement which had the effect of removing managerial powers from any new directors the shareholders might wish to appoint. That is also the language of Lord Wilberforce in *Howard Smith Ltd v Ampol* and of Lord Sumption in *Eclairs v JKX*.

448. For the present case – and I am here focussing upon the application of the proper purposes rule to the transfer of treasury shares to the EBT - the "substantial purpose" test (unaffected by the language of the English Companies Act) is therefore the correct one to apply, without reference to any belief the Four Directors may have had about the effect of Jupiter voting the shares one way being "good" for the Company as a whole.

449. The other power whose exercise by the Four Directors is challenged by Mr Tinkler is that under Article 89(5).

450. *Lee v Chou Wen Hsien* [1984] 1 WLR 1202 is a decision on the Privy Council which bears upon the decision of the Four Directors to remove Mr Tinkler from office using Article 89(5). The Company relies upon it but Mr Tinkler's counsel say it cannot stand in the light of *Eclairs v JKX*, at least not for the conclusion that an infringement of the rule results in the decision being voidable not void, as I address below.

451. In *Lee v Chou*, Mr Lee sought to retain his seat on the company's board notwithstanding his expulsion by his co-directors purporting to act under a power to expel contained in its articles. The provision in that case was similar to Article 89(5) in the present case, which both the Court of Appeal of Hong Kong and the Privy Council held to be a fiduciary power. Mr Tinkler does not resist that part of their decision. Both courts upheld the decision of the judge at first instance in dismissing Mr Lee's claim for injunctive relief on the basis that he was to be treated as remaining on the board by reason of the allegedly improper exercise of the power. As Lord Brightman (giving the judgment of the Board) explained, at 1206G, the power was:

> "…. fiduciary, in the sense that each director concurring in the expulsion of must act in accordance with what he believed to be in the best interests of the company, and that he cannot properly concur for ulterior purposes of his own."

452. Like the High Court and the Court of Appeal of Hong Kong, the Privy Council in *Lee v Chou* did not address the merits of the claim that the other directors had exercised the power of expulsion for an improper purpose (Mr Lee had been expelled in advance of a board meeting requisitioned by him for the purpose of asking questions about what he regarded to be suspect dealings by the company's subsidiaries). The appeal instead focussed upon whether the courts below had been right to uphold the striking out of the claim on the basis that, as a matter of principle, Mr Lee was wrong to say that their decision had no effect and to claim that, as an individual director, he had standing to bring a claim for injunctive relief to restrain him from being excluded as a director.

viii) Consequences of Motivation by Improper Purpose

453. The parties are in disagreement as to whether or not a finding that a power under the Articles has been exercised for an improper purpose (assuming it is a power to which the proper purposes rule, as applied here under common law and equitable principles rather than by the terms of the Companies Act 2006) results in the relevant act being voidable or void.

454. The Company, anxious to persuade the court that it has a discretion which may be exercised against the grant of the relief that would see Mr Tinkler reinstated to the Board (with what it contends would be hugely disruptive consequences) said that, even if carried out in breach of the proper purposes rule, the act is voidable.

455. Mr Tinkler, on the other hand, contended that such an act is void, a nullity, with the result that his reinstatement is inevitable if the court finds that the power was exercised for an improper purpose. His counsel's written closing submissions said: "*if the act is carried out for purposes which are primarily unconstitutional, it will not be valid*." In relation to the transfer of shares to the EBT, Mr Tinkler says that vote cast by Jupiter at the AGM was an invalid one and, if declared to be such, means that Mr Ferguson was not properly re-elected to office. His Counterclaim pleads that "*each of (i) the purported removal of Mr Tinkler as a director, (ii) the purported dismissal of Mr Tinkler as an employee and (iii) the transfer of the shares to the EBT is void and of no effect, alternatively invalid.*"

456. The issue over the effect of a finding that the Four Directors did not exercise a fiduciary power for a proper purpose is therefore a very real one on the facts of the present case.

457. In the case of their exercise of the Article 89(5) power in July 2018, the setting aside of their actions might be less problematic. That would result in Mr Tinkler being deemed to be back in office, though vulnerable to the future exercise of the power unless the court was persuaded to grant him his prayed-for injunctive relief over a seemingly indefinite period. The disruptive consequences to which the Company refers may be more relevant to the question of whether or not the directors' future exercise of the power should be fettered by such injunctive relief.

458. However, in relation to the re-election of Mr Ferguson at the July AGM, with the support of Jupiter's vote, things become potentially messier if the transfer of some or all of the shares to the EBT is declared to be "void" by reason of an improper purpose. The exercise of Jupiter's vote was just one consequence of the first transfer. Executives of the Company have also become entitled to some of the shares (or their proceeds net of tax) so transferred. In his closing submissions Mr Taylor QC said that his client does not seek to upset the transfer of any shares which have been used to satisfy LTIP entitlements but that any shares still held in the EBT should be transferred back to Treasury. He said: "*there may be, who knows, future votes, and the EBT should not be – the trustee should not be in possession of shares which should never have been transferred to it in the first place*". Mr Tinkler's counterclaim is for a "*setting aside of the purported transfer of the shares to the EBT, other than the Tinkler EBT shares*" (i.e. those which were due to vest in him on 22 June 2018).

459. Mr Leiper QC said in his reply submissions that Mr Tinkler's case in relation to the impugned transfers to the trustee did "*sound rather like a partial rescission and acceptance of some decisions by trustees but not others, for example the vote*" and "*it would be an incredibly complicated attempt to semi-unwind*". As I then observed, the "*restitutio*" would not be "*in integrum*".

460. The Company relies upon what the Privy Council said and decided in *Lee v Chou* to say it does not follow that an improperly motivated exercise of the fiduciary power to expel would mean that the act taken in exercise of it would be void. In a passage following immediately on from the one quoted above in relation to the fiduciary nature of the power, Lord Brightman said, at 1206G-1207A:

> "It does not, however, follow that a notice will be void and of no effect, and that the director sought to be expelled will remain a director of the board, because one or more of the requesting directors acted from an ulterior motive. Their Lordships

> have not been referred to any reported case directly in point. The decision of Farwell J in *In re Bodega Co. Ltd.* [1904] 1 Ch 276 provides the nearest analogy, but it is only of limited assistance. While it emphasises the automatic operation of an article similar to article 73, the bona fides of the continuing directors was not there in issue.
>
> To hold that bad faith on the part of any one director vitiates the notice to resign and leaves in office the director whose resignation is sought, would introduce in the management of the company a source of uncertainty which their Lordships consider it unlikely to have been intended by the signatories to the articles and by others becoming shareholders in the company. In order to give business sense to article 73(d), it is necessary to construe the article strictly in accordance with its terms without any qualification, and to treat the office of director as vacated if the specified event occurs. If this were not the case, and the expelled director challenged the bona fides of all or any of his co-directors, the management of the company's business might be at a standstill pending the resolution of the dispute by one means or another, in consequence of the doubt whether the expelled director ought or ought not properly to be treated as a member of the board."

461. The Company's counsel rely upon the fact that *Lee v Chou* is cited, without qualification, in the leading company textbooks of *Gore-Browne on Companies* (though really only to illustrate that a company's articles will often make provision for the board to have power to remove a director) and *Palmer's Company Law* (which, at para. 8.1329, does note that an ulterior motive will not invalidate the request as well as the point mentioned by me in the next paragraph below) as well as some other textbooks.

462. Although it was not necessary to do so and their remarks are obiter, the Privy Council in *Lee v Chou* went on to say – "without developing the matter at any length" - that the principles of *Foss v Harbottle* would preclude a director maintaining his own claim to be restored to the board of directors, as distinct from a derivative claim brought for the benefit of the company which has allegedly been wronged. Like the observations in *Howard Smith v Ampol*, there is therefore much in the decision in *Lee v Chou* which reinforces the general point about the court's reluctance to interfere in matters of internal management of a company's affairs, save perhaps where the complainant has a shareholding interest which is overshadowed by that behind the majority on the board who can be shown to be conducting its affairs in a wrongful way and to the detriment of the company's interests, or at least some of its membership.

463. I have already touched upon that reluctance in Section 2 above. During counsel's oral openings I also mentioned the authority of *Bentley-Stevens v Jones* [1974] 1 WLR 638 in relation to the court's reluctance to grant injunctive relief aimed at reinstating a director who has been removed without proper observance of procedure. The Company came to rely upon that authority in its written and oral closing submissions. I refer to it here because it chimes, even if rather faintly, with what was said in *Lee v Chou* about the difficulty of a director maintaining a personal claim for reinstatement to the board. The decision in *Bentley-Stevens v Jones* reveals the likely futility in granting such relief if that which had been done improperly in connection with his disputed removal could be done once again, properly observing any constitutional or statutory requirements governing the process, second time round.

464. I recognise that *Bentley-Stevens v Jones* concerned what might be described as an administrative failure prior to the exercise of a non-fiduciary power (the failure to give proper notice of the meeting at which the will of shareholders was expressed through a resolution) rather than a direct attack upon motives of those exercising a fiduciary power which are said to wholly undermine the act of removal. Another way of distinguishing that case might be to say that it concerned a matter going to the proper exercise of the ultimate authority of the shareholders rather than a delegated fiduciary power of the directors. Nevertheless, and as I also remarked in the course of opening submissions, Mr Tinkler's claim for injunctive relief to prevent those who now constitute the "remainder" of the Board from exercising the Article 89(5) power, indefinitely, does instinctively strike me as a matter which is better left to the Company's shareholders. In principle, they can decide, by whatever majority vote is appropriate for the task, either to remove the power from those directors or to remove them, or some of them, from the power.

465. Mr Tinkler's counsel submit that this decision of the Privy Council in *Lee v Chou* is not only not binding but not even persuasive in the light of what was said by Lord Sumption in *Eclairs v JKX*. In his judgment, at [16], his lordship said that one of the most common applications of the proper purposes principle was to prevent the use of directors' powers for the purposes of influencing the outcome of a general meeting, saying:

> "This is not only an abuse of power for a collateral purpose. It also offends the constitutional distribution of powers between different organs of the company, because it involves the use of the board's powers to control or influence a decision which the company's constitution assigns to the general body of shareholders."

466. They therefore argue on behalf of Mr Tinkler that, when it applies, the principle cannot be "construed away", as Mr Taylor QC put it, in the way the Privy Council did in *Lee v Chou* by looking at the business sense (or objective) of the power in question. As Mr Taylor highlighted, Lord Sumption said (at [15]) the proper purposes rule is not concerned with whether or not the impugned action falls within the scope of power, as a matter of construction of the instrument creating it or perhaps by implication, but it instead focuses upon the propriety of the reasons or motives of those plainly acting within its scope.

467. Mr Taylor also relied upon the decision of the House of Lords in *Criterion Properties v Stratford UK Properties* [2004] 1 WLR 1846, [28]-[31], where Lord Scott, recognising the "authority issue" was a matter for trial, discussed the likely difficulty in the way of a party to a contract being able to rely upon the actual or apparent authority of the directors of the counterparty, to commit their company to that contract, if there had been reason to believe they were acting in breach of their duty to the company. Mr Taylor submitted that, although it was plainly within the general power of the board to commit the company to contractual terms, any improper use of that power would mean the directors in fact lacked authority to do so. Mr Leiper QC responded by saying that this decision has no bearing on the question of whether an act taken through improper use of the power was void or voidable and, if anything, it was supportive of his position. As he submitted, the reasoning of Lord Scott (at [31]) is based upon the concept of apparent authority in the law of agency and assists his argument. I agree. Although Hart J had granted summary judgment against the company's counterparty on the basis that it was on notice of the improper use of the power to contract, so as to preclude any reliance upon the board's apparent authority, Lord Scott was speaking (and doing so in

deliberately tentative terms given the nature and outcome of the appeal) in more general terms about a "breach of duty" and a "transaction contrary to the commercial interests" of the company. Moreover, even if he did intend to equate such notions with a breach of the proper purposes rule, his contemplation that the company's counterparty might nevertheless plead ignorance of the breach and rely upon the board's apparent authority suggests to me that he did not regard the board's act as *ipso facto* invalid.

468. Therefore, in my judgment *Criterion Properties v Stratford* does not support the proposition that an act carried out by the directors in breach of the proper purposes rule is a nullity. When the House of Lords referred to directors acting otherwise than in good faith (and therefore in breach of the first fiduciary duty addressed above) and having no authority to do so, I cannot think they meant that their act was wholly ineffective. If that was the case, the scope for directors possibly being held to be financially accountable for a breach of that duty would be severely limited. The implicit recognition that someone not fixed with the knowledge or grounds for believing that the directors were acting in breach of duty might be able to rely upon their apparent authority (when it would be "very difficult" for someone with such knowledge or belief to do so) is a clear indication that their act might well be legally effective in some circumstances.

469. In my judgment, the submissions advanced on the basis of the authorities which are binding on me (though obviously well-founded in terms of drawing out what was said in *Eclairs v JKX* about the underlying basis of the rule) do not provide a knock-out answer as to whether an act which is substantially infected by an improper purpose is voidable or void. As I remarked during the course of counsel's closing submissions, Lord Sumption in *Eclairs v JKX* emphasised that there is a difference between an act which is authorised but carried out for improper purposes, on the one hand, and, on the other, one which is ultra vires, but, I then tentatively suggested, perhaps not whether the conclusion that it is a nullity follows in the first case as for the second. By an ultra vires act, I take his lordship to mean one that *the company (acting by its board) has no power to carry out*, as opposed to one which might, in the light of the way the point emerges in other cases (including *Hogg v Cramphorn* and *Criterion Properties v Stratford*) be described as beyond the authority of the board but not beyond the constitutional powers of the company.

470. In circumstances where Lord Sumption notes that the company law principle stemmed from the equitable doctrine of fraud on a power, what I then had in mind when comparing the utter ineffectiveness of a truly ultra vires act (subject to any statutory protection of the party in whose favour it is exercised) were older authorities on the question of whether or not a court of equity will set aside the "fraudulent" exercise of a *power of appointment* where the interests of a bona fide purchaser for value without notice of the improper purpose had intervened. Although the Companies Act 2006 has no application to the present case, I note (as did Lord Sumption in *Eclairs v JKX*) that – in connection with the proper purposes rule embodied in section 171(b) – section 170(4) states that the general duties are to be "interpreted *and applied* in the same way as common law rules or equitable principles, and regard shall be had to the corresponding rules and equitable principles in interpreting *and applying* the general duties" (with my emphasis).

471. During Mr Taylor's closing submissions, I remarked that Lord Sumption's reference to the court "setting aside" the directors' decision did perhaps indicate that he regarded

their act to be voidable rather than void, and Mr Taylor QC did not demur. As I read his lordship's judgment at [21] – the point, upon which the majority reserved their position, that *any* improper purpose would result in a breach of the duty under section 171(b) but should not lead to the decision being set aside unless that purpose was the causative one applying the "but for" test – he appears expressly to recognise that a breach of the proper purpose rule would not automatically lead to the decision being null and void. I think Mr Taylor's submission in support of a *pro tanto* setting aside of the transfer of shares to the EBT reinforces my observation.

472. In *Eclairs v JKX*, at [17], Lord Sumption also referred to the "principled concern of courts of equity not just to uphold the integrity of the decision-making process, but to limit its intervention in the conduct of a company's affairs to cases in which an injustice has resulted" but, his focus there was upon the application of the rule – there in the context of multiple purposes including a proper one - rather than the legal effect when it is found to have bite. Looking at how Lord Sumption expressed himself at [21], I note that Lord Mance spoke, at [53], of "the granting of relief in the event of a breach of section 171(1)(b)", albeit in the context of it being a matter worthy of legal argument.

473. The "setting aside" in *Eclairs v JKX* would not have involved any great undoing of the directors' actions. On the day the proceedings were commenced in that case (which was the day before the AGM at which the claimants' shares would otherwise have suffered from the voting restriction imposed as a result of the directors' actions) the company gave undertakings to the court which had the effect that the claimants were allowed to vote their shares at the AGM without prejudice to their validity. Once the Supreme Court had upheld the decision of Mann J, the setting aside of the directors' actions would simply have involved that caveat being put to one side. I have already observed that, in the present case, things are not so straightforward in relation to the transfer of shares to the EBT.

474. Having further reflected on the void versus voidable point for the purposes of this judgment, I can see that my tentative observation during closing submissions was not entirely misplaced: see *Cloutte v Storey* [1911] 1 Ch 18, 31, per Farwell LJ (where, unlike Neville J in the court below, the judge refrained from citing his own leading textbook on powers). In that case, the power which had been exercised on the back of a secret arrangement between appointor and appointee was an equitable one (not capable of passing the legal interest in the property which was still held in reversion but instead a "mandate to the trustees") and its fraudulent exercise meant the appointment was void, as there was no transfer to be set aside or cancelled. However, the Court of Appeal held that "an appointment under a common law power, or a power operating under the Statute of Uses by which the legal estate has passed, is voidable only, and a purchaser for value with the legal estate and without notice is not affected by the fraudulent execution of the power." The reference to a common law power in this context must be a reference to one by which the person holding the power (or his or its agent for the purpose) can convey the legal estate, in contrast to the fiduciary power – the discretionary dispositive power – which a trustee has under a power of appointment. The discussion of *Cloutte v Storey* in *Pitt v Holt, Futter v Futter* [2012] Ch 132, [96]-[101], where Lloyd LJ was "not willing to apply that decision more extensively, by analogy, to cases to which it does not relate directly as a matter of decision", makes it clear that it is only in the latter case that a disposition outside the scope of the trustee's

discretionary power to benefit one or more objects of the power (because of some fraud on the power) will be void.

475. But I have not had the benefit of submissions from the parties upon *Cloutte v Storey* (or *Pitt v Holt*) and the equitable principles as applied to powers of appointment and the facts of that case are some considerable distance away from the actions of the Four Directors in transferring the Treasury shares or dismissing Mr Tinkler. As Mr Taylor QC did not offer resistance to my tentative observation as to what appeared to come out of *Eclairs v JKX* on the void versus voidable point, and indeed Mr Tinkler accepts that the transfer of shares to the EBT should stand (i.e. be regarded as legally effective) at least for some purposes, I have therefore not thought it necessary to invite their further submissions on the application of those principles in the non-corporate context.

476. So far as the exercise of the power under Article 89(5) is concerned, it would seem that there is no further authority as to the consequences of an improper exercise than there was in 1984 when the Privy Council came to consider the point in *Lee v Chou*. I would remark that it would be very surprising if the panel, which included Lord Templeman alongside Lord Brightman, did not have well in mind the established equitable principles (the author of a book on powers, Farwell J as he then was, being the judge in the one case regarded by them as being of limited assistance on the point). Their lordships' obiter observation that the rule in *Foss v Harbottle* would require any challenge to the directors' action to have been made by or on behalf of the company indicates to me that they had well in mind the need, applying those principles, to consider the position of the person "defrauded" by the improper exercise of the power and "entitled" in default.

477. I note that in *Howard Smith v Ampol* the Privy Council expressed agreement with the trial judge that the appellant had notice of the impropriety on the part of the company's directors. Although its further brief inquiry on this aspect of the case led nowhere, it seems that the court there also had well in mind the potential significance of the recipient of the allotted shares being a bona fide purchaser for value. Its contemplation that, in this corporate context, Equity's Darling might make an appearance is, I think, an indication that the court might have been receptive to an argument that the impugned allotment was voidable not void.

478. In *Howard Smith v Ampol* the court relied upon a number of authorities, including *Hogg v Cramphorn*, for the proposition that, in relation to the allotment of shares, "[T]he purpose of altering the balance of voting power is never permissible." I note that in that earlier case Buckley J said (at p. 269A) that the issue of shares for that improper motive, which was the primary purpose of the scheme of which their issuance formed part, was "liable to set aside." Indeed, he adjourned the proceedings to enable the shareholders (voting shares other than those whose issuance was challenged) to decide in general meeting whether to "ratify" what the board had done; and a footnote to the report shows that they duly did so. Such ratification would not have been possible if the improper purpose had completely nullified the issue of shares.

479. The Company relied upon the decision of Mr John Randall QC, sitting as a Deputy High Court Judge, in *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch). In that case the court directly addressed the issue of "void versus voidable" where the decision of the directors to forfeit a shareholding had been impugned on a number of grounds including an alleged improper purpose. It set aside the forfeiture (on the

ground that it was voidable) but not on that ground, as the decision was found to have been made for a proper purpose. However, having considered *Howard Smith v Ampol*, *Lee Panavision*, *Byng* and other authority as to the effect of an "unconstitutional" decision, the Deputy Judge said, at [179]:

> "In the absence of any clearer guidance on the "void" or "voidable" question in the context of company law, and in particular decisions of directors, in any of the cases cited to me on this point, I conclude that the appropriate legal consequence of a relevant failure by directors to take into account a material consideration is voidability. Pragmatic considerations undoubtedly point in favour of relief in such cases being discretionary. This fits in with the judgment of Pennycuick J in Charterbridge Corporation v Lloyds Bank *supra*. This would also appear to accord with general principles in relation to what in old fashioned language would have been described as "fraud on a (directors') power" (as to which I note the observations of Helsham in a New South Wales case Provident International Corporation v International Leasing Corporation *infra*, citing Dixon J at 439[32]-[35], and then in the passage I cite in paragraph (196) below, and is consistent with the views of Lightman J in Abacus Trust v Barr *supra*, the most recent of the series of trust cases discussed above."

480. That passage refers to yet further authority upon which the parties have not addressed me, but the conclusion reached by the Deputy Judge is one that I would have favoured in any event. Recognising it is strictly obiter so far as his decision on the proper purposes rule was concerned, I adopt his reasoning (in the context of a directors' decision affecting a shareholding) that pragmatic considerations point to any relief being discretionary.

481. Having considered the authorities relied upon by counsel, and in particular whether the "voidable not void" reasoning in *Lee v Chou* (which is at best persuasive rather than binding) can stand in the light of *Eclairs v JKX*, I conclude that the transgression of the proper purposes rule by the Four Directors would result in their act being voidable not void. I do not read the judgments in *Eclairs v JKX* to be at odds with what the Privy Council held and (recognising that the majority were not there and then prepared to subscribe to it) the view expressed by Lord Sumption at [21] seems to accord with the earlier decision.

482. That is my conclusion both in relation to the exercise of the Article 89(5) power and that of transferring shares from Treasury to the EBT. Each decision reflected the exercise of a legal power conferred by the Company's Articles and the application of equitable principles (as section 170(4) stipulates they should be applied in relation to English companies) must allow for the fact that under that contract they had provisional legal effect.

483. In relation to the share transfer, Jupiter was able to give the Company a valid discharge for the transfer, even though it was not a "purchaser for value" as such, and legal ownership of the shares passed to it (and Mr Tinkler recognises that it cannot be restored to the Company in respect of those shares which have been used to satisfy LTIP awards).

484. I should say that I had greater hesitation in reaching that conclusion over the effect of the misuse of the Article 89(5) power than decision to transfer the Treasury shares.

That decision of the Four Directors did not involve any transfer of ownership. The power under Article 89(5) – that article being the first in a section headed "Disqualification and Removal of Directors" when the previous section is headed "Other Powers and Duties of the Board" – is capable of being regarded as relating purely to matters that are internal to the Board, as opposed to being dispositive in nature. It is a specific power conferred upon the "co-directors" to do something against one of their number. Adopting the language used by Buckley J in *Hogg v Cramphorn*, it is in my view more difficult to think in terms of the Article 89(5) power being exercised in a manner that is ultra vires the directors (i.e. the Board) but intra vires the Company.

485. However, remorseless pursuit of this line of thought might conceivably carry with it the conclusion that the Article 89(5) power is not really a fiduciary power at all (delegated by the Company to its fiduciaries with its improper use capable of being ratified by its members) but is instead merely an administrative one exercisable by the directors for the better regulation of their own affairs. Viewed as such, the "proper purpose" of the power might be circumscribed by reference to nothing more nor less than the willingness of those competent to exercise it proceeding to do so and, on that basis, the proper purpose rule (at least when supported only by common law or equitable principles as opposed to the language of the Companies Act 2006) might have no sensible application. However, that was not the conclusion in *Lee v Chou*, in relation to the equivalent power under consideration in that case, and it is not the basis on which the parties have proceeded in this case.

486. Therefore, proceeding on the parties' shared assumption that the power is a fiduciary one and guided by the Privy Council's decision in support of that, I have concluded that the improper use of the Article 89(5) power does not mean that the resulting decision has no potential effect whatever. As to that, although Mr Tinkler's counterclaim in relation to the first decision is for declaratory relief that he has remained a director throughout (his primary case being that it was "void and no effect" with "invalidity" expressed as the alternative) I cannot see why, as a matter of principle, he could not instead have treated the decision as legally effective but relied upon it as part of a claim that he was wrongfully dismissed from his employment. Article 99(2) of the Company's Articles seems to recognise as much.

487. I do not regard my conclusion, in relation to either power, as involving an impermissible "construing away" of the proper purposes rule by reference to the express language of the power to which it is accepted that the rule applies but, instead, it being a case of recognising that it is at least open to the court to decide that either or both decisions should not be set aside notwithstanding an infringement of the rule. In my judgment, there must be circumstances in which the court, applying equitable principles, would be entitled to refuse to set aside a decision reached through a breach of the rule. Although it is not a feature of the present case, delay (or laches) or affirmation on the part of the challenger ought to be relevant considerations.

488. However, in my judgment, the obiter dictum in *Lee v Chou* that the expelled director would need to bring a derivative claim rather than his own personal one is of no real significance in the present case where the Company is a party to the proceedings, albeit as the adversary to Mr Tinkler's claim rather than as the putative beneficiary of this aspect of it. The Company did not take the point that Mr Tinkler lacked standing to pursue it and the court is able to consider the Company's interests in the context of his challenge to exercise of the Article 89(5) power. In this litigation, neither side has

thought to consider the potential implications of any provision of Guernsey law governing the commencement and pursuit of a derivative claim (as I believe would probably apply, as the law of the Company's incorporation, over this court's procedural provisions in CPR 19.9 and Practice Direction 19C). In those circumstances, the fact that the Company, at the direction of the present Board, resists the challenge is clearly a relevant consideration, though Mr Tinkler would argue that it should count for nought when the exercise of the Article 89(5) power, by the then Board, was directly at odds with the will of the majority of the Company's members expressed at the AGM the previous day.

ix) The "Sufficient Information Duty"

489. As directors have greater knowledge of their company's affairs they are also under an equitable duty to provide shareholders with sufficient information to enable shareholders to make an informed decision on a matter which falls to their vote in general meeting. In *Sharp v Blank* (which I have mentioned at paragraph 384 above in the context of some general considerations affecting directors' duties), at [15]-[21], the existence of this duty was conceded by the directors in the context of their application to strike out or for summary judgment on the claims made against them. It was labelled the "sufficient information duty" by Nugee J.

490. The parties in the present case did not dispute that such a duty existed (indeed they each seek to pray it in aid in the context of their actions in relation to the 29 May RNS) and it is difficult to see how they could when it is grounded in basic principles of fairness.

491. In *Sharp v Blank* Nugee J, citing Neuberger J in *Re RAC Motoring Services Ltd* [2000] 1 BCLC 307, made it clear that the duty is based upon principles of reasonableness and fairness and not upon the existence of a fiduciary duty to shareholders. The facts of the present case, in relation to the voting at the AGM on 6 July 2018, show just how problematic the concept of undivided loyalty (the keystone to any fiduciary duty) would be when different shareholders indicate, by their conflicting voting intentions, that they hold different views as to where their best interests may lie.

492. The present equitable duty carries with it an obligation not to conceal relevant information and not to mislead. Each side relied upon *Re a Company* [1986] BCLC 382, which concerned another strike-out application in response to an unfair prejudice petition arising out of an allegedly deficient circular sent by the board to shareholders in respect of rival takeoever bids for the company. Hoffmann J referred (at 389c) to the "fairness" to be observed by the directors (who as shareholders themselves favoured the lower bid) which required them "to give the shareholders sufficient information and advice to enable them to reach a properly informed decision and to refrain from giving misleading advice or exercising their fiduciary powers in a way which would prevent or inhibit shareholders from choosing to take the better price."

493. Observance of this duty therefore falls to be tested by reference to consideration of the information which has been provided to all shareholders, without discriminating between any factions within their class, for the purpose of enabling them to make a properly informed decision upon the matter to be voted upon by them.

x) Potential Relief from a Breach of Duty

494. If the court refuses to reverse the exercise of a fiduciary power for an improper purpose it will not be on the basis that the conduct of those responsible is somehow excused but instead by reference to factors relevant to the position of the person "entitled" in default of its exercise.

495. However, in relation to any breach by Mr Tinkler of a duty owed by him to the Company, his counsel submitted that if, contrary to his primary case, the court were to find that he had committed such breach, then he would seek relief from personal liability under section 522 of the Guernsey Companies Law. This on the basis that he has at all times acted honestly and reasonably and in what he considered to be the best interests of shareholders.

496. The Company's response to this was twofold. First, it said that the suggested relevance of the section was unclear on the facts of this case. Secondly, it said that the point had not been pleaded and was reliant upon foreign law which had not been proved.

497. As to the second point, this is another aspect of the case which was not and could not in the time available be explored in oral submissions and I think I can fairly observe that it is not amongst the bigger ones in the parties' written submissions (opening and closing) which run to over 100 pages on the Company's side and about 250 pages on Mr Tinkler's. Having since reflected upon it by a reference to a dim and distant memory, I believe the balance of authority indicates that it is not necessary for a director to plead the relieving provision of what is now, in relation to English companies, section 1174 of the Companies Act 2006 and that the provision may be invoked by reference to the facts established at trial see: *Re Kirby's Coaches Ltd* [1991] BCLC 414. And, although I do not think I should assume otherwise when the parties have not, I also have my doubts as to whether it is section 522 of the Guernsey Companies Law (rather than section 1174 of the Companies Act 2006) that applies, if at all, to these English proceedings in relation to a Guernsey company. I can see a case for saying that section 1174 is a procedural law which applies, as the *lex fori*, to these English proceedings. In *Re D'Jan of London* [1994] 1 BCLC 561, 564, Hoffmann LJ (sitting as an additional judge of the Chancery Division) said that of the earlier section 727 of the Companies Act 1985) that it "gives the court a discretionary power to relieve a director wholly or in part from liability for breaches of duty, including negligence, if the court considers that he acted honestly and reasonably and ought fairly to be excused"; and that, of course, is how the section reads.

498. In any event, it is in my judgment unrealistic to ignore the potential impact of section 522 when its existence and terms are so unsurprising and the parties' starting point (by reference to *Carlyle Capital v Conway*) rests upon the law of Guernsey tracking so closely the English law common law and equitable principles governing directors' duties, as established before the Companies Act 2006.

499. Section 522 is materially identical to 1174 of the Companies Act 2006 (and its predecessor of s.727 in the 1985 Act), and provides that:

> "(1) If in proceedings for negligence, default, breach of duty or breach of trust against—
>
> (a) an officer of a company, or
>
> (b) a person appointed by a company as auditor (whether he is or is not an officer of the company),
>
> it appears to the Court that the officer or person is or may be liable but that—
>
> (i) he acted honestly and reasonably, and
>
> (ii) having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused,
>
> the Court may relieve him, either wholly or in part, from his liability on such terms and conditions as it thinks fit."

500. As to the Company's first point, which is to question what part section 522 has to play in this case, this appears to have more force, allowing for the fact that this is my judgment following a trial on liability only. Now that the Company has abandoned its expenses claim and the most obvious (though not necessarily only) remaining ground for Mr Tinkler's "liability" to pay the Company is the conspiracy claim, it is not clear to me that section 522 (or section 1174) has much of a place in these proceedings. However, that is a question best left for any trial over quantum. For the purposes of the present trial, I certainly cannot see how it would enable the court to overlook some wrongdoing on his part (even if perpetrated honestly and reasonably) which otherwise stands in the way of him securing relief on his own counterclaim when that is predicated not upon his own liability but liability on the part of the Company.

Employment Law

i) The Service Agreement

501. Mr Tinkler's Service Agreement is dated 21 September 2007 but it was amended in May 2015 to accommodate him stepping down as CEO and devoting half his time to Stobart Capital. His Service Agreement contains the following material provisions:

Clause 4.1 of the Service Agreement requires that Mr Tinkler should:

> "(b) faithfully, competently and diligently perform such duties and exercise such powers consistent with his position as may from time to time be assigned to or vested in him by the Board;
>
> (c) obey the reasonable and lawful directions of the Board;
>
> (d) comply with all the Company's rules, regulations, policies and procedures from time to time and in force; and

(e) keep the Board at all times promptly and fully informed (in writing if so requested) of his conduct of the business of the Company and any Group Company and provide such explanations in connection with it as the Board may require."

Clause 15.1 provides that:

"[Mr Tinkler] shall neither during the Employment (except in the proper performance of his duties or with the express written consent of the Board) nor at any time (without limit) after the termination of the Employment except in compliance with an order of a competent court:

(a) divulge or communicate to any person, company, business entity or other organisation;

(b) use for his own purposes or for any purposes other than those of the Company or Group Company; or

(c) through any failure to exercise due care and diligence, permit or cause any unauthorised disclosure of

any Confidential Information…".

"Confidential Information" was defined in clause 1.1 of the Agreement as including "information relating to the business, products, affairs and finances of the Company or any Group Company for the time being confidential to it or to them and trade secrets…including in particular…its or their financial, investment, pricing, unpublished and price-sensitive information, strategy, plans, accounting or other information (being confidential)…"

Clause 17.1 identifies the circumstances in which the Company might terminate the Employment summarily. These include events whereby Mr Tinkler:

"(a) commits any serious breach of this Agreement or is guilty of any gross misconduct, or any wilful neglect in the discharge of his duties; or…

(c) is guilty of any…conduct tending to bring himself, the Company or any Group Company into disrepute…

This clause expressly provides that: "[A]ny delay by the Company in exercising such right of termination shall not constitute a waiver of it."

Clause 17.4 has spawned a particular issue between the parties (Issue 7) as to whether it carried with it the right of the Company to request that Mr Tinkler

should resign as a director of the Company. Under the Service Agreement the term "Group Company" is defined as meaning "any company which is for the time being a subsidiary or holding company of the Company." Clause 17.4 provides:

> "Upon termination of the Employment ….. the Executive shall …. At the request of the Company resign from all offices held by him in any Group Company …"

502. The Company points to the AP-B email in arguing that the making of sexist remarks, even if made only once, can amount to "gross misconduct". It relies upon the Scottish case of *McNeill v Aberdeen City Council* [2015] ICR 27, at [32]. I note, however, that the sexist remarks in that case were made to colleagues in the same workplace, and made about at least one other employee, and that, by the time the appeal reached the Court of Session (the Employment Appeal Tribunal having differed from the Employment Tribunal's conclusion that there was only once such occasion), it appears to have been accepted that making sexist remarks to a number of female colleagues and permitting a "laddish" culture to prevail within the department together constituted gross misconduct.

503. Mr Tinkler relies upon the decision of the Employment Appeal Tribunal (HHJ David Richardson) in *Robert Bates Wrekin Landscapes v Knight* UKEAT/0164/13/GE (30/1/14), at [25], to the effect that a contractual provision for summary dismissal is not "lightly to be interpreted" in a way which extends the rights of the employer contrary to the general understanding, reinforced by legislation, that notice of termination is generally required (the legislation providing for an exception based upon the party's conduct). In that case, the employment contract set out seventeen grounds for summary dismissal, some of which might be said to have been capable of embracing less serious conduct than others.

504. I recognise that, in this case, the Company has to make good its pleaded grounds for summary dismissal based upon gross misconduct or conduct tending to bring either Mr Tinkler or the Company into disrepute and that the relevant language of clause 17.1 is not susceptible to a soft interpretation. Although each is a flexible concept, so far as the types of conduct that may fall within either are concerned, it is clear that they each have in mind misconduct which is either serious or sustained, in the sense of perpetrated wilfully in the face of a prior warning against it, or possibly both. I put it like that because "gross misconduct" is by its very essence repudiatory in nature. I can see there might be greater potential for argument as to whether the individual's conduct has in fact risked himself or his employer being brought into disrepute (though perhaps less so where the employer is a publicly listed company which should be expected to be governed in a manner partly addressed above) but, again, by definition it would need to be quite serious, when viewed objectively, to carry with it the risk of reputational damage.

505. In addition to the express terms of the Service Agreement, the Company alleges and Mr Tinkler's Amended Defence admits that his employment also carried with it implied terms of trust and confidence and fidelity. The first required that he would not (without reasonable and proper cause) conduct himself in a manner calculated or likely to undermine the relationship of trust and confidence between himself and the Company:

see *Neary v Dean of Westminster* [1999] IRLR 288, at [22]. The second that he should serve the Company faithfully: see *Robb v Green* [1895] 2 QB 315, 320.

506. Both parties relied upon the decision of the Court of Appeal in *Tullet Prebon Plc v BGC Brokers LP* [2011] IRLR 420, at [19]-[20], which confirms that the question of whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact" and is therefore a "highly context-specific question". The modern expression of the question is to ask whether the employee has abandoned and altogether refused to perform the employment contract. Any statement by the other party of his willingness to perform the contract will be a relevant matter for consideration but the essential question is whether all the circumstances support the conclusion that the contract breaker has, by conducting himself in a manner that is no longer consistent with continued employment, clearly shown an intention to abandon it and the performance of his obligations under it.

507. Mr Leiper QC therefore emphasised that *Tullet Prebon* shows there is more to this question than simply looking to see whether the employee continues to express a willingness to perform the contract. The court approaches this question objectively. It does so from the perspective of the innocent party, when assessing whether or not it is repudiatory in nature, but it is for the court to establish whether the misconduct occurred as opposed to whether that party believed it had occurred: see the decision of *British Heart Foundation v Roy* UKEAT/0049/15/RN (16/7/15), a decision of Langstaff J in the Employment Appeal Tribunal.

508. Where the conduct relied upon by the innocent party forms part of a series of breaches of the employment contract, with the earlier ones having arguably been affirmed, the court is still able to look at the last breach to see whether or not, when viewed cumulatively with the others, it amounted to a repudiatory breach of contract: see *Kearns v Glencore UK Ltd* [2013] EWHC 3697 (QB), at [76]-[77] and *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833, at [51]. This "last straw" doctrine relied upon by the Company means that the last breach does not land in an empty scale because it is treated as a continuation of the breach evidenced by the earlier conduct.

509. The Company relies upon the acts of Mr Tinkler, in particular the Letter of Shareholders, to say that he breached the implied term of trust and confidence by bringing about a situation of the kind described by Ebsworth J in *Wheatley v Control Techniques Plc* (unrep., 30 September 1999, QBD) in the following terms:

> "He forced a situation in which both CT [the company] and Emerson [the parent company] had to choose between the continued benefit of his services and their chosen management and approached the matter on the basis of 'back me or sack me'. I am satisfied he calculated they would support him; he miscalculated; once he had done so he left an intolerable situation in which a Board of Directors could not be expected to continue to operate. Board room rows and policy disagreements are no doubt common currency, but there must come a point at which their continuation is adverse to the best interests of the company concerned. An attack upon fellow directors on this scale amounting to a declaration of war, which is persisted in, justifies summary dismissal of the attacker."

510. In addition to the implied term based upon the relationship of trust and confidence, the Company relies upon Mr Tinkler's implied duty to serve the Company faithfully. I

have already mentioned *Super-Max Offshore Holdings v Malhotra* [2017] EWHC 3246 (Comm) above in the context of the director's duty to exercise independent judgment. In that case, at [115]-[116], Popplewell J explained that the duty to serve an employer in good faith includes a duty to refrain from wilful disruption of the employer's business. The judge found that by staging a boardroom coup, conducting a sustained campaign or aggressive abuse and disparagement against members of senior management and deceiving an advisory board established to be the principal governing body of the group, respectively, the executive chairman had acted in breach of that duty.

511. Mr Taylor QC made the opening submission that if Mr Tinkler was found not to have been in breach of his fiduciary duties as a director then it would be fanciful to suggest that he was in repudiatory breach of his employment contract. Mr Leiper QC countered by saying, in my view correctly, that a breach of the duty of fidelity or the duty of trust and confidence, which would be repudiatory in nature, may be established whether or not the conduct in question also amounts to a breach of fiduciary duty.

512. The Company also says that dismissal will be justified if the grounds for it are shown to have existed, regardless of whether the breach was known to the employer at the time of the dismissal and irrespective of whether the dismissal was otherwise justified: see *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch D 339, 352. That was a case where the employer had not known at the time of the defendant's dismissal of his defendant's receipt of at least one secret commission from a supplier, in breach of the terms of his employment, and only discovered it during the course of proceedings. Kekewich J decided it did not provide a defence to the employee's counterclaim for wrongful dismissal and arrears of salary but, on the basis that the employer had not known about the receipt and therefore could not be taken to have condoned it, the Court of Appeal disagreed.

513. The principle that the employer is able to invoke grounds for summary dismissal which were not relied upon at the time was recognised by Peter Pain J in *Jackson v Invicta Plastics Ltd* [1987] BCLC 329, at 342g-343a, where the court made the obvious points that the burden lies upon the employer to justify the dismissal and that, if the unspecified grounds were known about at the time, then that must raise a doubt over their adequacy for that purpose.

ii) Contractual Interpretation

514. Although they are not peculiar to the area of employment law, there are issues between the parties that arise out of the Committee's exercise of its assumed power to remove Mr Tinkler from office on the back of his dismissal as an employee.

515. The first issue of construction (reflected in Issue 5 and part of Issue 6(b)) is whether or not the Committee had the delegated authority to dismiss him under its terms of reference. In the summary of events, I have mentioned how there was removed from the Committee's terms of reference (approved on 5 June 2018) the language addressing "*the future position of Andrew Tinkler in relation to the Company and its subsidiaries, whether as a director or an employee*".

516. The second issue I have already mentioned above as it identifies Issue 7. The question is whether or not, on its true construction, clause 17.4 of the Service Agreement extends to a power in the Company (acting by whichever organ) to remove Mr Tinkler as a director of the Company when it is only the Company's associates (whether a holding or subsidiary company) which fall within the definition of "Group Company".

517. In relation to the issue over the Committee's terms of reference, Mr Tinkler says that the deliberate removal of those words means that the Committee lacked any authority it might otherwise have had to remove him from office. He relies upon what Travers Smith said on 5 June 2018 about a potential revision of the Committee's terms of reference in relation to the removal of Mr Tinkler, after the AGM, which never happened.

518. However, the Company contends that any words deleted from previous drafts provide limited, if any, aid to construction: It relies upon what Lloyd J said in *The Golden Leader* [1980] 2 Lloyd's Rep 573, at 575:

> "… the use of a word or phrase in the deleted part of the clause may throw light on the meaning of the same word or phrase in what remains of the clause. … But it seems to me quite another thing to say that the deletion itself has any contractual significance; or that by deleting a provision in a contract the parties must be deemed to have agreed the converse. The parties may have had all sorts of reasons for deleting the provision; they may have thought it unnecessary; they may have thought it inconsistent with some other provision in the contract; it may even have been deleted by mistake."

519. The Company further relies upon the observation of Christopher Clarke J in *Mopani Copper Mines Plc v Millennium Underwriting Ltd* [2008] EWHC 1331 (Comm), at [122]:

> "Even if recourse is had to the deleted words, care must be taken as to what inferences, if any, can properly be drawn from them. The parties may have deleted the words because they thought they added nothing to, or were inconsistent with, what was already contained in the document; or because the words that were left were the only common denominator of agreement, or for unfathomable reasons or by mistake. They may have had different ideas as to what the words meant and whether or not the words that remained achieved their respective purposes."

520. Mr Tinkler submits that these cases were addressing the construction of a contractual document, not the "unilateral document" constituted by the Committee's terms of reference, but for my part, I cannot see why as a matter of principle their reasoning should not apply to any legally effective document whose final terms reflect some prior deletion. It is, after all, Mr Tinkler who is praying in aid the earlier deletion and the thrust of these cases is to urge caution in relation to reading too much into the deleted words. Even though their deletion was not the result of inter-party negotiation, I do not see why those who were responsible for the drafting of the terms of reference should not be able to rely upon one or more of the contemplated reasons for deletion identified in those judgments.

521. However, Mr Tinkler also says that the genesis of the deletion is clear from the documentary evidence which also demonstrates that, without the deleted words, the

Committee lacked the power to dismiss Mr Tinkler as an employee. As this question of interpretation involves consideration of the evidence, including testimony upon the documents upon which he relies, I defer my determination of that point until later in this judgment.

522. In relation to the second issue of contractual interpretation, arising out of the language of clause 17.4, the definition of "Group Company" in the Service Agreement is:

> " *…. any company which is for the time being a subsidiary or holding company of the Company and any subsidiary of such holding company and for the purposes of this Agreement the terms subsidiary and holding company shall have the meanings ascribed to them by sections 736 and 736A of the Companies Act 1985 (and Group Companies shall be interpreted accordingly).*"

523. The Company submits that it was clearly intended that the power to remove as a director would extend to all of the companies in the Group, including the Company. It says the point is amply demonstrated by the fact that if Mr Tinkler had been given notice (rather than dismissed summarily) then the Company could have removed him as a director under clause 3.4 of the Service Agreement. It would be bizarre, the Company says, if he could be removed if given notice, but not if not given notice. That makes no commercial sense whatever and is clearly not what the parties intended.

524. Clause 3.4, to which the Company refers, forms part of the provisions of the Service Agreement governing the duration of Mr Tinkler's employment. It is aimed at regulating the position during "*any period of notice of termination served in accordance hereunder* (sic)", including possible gardening leave, and makes reference to the Company having the right to remove Mr Tinkler "*from office as a director of the Company and from any or all offices held by him in the Company or in any other Company in the Group*".

525. When Mr Leiper QC returned to clause 3.4 in his oral closing submissions, it did cross my mind to ask him why a written notice of summary determination (which clause 17.1 stipulates to be the means of effecting any summary dismissal) would not constitute a notice of termination within the meaning of clause 3.4. In other words, to read the "*hereunder*" as not referring exclusively to the 12 months' notice contemplated by clause 3.1 (and to the period under which the terms of clause 3.4 are most obviously directed) but to a notice of termination given under any provision of the Service Agreement, even if the notice under clause 17.1, from the perspective of the "*period*" contemplated by clause 3.4, might have required Mr Tinkler to leave the Company within a matter of hours. However, Mr Leiper did not greet my suggestion with much enthusiasm and I think he was probably right not to do so, not least when the clause 17.4 begins with language that draws a distinction between "*termination*" and the exercise or rights under clause 3.4 and also where the Committee's letter of 14 June 2018 made reference only to clause 17.4 and gave notice of "immediate" termination.

526. Instead, the Company's position is that something has gone wrong in the drafting of clause 17.4 but it is clearly correctable in the process of interpretation. It notes that clause 3.4 itself does not use the definitional term "*Group Company*" but instead refers to "*the Company or [in] any other company in the Group*". Likewise, it says, clause 17.4 must be read as referring to any company in the Group (including the Company) rather than by slavish application of the definitional term.

527. Mr Tinkler counters the Company's argument with the basic point that there are numerous instances within the Service Agreement where the draftsman chose to refer to "*the Company*" as well as "*Group Company*". The definition of "*Confidential Information*", clause 15 (restricting the use of it) and clause 14 (imposing restrictions upon other employment of related activity) are examples. The draftsman chose not to do so in clause 17.4. Mr Tinkler's counsel also submitted that the exclusion of any reference to the Company in clause 17.4 made good commercial sense where:

    i) a director of the Company (which is the listed entity) ceases to be an employee (i.e. is no longer an executive director) it makes sense that he can be removed from his directorships of Group companies, which are functions he exercises as employee of the listed entity, the parent of those companies;

    ii) by contrast, it does not follow that a cessation of employment means he should automatically be removed as a director of the listed entity, as opposed to simply continuing in a non-executive capacity. They submit that should be a decision for shareholders or (provided always that the power is exercised for proper purposes) a unanimous decision of the Board under Article 89(5); and

    iii) the Company's construction of Clause 17.4 would allow a bare majority of the directors to subvert the basic rules of company law, and the requirement for unanimity in Article 89(5), by dismissing an executive director from his employment and then invoking Clause 17.4 to require him to resign from the Company's board.

528. This second issue, over the reach of clause 17.4, is one of pure construction which does not turn upon any consideration of the facts of the present dispute but has been latent since the parties (by novation in the Company's case) entered into the Service Agreement. Accordingly, in my judgment it is appropriate that I should resolve it at this point in my judgment.

529. Mr Tinkler relies upon the decision of the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR, at [23], to say that the use of the definitional term constitutes unambiguous language which the court must apply. However, the same authority confirms that the resolution of an issue of contractual interpretation is an iterative process and that, where the language admits of more than one meaning, the meaning must be tested against the other provisions of the document and against its commercial consequences. In a case of ambiguity, "the court is entitled to prefer the construction which is consistent with business common sense and to reject the other" (at [21]). This exercise involves consideration of the language against all the background knowledge reasonably available to the parties at the time they contracted.

530. In my judgment, the language of clause 17.4 is ambiguous. The first point to note is that the definition of "*Group Company*", which Mr Tinkler says concludes the point, is said by clause 1.1 to apply "*unless the context otherwise requires*". Looking at the introductory words of clause 17.4 the context is one where the parties expressly recognised that, if notice of termination had been given under clause 3.4, the Company could remove Mr Tinkler from his directorship of the Company. But because clause 17.4 only refers to "*Group Company*", on a strict literal approach, that could only be done in reliance upon clause 3.4 and its reference to the Company alongside "*any other company in the Group.*" The fact that clause 17.4 expressly makes reference to clause

3.4 and, at least in that scenario of a 12 month notice of termination having been given, picks up again the idea of removal from an office held in any company in the Group is a clear indication that the strict definitional term of "Group Company" yields to the language of that earlier clause so as to include the Company.

531. The second point to note in relation to ambiguity is that clause 17.4 provides that, upon removal from his office in any "Group Company", Mr Tinkler will transfer to the Company or at its direction "*any qualifying shares held by him as nominee for the Company*". On his argument, he would have to do so, following his removal from office of any other Group Company, even though he remained a director of the Company unless and until removed at an EGM or under Article 89(5). As far as I can see, his Service Agreement does not otherwise appear to address the question of qualifying shares and I have not been taken to any provisions of the Company's Articles, as they were in 2007 at the date of the Service Agreement, indicating that a director of his then employer, Stobart Holdings Limited, needed to hold a qualifying shareholding in that company. Article 77 of the Company's current Articles, adopted on 29 June 2017, states that a director need not be a member of the Company. Nevertheless, the stipulation in clause 17.4 that Mr Tinkler was obliged to transfer to the Company any qualifying shares held by him as nominee for the Company, following a request to resign, is in my view a further clear indication that the parties contemplated that the resignation request could extend to the Company itself. So too is the provision in clause 17.4 that any such requested resignation should not prejudice any claim which he might have against "*the Company or any Group Company*" arising out of the termination of his employment. These further express references to the Company are only consistent with his directorship of the Company being the subject of a resignation request.

532. Once it is recognised there is ambiguity within clause 17.4 then, in my judgment, business common sense requires it to be given the same scope as clause 3.4. To conclude otherwise, so that the Company cannot request the resignation of its director whose conduct as employee has been considered worthy of summary dismissal, would confound business common sense. The notion that, in such circumstances, the Company could only remove him from ancillary directorships that the Company has required him as an employee to take up (see clause 4.2 of the Service Agreement) but not from its own boardroom, so that the expelled employee would still be entitled to attend directors' meetings (including any that might wish to address any consequential employment claim by him) strikes me as absurd. As for Mr Tinkler's other points, I cannot see why his consequential removal from office of director in the employing company should be the preserve of members in general meeting or the directors exercising their power under Article 89(5). On the contrary, one would expect such removal to be covered by the terms of employment, especially when those terms address his removal from office in companies that do not employ him.

533. In my judgment, the Company's position on this issue is therefore to be preferred. On its true construction, clause 17.4 carried with it the right of the Company to request Mr Tinkler's resignation as director of the Company. Therefore, if the Committee was competent to dismiss him as an employee, the request that he should resign as a director of the Company was a valid one.

iii) Remedy

534. On the basis that he was not properly dismissed from his employment on 14 June 2018, Mr Tinkler seeks a declaration that he still remains an employee of the Company.

535. The Company, building on its reliance upon *Lee v Chou* to say that Mr Tinkler's removal from the office of director is provisionally effective even if carried out for an improper purpose, submitted that the grant of such relief would be contrary to authority makes the following points:

i) First, that in *Geys v Société Générale* [2013] 1 AC 523, at [93]-[94], the Supreme Court generally endorsed an "elective" approach to repudiation but made it clear that the employment contract would only continue to subsist "while there exists a reason and an opportunity for the innocent party to affirm the contract". The Company says that no such "reason" exists here, when the trial was almost 6 months after Mr Tinkler was informed of his dismissal, and (to use Mr Leiper's phrase in closing submissions) it would be "completely heretical" to think in terms of the court granting relief that amounted to specific performance against the Company.

ii) Second, that neither the common law nor equity (in the form of the grant of declaratory relief) are applied to keep a contract of employment in being following a wrongful dismissal. It is inappropriate to force parties into relations demanding close personal trust and confidence. The Company cites *Ridge v Baldwin* [1964] AC 40, 64; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699, 737E–F; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361, 381E; and *Chappell v Times Newspapers Ltd* [1975] 1 WLR 482, 492-3.

iii) Thirdly, that there are positive reasons not to reinstate Mr Tinkler's employment. In *Geys v Société Générale*, at [77], Lord Wilson noted the observation in *Chappel v Times Newspapers* that "if one party has no faith in the honesty or integrity or the loyalty of the other, to force him to serve or to employ that other is a plain recipe for disaster". In *Incasep Ltd v Jones* (unrep., Chancery Div., 26 October 2011) Pumfrey J noted that:

> "the potential disruption caused by the reinstatement of an executive director whom the remainder of the board have already decided to dismiss is intrinsically a highly disruptive step and productive of continual disagreement. That of itself has an adverse impact upon the day-to-day management of the company".

The decision of Pumfrey J was reversed on appeal, but not on that point.

536. In relation to *Geys v Société Générale*, Mr Tinkler counters by saying there is every good reason exists for upholding the continuation of the Service Agreement in that it would vindicate his right to the LTIP shares that would otherwise have vested in him on 22 June 2018. He also says that at the time his solicitors affirmed his contract of employment, which they did by their letter of 19 June 2018, the prospect at that point in time that Mr Ferguson would not be re-elected at the AGM (which would have

resolved any issue of incompatibility between the two) is a further reason in support of his position.

537. As for the other authorities relied upon by the Company, Mr Tinkler's counsel point out that they do not concern the grant of declaratory relief but instead go to the proposition that the court will not grant an injunction carrying penal consequences for an employer who refuses to welcome back a dismissed employee. They say that does not bear on the quite separate question of whether it will declare that, as a matter of legal relations, an individual's employment contract remains on foot when, they submit in reliance upon *Tito v Waddell (No. 2)* [1977] Ch. 106, at 259B–C per Megarry V.C., declaratory relief is not an equitable or legal remedy, but a statutory one. Mr Tinkler says that if the claimant in *Geys v Société Générale* had sought a declaration at the time that he continued to be employed, he would have been entitled to it. Indeed, his financial rights flowed from that entitlement.

538. And, they say, once declared to have been affirmed by the innocent party the employment contract remains in force and does not somehow lapse. Therefore, in relation to him resuming his employment, Mr Tinkler's counsel say that, should the court find that he committed no wrongdoing to justify his summary dismissal, there is no reason why the Company should not permit him to resume the employment. They submit that is especially so when both Mr Ferguson and Mr Wood have announced they will be stepping down from the Board in due course.

539. I recognise Mr Tinkler's point that the court's general power to grant declarations does not rest upon an equitable jurisdiction. For present purposes, the relevant jurisdiction mentioned by the Vice Chancellor in *Tito v Wadell* (not the one concerned with declaratory relief against the Crown) was that which was first conferred by rules of court in 1883 and which, by the time he was speaking, was reflected in RSC Order 15, rule 16. The power is now contained in CPR 40.20. The language of the Rules of the Supreme Court was discretionary, as Megarry V.C. made clear, even though O. 15 r. 16 referred to "binding declarations of right" and that remains the case under the Civil Procedure Rules (CPR 40.20 now simply providing that the court may make "binding declarations" whether or not any other remedy is claimed).

540. However, recognition that the power to grant declaratory relief is not equitable but nevertheless discretionary does not, I think, assist greatly with the real issue between the parties that I have to decide. It might be one thing for the court to be persuaded to declare that his employment contract was not validly terminated (with whatever financial consequences in terms of pay in lieu of notice, or accrued share or bonus entitlement, might follow from that) but quite another to say that he therefore continues to have the right to provide continued personal service under that contract which, being bound by the declaration, the Company would be obliged to accept. From the Company's perspective, the latter declaration would in substance amount to the grant of specific performance. That is an entirely different discretionary remedy and the court's power to grant damages in lieu of that relief is conferred by section 50 of the Senior Courts Act 1981. The difficulties in the way of obtaining specific performance of a contract involving personal service are well-known to lawyers. One of the reasons the court is reluctant to order it is because of the future supervision of due performance that would be likely to be required in circumstances where employer and employee have fallen out.

541. In *Geys v Société Générale* the Supreme Court was confronted with the question of whether or not the wrongful repudiation of an employment contract (by either the employer or the employee) automatically terminated the contract (the automatic theory) or only did so if and when the innocent party elected to accept the repudiation (the elective theory). The point was crucial in that case because the claimant employee's financial rewards for past performance were very much greater if the period of his employment survived a matter of weeks beyond the employer's purported dismissal of him. The judgment of Lord Wilson with whom the majority agreed confirmed, at [93], that just as for any other contract, repudiation cannot determine a contract of service while there exists a reason and opportunity for the innocent party to affirm the contract. An obvious financial reason existed *Geys v Société Générale* which their lordships held to be a good reason.

542. However, at [76]-[79] of *Geys v Société Générale*, Lord Wilson also explained how the automatic theory had taken hold in the employment context and addressed the extent to which it should take hold. I have already noted his reference to *Chappell v Times Newspapers.* He also referred to the principle in *Denmark Productions Ltd v Boscobel* that the mere readiness of an employee to resume work, following his wrongful dismissal, does not entitle him to sue for his wages and that it is better for both employer and employee for his claim to be for damages for loss of wages, subject to the duty to mitigate by taking reasonable steps to find other work. Lord Wilson noted that, in terms of remedies, a contract of employment was a special case (and that the facts of the appeal before him left no room for any attack on the principle).

543. It is therefore clear from the authorities that, to the extent that Mr Tinkler's claim for declaratory relief is tantamount to an order for specific performance of his Service Agreement, he runs up against what Lord Wilson described as "the usual unavailability" of that remedy.

Conspiracy

544. Subject to what I say below about Mr Tinkler's important contention that the third one requires knowledge of unlawfulness on the part of a conspirator, the parties agree that the components of a claim for unlawful means conspiracy were as I summarised them recently in *Palmer Birch v Lloyd* [2018] EWHC 2316 (TCC), [203]. They are:

i) An agreement, or "combination", between a given defendant and one or more others;

ii) An intention to injure the claimant;

iii) Unlawful acts carried out pursuant to the combination or agreement as a means of injuring the claimant; and

iv) Loss to the claimant suffered as a consequence of those acts.

545. In relation to the first, the decision of the Court of Appeal in *Kuwait Oil Tanker Co SAK v Al-Bader (No.3)* [2000] 2 All ER (Comm) 271, at [111], shows that:

> "[I]t is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end."

546. However, as I said in *Palmer Birch* (at [206]) the parties to the alleged conspiracy must be shown to have been sufficiently aware of the relevant circumstances, and to have had a sufficiently similar objective, before it can be inferred that they were acting in combination at the time of the unlawful acts. Mr Tinkler relies upon *Sandman v Panasonic UK Ltd* [1998] FSR 651 to say that what is required is something more than a "mere association".

547. On intention to injure, Mr Tinkler's counsel submit that (as noted in *Palmer Birch* at [220]) the law is as set out in *OBG v Allan* [2008] 1 AC 1, in particular by Lord Nicholls (at [164] – [167], from which it can be seen that:

> "A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests."

548. More controversially, they also say that it is a requirement of an unlawful means conspiracy that conspirators must know that their means are unlawful. In this regard, reliance is placed upon what was said in *Meretz Investments NV v ACP Ltd* [2008] Ch. 244, at [124], [127] and [146] (per Arden LJ) and [174] (per Toulson LJ). They recognise that the alternative view is that the conspirators need not know the means are unlawful if they knew the relevant facts, noting that Buckley LJ said in *Belmont Finance Corp v Williams Furniture Ltd (No. 2)* [1980] 1 All ER 393, at 404-405, that if the facts which make the transaction unlawful were known the parties, then ignorance of the law is no excuse.

549. For my part and for the reasons set out below I am not persuaded that *Meretz* should be relied upon, in the face of *Belmont Finance*, to add to the four components identified above a further ingredient as to the defendant's state of mind; namely some degree of knowledge that the resulting action (taken pursuant to the agreement with its intended harm) is unlawful.

550. The observations in *Meretz*, which were probably obiter by Arden LJ and were expressly so by Toulson LJ who (like Arden LJ) had decided that no unlawful means were used, were directed to the exculpatory belief on the part of the defendants that they had a lawful right to act as they did.

551. *Belmont Finance* was cited to the Court of Appeal in *Meretz* and referred to in the judgment of Arden LJ but not by Toulson LJ. Arden LJ addressed the authority in response to the submission that it created tension with the principle that "if a party is advised that a transaction does not infringe the claimant's rights then he may not have

the intention necessary to commit an economic tort." *Belmont Finance* was therefore cited in relation to both economic torts relied upon in *Meretz*, namely inducing a breach of contract and an unlawful means conspiracy. In addressing and rejecting the submission, Arden LJ referred to her earlier decision (supported by Sedley LJ and Aikens J) and that of the House of Lords (sub nom *OBG Ltd v Allan*) in *Mainstream Properties Ltd v Young* [2005] IRLR 964 and [2008] 1 AC 1. Recognising the proper labelling of the tort which came out of the House of Lords' decision, *Mainstream Properties v Young* concerned only the tort of inducing a breach of contract. *Belmont Finance* was not cited to the Court of Appeal in *Mainstream Properties v Young*. It was cited in the House of Lords in the conjoined appeals but was not referred to in any of their lordships' judgments.

552. It is, I think, noteworthy that the observations of Arden LJ at [146] were made in the context of considering the element of an intention to cause loss (or to injure) required for an unlawful means conspiracy. She referred to the legal advice received being "inconsistent with an intention to cause harm to Britel". I also note that in summarising the intention required for the conspiracy claim, at paragraph [90], Arden LJ (again referring to *OBG v Allan* which, as she expressly recognised, did not concern the tort of conspiracy) referred to the requisite "intention to cause loss by unlawful means" but did not say there had to be knowledge of such unlawfulness. To the extent there may be any conceptual difference between the two (I think analysis of the justification defence to the tort of inducing a breach of contract indicates there is one) her emphasis at [146] was not upon a need to establish positive knowledge on the part of the conspirators that what they were doing was wrongful but, instead, that they believed they had a right to act as they did. It is the latter that Toulson LJ considered should be a "defence" to a claim in unlawful means conspiracy though his reference, in that regard, to paragraph [127] of Arden LJ's judgment was to a passage dealing not with conspiracy but with the tort of inducing a breach of contract. For the inducement tort, there is a recognised defence of justification in reliance upon an equal or superior legal right. In addressing the claim for unlawful means conspiracy (at [146]) Arden LJ spoke in terms of an absence of intention to cause harm and she certainly did not pronounce, in clear terms, the proposition for which Mr Tinkler contends.

553. I am therefore not at all confident as to how the remarks in *Meretz* should be pigeon-holed in relation to the established components of an unlawful means conspiracy set out above. The focus upon the defendant's perception that his actions were justified (which might, I suppose, even be referable to him having received prior legal advice that might later be shown to have been just plain wrong) suggests to me that they may straddle both the intention to injure and the unlawfulness of the act, but probably more of the former than the latter. And, given that it is paragraph [127] of the judgment of Arden LJ which appears to provide the springboard for their remarks, the overall flavour of this exculpatory factor is one of "justification" as that defence is known in the inducement tort.

554. *Meretz* decided (at [146]) that the intention to injure required for an unlawful means conspiracy was the same as that established by the House of Lords in *OBG v Allan* [2008] 1 AC 1 for the further tort of unlawful interference. As I noted in *Palmer Birch* at [224], the two torts clearly differ as to what may qualify as a relevant "unlawful" act. If Arden LJ and Toulson LJ had in mind (or more in mind) the defendant's belief of a legal entitlement to act as he did thereby operating to obviate an intention to injure the

claimant then I am not sure that the second does necessarily follow, particularly when such intention may be fixed by reference to it being the inevitable flip-side of the defendant's intended gain. If theirs is the language of "justification", then another point of distinction between the inducement tort and the tort of unlawful means conspiracy is that the former does not require any intention to cause damage. For the inducement tort, the defence of justification operates in the absence of any such requisite intention and, in relation to the intention to procure a breach of contract (which is the only intention required to establish liability) it is clearly a defence for the defendant to show that he acted to protect his equal or superior right – i.e. the defence of justification, which is not really a question of intention (nor of mistaken belief of legal entitlement) - or that he honestly, even if mistakenly, believed that the outcome sought by him would not involve a breach of contract: *OBG v Allan*, at [193] and [202] per Lord Nicholls (his second proposition being relied upon to dismiss the appeal in *Mainstream Properties v Young*).

555. To go arguably further than what the Lords Justices had in mind in *Meretz*, and add knowledge of unlawfulness to the third element of an unlawful means conspiracy, would also appear to detract from the fundamental point that it is in the fact of the conspiracy (with the requisite intent to injure) that the unlawfulness resides. It is that fact (conspiracy being reprehensible in any context) that distinguishes this tort from the tort of unlawful interference. That is the point I sought to make in *Palmer Birch* (at [183]-[193] and [234]) when ruling that the defence of justification had no place in a claim based on an unlawful means conspiracy. Although any such suggested defence of justification would involve analysis of only one particular facet of any wider legal knowledge the alleged conspirators might possess (namely their knowledge or awareness of what is said to be an equal or superior right in at least one of the conspirators that justified their actions) I cannot see that an inquiry into their knowledge of "the law" has any proper place in the context of this tort. Still less so when, as here, the lawyers in the case might not even agree that application of the relevant legal principles to the alleged conspirators' actions leads to the conclusion that they were unlawful ones. To add knowledge of unlawfulness to the requirement of the intention to harm would raise a whole host of unanswered questions such as the standard of knowledge (or suspicion) required, the scope for reliance upon patently unrealistic (and possibly self-serving) legal advice and (if it goes to a "defence" as Lord Justice Toulson contemplated) the legal burden of proof.

556. If knowledge of unlawfulness was an additional condition of liability then the very existence of the lively (and sustainable) debate in present case, as to what actions Mr Tinkler's fiduciary duties to the Company permitted or proscribed, would seem to provide a defence for a defendant who will then argue that he cannot be taken to have known that the court will later decide that some of them were "unlawful" (assuming it does and the elements of the conspiracy, ignoring the *Meretz* gloss, are therefore otherwise established). Although the relevant unlawfulness might be more obvious and indisputable in other cases, so that even those with no appetite for legal research or legal advice may have difficulty in feigning ignorance of it, it seems a very odd notion to contemplate that legal principles might have to be put to alleged conspirators, during their cross-examination, in order to establish their familiarity with them.

557. Indeed, if Mr Tinkler's position is correct, knowledge of the law would presumably have to be pleaded, certainly on the part of any given defendant sought to be made

liable. If that defendant has the requisite intent to injure and it can be shown that unlawful means were used then, in preference to placing this additional burden upon the claimant, my own reaction would be to echo that of Buckley LJ in *Belmont Finance*. I do not see why liability for an unlawful means conspiracy should turn upon the extent of the defendant's legal knowledge (or the claimant's awareness of such knowledge for the purpose of being able to plead it) however sound or unsound the court's later finding, in relation to the actual use of unlawful means, may show it to have been.

558. The observations in *Meretz* are not only at odds with *Belmont Finance* but they also do not reflect what the Court of Appeal in *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER Comm 271, at [108], had identified to be components of an unlawful means conspiracy. Further, as I read it and sought to address in *Palmer Birch* in the context of the suggested justification defence, the judgment of Lords Sumption and Lloyd-Jones in *JSC BTA Bank v Ablyazov (No. 14)* [2018] UKSC 19, at [11]-[15] in relation to the concept of "unlawful means" does not appear to introduce a further requirement of knowledge (or, perhaps, suspicion or belief) of unlawfulness on the part of the defendant (or, perhaps, at least one of the conspirators).

559. However, in addition to their list of first instance decisions produced in response to the Company's reliance upon the decision of Norris J in *First Subsea Ltd v Baltec*, to both of which I turn below, Mr Tinkler's counsel also mentioned the decision of the House of Lords in *Concord Trust v The Law Debenture Trust Corporation* [2005] 1 WLR 1591, at [39], which they submit should decide this issue in his favour. I note that, like *Belmont Finance*, this authority was cited to the House of Lords in *OBG v Allan* but not referred to by the court. *Concord Trust v The Law Debenture Trust* did not directly concern a cause of action based on an unlawful means conspiracy. Rather, the issue was as to the scope of the indemnity that a trustee might justifiably seek in relation to its redemption of bonds where the issuing company had advised the trustee that a notice of early redemption would be invalid and cause substantial losses. One of the contemplated bases of liability, upon which the trustee relied in seeking a more extensive indemnity from bondholders, was that it might be found to be liable for conspiring with bondholders to cause the company injury by unlawful means. Lord Scott said that the correct approach was to ask whether it was reasonably arguable that the cause of action might lie. He noted that the anticipated liability for conspiracy had not been raised at first instance or in the Court of Appeal.

560. I do not regard anything said by Lord Scott in *Concord Trust v The Law Debenture Trust* at [39], with whom the other judges agreed, as being at odds with *Belmont Finance*. It is true that he did say it was unarguable to suggest that the trustee could be liable in conspiracy notwithstanding its honest belief that the notice of redemption was valid. That belief was fully justified by the court's declaration that the trustee could certify that a redemption event had occurred. That was also the reason why no intention to cause injury could be established. But his emphasis was upon questioning how there could be said to be an unlawful means at all (given the court's declaration) and his reasoning against exposure to a conspiracy claim being even arguable was based upon a party "without more" unilaterally serving a legal notice in the belief it is valid only for it later to be established that it was in fact and law invalid. Lord Scott did not address the point that a conspiracy between more than one person, to cause injury by means later shown to be unlawful, would or arguably might be actionable.

561. Those are my observations upon the authorities from an appellate level but the parties also drew my attention to some first instance authorities which have considered the impact of what Arden LJ and Toulson LJ said in *Meretz*.

562. The decision of Norris J in *First Subsea Ltd v Baltec Ltd* [2014] EWHC 866 (Ch), at [150]-[157] was relied upon the Company as an accurate statement of the law. Mr Leiper QC pointed out that the judge had noted that he was attracted to the suggestions in *Meretz*, that the law of unlawful means conspiracy now stands on a different footing in the light of what was said in *OBG v Allan* [2008] 1 AC 1 in relation to the intention required for the tort of unlawful interference. But Norris J also recognised that that the conclusion of Toulson LJ was clearly obiter, while Pill LJ did not decide the point, and concluded he was bound by *Belmont Finance* which was directly in point. Norris J also observed that *Belmont Finance* was cited to the House of Lords in *OBG v Allan* (upon which decision Arden LJ had relied in responding to the submission made in relation to *Belmont Finance*) "but it was not overruled or even commented upon adversely."

563. I should note here that although the decision of Norris J was (unsuccessfully) appealed, the appeal concerned only a separate limitation point and not his observations upon an unlawful means conspiracy: see [2018] Ch 25.

564. In response to the Company's reliance upon *First Subsea Ltd v Baltec*, Mr Taylor QC countered with reliance upon what Morgan J said in *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHCC 774 (Ch) at Annex I [86]-[117] which, though earlier in time, was not cited in *First Subsea v Baltec*. He also produced (in the tabular response headed "Defendant's Summary Response to the Company's Additional Points of Law" which included mention of *Concord Trust v The Law Debenture Trust*) a table of cases, including *Digicel*, where *Meretz* had been followed at first instance.

565. So far as *Digicel* is concerned, Mr Taylor urged me to follow what Morgan J, having reviewed the authorities, said at [117]:

> "It is probably the case that the statements in the Court of Appeal in Meretz on this present point were obiter. But for the decision of the Court of Appeal in British Industrial Plastics Ltd v Ferguson, I might have been prepared to hold that I was bound by the ratio of Belmont and I should follow that ratio notwithstanding the obiter dicta in Meretz. However, in view of what was said by the Court of Appeal in British Industrial Plastics Ltd v Ferguson together with the dicta in the Court of Appeal in Meretz, my conclusion is that a judge at first instance ought to follow what is clearly stated by Toulson LJ in Meretz at [174]."

566. *British Industrial Plastics Ltd v Ferguson* [1938] 4 All E.R. 504 was an earlier decision by the Court of Appeal than that in *Belmont Finance* which was not cited in the later case (and which was not affected by the House of Lords judgment at [1940] 1 All E.R. 479 which considered only the tort of inducing a breach of contract). As Morgan J noted in *Digicel*, the Court of Appeal in *British Industrial Plastics v Ferguson* approached the two torts under consideration, inducing a breach of contract and unlawful means conspiracy, on the same basis. The defendant's lack of knowledge that his conduct would bring about a breach of contract was also a reason why he could not be liable in conspiracy. As he also noted, the members of the Court of Appeal in *Belmont Finance* addressed the question of knowledge of unlawfulness for the purposes

of conspiracy more directly and, on my reading of the two authorities, in much clearer terms than the judgments in *British Industrial Plastics v Ferguson*.

567. When Morgan J referred in the quote above from *Digicel* to "this present point" he was referring to the issue (which he introduced at [86]) of whether a genuine belief on the part of the defendants that the acts taken pursuant to the conspiracy were not unlawful meant they could not be liable in conspiracy. After the quoted passage, at [119], he deliberately left unresolved the question, which formed part of that same point, as to who would bear the legal burden of proof of establishing the absence or presence of a genuine belief that the acts were lawful.

568. I do not find the statement of Toulson LJ in *Meretz* as compelling as Morgan J did when they are read in the light of *Belmont Finance*. I recognise that what Toulson LJ said was stated clearly when he said "a defendant should not be liable for conspiracy to injure by unlawful means if he believes that he has a lawful right to do what he is doing." However, the statement was obiter and was in fact directly addressing what Arden LJ had in fact said (at [127]) about the tort of inducing a breach of contract, not conspiracy. I assume that it is the first tort that Toulson LJ had in mind when he referred separately to "the tort of conspiracy to induce a breach of contract" and, in that context, went on to mention the defendant's belief that the outcome sought by him will not involve a breach of contract. Clearly the defendant must intend a breach of contract to result if he is to be liable for the inducement tort: see *OBG v Allan* at [8]. Similarly, as I have noted, the inducement tort (being a tort of secondary liability) admits of a justification defence which is also the language of Toulson LJ ("if he believes he has a lawful right to do what he is doing") when, for the reasons I gave in *Palmer Birch*, I do not believe the conspiracy tort does. But, most important of all and again echoing *Belmont Finance*, the justification for relieving a defendant from liability for damage by reference to his honest but mistaken view of the law, when all other boxes in respect of the components for liability identified in paragraph 543 above are ticked against him and any ill-founded belief of a legal right to justify the harm does not mean the intention to injure is not present, is not at all obvious to me. As I noted in *Palmer Birch* at [187], in *Quinn v Leathem* [1901] AC 495, at 537, Lord Lindley said "[T]he intention to injure the plaintiff negatives all excuses."

569. I note that, like Norris J, other first instance judges have recognised the impact of *Belmont Finance*. In *Revenue & Customs Commissioners v Begum* [2010] EWHC 1799 (Ch), at [48]-[50], David Richards J (as he then was) was concerned with an alleged unlawful means conspiracy involving criminal acts, noting that *Digicel* was not such a case, though on the amendment application before him he was prepared to proceed on the basis that lack of knowledge of unlawfulness might be a defence and that it was an open question as to who bore the legal burden. In *Capital for Enterprise Fund LP v Bibby Financial Services Ltd* [2015] EWHC 2593 (Ch), at [11]-[13], HH Judge Pelling QC reached the conclusion that the approach adopted by Norris J in *First Subsea v Baltec* was the one he should follow.

570. However, in *Lictor Anstalt v MIR Steel UK Limited* [2014] EWHC 3316 (Ch), at [262] Asplin J (as she then was) interpreted *Meretz* as showing it is "a condition of liability that the defendant knows that the claimant's loss will be caused by the use of unlawful means." I take this to mean, as Mr Tinkler's counsel clearly do, that the defendant must have knowledge not just that such means are being deployed but, also, that they are unlawful. As Judge Pelling QC noted in *CFEFA v Bibby*, the decision in *First Subsea*

v Baltec was not cited to Asplin J and neither, it appears, was *Belmont Finance* in circumstances where there appears to have been no issue over the proposition she drew from *Meretz*. As I have sought to explain above, I do not derive that proposition from *Meretz*, which would mean that there was a legal burden upon the claimant to plead and prove the relevant defendant conspirator's knowledge of the law (though I suppose what Morgan J in *Digicel* described as "shut-eye" knowledge, based upon a suspicion of unlawfulness, might suffice).

571. Mr Tinkler's counsel also rely upon *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm), at [95], where Cockerill J referred to *Meretz* and *Digicel* in saying a person "is not liable in conspiracy if the causative act is something which the party doing it believes he has a lawful right to do." Again, it appears that neither *Belmont Finance* nor the first instance decisions noting its impact, as mentioned above, were cited to her. Cockerill J appears to have read the remarks in *Meretz* in terms of justification, as I do, and I note that the paragraphs in the judgment of Arden LJ relied upon by her were paragraphs [126]-[127] (as well as paragraph [174] of Toulson LJ).

572. The final first instance decision relied upon by Mr Tinkler is that of Zacaroli J in *Brent LBC v Davies* [2018] EWHC 2214 (Ch). However, the claimant in that case did not seek to rely upon the *Belmont Finance* principle, as is apparent from what the judge said at [284]:

> "It was common ground between the parties that it is essential for the conspirators to appreciate that the actions that they combine to take are unlawful (see, for example, *Meretz Investments NV v ACP* [2008] Ch 244, per Toulson LJ at [174]; *Digicel (St Lucia) Limited v Cable & Wireless Plc* [2010] EWHC 774 (Ch), per Morgan J at [86]- [118] of Annex I to the judgment). Mr Rees QC for the Claimant accepted that the test was as set out by Finlay LJ in *British Industrial Plastics Limited v Ferguson* [1938] 4 All ER 504, at p.514: "A person could never be liable for conspiracy, either in a civil or in a criminal court, if he had no knowledge that the design was unlawful."

573. Although, for the reasons given above, I am therefore less attracted than he appears to have been to the introduction of a further qualification to liability for unlawful means conspiracy, like Norris J in *First Subsea Ltd v Baltec* I regard myself as bound by *Belmont Finance*. The fact that the conspirator did not know that his actions were unlawful is no defence to liability. In order for him to be liable, it is enough to show that he had sufficient knowledge of the essential facts, that acts which were unlawful were to be carried out so as to implicate him in liability for them. The submission for Mr Tinkler is that the sting of an allegation of conspiracy should only attach to those who have a realisation of the impropriety of their behaviour. In my judgment, when coupled with an intention to injure the claimant, such knowledge of the facts should enable them to have that appreciation regardless of any knowledge or suspicion they may have about the characterisation of them in law.

SECTION 5: FINDINGS

574. With the legal principles in mind I now turn to the determination of the matters in dispute between the parties.

(a) Context

575. Before turning to the Issues formulated by the parties, I need to establish what expectations Mr Tinkler had encouraged the Company to hold by his discussions with the Board or members of it in early 2018.

576. I have already mentioned, in the Introduction above, the Company's position that Mr Tinkler indicated an intention to stand down from the Board only then to plan a boardroom coup. Mr Leiper QC returned to this in his closing submissions when, looking at the actions taken later by the Four Directors, he said:

> *"That is why the events of January and February are so important. From the majority's perspective, why on earth was Mr Tinkler briefing shareholders against the board, agitating against Mr Ferguson, when he had simply not raised it with the board?"*

577. Mr Ferguson and Mr Tinkler are at odds as to whether or not, in early 2018, Mr Tinkler had given to Mr Ferguson the clear impression that he was, voluntarily, on his way out from the Company and that it was a case not of "if", but "when".

578. Mr Ferguson's version of events gains some initial momentum in the form of the email which Mr Tinkler wrote on 29 September 2017, from which I have already quoted in Section 3. Mr Tinkler talked about having discussed his future with his partner and going it alone after 10 hard years with the Company.

579. During his cross-examination, which was consistent with his witness statement, Mr Tinkler said that the 29 September email did not indicate any more than he was thinking about standing down as a director. He said:

> *"I felt that maybe it would be sensible for me to leave the company -- right? -- having been there for ten years, but I haven't made that decision at that point."*
>
> and
>
> *"I'm not saying I will resign. I've put to Mr Ferguson I felt -- that's my thoughts at that moment in time."*

580. I did not find those to be convincing answers in the face of the email's terms. In the same passage of cross-examination he gave an answer which, in my judgment, revealed the true position; that Mr Tinkler later had a change of heart about resigning once he had spoken to significant shareholders:

> "*Yes, but actually after discussions with them -- right? -- especially Mr Jenkinson -- and discussions with Mr Jenkinson especially he thought it wasn't the right thing to do.*"

581. That answer was consistent with the terms of the email indicating that the timing and mechanics of Mr Tinkler's resignation would be subject to him further discussing it with shareholders but not that his initial preparedness or willingness to resign, as expressed to Mr Ferguson in the 29 September email, was somehow conditional upon the prior approval of shareholders or, perhaps, certain shareholders. The answer also chimes with how Mr Tinkler concluded his reference to the email in his witness

statement: "*In the end, given my concerns about the way things were going, I decided not to do this but to stay in the business and keep working*". Later in his evidence, Mr Tinkler said of the email: *"I think I had a discussion with Mr Jenkinson and we'd moved on and that had gone no further."*

582. In relation to the 29 September email, Mr Jenkinson said in his evidence that, on his reading of it at trial, Mr Tinkler had indicated that he intended to step away from the Company. When Mr Leiper QC then put to Mr Jenkinson the Company's understanding that Mr Tinkler had decided to stay after discussions with him, he responded: "*He would make his own mind up what he was doing.*"

583. In my judgment the September email can only have encouraged Mr Ferguson to believe that Mr Tinkler was on his way out of the Company.

584. Mr Ferguson and Mr Tinkler met on 10 January 2018. Mr Butcher was present. Mr Tinkler says he made some notes on his phone during the helicopter ride to LSA in advance of the meeting. A printout of those notes appeared in the chronological run of documents in the trial bundle with there being "No Date" for the start time or end time for the creation of those notes (as opposed to the end time for some others on the phone). The Company also observes that the notes were not located during the original disclosure process and were disclosed (without explanation) only after the exchange of witness statements. The notes record Mr Tinkler's three "options" as being:

> (*1) "resign and sell down my shares and run my own fund with N[eil] W[oodford]";*
>
> *(2) "Get rewarded properly for my 10 year service and then become an adviser to the Board through Stobart Capital"; and*
>
> *(3) "Get rewarded properly and become Exc Chairman with shareholder support. To preserve Value and can control Strategy through the Board to deliver Shareholder Value from the foundations kin [sic] place".*

585. Mr Ferguson disputed that the third option (which is in direct contrast to the first) was raised by Mr Tinkler on 10 January and remained firm on the point during cross-examination. He said the essential message from Mr Tinkler was that the Company should either reward him properly (he had produced the spreadsheet he had been working on over Christmas) or he would resign. Mr Ferguson acknowledges that it was understood Mr Tinkler would be speaking to shareholders about his remuneration package and his personal future.

586. Mr Tinkler and Mr Butcher say the third option was raised. The language of the relevant passages in their respective witness statements (which tracked the three points in the note) is materially the same. However, in his testimony Mr Tinkler was vague about the discussion at the meeting and he gave answers which indicated his witness statement was as much about explaining the content of the notes as opposed to what he had said at the meeting (of his recollection of the meeting he said "*I wouldn't say it's hazy. I think I remember certain points …*"). In his testimony, Mr Butcher accepted that his witness statement "*used the wording that was provided by the solicitors, checked with my own records and recollections of the events that are described in the witness statement, and confirmed that I was happy with – with what was written*". Mr

Butcher also referred to a different version of the spreadsheet (to the one he was shown in the witness box) being produced at the meeting but that did not accord with Mr Tinkler's position.

587. In his witness statement, Mr Tinkler said that on 10 January 2018 he had agreed with Mr Ferguson that he would "*meet with the major shareholders to discuss what they wanted from me going forwards in Stobart Group, and to explain my history, rewards and concerns.*" However, Mr Ferguson says he made it clear that Mr Tinkler's discussion with shareholders should not extend to any criticism of the Company.

588. I prefer the evidence of Mr Ferguson in relation to the meeting on 10 January 2018. His greater certainty as to what was and was not discussed is reinforced by the point that it would be inconceivable that he would have contemplated Mr Tinkler going off to speak to shareholders to discuss the possibility of him taking over Mr Ferguson's own role as Chairman. He would also have reacted to that suggestion and, although Mr Tinkler suggested that Mr Ferguson had "taken offence" at the suggestion, the Company correctly point out that Mr Jenkinson detected no frostiness when he joined the meeting. Whether or not Mr Tinkler prepared his note in advance of the meeting, I am satisfied he did not share the third option with Mr Ferguson.

589. The result of me preferring Mr Feguson's account of the meeting is that it represented a further indication by Mr Tinkler that he had it in mind to step down from the Board.

590. There is also a dispute between Mr Tinkler and Mr Ferguson over whether or not at their later meeting, on 24 January 2018, Mr Tinkler mentioned his desire to step down from the Board at a private meeting between them on that day. It might be more appropriate to describe it as a private conversation, which took place in a corridor outside meeting rooms, given that their discussion took place on the day fixed for a meeting of the VCC.

591. Mr Taylor QC challenged the reliability of Mr Ferguson's account in circumstances where, at the outset of his testimony, Mr Ferguson had changed the terms of his witness statement as to the order of events in the late afternoon on 24 January. Mr Ferguson said he had done so having considered Mr Tinkler's witness statement and having discussed the order of events with Mr Brady; the three of them having also met that afternoon, when they were all at the Company's London offices and then having later attended the VCC meeting (though Mr Tinkler left the meeting early and did not attend the dinner that followed).

592. But, despite that challenge in cross-examination to the reliability of his recollection, Mr Ferguson remained firm that Mr Tinkler had indeed raised during their chat the matter of his own stepping-down. He said:

> *"What is not correct is that the -- I met Mr Tinkler after the VCC, it was clearly before, and that is a matter of note, I think. But I did meet with him and we did very briefly discuss the fact that as the Project Wright, Project Blue, the takeover of Flybe -- the potential takeover of Flybe was moving forward, Mr Tinkler wished to step down from the board. We -- all we really discussed was the potential date."*

593. Mr Ferguson said it was no surprise that Mr Tinkler talked again about stepping down when he had already raised the idea on 10 January. When Mr Ferguson said it was "*a*

matter of note" that his discussion with Mr Tinkler preceded the VCC meeting I presume he had in mind that (as the minutes of the VCC record) Mr Tinkler attended that meeting as a representative of Stobart Capital. According to Mr Ferguson, it was Mr Tinkler's desire to undertake the Project Wright transaction as a private deal, in which he might personally participate, that he gave as the reason for wanting to step down. Mr Ferguson said that his recollection of the discussion on 24 January was "*very strong*". It is supported by the note he made of the conversation the next day, following on from some notes he made of a meeting that following day.

594. Mr Tinkler was cross-examined about the 24 January discussion with Mr Ferguson and whether he had said he wanted to step down in order to participate in the Flybe deal. Mr Leiper QC asked him whether his position was that he did not recall the conversation or that he did recall it and never said that. Mr Tinkler's answer was:

> *"Well, I don't recall it, and I think it's a very important thing, that if I was to say to Mr Ferguson I was going to step down, I would remember something as important as that after I've been in the company for ten years, and I hadn't even been to see shareholders yet to ask their opinion on ways forward."*

595. Mr Tinkler went on to say that the discussion in the corridor might have been over something completely different and that he didn't believe he had *"said I would resign to Mr Ferguson on the 24th without saying I would actually have to go and see shareholders, which I hadn't seen by then from 10 January, because they're very busy people."*

596. On my assessment of the evidence, the account of Mr Ferguson is again to be preferred. I find that, during their conversation on 24 January, Mr Tinkler expressed to Mr Ferguson his wish to step down from the Board. That is entirely consistent with Mr Ferguson raising it with the Nominations Committee the following day (albeit that Mr Ferguson agreed that the date of 16 February was mentioned as a notional departure date). Mr Ferguson had no cause to raise with the committee an illusory point which, if baseless, would only result in it wasting its own time and aggravating Mr Tinkler.

597. Mr Ferguson had also taken the step of preparing a draft RNS which he had shown Mr Tinkler outside the Board meeting on 25 January. Mr Ferguson had made a handwritten note on 25 January (following on from some notes on the Audit Committee meeting at 9am that day) which referred to him adding Mr Tinkler to the RNS in relation to Mr Garbutt and Mr Laycock which he "*will show to AT at Board tomorrow*".

598. Although their discussion resulted in the RNS not being taken any further, the minutes of the Board meeting, at which Mr Tinkler was present, record:

> "*NOTE: In a discussion following the Board meeting it had been agreed that AT would personally meet the 4 key shareholders to discuss options around his future with SGL*."

599. In relation to the draft RNS which had been shown to him, Mr Tinkler's evidence was *"I think I said to Mr Ferguson at the time 'Look I haven't even seen shareholders'."* As the Company says, that answer shows that his resignation was on the cards but that Mr Tinkler was keen to discuss it with shareholders before it was set out in an RNS.

600. My finding is also supported by the terms of his email to Mr Ferguson of 26 January 2018 (01:33) which was generally to the effect that he would not be pushed on the timing of it until he had spoken to shareholders. It also mentioned discussing with them his remuneration over the past 10 years with the Company.

601. As with his earlier discussion with Mr Jenkinson after he sent his email of 29 September, Mr Tinkler again discussed with him, at the end of January 2018 and after Mr Ferguson had shown Mr Tinkler the draft RNS outside the Board meeting, the idea of stepping down. In relation to that, Mr Tinkler's evidence was: *"…. both Mr Jenkinson and myself – well, especially Mr Jenkinson has always said he thought it's best that I stay on board. He has an investment in the business as much as I have and he also sits on the executive management board and the core time, and I think we work well together,"*

602. Again, Mr Tinkler's evidence supports the conclusion that he raised with Mr Jenkinson the idea of resigning only to be dissuaded from that course by Mr Jenkinson. At an early point during his cross-examination, in relation to the September email, Mr Tinkler said that any decision to step down would be after discussion with shareholders, and *"with Mr Jenkinson especially [if] he thought it wasn't the right thing to do."*

603. The next significant meeting between Mr Ferguson and Mr Tinkler was the one that took place on 7 February 2018, by which time Mr Tinkler had met with the key shareholders (and the Company had discovered he had been discussing management and strategy issues with them).

604. I have already addressed the discussions at that meeting in Section 3 above and that Mr Brady and Mr Ferguson later prepared a file note (with tracked changes) of the meeting. The note was not completed until 19 February and I have already referred to Mr Brady's evidence about how he went about compiling the note. Although the meeting was concerned with other matters (including Mr Hodges' advice against airing "dirty laundry" in public and the possibility of Mr Tinkler receiving the shares in the EBT) the evidence of Mr Ferguson and Mr Brady was that Mr Tinkler said he either wanted to be fully involved in the management of the Company and its businesses or he wished to divest himself of his shares and leave the business.

605. Their later file note included a reference to Mr Tinkler having stepped back as CEO to invest in Stobart Capital and to him stepping down as Executive Director being "*a logical part of the transition*." As well as recording that Mr Tinkler had started talking about "*selling all his shares and exiting entirely*", the note indicates that the idea of him reducing his shareholding to around 5% to focus on Stobart Capital and become an adviser to the Group (the "*model being rather like the situation with Alan Jenkinson*") was also discussed.

606. By the time of the meeting on 7 February, Mr Ferguson and Mr Brady had discovered that the one matter that Mr Tinkler had not raised with Invesco, Miton and M&G was his contemplated departure.

607. Of course, in circumstances where I have found that Mr Tinkler's suggestion that his indications to Mr Ferguson about leaving were not as equivocal as he would now like to claim, I still cannot be entirely sure what was in Mr Tinkler's mind and found expression, in terms of his future with the Company, when he spoke to shareholders at

the end of January 2018. However, it is clear that his grievance over past remuneration, which had so recently preoccupied him in the bellyaching over Christmas and the New Year, would not have ceased to be his main point of concern. On my assessment of the evidence, he had not given up a reward along the lines of Ms Palmer-Baunack's bonus (allowing for those already received by him) as a forlorn hope.

608. In my judgment, when Mr Tinkler had his private discussion with the representatives of Invesco, Miton and M&G at the end of January 2018 he did so with a view to amassing shareholder support for his claim for greater remuneration, the better to negotiate with the remainder of the Board who had to date been unreceptive to his suggestions. By that time his own proposal in relation to Project Wright had appeared to be getting nowhere and certainly did not provide an urgent incentive for him to step aside from the Company. Any debate (and accompanying doubt) over his future with the Company would have been a poor starting point for negotiating a substantial award for past services as CEO.

609. I have mentioned in Section 3 above that Mr Tinkler's evidence was that Mr Wood's later email of 22 May 2018 provided an entirely accurate summary of their conversation that day. Point 5 of that email recorded that Mr Tinkler had "*discussed the situation with shareholders and had offered to resign from the Board. They had made it clear to him that they wanted him to remain involved ….*". This conversation was of course 3 months later but, although Mr Tinkler had written to Mr Ferguson on 5 May indicating that he would respect the shareholders' choice (as he saw it) as to which of them should remain on the Board, the other communications from Mr Tinkler that month were really to the effect that it was Mr Ferguson, not himself, who had to go. In circumstances where Mr Tinkler was, in May 2018, giving no outward indication that he was willing to leave the Company, I was therefore anxious to establish when it was that, as he accepted, he had "offered to resign" in discussions with "shareholders".

610. At the conclusion of his evidence, I asked Mr Tinkler on what occasion that would have been. His answers did not appear to identify a particular occasion or point in time but, in relation to the discussions at the end of January with the three representatives of the institutional shareholders, he said:

> *"Yes, I suppose, my Lord, at that particular point it was more not talking about stepping down or anything like that ….. that was more about a discussion on where we'd come over the last 10 years …."*

611. That answer is further support for the conclusion that Mr Tinkler did not go to those shareholders at the end of January with any idea of him resigning (the first option in the notes he says he prepared for the meeting on 10 January) as he had led Mr Ferguson to believe he would. In the light of the evidence of Mr Tinkler and Mr Jenkinson, it seems most likely that he put the idea of stepping down only to his friend Mr Jenkinson and from him received strong discouragement from doing so.

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

613. It is therefore no coincidence that what came out of those discussions at the end of January was not any idea of Mr Tinkler stepping down but, instead, Mr Ferguson doing so. It was Mr Ferguson who Mr Tinkler had identified in the AP-B email a month earlier as the person who had "*shafted*" the senior executives by introducing the LTIP in place of an earlier, more generous incentive scheme.

614. That is the factual setting in which I now address the Issues (with an initial reminder of the core question(s) within each one).

(b) The 10 Issues In Turn

615. **Issue 1**: Did Mr Tinkler have and raise with the Board genuine concerns about the management of the Company?

616. I would start my observations upon this issue by noting again that I have added the words "and raise with the Board" in the interests of bringing proper focus to the application of the duty to exercise an independent mind (addressed above). Making due allowance for that change, I would also note that the very terms in which the issue is framed perhaps provide an initial indication that things are not as clear as they ideally should be for the purposes of providing the springboard for an argument by Mr Tinkler (in the context of Issue 3 below) that any steps subsequently taken by him were entirely consistent with his observance of that duty. To put it another way, if it was clear as a matter of documentary record (perhaps even in the shape of formally minuted objections taken by him at Board meetings) that Mr Tinkler had formed and then raised with the Board his dissenting view on matters of corporate significance then one would have expected less time to be spent with witnesses in cross-examination in identifying the dates and subject matter of such expressions of concern. The parties' submissions, as to what action that particular duty justified or required, would have been less general and more specific to the particular matter under consideration.

617. Seven matters are identified within this issue. I have referred in Section 4 above to the exchange during the course of Mr Ferguson's evidence in which I made the tentative observation that the consequential steps to be taken by the dissenting director might well depend upon the significance of the matters raised by him. Having done so, Mr Taylor QC responded by referring to four, if not five, of the seven matters identified in support of the present issue, as well as others, and concluded with the question: "*There were a whole range of issues, weren't there, Mr Ferguson, that were being raised by Mr Tinkler with you*?"

618. As to that, I should note that the List of Issues is expressly stated to be a short summary of the issues in the case and that, in the event of conflict or inconsistency, the statements of case should prevail. Nevertheless, I think it is fair to conclude that the List of Issues does distil (by reference to paragraph 15 of the Amended Defence and paragraph 9 of the Reply) the most significant matters over which there is a dispute as to whether or not Mr Tinkler had cause to become disillusioned with the Company's strategy and management. However, as I have added to the formulation of this Issue the words designed to establish whether or not Mr Tinkler expressed any such disillusionment to the Board, I should make it clear that it is paragraph 16 of the Amended Defence (directed to the actions which it is said the Four Directors took to suppress his dissent)

which, firstly, assumes that he did express concerns over the matters mentioned in paragraph 15 and, secondly, adds two further matters of concern and questioning by him. The additional matters are the terms of Mr Brady's bonus under the Stobart Aviation Incentive Plan ("**SAIP**"), which carried a potential payment to him of £18m, and the terms of the Ryanair contract which had been discussed at the Board meeting on 7 June 2018. Those two matters were introduced by an amendment to the Defence after the List of Issues had been formulated.

619. In response to Mr Taylor's question quoted above, Mr Ferguson said in relation to the particular concerns that counsel had identified that they had been raised *"[A]t some stage, not particularly as a list of this type, but I had heard each of those concerns raised at some time. And I have discussed them with Mr Tinkler and I have discussed them with Mr Brady ….."*. That answer was directed to the mention of concerns over the share price, Mr Brady's management style (in terms of insufficient engagement with operational issues and executives being excluded from decisions on them), the "8+4" figures for 2017, and the proposed Flybe acquisition. There was therefore an acceptance by Mr Ferguson that, at some point, each of these matters had been raised by Mr Tinkler with him.

620. Mr Ferguson also accepted that, towards the end of 2017, Mr Tinkler had "*raised several concerns with me. I remember that he raised the concern that he felt that there was now too much paperwork and too much process, and that the decision-making process in his mind, which had previously really been vested in him and one or two others, was now being shared across a broader range of management*." Mr Ferguson said: "*they involved his view of the strategy and his view of the way that Mr Brady was changing and professionalising the management of the company*".

621. Although Mr Tinkler's Defence enumerates the concerns which had caused him to "*become increasingly disillusioned*" from late 2017 onwards, he had no clear recollection of the approximate dates when, he says, he raised them with Mr Ferguson. For example, in relation to what he regarded as the disproportionate amount of time Mr Brady spent in London, away from the Group's operational centres, he could not remember when the two or three conversations which he says he had with Mr Ferguson on the point took place. Mr Ferguson had no recollection of Mr Tinkler raising this point. Nor could Mr Tinkler recall when he challenged the process by which big operational decisions went to the Board (which he said had not gone down well with Mr Ferguson or Mr Brady). He said it *"[M]ight have been different discussions with both at different times but I can't actually put a date on it*" and that there may also have been discussion of it at Board meetings, albeit not minuted.

622. It is on that last point that Mr Ferguson took issue with the suggestion that Mr Tinkler had raised his concerns with the Board: "*No, I think you're wrong, there's no evidence of him bringing them up at Board meetings. We didn't have fulsome discussions about this ….*"

623. In my judgment, there is no evidence to show that Mr Tinkler either held or articulated specific concerns about any of the matters identified in paragraphs 15 or 16 of the Defence to a degree which, on my analysis above of what comes of the duty to exercise an independent mind, would be relevant to the disposal of this case. If he had held any such concerns, deep-rooted enough to be relevant in that context, I would have expected

to have seen them expressed by him at Board meetings, when there is no evidence they were.

624. The evidence of Mr Ferguson and Mr Wood was insightful on this point.

625. Mr Ferguson said:

> *"I would like to make it very clear that if he has got a clear and well-articulated argument and he has raised it with the chairman, raised it with the senior independent director, raised it with the board, and that there is documentary evidence of this, well, then I think that he may -- he may have something where he may want to take it to some of the fellow shareholders. …But only after he has been through the entire process, because otherwise anarchy would reign in companies where there are significant shareholders who happen to also be directors."*

626. Mr Wood said:

> *"Mr Tinkler should have raised those issues with the board, in my opinion – and he had plenty of opportunity to raise them with the board, and he never did so, and we could have had a sensible debate about it and then made a decision as to what to do."*

627. Those were the answers of experienced men of business and the sentiment of them not only chimed with my initial thoughts based upon the constitutional division between directors and shareholders but, in my judgment, reflects how a director's duty to exercise independent judgment should be reflected in his behaviour, as I have sought to explain in Section 4.

628. Had Mr Tinkler developed and expressed the particular concerns identified in the Amended Defence then I think the cumulative effect of them would probably have been that consideration of Mr Brady's ongoing position as CEO (as opposed to Mr Ferguson's non-executive chairmanship) would have come to the fore by the time of the July AGM. Yet Mr Brady said he was unaware of Mr Tinkler's concerns about management and strategy before their telephone conversation on 22 February 2018. Mr Brady's notes of that conversation record "*AT not happy with how the board is being run and that there is no proper [Executive Management Board] of the company*" but also "*AT was keen to explain that WB was doing a good job and he had said this to shareholders but the board was not being run properly*". Likewise, Mr Wood's evidence was that he only became aware of Mr Tinkler's alleged concerns about strategy after Mr Brady had spoken to shareholders on 1 February 2018 and discovered that Mr Tinkler had been briefing against the Board.

629. It is not sensible to attempt the exercise of establishing the dearth of such evidence within the many thousands of pages in the trial bundles. But certain answers given by Mr Tinkler himself support the conclusion that more is sought to be made of the relevant matters now, for the purposes of justifying his later actions, than he made of them at the time.

630. His Amended Defence refers to his concerns about the Company's increased spending on third party advisers, including under a potentially onerous contract with the management consultants Xinfu (who had organised the Manchester ELT event). Mr

Tinkler accepted in his evidence that the matters upon which he relied in saying that the terms of the Xinfu contract were onerous (and, he went on to suggest in the witness box, involved a share entitlement that ought to have been passed by Remco) were not known to him before disclosure in these proceedings. He said: "*I'm not sure whether Xinfu was ever mentioned at any Board meeting.*"

631. Speaking of discussions about Project Fort in December 2017, and the process of major operational decisions being remitted to the Board rather than by the executive boards at divisional level (he used the term "micromanagement") with consequent damage to executive morale, Mr Tinkler said he could not remember when it was that he challenged the process, nor whether he discussed it with both Mr Ferguson and Mr Brady. The following answer fairly reflects his position on this aspect: "*Like I say, we probably had a conversation, but to my mind I can't remember the time. I can remember having conversations and sitting down with Mr Ferguson and alerting him to it*."

632. Mr Tinkler's Boxing Day email to Mr Brady did address the "8+4" figures and contained the reference to people "*working in silos*" but that was in the context of him being unable to comment upon the overheads figure because he had not seen a breakdown. If this was said to be the expression of considered or well-founded concern by one director to another, about management style or financial performance, then Mr Tinkler was certainly being less open with Mr Brady than he was with Mr Whawell and Mr Butcher to whom he forwarded the exchanges with his "*got him rattled*" message.

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

634. I believe that the basis for a finding in the general terms I have indicated above is further established by considering the two particular matters mentioned in paragraph 16 of the Amended Defence (and post-dating the List of Issues) that are relied upon by Mr Tinkler in saying that his criticisms were aired to the extent that they needed to be suppressed: Mr Brady's **S**AIP and the terms of the Ryanair deal.

635. In relation to the SAIP, I have already mentioned that Mr Brady's bonus terms were mentioned, albeit quite briefly, at the Board meeting on 7 June 2018. Mr Tinkler's Defence also said he raised it at the AGM on 6 July 2018.

636. In his testimony, Mr Tinkler said he was "*cut short*" in his mention of the SAIP at the Board meeting. The transcript of the meeting does not support that evidence. Instead, it shows that, as well as any share entitlement under the SEIP, he wanted to have an "*understanding what the SAP would be as well, because that's cash and it's sort of get a better understanding where that would be if you know what I am saying*." In an email to Mr Hodges of 14 January 2018, Mr Tinkler had referred to the "*Ben SEIP and*

Warwick SAIP Both capable of 20m pay-out if they achieve 12% per annum for shareholders." At the meeting, Mr Ferguson indicated that any pay-out under the SAIP was "further out", Mr Tinkler said the Company was still supposed to measure its likely size and Mr Ferguson said that Remco was to keep a weather-eye on likely payments out for both plans.

637. As for what was said about the SAIP at the AGM, the transcript of the meeting shows that Mr Tinkler raised a point about the valuation at which the Group's aviation assets were taken as the starting point for computing any bonus under the SAIP. Mr Ferguson pointed out that Mr Tinkler had been "*the main architect of actually putting this together for Warwick.*" Mr Tinkler responded: "*I am happy to support that, but I was not involved with what value the aviation assets went into that SAP. I was not involved*." Mr Ferguson countered by saying that the valuation had been done through Remco and "*then agreed by the Board, Andrew, where you were a part of it*."

638. Mr Ferguson's riposte was fully justified even though Mr Tinkler was on a sailing holiday in Croatia when an email of 30 June 2017 to him and Mr Brady, explaining some of the terms (the percentage allocation to Mr Brady) was sent through. Mr Tinkler told me that he could not recall seeing the email. In relation to the basis valuation, the Company's justified submission was as follows:

> "*The basis for valuation was described in detail in the RemCo minutes from the meeting on 10 May 2017. Those minutes were approved by the full board on 4 July 2017. Mr Tinkler had access to these minutes, after all, he was on a 155 foot yacht furnished with all mod cons. The other directors knew he had access to them, even if he did not read them as he claimed*."

639. I form the same view upon Mr Tinkler's subsequent reliance in these proceedings (the language of the Amended Defence is "*It now transpires …*") upon the SAIP not having come within an exception in the Listing Rules which permitted it to be adopted without approval by shareholders. Mr Coombs had addressed the exception in Listing Rule 9.4.2 and was cross-examined upon it. For the purposes of addressing the present issue it is enough for me to note that, in December 2016, Mr Tinkler was copied into email exchanges between the Company's then Chief Financial Officer (Mark Adams) and its remuneration consultants, then known as Mercer, which made it clear that, on an interpretation supported by the lawyers Hill Dickinson, the Company proposed to rely upon the exception in the hoped-for recruitment of Mr Brady.

640. None of the exchanges over the SAIP can sensibly be relied upon by Mr Tinkler as an illustration of him raising "concerns" about Mr Brady's incentive plan, let alone in a way that supports the case that the Four Directors, hearing what he had said about it, concluded that he had to be dismissed. Of course, by the date of the AGM the Committee had already resolved to dismiss him.

641. As for the Ryanair deal, I have already related how this too was discussed at the Board meeting on 7 June 2018. If by having and expressing "concerns" Mr Tinkler means to suggest that he said at the meeting that he wanted to see the impact of the Heads of Terms reflected in a financial model showing cash flow and expenditure then, clearly, he said that in the context of him expressing the view that the deal would involve an initial drain on cash flow. Mr Brady agreed to provide a model, though in the event one was not provided before the agreement with Ryanair was signed on 12 June 2018.

But this was not anything approaching opposition to the deal by Mr Tinkler or an expression of concern that the Company should not proceed with it. On the contrary, Mr Tinkler's view was "…. *at the end of the day we are where we are. We can't not go forward with this*." As the Company pointed out in its closing submissions, Mr Tinkler had, along with the rest of the Board, been sent the draft Heads of Terms in advance of the Board meeting and they were not materially different from the terms later agreed with Ryanair. Mr Tinkler's evidence was that he had only skimmed over the proposed terms prior to the meeting as he had not had a great deal of time to look through them.

642. As to the terms agreed with Ryanair on 12 June 2018, it is not necessary for me in this judgment to explore in any contractual detail the matters addressed in evidence while the court sat in private (see Section 1 above). The terms of the Ryanair contract are confidential. It was suggested to Mr Brady that, during a live interview in 13 June (and posted on the internet by "Proactive Investors" in the form of a YouTube video which was still accessible when Mr Brady was giving evidence) in which he denied that the Company or LSA was paying Ryainair to use Southend and said that it was a "*normal commercial deal with Ryanair*", he had not been truthful. The Company's RNS in relation to the Ryanair deal, issued on 13 June 2018, had also referred to the five-year agreement with Ryanair being "*agreed on our standard commercial terms*".

643. Mr Brady recognised in his evidence that there are non-standard terms in the Ryanair contact and that, in hindsight, he should have answered differently but he was very concerned at the time about the commercial sensitivity of the contract. One can read the hesitation on his part in the written transcript of the video. He said in evidence: "*I was trying basically to avoid – I wanted to be very sensitive to the fact it was a highly commercial contract and airlines, especially Ryanair and easyJet, are extremely sensitive about the terms*." In terms of correcting the answer he gave during the interview, Mr Brady said: "*I am not sure what there is to do. …… To say it's commercially sensitive, we could do that, We'll consider doing that. Good idea.*"

644. In relation to the terms of the RNS, Mr Brady was less apologetic. He said that, having been involved in hundreds of airport and airline deals, the structure of the deal was standard. He also said that the terms of the RNS were agreed with Ryanair. In one answer, he said: "*Again, in my view this was a general standard structure, and Ryanair were obviously also part of that RNS and they were part of producing it because they also don't want to draw anything to their commercial terms which is why we use that language and that was the basis we were using that language*."

645. Although this part of his evidence obviously caused Mr Brady some discomfort, I do not believe his failure in June 2018 to give a deflective answer during the interview, of the kind which he now recognises would have been better, really leads anywhere in my determination of the issues between the Company and Mr Tinkler. It is true that paragraph 16 of the Amended Defence asserts that Mr Tinkler's dismissal from employment was in part a response to him raising concerns about the Ryanair contract. But I have found that the only occasion when he addressed his mind to the deal, 7 June 2018, was not one on which he expressed anything like the type of concern which might support the inference of retaliatory action by the Four Directors. As to the detail of the Ryanair contact (unexplored in this judgment but by reference to which Mr Brady was taken to task by Mr Taylor QC) these were not matters raised by Mr Tinkler with the Board before he was dismissed. So much is obvious from the language of the said

paragraph 16 addressing its terms (again, using the language "*It now transpires ….*") and from the fact that reliance upon the YouTube video first emerged in Mr Tinkler's witness statement of 14 October 2018. I accept the Company's position that any concerns which Mr Tinkler may have had about the Ryanair contract were not ones which the Four Directors were either aware of, or acted upon at the time of his dismissal.

646. **Issue 2**: Did Mr Tinkler reach an agreement with any of Mr Hodges, Mr Woodford and/or Mr Day to take steps in pursuit of the Objective? That is the principal question raised by this issue, though there are other components which reflect the necessary components of an unlawful means conspiracy addressed in Section 4 above (and I would note that the way the parties worded the first component left it open as to whether knowledge that the means were unlawful was a condition of liability, as I have concluded it is not).

647. The Objective is said to have been a change in the composition of the Board (in part by the replacement of the Chairman, Mr Iain Ferguson) with a view to ensuring that Mr Tinkler's influence over it was such as to safeguard his personal interests.

648. This is the conspiracy allegation, from which Mr Jenkinson has since disappeared as a suggested participant. Also, as I have already noted, the Company did not succeed at the PTR in bringing Mr Whawell within the scope of its conspiracy allegation.

649. I will therefore confine my observations upon Mr Jenkinson and Mr Whawell to those which I think it is necessary and appropriate to make for the purpose of casting light upon Mr Tinkler's intentions and actions in relation to the alleged Objective.

650. As both Mr Jenkinson and Mr Whawell gave evidence upon some of the material events that are said by the Company to be relevant to the exercise of determining this part of the case against Mr Tinkler, it is necessary for me to form an assessment of them as witnesses whilst recognising that the Company no longer seeks to implicate either of them in the alleged conspiracy. Accordingly, I ought to be discriminating in any criticism of either. I have already made general comments on the quality of their evidence when introducing them in Section 3 above.

651. Mr Jenkinson's answers were clear and direct. I have no difficulty in understanding the Company's decision, after Mr Jenkinson had given evidence, to abandon the notion that he had conspired with Mr Tinkler. Broadly, the true position, so far as the court is able to piece it together between the two individuals, is that Mr Tinkler relied heavily on Mr Jenkinson in testing his ideas about enhanced remuneration and stepping down from the Company. Mr Tinkler's own evidence confirms that he regarded Mr Jenkinson's views, as a shareholder, as probably being more influential than any other.

652. To describe Mr Jenkinson as a sounding board might risk overlooking the friendship and strong loyalty that clearly existed between them. Mr Tinkler had in Mr Jenkinson a reliable supporter and, in my judgment, it was Mr Jenkinson's reaction to Mr Tinkler's suggestion that he would be standing down that resulted in what I have concluded to have been a volte face on that front. But, certainly by late 2017, Mr Jenkinson was speaking as an outsider to the Board (allowing for his ongoing contact with Mr Whawell only, on energy matters, in place of his previous general advisory role) and in any event

he was fully entitled to speak his mind as a significant shareholder in the Company. Mr Jenkinson's unprompted statement at the end of his evidence, to which I have already alluded, was:

> *"I would just like to say to everybody, my Lord, but basically on our Stobart side, it's pretty important to us is Stobarts, to maintain it and go forward, and having the right structuring to go forward is very important."*

653. Whether or not he is right in his conviction (which I read into that statement) that, going forward, the Company would be better off with Mr Tinkler rather than the current management at the helm - my impression was that nothing that I might say in this judgment in relation to corporate governance issues is likely to dent his support for Mr Tinkler – is not a matter for the court. However, it is worth making the obvious point that there was nothing wrong in Mr Jenkinson having previously expressed such views in response to Mr Tinkler's approaches. His concluding statement shows that he believes he has the Company's best interests at heart.

654. Mr Whawell's evidence was, in my assessment, anything but clear and direct. In hindsight, I can see why the Company applied, unsuccessfully, to bring his involvement within the embrace of its conspiracy allegation. If these proceedings had not been expedited, and the Company's application made at an earlier stage than the PTR, I suspect that its case about Mr Whawell's contribution to the first component of an unlawful means conspiracy (see paragraph 543 above) coupled with invocation of the court's ability to draw inferences in the light of the evidence at trial, but with no claim for relief being sought against him, might have led to a different outcome on that application.

655. Unlike Mr Jenkinson, Mr Whawell was an insider and, as CEO of the Energy Division, in a very senior management position within the Group. But, like Mr Jenkinson, he was and clearly remains "a Tinkler man" (Mr Whawell had worked with Mr Tinkler since 2001) and he seems to have been content to adopt the general line that if Mr Tinkler wished for something then it should be so. Mr Coombs considered Mr Whawell to have been a "ringleader" and that was no doubt based upon his intervention at the June ELT event in Manchester. My impression of Mr Whawell is that he was more of a willing stoker of Mr Tinkler's aims and ambitions and, from a position of personal loyalty built up over many years, was content to support him without much thought, if any, as to what Mr Tinkler might have been saying to the Board, nor whether his influence was becoming a malign one from the Company's perspective.

656. Because Mr Whawell appears to have been content to hear only Mr Tinkler's side of things, in June 2018 he was communicating with him on the basis that the Board had hatched "*a plot to oust you*". That is a clear indication that Mr Tinkler had not shared with Mr Whawell (as he did with Mr Jenkinson) his earlier idea of stepping down as director. It seems that, although he had found in Mr Whawell an unconditional supporter for his grievance over the level of past remuneration, as indicated by their exchanges during Christmas 2017, Mr Tinkler had not given him any indication that he had been proposing to leave the Company. On 27 March 2018, Mr Tinkler had sent Mr Whawell the link to the Business Law Donut website information about shareholder and boardroom disputes, though Mr Whawell told me that he could not remember whether or not he opened it.

657. So far as matters relating to the future composition of the Board is concerned, Mr Whawell's witness statement began with events in May 2018. As I say, Mr Tinkler does not seem to have told him that in early 2018 he had raised with Mr Ferguson the idea that he would be stepping aside after 10 years' hard work. The most Mr Whawell appears to have known, and which he accepted by reference to an email exchange with Mr Tinkler in September 2017 - in which he, Mr Whawell had said *"Let me know when you've had enough. I'll walk away with you."*- was that Mr Tinkler was unsettled after stepping down as CEO. At that time, September 2017, Mr Tinkler's plans for Project Wright, which formed a significant part of his later idea of leaving the Company, had yet to be formulated. By 5 May 2018, Mr Whawell was indicating to Mr Tinkler (in response to him having been sent a document about directors' duties and corporate governance in Guernsey) that the "*solution* [was] *clear*", though in his evidence Mr Whawell was unable to recall what he may then have had in mind: *"The solution could have been that the chairman was to be replaced. I don't know."*

658. So far Mr Whawell's evidence about his involvement in events at the end of May and early June 2018 is concerned, and his general attempt to portray his actions as not having been at Mr Tinkler's bidding, I found this to be wholly unconvincing.

659. The intimidating text message he sent to Mr Laycock about the draft of the 29 May RNS (in the middle of the night, having already tried to phone him, and this while Mr Whawell was on holiday in Mallorca) can only have been because Mr Tinkler had requested action by him. Mr Whawell vehemently denied that he had attended the June event in Manchester with a prepared script, as he had not been anticipating a Q&A session, even though he sent an email to Ms Brace later in the month with an apparently verbatim record of his statement. His testimony that he remembered it because he thought it was a great statement and that his email was not intended to read as an exact quote did him no credit.

660. Mr Whawell's evidence in relation to his drafts of the ELT letter (with the involvement of Mr Tinkler's solicitor Ms Moran) and whether he sent a first one to Mr Tinkler, from which the reference to Mr Tinkler was then excised, or discussed either draft with Tinkler, was also implausible. Mr Whawell told me that he had not wanted Mr Tinkler involved in it but the chronology of events and the later release of the ELT letter and the Letter to Shareholders within minutes of each other shows that Mr Tinkler's fingerprints were all over it. Following discussion with Mr Whawell, he gave Ms Moran a list of email addresses for those who had attended the ELT event *"for the letter"*. So too, Mr Whawell's evidence about him putting Mr Tinkler in touch with Mr Conlon, who was unwilling to subscribe to the letter, did not ring true. I do not accept Mr Whawell's account that this was simply so that Mr Conlon might find out more about Mr Day. Likewise, Mr Whawell (from his private email address) offered input into the Letter to Shareholders on 8 June 2018.

661. By early July, and their joint instruction of Collas Crill with a view to obtaining an injunction against Jupiter in Guernsey, Mr Whawell was acting openly alongside Mr Tinkler.

662. All in all, I found Mr Whawell's evidence to have been deeply unsatisfactory in providing me with his part of an informed picture of events and his unalloyed support for Mr Tinkler against the remainder of the Board.

663. Those who remain implicated in the alleged conspiracy are Mr Hodges, Mr Woodford and Mr Day.

664. In my assessment of Mr Hodges' evidence I should note that I have not had cause to consider the contractual or other terms under which his firm Cenkos acted as one of the Company's brokers before it resigned at the end of May 2018. I should also repeat my general observation that I found Mr Hodges to be a straightforward witness. In essence, he was unapologetic about his separate communications with Mr Tinkler over matters which involved a divergence between Mr Tinkler and the Board. Recognising those matters, it nevertheless appears to me that Mr Hodges got too close to Mr Tinkler (in his developing differences with the Board) than he should have. There is an indication in the documents both that Ms Moran reminded Mr Hodges in mid-May of the need for Cenkos to be independent and that, by the end of that month and before Cenkos took the step of resigning, Mr Ferguson had it in mind to review the Company's relationship with the brokers. Cenkos were the independent brokers to the Company but I think Mr Hodges was guilty of a degree of ill-informed partiality towards Mr Tinkler over other members of the Board.

665. That said, I recognise that, as matters moved close to the AGM, Mr Hodges did cease to have private contact with Mr Tinkler. He also told me, and I accept, that neither he nor the Board knew that Mr Elgar was to speak at the AGM apparently on behalf of Cenkos, that he was surprised to hear him say it and that the circumstances in which Mr Elgar came to say it were currently being investigated.

666. However, I have concluded that Mr Hodges' prior dealings with Mr Tinkler provided a mental foothold for his preference for the Tinkler view of things. For example, his evidence was that he thought the Four Directors had behaved "*abysmally badly*" and that, by the end of May, *"[T]he sensible thing, it seemed to me, the sensible course, was for Philip Day to come in as chairman with Mr Tinkler as an executive director and they could sort out this mess from there.*" For Mr Hodges to have held that view indicates to me that he did not have a complete grasp of Mr Tinkler's part in creating that "mess", nor of Mr Day's reticence to engage with Mr Ferguson over the steps that might see him, Mr Day, put up for the Chairman's role at the AGM. That said, it is right that I should record that Mr Hodges' view of the actions of the majority was that *"having heard their testimony in this court that view hasn't changed*."

667. In relation to the terms of the 29 May RNS, Mr Hodges expressed himself in similarly trenchant terms. He said that it was *"one of the most fundamentally dishonest documents I've seen in 37 years"*, that it had *"gone beyond the pale"* and *"[I]n 37 years, my Lord, I have seen corporate skulduggery before, and I have seen worse than this but, in my opinion, what they did on 29 May is right up there."* When I heard these words from the witness box I must say that I was inwardly surprised but that was not because I had by then formed anything like a clear view about whether the terms of the 29 May RNS, or some of them, were either justified or condemnable. It was instead because (allowing for the fact that almost all of Mr Hodges' years followed the Big Bang and the regulation which came with it) my perhaps cynical mind thought this man of the City might perhaps have seen a lot worse.

668. Mr Hodges was a witness of fact and the opinion he expressed about the 29 May RNS is ultimately a matter for me (if only in relation to the standards required of a director rather than any allegedly defamatory aspects of it which will be an issue in Mr Tinkler's

libel claim). Nevertheless, I have no reason to doubt the sincerity of his own view and his professional experience of such matters has given me further pause for thought about that document. My conclusions upon it are set out under Issue 4 below.

669. The allegation against Mr Hodges is that he was prepared to conspire with Mr Tinkler in the pursuit of the Objective. Mr Leiper QC put to Mr Hodges that he had been prepared to act in Mr Tinkler's interests and not those of the Company. Mr Hodges denied that. He also denied that he had any understanding that Mr Tinkler would be acting in breach of his duties to the Company. He said: *"No, that wasn't my understanding then or now."* And, in response to the suggestion that he played a part in putting Mr Tinkler in the position of being able to increase his remuneration from the Company, Mr Hodges said:

> *"No, that's completely wrong. I think I've indicated on several occasions that I wasn't sympathetic, either in November '17 or January '18 on this subject, and by the time we get to May, June, July, we've been overtaken by rather more pressing events. So the answer to that question is a direct, no, that had nothing whatever to do with it."*

670. I accept the truth of these answers from Mr Hodges. Each of them is consistent with an objective review of the meetings and communications in which he was involved. Doing so leads me to conclude that he was not a party to any conspiracy. Getting too close to Mr Tinkler for Cenkos' own good is something which, on the facts as I find them in relation to Mr Hodges, falls a long way short of him having participated in an unlawful means conspiracy.

671. The second alleged co-conspirator is Mr Woodford.

672. Mr Woodford is not a friend of Mr Tinkler though he has had a good professional relationship with him over the last 10 years or so since the Company became listed. Mr Woodford has also known Mr Hodges professionally for about 30 years.

673. Even allowing for the nature of Mr Woodford's role as a fund manager which, as he said, involves many investment proposals being put to him, I was surprised by the vagueness of Mr Woodford's recollection of the proposals in relation to Project Wright. One year on, he could not recall whether he had been shown Mr Tinkler's "Investor Working Step Plan" (he was clearer that he had not been shown the pictorial representation of it prepared by Mr Buchanan) and said that he could not remember the details of the proposal. He said that part of the reason for him not recalling was because he did not want to spend too much time thinking about a deal that was not financeable by WIM so long as the investment vehicle was a private one. I have already addressed Mr Woodford's testimony in relation to Project Wright in the context of my summary of the relevant events. His evidence shed no light, therefore, as to why Mr Tinkler encouraged Mr Day to think that he, Mr Woodford, liked the deal but would need a listed vehicle to invest or why the Plan showed "NW" (or, perhaps more accurately, WIM) acquiring a relatively modest 2.5% stake, for £0.5m, in the private vehicle rising to an investment of just under 30% in the publicly listed NEX.

674. However, Project Wright (which came to nothing on either proposal promoted by Mr Tinkler and Mr Brady respectively) is of no relevance to the conspiracy allegation, save perhaps as background in demonstrating Mr Tinkler's appetite for greater personal

reward, and a poor recollection on Mr Woodford's part on such a tangential matter, involving Mr Brady, is not a promising start for extending the conspiracy allegation to cover his involvement.

675. In relation to his later involvement (such as it was) in connection with Mr Tinkler's proposal to remove Mr Ferguson, Mr Woodford had first got wind of the tension between them as a result of his brief chat with Mr Tinkler on 16 April after Mr Woodford and Mr Day had met in connection with House of Fraser. Mr Woodford explained that from around May 2018 he had a number of conversations with Mr Hodges, with Mr Hodges updating him about once or twice a fortnight. Mr Woodford said that these reflected his obvious interest in the developing situation and its potential impact on the share price. He said he did not have any further conversations with Mr Tinkler until 27 May 2018, following the 25 May RNS, when the telephone call which also included Mr Hodges, Mr Day and Ms Moran took place. Once it became apparent to Mr Woodford that it was not going to be possible for Mr Tinkler and Mr Ferguson to co-exist on the Board, there was in Mr Woodford's view *"really no grey area"* in that Mr Tinkler's achievements in creating value for the Company meant that he would support Mr Tinkler.

676. Mr Woodford said that by the time he came to write his letter on 22 May 2018, requesting Mr Ferguson to stand down, he had spoken to Mr Dobell as well as Mr Hodges. In response to questions from Mr Leiper QC suggesting he should have done so in response to Mr Ferguson's request that Mr Woodford meet with him and Mr Wood, which Mr Woodford had reluctantly agreed to do on 21 May but later cancelled, he said there was little point in seeking to persuade them of the value of Mr Tinkler if they did not already appreciate that. His assistant's message asking (in generally discouraging terms) whether Mr Ferguson still wanted a meeting, which Mr Woodford might still be able to fit in, had said Mr Woodford was "*aware of the situation at Stobart*" and wanted Mr Ferguson to know that he was "*very strongly supportive of Andrew Tinkler*."

677. The day before he signed the letter of 22 May Mr Woodford had received from Mr Wood, in his capacity as senior independent director, the email requesting a meeting to discuss *"an ongoing serious governance matter"*. It does follow, in my judgment, as Mr Leiper suggested, that Mr Woodford did not take any steps to establish the view of the Board so that, as he put in his answer, he was only *"vaguely aware of the nature of the dispute"* and was acting largely on the basis of what he had been told by Mr Hodges who he recognised was actively campaigning for Mr Tinkler. The result was that Mr Woodford was acting on *"the imperfect knowledge"*, which he said shareholders often have to act upon, and by not engaging with the Board he certainly did not seek to improve upon it. Had he done so he would probably have discerned that Mr Hodges' own information was deficient and, therefore, his judgment on the dispute probably also skewed.

678. Whether or not it also follows, as Mr Leiper suggested, that Mr Woodford was in dereliction of his duties as a fund manager in failing to hear the Board's views upon the matter is, however, not a matter for me to decide, at least not in the absence of any positive action on the part of Mr Woodford which was pertinent to the Objective. Mr Woodford's public announcement on 18 June 2018 that, once he became aware of the Company's governance issues, he undertook "*extensive due diligence*" to establish the cause of the instability certainly seems questionable in the light of his reaction to the

overtures of Messrs Ferguson and Wood. But, in relation to the Objective, the only things for which Mr Woodford was responsible were writing the letter of 22 May, arranging and participating in the telephone call on 27 May which involved Mr Day, giving Mr Tinkler further encouragement by reacting warmly ("*Great Letter Andrew*") to the Letter to Shareholders, and causing WIM to vote at the AGM against Mr Ferguson and in favour of Mr Tinkler. These were all steps that Mr Woodford, representing a significant shareholder in the Company, was entitled to take (and it must be noted that the first and second steps respectively involved Mr Fox, his firm's general counsel, and Ms Moran of K&L Gates). In my judgment, these steps cannot properly be categorised as reflecting his personal part in any conspiracy.

679. There is also the point that, however one-sided his information about the genesis of the dispute (and the circumstances in which Mr Tinkler had forced a choice between himself and Mr Ferguson) may have been, Mr Woodford clearly thought that by supporting Mr Tinkler he was doing the right thing for WIM's investors. During his evidence Mr Woodford made repeated references to his investment judgment reflecting his view that Mr Tinkler was the value creator who was essential to the Company's business. In my judgment, no sensible answer can be given to the rhetorical question raised by Mr Woodford in his witness statement as to why, as the fund manager of a substantial shareholder in the Company, he would act with the intention of harming the Company. That is another fatal blow to the conspiracy allegation based on Mr Woodford's involvement.

680. For these reasons, I find that the conspiracy claim against Mr Tinkler based upon Mr Woodford's involvement is not made out.

681. The third participant alongside Mr Tinkler in the conspiracy alleged by the Company is Mr Day.

682. I think it fair to me to say that, by the Spring of 2018, the relationship between Mr Day and Mr Tinkler was closer than each of them suggested, albeit I recognise that Mr Day lives abroad most of the time. Mr Day's witness statement said that he believed he first met Mr Tinkler in 2012 at a business dinner and that they had bumped into each other on a few occasions since. In his statement, Mr Tinkler described Mr Day as a business acquaintance, saying they have only met a handful of times and they are not personally close. This evidence underplays their true relationship.

683. Allowing for the fact that Mr Day lives abroad for most of the year and that his English property is a castle within an estate, he and Mr Tinkler are neighbours in Cumbria. They both shoot and Mr Tinkler sometimes does so on Mr Day's estate though, reminded by a reference indicating that Mr Tinkler had done so in 11 January 2018, Mr Day was unable to recall whether they had shot together during that game season. But they did meet for a couple of hours at the Dubai Gold Cup in the March and it was Mr Tinkler who arranged the introduction of Mr Day to Mr Woodford so that the two of them might discuss the potential opportunity in relation to House of Fraser. Mr Tinkler enjoyed Mr Day's hospitality at his Cumbrian home, albeit in the company of over 400 hundred other guests, during the rugby sevens event organised by Mr Day (through Edinburgh Woollen Mill) at the end of April 2018.

684. Email communications between Mr Day and Mr Tinkler over the site visit to the anaerobic digester on 16 May 2018 show they were on familiar terms and enjoyed each

other's company. After that site visit, Mr Day flew back to Spain and attended a press event, saying in an email to Mr Tinkler on 18 May that he ought to come to the next one of its kind. Before a postscript indicating that Mr Day had arranged for Mr Whawell (who he had met for the first time on that site visit) to be flown privately to a sporting event at his own expense, Mr Day signed off: *"Take care mate and speak soon."*

685. Mr Tinkler had included Mr Day as a consortium member in his proposal for Project Wright, though Mr Day said he did not get into the detail of the proposal as it was too convoluted for him to be interested.

686. So far as Mr Day's dealings, such as they were, with other members of the Board were concerned, in my judgment they lacked sincerity on his part. The unavoidable fact, from his perspective, is that in the event he did not agree to stand as Chairman. This leads me to conclude that Mr Day was from around mid-May 2018 instead content to play his part in Mr Tinkler's plan to reassert influence over the direction of the Company by offering himself up as a stalking horse. He did so without having held any genuine intention of becoming Chairman, or certainly not one that could be said to be the product of consideration by him of the Company's interests independently from the exhortations of Mr Tinkler. In putting it like that, I bear in mind that, by late May 2018, Mr Day was also being encouraged to consider the Chairman's role by Mr Woodford (whose own understanding of the wider picture was impaired as I have explained) but, for the reasons given below, I believe Mr Day had agreed to play his part for Mr Tinkler before Mr Woodford added his weight to the cause.

687. During Mr Day's cross-examination he was taken to the terms of an email which Mr Brady had written on 31 May 2018 in relation to the views expressed to him (Mr Brady) by the representatives of Invesco in the meeting they had that day with Mr Day. Mr Brady had reported to his fellow directors (not including Mr Tinkler), Mr Arch and Mr Foster that Mr Day had said he was independent, that the situation needed sorting out as soon as possible, that the "*Chairman was weak, Operating Chairman needed*." Mr Brady's email went on:

> "*Invesco challenged his independence and PD claimed only met AT a couple of times for 20 minutes and this was a NW request/favour. They also asked about a connection to AT given that the [sic] have a castle within 10 miles of each other in Cumbria*."

688. In his evidence, Mr Day said about this: "*I don't think there was a discussion about a couple of times for 20 minutes. I certainly did say that I'd actually only met Andrew a handful of times. That was my comment. And I certainly did say to Mark and Fred that my only interest in this was to act as a completely non-executive chairman.*" When I asked him whether he thought his handful of times reference was an accurate summary, Mr Day said: "*I think that was probably overplayed, I think – I think a handful of times, five or six times yes*." Allowing for the fact that I did not hear evidence from Mr Barnett or Mr Bouverat of Invesco, I conclude that in his discussion with them Mr Day did overplay his suggested independence from Mr Tinkler.

689. My general impression is that, now the Company has sought to implicate him in the Company's conspiracy claim against Mr Tinkler, Mr Day has sought to put some distance between himself and his friend Mr Tinkler.

690. There are other aspects of Mr Day's evidence that I found to be unsatisfactory. For example, it did not strike me as credible that he did not raise with Mr Tinkler, either when travelling together on 16 April or at the sevens tournament at the end of that month or at the site visit on 16 May, and no matter how briefly, whether anything had come of him putting forward Mr Herring as a potential Chairman for the Company. And in his testimony Mr Day indicated that it was from Mr Herring (not Mr Tinkler as indicated in Mr Day's witness statement) that he first became aware that there were some difficulties in the Company's management and it was that which prompted him to ask Mr Tinkler about them. The answer Mr Day gave about not having read the private and confidential document in relation to Project Park, which Mr Tinkler sent him on 15 May 2018, when his email in response clearly indicated he had - Mr Day said "*It wasn't a lie, it was basically being courteous*" –inevitably leaves me in doubt as to what to believe on that point. I was also struck by the way in which Mr Day, in his testimony, seemed keen to anticipate the telephone call on 27 May 2018, which Mr Woodford asked him to join, before Mr Leiper had even asked a question about it.

691. That was the call on which Mr Tinkler, Mr Hodges, Ms Moran as well as Mr Woodford were present. It was a significant conversation because Mr Day told me that Mr Woodford, who he had met for the first time the previous month, had asked him if he would join the call, from Spain, to give advice on one of his investments ("*it was as general as that*") and it ended up with Mr Day indicating conditional preparedness to take on a non-executive role within the Company. Within days of the conversation he was in England meeting the representatives of the other three institutional shareholders.

692. These observations about his evidence lead me to conclude that in his evidence Mr Day was not being frank about the true extent of his discussions with Mr Tinkler in connection with the Company's management issues. I believe that, by the time of the telephone call on 27 May, Mr Tinkler had told Mr Day more about his dissatisfaction with the management of the Company than Mr Day was prepared to admit. His answer that he did not know what Mr Tinkler meant when he said in his email of 18 May 2018 that it was "*D-Day*" for Mr Ferguson was unconvincing. Mr Tinkler would not have written to Mr Day in such terms if he was not already *au fait* with such matters. Similarly, Mr Day's explanation that his *"let's hope!"* message to Mr Tinkler on 31 May 2018 referred to the hope that there would be sufficient shareholder support for Mr Ferguson to be persuaded to step down quietly, with less impact for the Company, did not fit with him echoing at the time Mr Tinkler's observation that "*they are getting desperate*", written as that was in the light of the 29 May RNS.

693. This brings me to the question over the degree of complicity on Mr Day's part and whether he and Mr Tinkler had a sufficiently similar objective for the court to be able to conclude they were acting in combination to bring about certain action and, if so, what action they had agreed upon. The point is important because it goes to the third component of the conspiracy claim and whether it can be said that the unlawful acts were carried out pursuant to the agreement or understanding between them. It is also relevant to any inferential finding that they intended to harm the Company.

694. On my analysis of the authorities in Section 4 of this judgment, it matters not that Mr Tinkler and Mr Day may not have appreciated that Mr Tinkler's actions were unlawful ones if they were knowingly carried out in accordance with an agreement or understanding between them. This court cannot realistically aspire to establishing, at least not with anything approaching complete confidence, what actually was in their

minds and, in particular, whether Mr Day was a fully informed accomplice so far as his part in Mr Tinkler's machinations was concerned. They will have their own respective thoughts about that but, viewed objectively, my conclusion is that Mr Tinkler had probably not enlightened Mr Day about his grievance over remuneration which was really the spark for Mr Tinkler going on the offensive in pressing for change within the boardroom. Instead, he appears to have piqued Mr Day's interest in the Company with discussion about certain aspects of the Company's business (specifically Duranta) and in relation to Stobart Capital (which had prepared the document on Project Park).

695. My general impression of Mr Tinkler, in the light of the evidence in this case, is that he is quite a manipulative person who was capable of not putting Mr Day fully in the picture as to what his intentions were. I refer to my conclusion that Mr Tinkler does not appear to have given Mr Whawell the background information about his intention to resign when his own proposal within Project Wright was still live. There is also what I regard to have been Mr Tinkler's fanciful suggestion in the witness box that his thoughts in January 2018 about a possible transfer of shares from the EBT, as a reward for past performance, were not just about him but other employees as well. I believe that also shows he is prepared to give others an impression which masks his true intent. Further, although I have said that Mr Tinkler and Mr Day each underplayed their relationship and alliance, I am not persuaded that it was sufficiently close that Mr Day can be taken to have known what was in Mr Tinkler's mind, as a closer friend in more regular contact might have known. On my assessment of the relationships, Mr Day was clearly not as close to Mr Tinkler as each of Mr Jenkinson and Mr Whawell were.

696. The evidence adduced at trial leaves me in little doubt that, for his part and in the sense of how its business has been built up and the direction it should now take, Mr Tinkler does still appear to regard the Company as very much "his" baby, even though he has a minority (though substantial) shareholding and had agreed to stand down as CEO in 2017. Mr Day would have known this and would have been anxious to assist his friend who no doubt also gave him the impression he was being forced out of the Company. I have reflected, in particular, upon Mr Day's discourteous treatment of Mr Ferguson's requests, in June 2018, for the basic information that would have enabled his name to be put forward for the Chairman's role. That might be an indication of greater awareness on the part of Mr Day of Mr Tinkler's plans and ambitions (to which I turn below) but, on balance, I conclude that it reflected a willingness to assist that was motivated by a much vaguer understanding on his part as to what Mr Tinkler was really up to.

697. In the light of that conclusion and also the chronology of events involving Mr Day, there can be said to be a real obstacle in the way of a finding that unlawful acts were carried out pursuant to an express or tacit agreement between the two men. The chronology of events relevant to Mr Day indicates to me that the most obvious candidates for categorisation as unlawful acts (on the part of Mr Tinkler) were not done by agreement with Mr Day but, instead, were committed in the course of getting Mr Day on side in the first place, so that Mr Day would then do his bit in support of Mr Tinkler's and his contest with the rest of the Board. I refer to Mr Tinkler's providing Mr Day with the Project Park document on 15 May and with the Duranta budget on 17 May 2018.

698. However, the Company's case is that the Objective involved Mr Tinkler advancing his personal interests at the expense of the Company. If that was established and Mr Day

was a part of it, that would mean that, after Mr Day expressed his willingness to be considered as Chairman later in May 2018, Mr Tinkler continued to act contrary to the best interests of the Company. That might be enough to implicate Mr Day with sufficient awareness that, with his support, Mr Tinkler was continuing to act in breach of his fiduciary duty of loyalty and in a manner that the court would categorise as unlawful. The Company invites me to infer that the plan was all about getting Mr Tinkler into a position where his expectations of proper reward, as he would have it, for the Company's past performance might then be satisfied.

699. As to what were in fact Mr Tinkler's plans and ambitions, my conclusion in relation to the actions of Mr Tinkler and Mr Day is that they reflected what in hindsight can be said to have been part of a rather ham-fisted attempt by Mr Tinkler to wrest back some control over the Company's direction. The lack of clarity as to how that control would manifest itself beyond securing Mr Tinkler's place on the Board and getting the non-executive Mr Ferguson off it - Mr Jenkinson's New Year message of *"let's pull it all back"* comes to mind – is not clear to me even now.

700. The opacity of any "plan", beyond the ambition of making sure Mr Tinkler was firmly entrenched on the Board at the expense of Mr Ferguson (and, as he knew from the 25 May RNS, Mr Wood and Mr Coombs also) is one of the reasons why their efforts strike me as having been so clumsy. At times, I have had to remind myself that I am concerned with the affairs of a substantial listed company rather than a small private one, or a partnership, where behind-the-scenes agitation of the type Mr Tinkler was prepared to in engage in could have been most effective in disposing of tension within its management.

701. Allowing for the fact that he had only subsequently learned of it - I recognise Mr Tinkler could not have predicted it when he started agitating in the Spring of 2018 - the reaction of Mr Coombs and Mr Woods to any removal of Mr Ferguson was such that, had that first step in his plan been achieved, the composition of the Board would in fact have been different from its present one. Mr Ferguson said in evidence that his own view was that Mr Tinkler saw the ousting of the Chairman as "*part of a process*" to take control of the whole Board and Mr Brady referred to having "*effectively a board coup*." Mr Grimes, giving evidence for Mr Tinkler, said that he perceived the AGM as Mr Tinkler "*taking back control of the Company*."

702. I also note that the wholly negative terms in which Mr Whawell wrote to Mr Tinkler on 8 May 2018 in relation to Mr Brady's "achievements" during his first year as CEO. That email and the exchanges between them (and Mr Butcher) between Christmas and the New Year indicate that Mr Tinkler was happy to encourage such complaints about Mr Brady's management style, which echoed in part what he had said to Mr Ferguson at the end of the year about there being "*too much paperwork and too much process*" under Mr Brady's direction. Given that Mr Tinkler had led Mr Brady to think he was doing a good job during their conversation on 22 February 2018 (and that the complaint he then voiced was directed to the lack of a proper executive management board) he was being disingenuous in his discussions with Mr Brady.

703. However, it would be conjecture on my part to assume that Mr Tinkler would then have turned his fire on Mr Brady or that, were he to do so, it would have been effective. I imagine that, egged on by Mr Whawell and the sentiments he and Mr Butcher were expressing during Christmas 2017 about Mr Brady's management style and the *"need*

to get back to basics", that Mr Tinkler would in that scenario have been pressing at Board level for changes in direction, if not personnel. I also suspect that, consistent with the nature of the corporate information Mr Tinkler shared with Mr Day in May 2018 (Duranta being within Mr Whawell's domain of the energy business) that Mr Tinkler wanted to get to a position where the management spheres of influence matched what Mr Butcher had said in his mail of 27 December 2017 should be the areas of executive responsibility. Mr Day's email to Mr Tinkler of 18 May 2018, written in its familiar terms mentioned above, indicates that he had offered his views upon certain aspects of the Company's energy business during the site visit two days earlier: "*All the points I have discussed with you about what no to do they are doing.*" But, again, this is really nothing more than surmise on my part as to where Mr Tinkler saw his plans ending up.

704. I have no difficulty in drawing the inference that it was Mr Tinkler's grievance about remuneration that caused him to target Mr Ferguson. His message to Mr Whawell and Mr Butcher on New Year's Eve shows that he held Mr Ferguson accountable – to the extent that Mr Ferguson and Remco needed to be "*ashamed of themselves*" – for introducing the LTIP in place of an earlier 2012 management incentive plan.

705. However, in the context of the affairs of this publicly listed company, it is a quite separate matter to conclude that Mr Tinkler and Mr Day acted with the intent to injure the Company. Only Mr Coombs' evidence really went so far as to suggest that the aim was one of direct financial gain. In putting forward his justification for the 29 May RNS, Mr Coombs referred to Mr Tinkler's "*value set and his approach to doing business, and had our board not been in place*." He said the RNS was designed to show: "*These are the likely things Mr Shareholder, reading this RNS, that you will get related-party transactions at an undervalue, et cetera, if you vote in Andrew Tinkler and his team …*".

706. Even though an intent to injure the Company may be shown by establishing an intention that Mr Tinkler should benefit personally at the expense of it, it is because his plan was so obscure in its aim and concerned the affairs of a public company, with an otherwise properly functioning Board and independent shareholders overseeing such matters, that I feel unable to attribute to the two alleged conspirators any realistic expectation of Mr Tinkler securing such a benefit.

707. Mr Tinkler had been advised by Mr Hodges in November 2017 and again in January or February 2018 that there was no prospect of him securing a retrospective award without shareholder approval. Mr Hodges referred in his evidence to the heavy regulation of this area and the presence of compliance departments within institutional shareholders.

708. The last document I was shown at the trial was Remco's Remuneration Report for the year to 28 February 2017. Subsequent reflection upon it reveals that it was a draft of May 2017 awaiting completion through the insertion of certain figures which contained reference to the Remuneration Policy approved at a general meeting on 24 October 2014 and referred to the intention to present a new Remuneration Policy for approval at the AGM on 29 June 2017 (and I note that the ISS Report prepared for the 2018 AGM records that it was then approved, so as to last for a 3 year period). However, it was envisaged that the new Policy would have only minor changes from the existing one and they were the subject of comment in the draft Report. I find it impossible to

steer my way through the various acronyms used in it to reach a clear conclusion about what the Policy from June 2017 is likely to have entailed.

709. Mr Leiper says it is clear from the document that not every remuneration issue would have to go to shareholders and points to the limited discretion available to Remco in implementing the Policy without reference to them. In that he appears to be right, just as I think Mr Taylor is correct to say that the discretion could not be relied upon to "*make a massive retrospective payment of millions of pounds which is the way the case has been put*." I note, for example, that the draft Report made reference to Remco having a discretion to grant a maximum LTIP up to 150% of salary, or 200% in exceptional circumstances.

710. The Company's 2018 Annual Report shows that Mr Tinkler's basic salary before other taxable benefits, pension and bonus was £324,400. I recognise that a discretionary award of the kind that the draft Report appeared to contemplate could therefore come at significant cost to the Company. However, it is not at all clear to me that Remco could have re-visited his reward for past years, within the scope of its discretion, and, even if I am wrong about that and Remco had felt bold enough to do so without putting it to shareholders, I do not see how Mr Tinkler's aims can sensibly be said to have involved him somehow commandeering the Remco process. For example, the draft Report referred to 2013 Regulations in the context of the revised Remuneration Policy being presented for approval at the 2017 AGM and, in my view, it is nonsensical to think that the Company's checks and balances on such matters would have gone out of the window.

711. In these circumstances, I feel unable to attribute to Mr Tinkler any realistic belief that, by getting Mr Ferguson off the Board and securing his own place on it, he would somehow secure the enhanced remuneration for which he so clearly hankered.

712. There is a further, more general reason for finding the Company has not established the necessary intention to injure on the part of Mr Tinkler and Mr Day. Although I am satisfied that Mr Tinkler's actions in targeting Mr Ferguson were prompted by his own self-interest and sense of grievance over the remuneration issue, I think his more obscure aim of turning back the clock in terms of management style (to the extent the detail of it can be discerned) was motivated by his genuine belief that this would benefit the Company. I repeat the remarks made above about the proprietorial instinct that Mr Tinkler appears to have towards the Company and him viewing his shareholding within it as a likely legacy for his family. Whether or not Mr Tinkler's actions were consistent with his earlier support for the appointment of Mr Brady as CEO or (as I address in the context of the next Issue) reflected the standard of behaviour to be expected of a director in his position, I am satisfied that he, at least, thought that in the long term the Company would benefit from a change in management direction.

713. So far as Mr Day is concerned, I accept the genuineness of the following answers he gave in response to Mr Leiper QC suggesting to him that he must have realised that, by offering himself up as a potential Chairman of the Company, his actions would destabilise the Company's business and provide avenues for potential personal benefit:

> *"No, no. I have got no interest at all, and I've not been approached at that time at all, my Lord, to do anything of the kind"*

And:

> *"I had no interest in doing a joint venture with Stobart at that time, this time or in the future on any of the businesses that have been put forward."*

714. Therefore, I feel unable, even by a process of inference, to conclude that Mr Tinkler and Mr Day acted with the intention of harming the Company. This means that the second component for a viable conspiracy claim is also missing.

715. I also conclude that, so far as any agreement between Mr Tinkler and Mr Day was concerned, the absence of a sufficiently clear common design between them, borne of ill intent, means that the third component for the claim is also not satisfied. Given the essentially subjective approach which governs any scrutiny of the duty of a director to act in the best interests of the company, I am unable to find that, after Mr Day came firmly on side for Mr Tinkler in around mid-May 2018, they agreed between them that Mr Tinkler would act in a way which (even if they did not know it to be so) the court might categorise as unlawful. As I have just said above in relation to intention, I believe Mr Tinkler thought he was acting in the best interests of the Company, at least when viewed in the longer-term. I therefore do not believe I can attribute to Mr Day and Mr Tinkler an agreement that he would thereafter act in breach of that fundamental duty of fidelity in circumstances where it is difficult to identify tangible financial loss to the Company caused by his actions in the period May to July 2018.

716. However, as I explain in my findings under Issue 3 below, it is the case that, by sending the Letter to Shareholders and the Communication to Employees, Mr Tinkler acted in breach of his fiduciary and contractual duties. The Letter to Shareholders did urge its recipients "*to vote for the election of Mr Philip Day as a director of the Company as and when that resolution is put to shareholders*". However, so far as Mr Day is concerned, and in contrast to Mr Whawell, he does not appear to have been involved in these developments and the evidence does not, in my judgment, show that he had sufficient awareness of them to satisfy the *Belmont Finance* test. Consistent with my finding that he lacked an intention to harm the Company, the evidence does not implicate Mr Day in those breaches of duty by Mr Tinkler.

717. As for his own action in agreeing to have his candidacy for Chairman floated without him being prepared to make good on the proposal, that is a basis for inferring that Mr Day reached an agreement with Mr Tinkler that he would support him in his contest but it cannot also be used to support the third component of the conspiracy claim. However one-sided and insincere his actions may have been, there was nothing unlawful in Mr Day playing his part as the stalking horse.

718. As against Mr Tinkler and Mr Day, their pusuit of the Objective has not been made out.

719. If I had reached the contrary conclusion that the evidence supported the existence of harmful intent and sufficient knowledge of subsequent unlawful acts then it would have been necessary for me to have addressed the fourth component of the conspiracy claim, namely resulting loss to the Company. Even on this trial of liability, only, it would have been necessary for the Company to have established the existence of loss for the cause of action to be complete.

720. The Company's pleaded case in relation to loss, which applies to the alleged breaches of contractual and fiduciary duty as well as the tortious claim, says (ignoring the now abandoned expenses claim) that loss would be claimed under the head of "increased management time costs and overheads (including public relations costs) as a result of [Mr Tinkler's] actions and/or the conspiracy". The Amended Particulars of Claim promise full particulars of such loss as and when they became known to the Company. On any conspiracy claim the damages are "at large" (a concept I touched upon in *Palmer Birch* at [242]-[246]) and a claim for the costs of management time expended in investigating and addressing the conspiracy is a recognised head of recoverable loss in a conspiracy claim. Mr Tinkler's counsel did not attack this particular limb of the Company's case and, had the other elements been satisfied, I would have directed an assessment of damages with directions for further pleadings in respect of them. In the event, my findings in relation to the conspiracy allegation involving each of Mr Hodges, Mr Woodford and Mr Day make it unnecessary to do so.

721. I therefore find the Company has not made good its conspiracy allegation by reference to Mr Tinkler's actions with Mr Hodges, Mr Woodford or Mr Day.

722. **Issue 3**: Was Mr Tinkler in breach of his fiduciary and/or contractual duties (and, if so, what is the nature and seriousness of the breach)?

723. The matters identified in support of this issue are set out fully in Section 2 above. I can deal with the issue in relatively short order in the light of:

i) my observations in Section 4(a) above (upon fiduciary duties generally and the particular duties relied upon in this case);

ii) the terms of clause 17.4 of the Service Agreement considered in Section 4(b) above; and

iii) my analysis, under Issue 2 above, of the evidence relied upon by the Company in support of its case that Mr Tinkler conspired with each of Mr Whawell and Mr Day.

724. I deal firstly with the particular matters identified within this issue which, in my judgment, did not involve Mr Tinkler breaching his fiduciary or contractual duties.

725. The first one concerns Mr Tinkler's proposal in the context of Project Wright. I have addressed the salient aspects of it in the narrative within Section 3(b) above. I can deal with it quite shortly because Mr Tinkler's proposal (embodied in his "Investor Working Step Plan") did not in my judgment constitute or evidence any breach of fiduciary duty on his part. It was only that, a proposal, and the potential for Mr Tinkler to derive personal benefit from its implementation was reasonably plain for all to see when he presented it to the meeting on 8 November 2017. By the end of that month Mr Soanes had highlighted the potential for conflict (with perhaps £12m proposed to be gained by the private consortium at the Company's expense). Mr Brady's response was essentially to treat Mr Tinkler's proposal as the weaker runner in a race to the finish against his own proposal backed by Cyrus Capital. Of course, neither got to the end. In his evidence (though I recognise that the matter is ultimately one for legal analysis)

Mr Brady accepted that Mr Tinkler was not acting breach of duty: "*No, absolutely not. There's no breach of duty in putting proposals forward*."

726. In Section 4(a)(v) above, I have made reference to the provisions of the Company's Article 85(1) in relation to the familiar procedure to be adopted where a director has a personal interest in a proposed contract with the Company. Had Mr Tinkler's proposal for Project Wright borne fruit then all the indications are that he would have resigned from the Board before the transaction was decided upon, with the Board being fully aware of the circumstances of him doing so. In that same section I also indicated that, although his proposal led nowhere, the making of it might be relevant to a wider allegation that he breached his duty to act in good faith and in the Company's best interests. Having considered his proposal in the context of the evidence generally, I am satisfied that the making of it has no bearing upon the other breaches of duty alleged against Mr Tinkler. As my summary of key events in Section 3 above indicates, Mr Tinkler's proposal within Project Wright provides nothing more than context for what came later.

727. In my view, the only real significance of Mr Tinkler's proposal in relation to Project Wright is that, in particular, it provides the context for the clear indications that he gave in late 2017 and early 2018 that he intended to step down from the Company. Mr Tinkler would have known that the only basis on which he could implement his proposal, and benefit under it with the informed agreement of the Company, was one where he had stood down from the Board and was no longer under his fiduciary obligations to the Company. It must be remembered that, when promoting Project Wright, Mr Tinkler (together with Mr Soanes) was really doing so on behalf of Stobart Capital. Until things turned sour between him and Mr Soanes, part of Mr Tinkler's thinking was that he might concentrate on Stobart Capital. The fact that Mr Soanes thought that the nature of Mr Tinkler's proposal to the Company caused regulatory issues for Stobart Capital is not a matter I need to explore further.

728. The second matter identified within Issue 3, which cannot have amounted to a breach by Mr Tinkler of any fiduciary or contractual duty, is his entry into an unlawful means conspiracy with any of Mr Hodges, Mr Woodford, Mr Jenkinson and/or Mr Day. For the reasons given in relation to the previous issue, I have found that he did not enter into such a conspiracy with any of them.

729. The third and last matter identified in Issue 3 which, in my judgment, did not involve a breach of any fiduciary or contractual duty was Mr Tinkler's sending of the AP-B email to Mr Jenkinson on 27 December 2017. I have set out the terms of that email in Section 3 above. He sent it using his Company email address. I agree with the Company that its language was completely unacceptable and the comparison made within it was deeply inappropriate. Mr Tinkler's counsel recognised the email was crude and should not have been sent.

730. Mr Tinkler had accepted in his witness statement that it was an inappropriate comment to make, even in a personal email conversation with Mr Jenkinson. However, as the Company also highlights, that statement was disingenuous in the light of his statement in the witness box that: "*No, I don't think it was inappropriate*." This dissembling has left me confused (he immediately went on to say that he had apologised to Ms Palmer-Baunack and she had accepted his apology) and I can only think that Mr Tinkler's retraction of his earlier concession was prompted by his concern that he was admitting

what the Company, in its opening submissions, had claimed to be an act of gross misconduct which, without more, justified his summary dismissal. The risk of me accepting that submission, with the discovery of the AP-B email being later vindication for his dismissal on 14 June 2018, would have materialised in the loss of the 1,327,332 shares vesting under the 2015 LTIP on 22 June 2018.

731. Although the AP-B email should not have been sent, and even if Mr Tinkler did not consider its language to be inappropriate he should still not have sent it from his work email address, I do not accept the Company's submission that it was an act of gross misconduct within the meaning of clause 17.1(a) of the Service Agreement. Further, although it can fairly be said to have been a disreputable piece of writing, I do not believe that it can be said to have triggered the ground identified in clause 17.1(c) either. Although not sent from a private email address, it was a personal email sent by Mr Tinkler to his friend Mr Jenkinson. Ms Palmer-Baunack and Mr Jenkinson were not fellow employees. In the ordinary way of things, and the continuation of Mr Tinkler's employment, it would probably never have come to light. As his counsel correctly point out, it was not copied to anyone else, or forwarded on, and Mr Jenkinson was not offended by it.

732. Indeed, Mr Tinkler says the Company has chosen (having searched his company email account after the termination of his employment) to make much the email in the publicity of this dispute. Whether or not that is so, the sending of the email did not in my judgment come within the language of clause 17.1. That clause is concerned with conduct which is repudiatory in nature, as I have explained in Section 4(b)(i) above, and the same applies to the "context-specific" analysis of the implied duty of trust and confidence. As for fiduciary duties, I do not regard any of those relied upon as having any relevance and the Company did not suggest otherwise.

733. I therefore turn to the other matters identified within Issue 3 for consideration as potential breaches of fiduciary or contractual duty. They are four in number. In my judgment, the Company has made out its case on each and each one constituted a serious breach of duty by Mr Tinkler.

734. The first allegation is that Mr Tinkler spoke to the Company's significant shareholders and, when doing so, criticised the Board's management and the Group's business and agitated for the removal of Mr Ferguson. I approach this allegation in the light of my conclusions in Section 4(a)(iv) and (vi) upon the duty to act on good faith in the best interests of the Company and the duty to exercise an independent mind.

735. In my judgment the evidence and the conclusions I have reached on Issues 1 and 2 above (and those made in first establishing the context for my consideration of the Issues) amply support a finding that in late January 2018 Mr Tinkler set out on a process of "briefing against the Board". He used the opportunity which Mr Ferguson had given to him, to discuss the timing of his departure from the Company with major shareholders, to instead do something that Mr Ferguson would not have countenanced and that was to foment shareholder dissatisfaction over the direction of the Company. I accept Mr Brady's evidence that this is what he discovered when he spoke to each of Mr Barnett and Mr Dobell on 1 February and Mr Williams on 2 February 2018. Mr Tinkler had not raised with any of them the idea of him resigning and they were surprised to hear of it from Mr Brady. Instead, Mr Tinkler had expressed concerns about the Chairman, the Board and the strategy of the Company.

736. Mr Tinkler did this without having raised his gripes with the remainder of the Board so that (to the extent that they went to matters of corporate strategy, as opposed to self-reward, and were reasoned and properly articulated) they might then have addressed them. Mr Tinkler's explanation in the witness box that he was only responding to the shareholders' questions which, once asked, he could not refuse to answer rang entirely hollow. In any event, even if I had been persuaded that it was the shareholders who somehow changed the agenda for the discussions from that of his intended resignation, Mr Tinkler should have curtailed the discussion rather than taking it upon himself to offer his own dissenting views. I also accept the evidence of Mr Ferguson and Mr Brady, supported by Mr Hodges, that Mr Tinkler recognised his actions had been unacceptable at their meeting (with Mr Hodges present) on 7 February 2018.

737. I address below the allegation based upon the Letter to Shareholders. When, shortly after midnight on the morning of 9 June, Mr Tinkler sent the Board a copy of the Letter to Shareholders his email said that he had sent it "today" to Company's major shareholders. He said "*it is my intention to send it to all shareholders once I have received a copy of the company's register of members. I will leave it to the company secretary to decide whether she should arrange for the despatch of copies to all shareholders immediately, so as to ensure equality of information to shareholders.*" It is quite likely that the terms of that email reflected the benefit of the advice which Mr Tinkler was clearly receiving from K&L Gates at the time. Whether or not that is so, I note that this appears to be the first occasion when Mr Tinkler recognised the need for all shareholders, big or small and whether allied to his cause or not, to be equally well informed of any matters considered by him to be properly put within their domain.

738. In my judgment, the selective communications which Mr Tinkler had with chosen shareholders prior to that date were all about himself and his personal aim of getting rid of Mr Ferguson. That aim became transparent after the heated meeting on 23 April 2018 but it is clear from Mr Day's evidence and from what Mr Williams told Mr Ferguson on 9 February 2018 that Mr Tinkler was thinking about a new Chairman before that date. His reason for doing so is because he was prepared to attempt to convince others (Mr Woodford and Mr Whawell and probably Mr Day too), and possibly even himself, that Mr Ferguson had been trying to get rid of him when in fact all Mr Ferguson had done was to take at face value Mr Tinkler's indication that he was stepping aside.

739. Subsequent events, including him securing and sending on 25 May 2018 the letters from WIM and Svenska (on behalf of Mr Jenkinson) requesting Mr Ferguson to step down, show how effective Mr Tinkler's behind-the-scenes efforts were on his personal battlefront. He had not thought fit to raise this momentous point with the Board, let alone provide reasoned justification for his position.

740. Mr Tinkler's discussions with shareholders were therefore pieces of covert action on his part which he cannot be heard to say somehow involved him acting in the best interests of the Company or exercising and expressing an independent mind. On the contrary, when considered in the light of the other matters addressed below, they can be seen to have had a de-stabilising effect upon the Company's management. Further, the very nature of the present inquiry into what it was he did say to the shareholders shows that Mr Tinkler did not give an account of actions (and thereby disclose the wrongdoing within them) to the Company.

741. In my judgment, Mr Tinkler's private discussions with shareholders involved him breaching his fiduciary duty to act in the best interests of the Company, clause 4.1(e) of the Service Agreement and the implied terms of trust and confidence and fidelity.

742. The next matter within Issue 3 is the allegation that Mr Tinkler improperly shared confidential information with persons outside the Company. The documents mentioned in the List of Issues are the attachment Mr Tinkler sent to Mr Jenkinson on 4 November 2017 (showing the comparison between the level of shareholder returns with anticipated LTIP awards); the email he sent to Mr Jenkinson on 5 November 2017 relating to deficiencies in the LTIP scheme and a division between the Board and management; and the Duranta budget which he sent to Mr Day on 17 May 2018. The Amended Particulars of Claim also referred to the spreadsheet which Mr Tinkler sent to Mr Hodges on 14 January 2018 as being confidential information.

743. The Amended Particulars of Claim did not plead that Mr Tinkler's sending the "private and confidential" document relating to Project Park to Mr Day, on 15 May 2018, was a breach of duty. In those circumstances, and in the light of Mr Tinkler's answer that the document belonged to Stobart Capital, I make no finding in relation to that document.

744. Indeed, no doubt recognising that Mr Jenkinson had occupied an "insider" advisory role in the Company and that Mr Hodges said in his evidence that most of the information received by him would be in the public domain (the disclosure of Mr Tinkler's tax information was a matter for him), in its closing submissions the Company only pressed the case in relation to the Duranta budget.

745. The Duranta budget was clearly a confidential document. It was marked "Strictly Private and Confidential". I have no reason to second-guess the importance that it should have remained confidential when the reaction of Perscitus LLP (in their email of 25 June 2018 headed "Duranta Budget leak") was to say: "*Allowing such commercially sensitive information to be shared with any third party, let alone a third party* [Mr Day] *who is also an owner of another AD plant, is a serious breach of the legal duties we have as directors of Shuban Power Ltd and also of the confidentiality provisions contained within the Shareholders Agreement signed by Stobart AD1 Ltd, Livingston Estates Ltd and Shuban Power Ltd*."

746. Only a matter of days before he sent the Duranta budget to Mr Day, Mr Tinkler had been reminded by Mr Ferguson's letter of 15 May that the Board expected him to observe his duties to the Company, including the duty of confidentiality. However, Mr Tinkler says that a key objective of the Company was to sell the Duranta investment, and that as he was a director of the company which held the investment (Stobart AD1 Ltd) he was plainly entitled to explore a potential disposal, and to seek Mr Day's advice about running the plant. In order to do that, he says, it was obviously necessary to exchange relevant financial information. He argues that he was doing his job, not breaching the Company's confidence.

747. I cannot accept this argument. In my judgment, the evidence shows that (as the Amended Particulars of Claim allege) Mr Tinkler sent the Duranta budget to Mr Day as part of his plan to secure change within the Company (the vagueness of which, falling short of the Objective, I have addressed under Issue 2). There is no evidence to suggest that Mr Tinkler raised with his fellow directors (of the Company or Stobart AD1 Ltd) the business case for doing so, either before or after he had taken it upon himself to do

so. Had he done so, the views of Perscitus would no doubt have been anticipated in any boardroom or executive management discussion. I therefore find that Mr Tinkler acted in clear breach of clause 15.1 of his Service Agreement in sending the Duranta budget to Mr Day.

748. A finding that he also acted in breach of his duty to act in good faith and in the best interests of the Company is less straightforward. As I have explained, the duty is expressed in subjective terms and I have already addressed in the context of the conspiracy allegation the vagueness of Mr Tinkler's longer-term plan (and the question mark over Mr Day's full awareness of it) and the resulting difficulty in attributing to him an intention to harm the Company for the purposes of that tortious claim.

749. Nevertheless, I conclude that Mr Tinkler also acted in breach of that fiduciary duty when sending the Duranta budget to Mr Day. As I have explained in the context of Issue 2, doing so was part of his action in getting Mr Day on side and, even though I am not persuaded the two of them intended harm to the Company, Mr Tinkler's breach of his confidentiality obligation was a step in his campaign against Mr Ferguson. That campaign de-stabilised the Company and this particular step within it damaged the Company's relationship with its joint venture partner Perscitus. In those circumstances, and even if he is able to assert he acted in good faith despite being in breach of his Service Agreement, Mr Tinkler cannot be heard to say that he was acting in the Company's best interests. It was an abuse of his stewardship of the Company's property, committed behind the back of the Board. Nor did Mr Tinkler disclose to the Board that he had done so.

750. The next matter within Issue 3 is the allegation that Mr Tinkler's Letter to Shareholders and Communication to Employees on 8 and 9 June, respectively, constituted breaches of duty by him. This cannot be considered in isolation from his wrongful acts in briefing against the Board.

751. The Company and the Four Directors accepted that, as a shareholder, Mr Tinkler was entitled to write to the other shareholders. However, the Letter to Shareholders was written in his capacity as "*Executive Director and Shareholder of Stobart Group Limited*". And it referred to matters that the reader would assume can only have been based upon knowledge acquired by him within the boardroom. I have set out the relevant parts of the letter in Section 3 above. It referred to the "*disagreement amongst the directors*" and its impact on the Company's operational management and future strategy.

752. What the independent reader would not have appreciated (not having had the benefit of considering the background to it as I have) is just how misleading the Letter to Shareholders really was. I make due allowance for the fact that Mr Tinkler had some cause to consider the Board had been guilty of "mud-slinging" through the issuing of the 29 May RNS (which I address below under Issue 4) though, again, one cannot consider that in isolation from his own earlier action in briefing against the Board.

753. But in its other aspects the Letter to Shareholders was seriously misleading. It suggested that there had been an attempt to remove him from the Board in early 2018 when it was he who had precipitated the discussion over his departure only then to go behind the Board's back by briefing against it and switching his focus to the removal of Mr Ferguson. It spoke of "*disagreement amongst directors*" when he had not extended to

his fellow directors the courtesy of letting them know what particular points of management direction so that, once articulated, there might be a constructive debate over them.

754. The terms of Mr Tinkler's text message to Mr Ferguson of 5 May 2018 (which I have quoted in Section 3 and whose reference to "*governance issues*" is just about as uninformative as the Letter to Shareholders in identifying Mr Tinkler's particular suggested points of concern) speaks volumes in relation to his preparedness to see events only as he would have them. That was the message, following on from their private chat after the meeting on 1 May 2018 when Mr Tinkler informed Mr Ferguson of his view that they could not work together, in which he referred to his discovery of the contemplated use of the Article 89(5) procedure in February 2018. True it is that Mr Tinkler made that discovery by chance when going through Mr Soanes' Stobart Capital email account but it plainly did suit his purposes to recognise why it might be the case that that most of his fellow directors were then considering that step. Having been talked out of his expressed idea of resigning (most likely by Mr Jenkinson) he then spoke to shareholders at the end of January 2018 in terms which he recognised at the meeting on 7 February were inappropriate (once Mr Brady had made his independent discovery of what he had been saying to them). None of that found reflection in the terms of the text message of 5 May, nor in the Letter to Shareholders. Both portray Mr Tinkler as the victim of some boardroom wrangle over the direction of the Company when the truth is that he was sniping at the Board from the outside.

755. The Letter to Shareholders also presented Mr Day as something of a white knight whose arrival was needed "*to stabilise operational management"* when in fact it was Mr Tinkler who had created the instability. Nor is the case for justifying the letter enhanced when the proposed appointee, Mr Day, was being so equivocal in his dealings with the Company on the matters necessary to see his name put forward at the AGM.

756. In my judgment, the Letter to Shareholders was a disgraceful letter for Mr Tinkler to have sent in the light of my findings under Issue 1 (and the findings which set the context for my determination of the Issues) and the absence of any proper basis for him to go straight to shareholders with a complaint that the Company had of late been lacking strong corporate governance. He was clearly whipped up by Mr Whawell into adding that particular professed concern to the terms of the letter. But he should not have written any letter in his capacity as director in terms which suggested that he was on the right side of some strategic issues which had been fully aired at Board level and which justified the replacement of the Chairman.

757. For the reasons I have given in Section 4(a), the duty to exercise independent judgment cannot support such guerrilla tactics on the part of Mr Tinkler. On the contrary, the writing of the Letter to Shareholders can be seen for what it was: part of Mr Tinkler's personal campaign to get rid of Mr Ferguson. That campaign had little if anything to do with genuine concerns over corporate strategy and direction. Such concerns had not been adequately raised by him (as I have found under Issue 1) and, in any event, any resulting grievance that they had somehow not been addressed would have been one better aimed at Mr Brady, as CEO.

758. The Letter to Shareholders can therefore be seen to have been a further act of "briefing against the Board".

759. For Mr Tinkler then to forward the letter in his Communication to Employees was a further wholly unjustified step. In his evidence Mr Tinkler said that he was entitled to do this in the light of the 29 May RNS and what Mr Brady had said in his message to the Group's employees on 1 June 2018. However, as the Company pointed out, it is likely that most employees would have been unaware of the RNS. Mr Grimes had seen it but that is because Mr Tinkler had sent it to him. Mr Grimes said that Mr Tinkler had telephoned him to make him aware that he "*very much wanted to change the Chairman*" and also that the general "*tittle-tattle*" about a rift within the Board had unsettled Mr Grimes. As to Mr Brady's message to employees, which I have quoted in Section 3 above, this was neutral in its terms and did not impliedly claim to reflect the right side of an argument on some significant disagreement on one or more points fully within the Board. Instead, it urged them to focus on "business as usual".

760. In my judgment, there can be no justification for sending the Letter to Shareholders to those employees (I imagine the vast majority) who did not have a vote at the AGM and who would therefore not have received it already in the capacity of shareholder. Mr Tinkler can only have done so to undermine the workforce's confidence in their management.

761. The Letter to Shareholders and the Communication to Employees cannot therefore be said to be the products of Mr Tinkler acting in good faith in what he believed to be the best interests of the Company and in my judgment the sending of each was a serious breach of his duty of loyalty to the Company, owed both as a fiduciary and under the implied term of his Service Agreement.

762. It is not easy to measure the impact upon the Company of him doing so and that is not a matter for this judgment on liability issues. Mr Tinkler accepted in his evidence that, by 24 May 2018, he was aware that the removal of Mr Ferguson would lead to the departure of both Mr Wood and Mr Coombs as the 25 May RNS made clear. Referring to the Communication to Employees, Mr Wood said: *"I think he knew that when he did that he would cause potentially a huge amount of disruption in the workforce, and I really do not think that was a wise action. ... There was an awful lot of disruption caused*." Mr Brady said that he regarded these events in early June as "*the tipping point of destabilisation of the business internally*".

763. That last matter identified within Issue 3 is the question of whether Mr Tinkler orchestrated the writing of the ELT letter and what has been described as "the petition" which had contained a reference to Mr Tinkler and the names and management positions of the signatories. In his Amended Defence, Mr Tinkler denies that he instigated or co-ordinated the ELT letter, or orchestrated any such petition.

764. I have no hesitation in rejecting that defence. The ELT letter emanated from Mr Whawell which was sent to the Board within 3 minutes of Mr Tinkler sending the Board the Letter to Shareholders shortly after midnight on 8 June. Just as Mr Whawell had offered input into the wording of the ELT letter, I find that Mr Tinkler was involved in the content of the petition and the ELT letter and (through its co-ordination with the Letter to Shareholders being sent to the Board) the timing of the latter. My reasons for doing so are set out under Issue 2 above in addressing the role of Mr Whawell in the context of the conspiracy allegation (on which, I repeat, the Company was not permitted to amend its case to allege he was a conspirator). As I have already said by reference to those reasons, Mr Tinkler's fingerprints were all over the ELT letter. Just as Mr

Coombs thought at the time that Mr Whawell was a "*ringleader*", so too his evidence was that the ELT letter (sent on behalf of anonymous executives) just did not smell right. To the extent he may have sensed the involvement of Mr Tinkler he was, in my view, absolutely right.

765. This was another breach of Mr Tinkler's fiduciary and implied contractual duty of loyalty to the Company.

766. In my judgment each of the four breaches of duty established above was a serious one. I am not at this stage required to consider what specific damage, if any, has resulted from any of them, though their impact is relevant to my determination of Issue 6. Clearly, the present proceedings are likely to have prejudiced rather than enhanced the Company's general reputation so far as the court's open inquiry into such matters is concerned. As I have indicated in Section 4(a)(x) above, the potential application of section 522 of the Guernsey Companies Law (or section 1174 of the Companies Act 2006), in this context, is also best left for future argument.

767. **Issue 4**: Were the Four Directors in breach of their fiduciary duties?

768. As with the previous one, there are many limbs to this issue as set out in Section 2 above. They can be broadly grouped into two parts: the actions of the Four Directors in, firstly, securing Mr Tinkler's removal from employment and office (including the setting up the Committee whose composition and powers form the subject of Issues 5 and 6) and, secondly, both in advance of, and at the 6 July AGM (including transferring shares from Treasury to the EBT, issuing the 29 May RNS and decisions in relation to voting upon Mr Tinkler's election). The challenge to their action in removing Mr Tinkler from office obviously extends to their decision to invoke Article 89(5) again, after Mr Tinkler had been voted back on to the Board at the EGM.

769. Mr Tinkler argues that both parts were aspects of an orchestrated plan, described as "Project Shelley", by which the Four Directors aimed to secure Mr Ferguson's appointment over Mr Tinkler's. That name was used in various emails passing between them and the Company's advisers from 24 May onwards.

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.

772. It was argued on behalf of Mr Tinkler (picking up phrases that had been used by one or more of the Four Directors in evidence) that the majority had seriously mischaracterised what had been his perfectly constitutional and proper proposal that shareholders should vote on Mr Ferguson's directorship as an "*attack on the Company*" and a "*coup*". His counsel submitted that the suggested justification of their actions involved, on that basis, wrongly equating the re-election of Mr Ferguson with "*the survival of the Company*" and wrongly adopting the position that they were duty bound or at least entitled to "*fight like tigers*" to ensure his re-election.

773. In the light of my findings under Issue 3, I cannot accept Mr Tinkler's argument that the Four Directors' characterisations of his actions were misconceived. Contrary to his counsel's protest that "*there was no attack on the Company, or indeed on the Board*", he had set about trying to undermine the Board from the outside. He did so without even properly airing with any of his co-directors such concerns as he may have had, beyond that of his personal under-remuneration, and which might have been germane to the question of whether or not Mr Ferguson should remain in office. Once he had been talked out of his earlier idea of stepping down from the Board, most obviously by Mr Jenkinson, he appears to have been more willing to discuss any strategic plans he might have had for the Company with one or more of Messrs Jenkinson, Whawell, Woodford and Day, rather than his co-directors on the Board.

774. Mr Tinkler was therefore very much outside the directors' tent in the first half of 2018. I come back to the point I made in the context of Issue 1, which is that the nice legal debate about what individual action might be justified by the duty to exercise an independent mind has taken place in something of a fact-free zone so far as any contemporaneous evidence of Mr Tinkler attempting to raise points with the Board is concerned. I also repeat that, given that his challenge to Mr Ferguson can therefore be said to have come largely out of the blue, I regard it as no coincidence that Mr Tinkler had identified Mr Ferguson in the AP-B email as the person who (alongside Ms Palmer-Baunack when she had been at the Company) had tried to "*shaft*" the senior executives by introducing the current LTIP scheme.

775. Mr Tinkler then argues that "*as regards Mr Ferguson—he was politely asked to stand down and when he declined shareholders exercised their right to require a vote on his directorship. None of that can properly be described as an "attack" or "coup"*." I do not dispute that Mr Tinkler's communications with Mr Ferguson were polite enough in the circumstances but, again, he overlooks the manner in which he had gone about generating and coordinating shareholder support for Mr Ferguson's removal. Even now it is not entirely clear what he said to them about the rest of the Board but I have greater confidence in coming to the conclusion that whatever he did say left them with an extremely partisan view of things.

776. The stance adopted by Mr Woodford, who was prepared to make his public statement about undertaking "*extensive due diligence*" on 18 June 2018 when he had been implored by Mr Wood to meet him and Mr Ferguson but refused to do so, illustrates the point. Mr Coombs said the majority could not understand Mr Woodford's stance:

> "*He had invited Iain Ferguson on to the Board. They had agreed a series of actions. Iain had delivered on all of those, he'd also delivered stunning financial performance over the period, and for some reason Mr Woodford had taken so against the current board that he wouldn't even take a meeting to hear the current board's side of the argument but was instead pursuing a "Let's get rid of the whole board strategy", and we just could not understand why that was other than he knew something that nobody else knew."*

777. In these circumstances, where Mr Tinkler had led Mr Ferguson to believe in January 2018 that he was going to discuss with shareholders the timing of his stepping down from the Board but instead had set about breaching his duties in the way established under Issue 3 above, I think the Four Directors were justified in believing they were facing the start of an attempted coup. And, as Mr Coombs put it, they were addressing a situation of chaotic destabilisation within the Company that Mr Tinkler had brought about.

778. With those general comments in mind I turn to the specific matters raised within Issue 4.

779. The first concerns the attempt by the Four Directors to use Article 89(5) to remove Mr Tinkler as a director in February 2018. Unlike Issue 10 (which focuses only upon the duty to act for proper purposes in relation to the implementation of Article 89(5) on 7 July 2018) the present issue is framed in terms wide enough to contemplate that it might have been a breach of one of the other fiduciary duties addressed above. I have already noted that the parties have been content to proceed on the basis that this power vested in the remaining directors is one to the proper purposes rule applies.

780. Of course, the Four Directors' contemplated use of Article 89(5) in February 2018 came to nothing. Although they signed the Article 89(5) notice on 26 February, Mr Garbutt would not do so. It do not believe that the proper purposes rule (which is essentially concerned with acts that are effective but tainted by a primary improper purpose that may lead to them being set aside) can have any sensible application to this "attempt". The notice was not complete, in terms of the necessary signatories, and neither was it served. Had Mr Garbutt signed it, then not only would his willingness to sign be of some significance to the allegation of improper purposes on the part of the Four Directors but I think it is also a fair inference to conclude that the directors would have paused to consider further whether or not to serve Mr Tinkler with it. The evidence of the Four Directors was that the "tipping point" had not by then been reached. The idea of serving such a notice had been raised by Mr Brown who had put them in touch with Mr Foster, so some final legal advice on the decision to serve it would have been likely.

781. Although it might be said that the other fiduciary duties have greater potential application to inchoate steps, and that the presence of an improper motive would indicate a lack of good faith and might also be indicative of a conflict of interest, they too most obviously concern effective action on the part of a director. I draw a comparison with my conclusion that Mr Tinkler did not act in breach of duty in merely making his proposal within Project Wright.

782. In any event, I am unable to conclude that any of the Four Directors acted in breach of fiduciary duty when signing the Article 89(5) notice. I have no reason to doubt that, when he did so, each had formed a genuine belief that it was in the best interests of the

Company that Mr Tinkler should be removed. Although further serious breaches of duty on his part were to emerge after 26 February 2018, as I have found under Issue 3 above, they had by that stage discovered that he had been briefing shareholders against the Board. That was enough to justify their belief and there is no basis for the court to conclude that no reasonable director could have come to the conclusion they had. Nor is there any evidence to suggest that any of them acted out of conflict of interest (by that stage Mr Tinkler had not sought to make it a clear choice between himself and Mr Ferguson though they had discovered from Mr Williams on 8 February that Mr Tinkler had told him that he wanted Mr Ferguson removed) or that any of them failed to exercise an independent mind on the point.

783. The next matter to be considered is the decision of the Four Directors to establish the Committee, which they decided to do at the Board meeting by telephone on 28 May 2018. They did so having taken legal advice during the course of that meeting. Mr Woods explained that their view was that "*the Company – and Mr Ferguson in particular – was under attack from Mr Tinkler*". He said the Four Directors decided that some form of sub-group was necessary because Mr Tinkler remained on the Board and so discussions about his conduct could not be taken by ordinary Board meeting, and privileged legal advice could not be sought without the appropriate protections being in place.

784. These strike me as perfectly sound reasons for establishing the Committee. Article 96 of the Company Articles gave them power to do so. By that Bank Holiday weekend the contest between Mr Tinkler and Mr Ferguson was out in the open (and it was known that Mr Ferguson's removal would carry with it resignation of Mr Coombs and Mr Wood) and Mr Tinkler's discussions with shareholders had materialised in him sending the letters from WIM and Mr Jenkinson's nominee which were supportive of his position. Matters had therefore moved on from how they had been in February when the Four Directors had turned their minds to Article 89(5) in the light of what they then knew. I cannot see any basis for categorising as wrongful their exercise of the constitutional right, as the majority on it, to delegate the Board's powers to a Committee. The composition of the Committee is a matter raised by Issue 6.

785. The next matter of challenge is their decision to issue the 29 May RNS. This followed the 25 May RNS with its more neutral wording, as revised following Mr Tinkler's objection to certain tendentious statements during the Board earlier that day. I have set out the material terms of the 29 May RNS in section 3 above. Mr Tinkler says that, as the earlier one had fulfilled the Company's regulatory obligations, the 29 May RNS was unnecessary and misleading. He says that, if anything further needed to be said on the issue of the chairmanship, it should have been said in explanatory statements (reflecting each side's position) in advance of the AGM. As I have noted, Mr Tinkler has commenced libel proceedings against the Four Directors on the back of the 29 May RNS.

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

787. It is not for me to trespass upon matters which are to be decided in the libel proceedings. I have well in mind Mr Hodges' view about the RNS, which is that it was a

"*fundamentally dishonest*" document. At the time, having read it that day, Mr Brown also thought it was "*misleading*" though, as the Company points out, Mr Tinkler may well have encouraged him to express that view. I have to decide, instead, whether the Four Directors acted in breach of fiduciary duty in causing it to be issued.

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

789. But the relevant part of the 29 May RNS was more inflammatory than that (and played a large part in prompting Mr Tinkler to write the Letter to Shareholders) and included within its list of "*challenges*" matters which were not really germane to this key issue for the shareholders' vote. For example, the last bullet referred to his proposal within Project Wright ("*a proposed related party transaction associated with the recent aborted airline transaction*") which, I have decided, involved no wrongdoing on his part. And the first bullet ("*settlement of contractual issues arising from a previous related party transaction when Mr Tinkler was CEO*") related to a contractual claim brought by the Company against Mr Tinkler in respect of a tax indemnity. The Company had brought that claim in 2017 and that it did not relate to something "*in the recent past*" is illustrated by the fact that, on 16 November 2018 and while the trial before me was proceeding, Mr Justice Phillips struck it out, I understand, on limitation grounds (although I gather that limited permission to appeal has since been granted). All that said, Mr Tinkler accepted in evidence that other parts of the RNS (addressing the "*Management's achievements*") could fairly be read as reflecting favourably upon his time as CEO.

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

in the light of my other findings, and the real question is whether or not the expression of it in an RNS (with some dubious points in support of it) constituted a breach of fiduciary duty.

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

792. As to that first duty, there are two reasons why I have concluded the Four Directors were not in breach of it. The first is that I find that each of them thought that it was in the best interests of the Company to publish the RNS. I have already referred to Mr Coombs' view about the need for the 29 May RNS in addressing, on the question of an intention to injure within Issue 2, what he perceived to be Mr Tinkler's aims. All four of them considered that his challenge to Mr Ferguson (with its repercussions in respect of Messrs Wood and Coombs) was destabilising the Company.

793. The second reason is that the terms of the RNS, though inappropriate in the respects mentioned above, do not justify the conclusion (by way of an objective check upon their subjective thoughts) that no reasonable director would have agreed to it. This second reason is reinforced by the advice the Four Directors received at the time and by the absence of any evidence that it damaged the Company. In addition to saying it damaged him personally, Mr Tinkler argued, by reference to Mr Grimes' evidence and the "*surprise and regret*" at the RNS expressed in a letter from three executives in the Aviation Division, that it did damage the Company. Mr Grimes referred to unsettlement amongst employees and questions from brokers and customers of the Jet Centre. Mr Tinkler also points to the evidence of Mr Whawell in relation to the general disquiet expressed at the ELT event in Manchester on 5 and 6 June 2018.

794. However, it is difficult to attribute employee disquiet to the 29 May RNS when I find it is just as likely, if not more likely, that such concerns on the part of employees and customers, about what was going on at the head of the Company, would have been generated by the terms of the earlier 25 May RNS. That earlier RNS would have told anyone who read it about the potential for upheaval within the Board and that Mr Tinkler was opposed to Mr Ferguson. It must be remembered that the gravamen of Mr Tinkler's challenge to the 29 May RNS is that it was an unnecessary attack upon, and damaging to him personally.

795. Next within Issue 4 is the question whether the Four Directors acted in breach of duty in failing to put forward Mr Day's name, for election as Chairman, on the ballot for the AGM. Mr Tinkler, Mr Jenkinson and WIM had requisitioned this on 4 June 2018, a fact announced in the RNS of the following day. The agenda for the AGM was published on 8 June without this proposed resolution included within it.

796. In my judgment, there is nothing in Mr Tinkler's complaint. Mr Day had failed to engage with the Board by confirming his willingness to stand and providing a CV or short biography, either in time for the notice of the AGM circulated on 8 June or subsequently, once Mr Tinkler had provided Mr Ferguson with Mr Day's contact details at the Board meeting on 7 June 2018. The Company is right to say that Mr Day's failure to engage constructively with Mr Ferguson's chasing messages (his email of 25 June had said that the papers for the AGM had already been sent to the printers and it is in those that the proposed resolution would have been the subject of any recommendation by the Board) meant that his candidacy could not even be voted upon at the AGM under "Any Other Business". So far as Mr Day's dialogue with the Board in June 2018 is concerned, all he did was have a brief lunch with Mr Garbutt. His own evidence was notable for the lack of complaint about not being put forward at the AGM.

797. The next two matters to be addressed within Issue 4 relate to Mr Tinkler's position. The first concerns the possible wrongfulness of the Committee's dismissal of Mr Tinkler from his employment on 14 June 2018. This issue is raised full square within Issues 5 and 6, the latter raising the question of whether or not it involved a breach of duty by the Four Directors acting for an improper purpose or in disregard of a conflict of interest. However, as with the question over their use of Article 89(5) on 7 July, the present question is framed in more general terms which might admit of a finding that they acted in breach of some other fiduciary duty.

798. The only other duty that might apply to Mr Tinkler's removal from office is the duty of fidelity in that the members of the Committee did not act in good faith and in the best interests of the Company. It was the Committee who dismissed him and although a complaint is made about his presence at its meetings (see Issue 6 below) Mr Ferguson was not a member of it. In my judgment, there is no basis for concluding that the members of the Committee, Messrs Wood, Coombs and Brady, acted in breach of that duty. I have already concluded the Four Directors were not (or would not) have been in breach of that duty when contemplating the use of Article 89(5) in February 2018. By 14 June (and therefore after the 29 May RNS in relation to which I have reached the same conclusion by reference to their beliefs as to the Company's best interests) they were confronting the fact and implications of Mr Tinkler's Letter to Shareholders and Communication to Employees.

799. I have found under Issue 3 above that both communications involved serious breaches of duty on his part. On the assumption that the Committee had the authority to dismiss him and observed due process (see Issue 6) its members' decision to terminate his employment was entirely consistent with their observance of their own duties to the Company. Although the "*Expenses*" element of Rosenblatt's letter dated 14 June 2018 cannot now be said to have been a justified ground for his dismissal, the grounds of "*Subverting the Board*" and "*Destabilising the Staff*" were matters that justified the Committee acting as it did.

800. Issue 4 also raises the directly linked question of whether or not, on the same date, the Four Directors acted in breach of duty in dismissing Mr Tinkler from his directorship. This is also the question under Issue 8 which refers specifically to them having failed to heed the proper purposes rule or to avoid a conflict of interest (Issue 7 being the point on the true construction of clause 17.4 of the Service Agreement on which I have already indicated that I accept the Company's argument).

801. For the same reasons as apply to the Committee's decision to dismiss Mr Tinkler as an employee, and on the basis that clause 17.4 of the Service Agreement entitled them to do so, the Four Directors were justified in terminating Mr Tinkler's directorship of the Company by reference to the same matters (excepting the expenses allegation) which justified his summary dismissal.

802. I therefore turn to the other significant aspect of Issue 4, which cannot be answered simply by looking at the predicament in which the Four Directors found themselves as a result of Mr Tinkler's breaches of duty, or the reticence of Mr Day to engage with them, and that is the question of whether or not they breached their own fiduciary duties in causing shares to be transferred from Treasury to the EBT.

803. It was an important part of Mr Tinkler's argument on this aspect of the case that any shares required to satisfy employees' LTIP awards could have been made by a transfer to them direct from Treasury without them passing through the EBT. He says the Four Directors decided to transfer them to the EBT only for the purpose of securing a favourable vote from Jupiter. He points to the fact that shares which are "warehoused" in Treasury, pending transfer to those entitled, do not carry any dividend rights against the Company (as well as being temporarily disenfranchised) whereas dividends become payable once the shares are in the custody of the trustee. The Rules for the 2014 LTIP (the 2015 Plan was not in evidence but was presumed to be the same) permitted share transfers to be made to award holders either direct from Treasury or from the EBT, and Mr Tinkler.

804. Mr Tinkler's evidence was that the 2.5m odd shares that were in the EBT as at May 2018 had been there since the EBT was established in 2007. He says that the discussion at the 7 June 2018 board meeting, over the 2015 LTIP entitlement vesting on 22 June 2018, was predicated upon the EBT being "exhausted" of those remaining shares and the balance being made good from Treasury.

805. On this aspect of the case Mr Taylor QC made a forceful observation about the absence of any evidence from the Company Secretary, Ms Brace, who was heavily involved in the decisions to make the transfers in question. His criticism was all the more powerful in the light of Mr Coombs' reliance upon what Ms Brace had told him about the mechanics of the satisfying any LTIP awards using shares in the Treasury. It was Mr Coombs whose evidence on behalf of the Company, in the absence of any from Ms Brace, related in detail about the decision to transfer shares to the EBT.

806. The submission on behalf of Mr Tinkler was that, as it emerged in his testimony, much of Mr Coombs' evidence was hearsay, rather than based upon his own knowledge as his witness statement had indicated, and his answers reflected specific points he had discussed with Ms Brace. The complaint was that no hearsay notice had been given (though Mr Coombs was unable to explain why Ms Brace had not been called) and, by reference to authority, I was invited to draw an adverse inference against the Company as to why Ms Brace had not been called.

807. In hindsight it clearly would have been preferable for Ms Brace to have given evidence as to the basis and timing of any decision that the shares should go from Treasury to the EBT rather than direct to employees (once the EBT had been exhausted). Such direct evidence might have had an important bearing upon the question of whether either the transfer on 19 June or that made on 21 June was infected by an improper purpose.

808. I have had this point well in mind when considering Mr Coombs' evidence in relation to the decision to transfer shares from Treasury to the EBT. In my judgment, that is the only matter to which the point goes; the use of the EBT as the vehicle for making any further LTIP distributions to employees (as opposed to them being transferred to employees direct from Treasury).

809. Mr Taylor put to Mr Coombs that a direct transfer from Treasury to the employees appeared to have been contemplated by the terms of a paper presented by Ms Brace to the Board meeting on 7 June 2018 and by what was recorded in the transcript of the meeting. The minutes for that meeting (referring to the decision to transfer to the EBT) were only drawn up later. The paper had referred to the 2015 LTIP's being satisfied by cash and shares in the EBT in the first instance and then by shares held in Treasury. Mr Coombs not only disagreed with the interpretation of the transcript (he said that the transfer was to be from Treasury to the EBT) but said that there would have been a subsequent resolution passed, at the instigation of Ms Brace, for the shares to go via the EBT. He went on to say:

> "*As I say, I have checked with Ms Brace and that is what she has confirmed to me. I have no reason to disbelieve her. She's a long-term lawyer and she's proven to be very capable in the time she's been with us. Why would I disbelieve her."*

810. Mr Coombs also said in his evidence that, as Company Secretary, Ms Brace had only ever used the EBT as the source of share transfers to employees, including those which vested in November 2017 and May 2018 (the latter being the 2014 LTIP award under which Mr Tinkler, Mr Whawell and Mr Butcher had an entitlement). He said that there had been a transfer in September 2017 made from Treasury to two employees but that had been made at the instigation of a temporary Company Secretary who, Mr Coombs said, had been unaware of the existence of the EBT. Again, this was based upon what Mr Coombs had been told by Ms Brace.

811. However, even though Mr Tinkler's counsel were not able to challenge Ms Brace on this aspect, in my judgment the decision to transfer shares from Treasury to the EBT, in order to satisfy LTIP awards via the EBT, was unremarkable.

812. Ms Brace's memo of 6 June about the shortfall within the EBT for meeting the LTIP awards must be read against a background, explained by Mr Coombs, where for the five-year period from 2013-2017 the EBT typically held between 3 and 4 million shares, and thus remained a "*good, safe, well-funded EBT over that period*". During that period there had not been any requirement for more shares. Mr Coombs said: "*That situation only changed as we've come into 2018, where we've had both a big call in 2018, and we had a very large call coming down the road in 2019, so the situation had changed dramatically*." He referred to the need for about 8 million shares which vest in employees within about a year.

813. When the Company undertook share buy-backs in February 2018 shares had been brought into Treasury for that purpose. Mr Wood's evidence was also that these would be used to satisfy LTIP awards, as the Company's RNS's at that time made clear.

814. That said, those same RNS's referred to the bought back shares being "*held in treasury*" from where, Mr Tinkler says, they could and should have gone straight to those entitled, without the need to pass through the EBT.

815. In another answer in relation to the share buy-backs earlier in the year, Mr Wood said: *"The shares were brought [sic] back with the specific purpose of being put into the employee benefit trust, which we had not done at this time."* Although he later said that it was a procedural matter, over which he was not sure, it seemed clear to me that Mr Wood's general understanding was that any shares bought back and placed in Treasury would, if to be used later to satisfy any employee share entitlements, first pass through the EBT.

816. Mr Coombs' evidence was much firmer than Mr Woods' in relation to the need for employee share awards to be administered through the EBT. He said there is no point having an EBT unless the Company is willing to fund it ("*it is a prudent provision that most, if not every, company that runs long-term incentive plans works with*") and that the need to pay dividends on shares transferred to the EBT was more than offset by the security it provides for employees, and also ignored the point that such dividends contributed to funding subsequent employee awards out of the EBT. Consistent with the dates of 2015 and 2018 in Ms Brace's memo, he said the policy was to "*run an EBT over a three-year period, supposed to be funded with enough shares to honour the full commitments*", which was a "*policy of prudence*".

817. I have no difficulty in accepting the Company's position that any further Treasury shares that were required to satisfy LTIP awards should first be transferred to the EBT. As Mr Coombs put it: "*Its's an odd thing to do it from Treasury when you have an EBT exactly for that purpose*." He also said: "*The whole sense that we had was this is how you do it. You put shares into the EBT to then use them to satisfy awards*."

818. Of course, in January and February 2018, Mr Tinkler himself had raised the idea of receiving shares from the EBT, as a reward for past services, though this was before the shares in Treasury had been replenished through the Company buying back shares in the market.

819. Mr Coombs said that there was a significant amount of administration involved in the making of employee benefit awards, including accounting for income tax and National Insurance liabilities. These could be handled by the EBT whereas numerous transfers direct from Treasury to the employees would lead to greater complexity. He explained that a "sell sufficient" direction to the trustee was one where the employee had elected to receive shares, rather than their cash proceeds, but a sufficient number of shares had to be sold to cover the employee's liabilities. In relation to the shares vesting on 22 June 2018, separate transfers to the employees from the EBT and Treasury would, as Mr Coombs said, have required two separate processes and complication or duplication over the tax calculations and any "stop levels" stipulated by the employees in relation to sale price. He said millions of shares coming on to the market requires careful management and co-ordination from the brokers' perspective "*So it had to work from one source only, and that was the EBT*."

820. Mr Whawell's own LTIP entitlement illustrates the type of administration appropriately undertaken by the EBT. He had expressed his wish to receive it in the form of cash rather than shares. By an email dated 12 June he had told Ms Brace and her colleagues that he wished to exercise his LTIP entitlement in accordance with "*Option 1 and that the dealing in shares is to be managed so as not to disrupt the share price too much but equally not to be spread over too long a period*." On 20 June, Ms Brace wrote to Mr Whawell in connection with the shares due to vest on 22 June under his LTIP award.

Her letter noted that he had already returned an executed notice that the award should be exercised in full on 22 June "*and either all or proportion of the resulting Shares be sold on your behalf as soon as possible thereafter, including to fund the income tax and employee National Insurance contributions liability due*." The purpose of the letter was to draw Mr Whawell's attention to the advice from the brokers was that the recent developments at Board level might mean that there was not an orderly market in the shares and the possibility of limited demand for them; and to give him the option of withdrawing the notice or setting a minimum sale price. It stated: "*If you do nothing, we will proceed in accordance with the instructions set out in your original Exercise Notice and your Award will be exercised on 22 June 2018*."

821. Mr Whawell was not the only employee who was not intending to receive his 2015 LTIP award only in the form of shares. A schedule prepared by Remco and sent to Jupiter on 21 June 2018 indicates that there were others who wished to "sell all" (with minimum sale prices being stipulated) and some who wished to "sell sufficient". For the latter class of employees, a further schedule indicated how many shares would then be transferred to them after liability for income tax and National Insurance Contributions had been met from the proceeds of those required to be sold for that purpose.

822. I therefore reject Mr Tinkler's argument (supported in part by one interpretation of an ambiguous reference in the transcript of the Board meeting on 7 June) that the decision not to satisfy LTIP entitlements using shares direct from Treasury indicates that the Four Directors were not acting for a proper purpose.

823. However, Mr Tinkler still invites me to conclude that the principal purpose of the transfer of shares from Treasury to the EBT was the improper one of seeking Mr Ferguson's re-election. In particular, he says that the Board had no proper reason to approve the transfer of the 1.7m shares as opposed to the 1.1m odd needed to satisfy vestings on 22 June (and identified in Ms Brace's memo of 6 June 2018 by reference to the deficit in the EBT).

824. He can point with some effect to the Company's Reply which initially referred only to the need to meet a deficit in the EBT for the purposes of satisfying LTIP awards (both immediate and due in 2019) and was only amended shortly before trial to concede that "*The Board was also mindful of the fact that transferring the shares would make them votable and could (if the trustees were so inclined) be used in favour of re-electing Mr Ferguson at the AGM*."

825. The minutes of the Board meeting on 7 June 2018 record that the Board had noted the comment in a report from Mercer Kepler, the Company's remuneration consultants, about "dilution" in the event of the Stobart Energy Incentive Plan doing particularly well. (It is not necessary to dwell upon the concept of dilution, and the parties did not do so, but I understand it to have been a reference to a percentage cap - incorporated into the LTIP rules by reference to Insurance Association guidance - upon the issuance of new shares. In circumstances where the acquisition of shares from Treasury was treated by the LTIP rules as an "issue" of new shares for these purposes, the risk that substantial LTIP share entitlements might cause the cap to come into play was one that the consultants had in mind).

826. It appears that further advice from Mercer Kepler on 11 June on this aspect of dilution, which they were saying should lead the EBT to go into the market to acquire further shares needed to satisfy awards rather than use those held in Treasury, may have played its part in the decision to make two separate transfers to the EBT. By an email to Mr Foster on 18 June, Ms Brace pointed out that the advice was based on the dilution position for all outstanding share awards and not just the immediate vesting required for the 2015 awards but went on to say "*Would appreciate if we can agree still fine to issue the 1.2m shares which we are in the process of doing now AND for the balance of Treasury shares to be transferred to the EBT*."

827. Travers Smith advised that, in terms of the mechanics of transferring the shares and making a voting recommendation, there were no issues from a Guernsey law perspective other than it must be in the best interests of the Company. However, they also pointed out that a provision of the Investment Association Principles of Remuneration stated that the EBT should not at any one time hold more shares than would be required in practice to meet outstanding liabilities and that any unvested shares should not be voted at shareholders meetings. The solicitors also said that, although the Principles were not binding, any voting recommendation from the Chairman to Jupiter would not be in accordance with them.

828. It is clear from the evidence of Mr Coombs that the Four Directors reflected on this advice before deciding to make the further transfer of 5.3m, accompanied as that one was by a voting recommendation.

829. There were of course two transfers and the first, of the 1.7m shares, had been made on 19 June and therefore before the voting recommendation made by the Company's letter dated 20 June 2018 (even though the recommendation extended to all shares held or to be held by Jupiter, including the 1.7m).

830. Mr Ferguson, Mr Brady, Mr Coombs and Mr Wood each explained in evidence the purpose behind each of the transfers to the EBT.

831. Mr Ferguson said:

> "*We decided, as you have seen, to do it in two tranches. We decided to deal with the 2015 shares in one tranche, which we did on 7 June meeting, and subsequently we did transfer shares to the EBT trust to be voted by Jupiter, the independent trustee.*"

832. Mr Brady said:

> "*We'd done the share buy-backs to effectively satisfy LTIP's and, as I think you rightly know, is that the transfer served two purposes. One is of course it allowed the independent trustee to have a vote on those shares, and secondly, and equally as importantly, allowed us to service the LTIP and the awards to employees. And in fact we needed – when you look – and I'm sure the next witness [which was Mr Coombs] will come on to it on the EBT, but from what I understand is that we needed that level of money to be in the EBT to service the next 12 months, or at least a lot of it."*

833. Mr Coombs, having referred to the need to replenish the EBT so that it was as "well-funded" as it had been prior to 2018, said "*in my view there were two different reasons for the two different transfers that were made in the month of June.*" At that point his answer was capable as being read as referring to two different timings for LTIP vestings as he had referred to the transfer of the 5.3m being required to cover the liabilities that were coming within the next year.

834. However, Mr Taylor later put to Mr Coombs that the transfer was conditional upon knowing how Jupiter would vote to the recommendation that Mr Ferguson be re-elected at the AGM. Mr Coombs responded:

> "*I don't think it was – I don't think ultimately the transfer was conditional upon that response because, as I said last week, there were two reasons we were transferring. But clearly it was high in people's minds at the time that voting was one of the key issues.*"

835. Mr Coombs said he could not honestly answer the question as to whether the transfer would have proceeded if Jupiter had indicated an intention to vote against Mr Ferguson because "*it never crossed our minds that would happen.*" He went on:

> "*If you recall we had two transfers, this particular one, which was talking about 1.7 million, and then I think it was on 21 June we were talking about the 5.3 transfer, and I've read the notes of the meeting on 21 June over the weekend and it's quite clear that there was a lot of conversation there about the need for the EBT to have those shares, and even those people who were perhaps not supporters, such as John Garbutt, for the re-election of Mr Ferguson were supportive of that transfer.*"
>
> And:
>
> *"…… I've not said that we weren't thinking about the importance of giving the trustee the chance to vote, but equally we were also thinking about the need to top back up again or to refill completely the EBT for the vestings that were coming the following year."*

836. In relation to the second transfer of the 5.3m shares, these answers are consistent with what Mr Ferguson said (and with the directors reflecting upon the Travers Smith advice sought by Ms Brace) and show that Mr Coombs had in mind the voting implications as well as the LTIP liabilities arising within the following year.

837. It was clear from the terms of Mr Wood's email of 24 May 2018 that the potential advantage of enhancing the EBT vote was in the mind of the Four Directors from around that time. That email does appear to have overlooked the independence of Jupiter and the fact that the decision as to how to vote any trust shares would be a matter for the trustee, no doubt with due observance of its own fiduciary duties. By the email (headed "Treasury shares and EBT") to Mr Arch, Mr Brady and Mr Ferguson, he said:

> "*I was talking to Richard Laycock this morning about various matters. He told me that there were 3m shares in the EBT which were votable and 6m treasury shares which were not included in the shares in issue and were not votable. As I understand it we are going to use all of these shares to satisfy the 2015 and future*

> *LTIP's and it struck me whether we could transfer the treasury shares in the EBT so that we could vote the 9m shares in favour of the Chairman. I have put this email on limited circulation as it may be a silly idea!"*

838. However, it is also clear from that email that Mr Wood understood that Treasury shares were needed to satisfy the 2015 LTIP awards as well as ones for later years. In his evidence, Mr Wood said "*we were trying to get Iain re-elected and if the independent trustee was minded to vote for him, this may help. I mean, I can – that was our position*" and "*That was part of the reason why they were transferred. There was also the need to satisfy LTIP's over the next 18 to 24 months.*"

839. Ms Brace's memo to the Board, of 6 June 2018, had shown that there were not enough shares in the EBT to satisfy the 2015 award and that, for the purpose of meeting it, there was a shortfall of over 1.1 million shares that would need to come from Treasury.

840. This was based upon an anticipated 4,089,532 shares vesting on 22 June 2018. That figure specifically excluded any awards due to Mr Tinkler as he had indicated that he would not be taking any awards in June. I have referred in Section 3 to Mr Tinkler's statement at the Board meeting on 7 June that he was still reviewing whether he would be exercising his 2014 LTIP award (526,495 shares) – and, as the Company points out, he said this when he must have known that the voting at the AGM would be tight – and that he would not be exercising his 2015 LTIP award (1,327,332 shares).

841. In my judgment, the transfer of the 1.7m odd shares on 19 June 2018 was made for the primary purpose of the Company being able to meet its immediate obligation to meet the 2015 LTIP awards. On the test applicable to the proper purposes duty, that was the primary or substantial purpose behind the transfer even though the Four Directors were aware of the implications of favourable voting by the trustee.

842. This conclusion is fully supported by the language of Ms Brace's email of 19 June (seeking Board approval to a further transfer) which referred to the Board having on 7 June approved the transfer of sufficient shares to cover the 2015 LTIP entitlements due to vest on 22 June 2018. In my judgment it is not undermined by the other contemporaneous evidence as to the Four Directors' awareness, prior to it being made on 19 June, of the voting implications of such a transfer, which I address further below in connection with the further transfer of 5.3m shares. A transfer was required to meet the immediate 2015 LTIP obligation and the EBT was the proper transferee. That was the purpose identified in the (corrective) RNS published on 25 June 2018 even though the number of 1,715,000 was, on Ms Brace's calculations, in excess of that immediately required. The RNS said those shares "*will be used to meet obligations under employee share plans.*"

843. The difficulty with Mr Tinkler's argument that the transfer of 1.7m shares was excessive and indicative of an improper purpose, as only 1.1m were required to meet the immediate deficit in the EBT, is that the Board made only one decision upon that transfer. This is exemplified by Mr Ferguson's answer referred to above, which talked about the decision in relation to the first tranche being in respect of "the 2015 shares". If the imminent need for the Company to make good on its LTIP obligation establishes the reason for the transfer of most of that total number then that reason, which motivated the single decision made in relation to the whole amount, cannot be diluted (let alone displaced as the primary reason) by reference to an argument that, in the event, the

decision caught too many shares. On the present facts in relation to the decision to transfer the 1.7m, I do not see how the motivation and purpose behind the decision on 7 June can somehow be apportioned and then undermined by looking at the precise number of shares to which it related. The proper purposes rule is concerned with motivation rather than effect. Obviously, I recognise that there may be cases where the scope and impact of the decision will influence the court's conclusion as to what motivated it in the first place but, in my judgment, this is not one of them so far as the decision in relation to the 1.7m is concerned.

844. Even if I had not been persuaded that the primary purpose behind the transfer of the 1.7m shares was to meet the LTIP awards vesting on 22nd June, I would still not have been persuaded that the primary purpose was, therefore, that of swaying the vote at the AGM. The first purpose was at least equal to any other. Further, I do not believe the evidence supports the conclusion that, when deciding upon the transfer on 7 June 2018, the majority either knew or could be confident that Jupiter would vote at the AGM as they wished. The fact that the Company later thought fit to make its voting recommendation in the letter dated 20 June is evidence that they did not. So too are the terms of Ms Brace's email of 11 June (referred to below) which, though written before the transfer actually took place, was the first indication that the trustee would vote in accordance with a Chairman's recommendation.

845. So far as my conclusions upon the decision to transfer the 1.7m shares are concerned, they are summed up by the way Mr Brady put it in evidence (when talking about both transfers):

> "*Again, priority one: service the EBT for the LTIP shares; two, allow the independent trustee to decide on which vote – which way they would like to vote. They could abstain, they could have voted for Tinkler, they could have voted against Tinkler, they could have voted for (inaudible). They could do whatever they like, they're independent."*

846. However, the further transfer of the 5.3m shares was the subject of a separate decision, made later by individual director emails on 19 and 20 June and formally approved on the later date, and was not motivated by the urgent need to meet a deficit within the EBT in relation to the 2015 LTIP entitlements. Again, this is illustrated by the evidence of the Four Directors about their awareness of further LTIP entitlements arising within the next year or so. As the immediate deficit in relation to 2015 awards had been met by the earlier transfer, and the later one was the subject of a separate decision, the purpose behind it requires separate consideration.

847. In my judgment, this presents the court with a much greater challenge in determining the outcome of the test under the proper purposes duty. The analysis is necessarily less straightforward where it cannot be justified by a degree of urgency relative to the date of the 2015 LTIP vesting date.

848. Mr Tinkler says that the anticipated shortfall for the 2015 awards cannot have been a reason for the further transfer of approximately 5.3m shares to the EBT approved on 21 June 2018.

849. In relation to that larger transfer, Ms Brace's email of 19 June 2018 sought approval for it on the basis that it was to "*satisfy future LTIP or other share based incentive awards*".

850. Mr Coombs' said in his witness statement:

> "*Through my involvement with Remco, I recall being informed that, following the vesting of the 2014 LTIP's, there would be a deficit of shares in the EBT when the 2015, 2016 and 2017 LTIP, SEIP and [Save As You Earn] scheme vestings were taken into account. Indeed, even with all of the Treasury shares transferred to the EBT, there would still be a shortfall."*

851. In his evidence Mr Ferguson said "*we had through the RemCo calculated the next two to three years' worth of requirement, and this number [the 1.7m] would not be sufficient to meet that*." The exchange between him and Mr Taylor continued as follows:

> *Q. Well, Mr Ferguson, you did not know at that time how many shares would vest in future LTIP programmes which had not yet completed, did you?*
>
> *A. Not precisely but we had a very good idea about what would vest in 2019 and a pretty good idea about 2020.*
>
> *Q. Those depended entirely on how the company performed between that date and 2019 or 2020, didn't it?*
>
> *A. Well, there you're not right, I'm afraid, because some of the 2019 and 2020 is a three-year programme -- a three-year averaging of the results which had been particularly good following the sale of the Eddie Stobart stake. So we could see, we had good visibility for 2019 and 2020.*
>
> *Q. But there was no reason to transfer them at that time, was there, Mr Ferguson, other than to be voted in your favour?*
>
> *A. It made good commercial sense to transfer them. There is no cost in transferring them, and once they're in the EBT, they're absolutely available for the use of the beneficiaries of the EBT. But that was one reason. The second reason was that we as a board had decided that it was in the very best interests of the company and all shareholders if we managed to return a stable board at the AGM, and we took this decision partly on that basis, but partly also on the basis that it was a good commercial decision. The two ran side by side.*
>
> *Q. Can we agree, Mr Ferguson, that the predominant reason was to vote shares in your favour?*
>
> *A. It's -- I think that we took the two in parallel, that's my recollection of this. It was for us a very difficult decision to take but we wanted to make sure that we gave every opportunity for the return of a stable board for Stobart Group Ltd, but we took it as two separate decisions, one was about satisfying the needs of the LTIP, a good commercial decision, and the second was to give the independent trustees of the Jupiter trust the opportunity to vote the shares in what would be seen as the best interests of all shareholders."*

852. In his testimony, Mr Wood said:

> *"… I think they were done for two reasons. Firstly there was the issue about the re-election of Mr Ferguson and, secondly, there was the added issue that they were needed in the medium term to satisfy the future LTP's."*

853. The minutes of the Board meeting (by telephone) on 21 June 2018, noting that five of the six directors present had already approved by their emails the transfer of the 5.3m odd shares, recorded the Board's decision in the following terms:

> "*It was explained that a written resolution of the board of directors of the Company had previously been circulated to each of the Directors in order to approve certain employee incentive matters, in particular:*
>
> *a) the transfer of 5,320,425 ordinary shares currently held in treasury by the Company and which had not already been approved for such transfer (the "Treasury Shares") to the Stobart Group Employee Benefit Trust ("the Trust") by way of gift (the EBT Transfer"); and*
>
> *b) subject to the foregoing, approval of the terms of a voting recommendation to be made to Jupiter Trustees in its capacity as trustee of the Trust ("the Trustee") regarding the Treasury Shares so acquired and any other ordinary shares in the Company held by the trustee as at the voting record date for the AGM (the "Voting Recommendation")."*

854. It is also important to note (as Mr Coombs did in relation to Mr Garbutt in one of his answers mentioned above) that, in addition to the Four Directors, Mr Garbutt and Mr Laycock also approved the transfer. In the minutes of the Board meeting, by telephone, on 21 June 2018 Mr Laycock (who unlike the others had not given prior approval to the transfer by email) was noted as giving his approval "*on the basis that the shares will be needed in the EBT to satisfy incentive schemes."* The fact that two directors who Mr Tinkler does not seek to implicate in "Project Shelley" supported the further transfer perhaps points against the conclusion that the primary purpose behind the decision to make it was that of procuring Jupiter's favourable vote. As with the language of the minutes, it shows a duality of purpose, with the need to satisfy the less imminent LTIP (or similar) awards perhaps being regarded by the Board as no less important than the voting recommendation.

855. Nevertheless, despite this evidence and having found this to be the most difficult issue to resolve in this case, I have reached the conclusion that the primary purpose behind the decision to transfer the 5.3m shares to the EBT, at that time, was to secure the trustee's favourable vote. And that, in my judgment, was not a proper purpose for the "issue" of shares to the EBT (see the discussion of Article 7 in Section 4(a)(i) above).

856. I have reached this conclusion after considerable hesitation. Doubt over such a matter is inevitable when the conclusion rests upon after-the-event analysis of the state of mind of individual directors and where two of them (Messrs Garbutt and Laycock) did not give evidence and the others (the Four Directors) have asserted mixed purposes. To the extent that "purpose" is to be discerned by reference to outcome – speaking generally "purpose" can be said to be a pull from the future whereas "motive" is a push from the past – there is more to the court's analysis than simply looking at how Jupiter came to vote the EBT shares.

857. The fact that the voting recommendation to the trustee was just that, a recommendation, is a particular reason for caution. That the Board considered it appropriate to make one may be said to distinguish the facts of the present case from the kind of situation that existed in *Hogg v Cramphorn* or *Howard Smith v Ampol* where the directors could rely upon the view of the allottee of the new shares and did not need to look for reassurance of the kind that the Company sought from Jupiter in response to its recommendation.

858. I have already noted in Section 3 above that the recommendation to Jupiter (made by the majority of the Board) to vote in favour of Mr Ferguson was contained in the Company's letter dated 20 June 2018. That letter recognised that Jupiter had full discretion as to how to vote. It is important to note that Mr Ferguson and Mr Coombs (late in the evening of 19 June) and Mr Wood (early on the morning of the 20th) had already approved the transfer before the letter had been sent, although Ms Brace had clearly sought their approval on the basis that it would be sent and had provided them with a draft. Similarly, the language of the Board minutes quoted indicates that the "formal approval and ratification" at the Board meeting held at 9.15am on 20 June was not conditional upon Jupiter accepting the recommendation even though the making of it was decided upon in tandem with the decision to transfer.

859. I have also given anxious thought as to whether the terms of the Company's letter of 20 June, the draft of which had been provided to the directors the previous day before any approvals by email, are to be construed as amounting to something more than a "voting recommendation" and, instead, as having imposed a voting pre-condition to the transfer of the further 5.3m shares. It is the case that the Company's letter was expressed as an "offer" to Jupiter to acquire the 5.3m shares and required Jupiter to execute the enclosed "Acquisition Letter". The Acquisition Letter, duly completed by the trustee, did constitute an application for the shares "*to be held in accordance with the terms of the Trust and the terms of the recommendation letter from the Company (the "Acquisition Price)*" (my emphasis). The letter of 20 June ended with a recommendation not just that Jupiter should "*in its absolute discretion*" complete the Acquisition Letter but "*undertake to approve, authorise, execute and to, or procure to be executed or done, all documents, acts or things that are necessary or desirable for the purposes of giving effect to the same and to the Voting Recommendation*" (again, my emphasis). It concluded with the request that Jupiter confirm any decision (in the exercise of its "*absolute discretion*") to act on the recommendations of the Company by countersigning a duplicate of the letter and returning it with the duly completed Acquisition Letter.

860. Mr Tinkler did not press these particular points of interpretation, which are capable of being read as requiring Jupiter's prior agreement to act on the terms of the Company's recommendation, as the price of acquisition of the 5.3m. They obviously raise the prospect that the Board was simply paying lip service to the trustee's voting discretion and had instead sought to tie down Jupiter as to how it would vote the 5.3m shares (and what its letter described as the "Existing Shares" of 4,218,527, which included the 1.7m recently transferred). In relation an earlier draft (I think it most likely he was referring to the draft of the Acquisition Letter) Mr Foster said in an email of 11 June containing "*general comments*" upon the steps of offering the Treasury shares and making the voting recommendation:

> "*We have included wording in [ ]* [sic] *suggesting that the transfer is conditional upon the Trustee agreeing to vote the shares in accordance with the*

recommendation (as per Kevin's note). This could be counter-productive as this may make unsettle (sic) the trustee."

861. In referring to the trustee becoming "*unsettled*" by the attempt to make the transfer conditional upon it giving a voting a commitment, and the risk of it proving to be counter-productive, I infer that Mr Foster had in mind the point that the decision as to how to vote was ultimately a matter for the trustee's discretion.

862. The letter of 20 June and the Acquisition Letter certainly used contradictory language in connection with voting discretion and what I might describe as a voting commitment. I say this without having seen the terms of the Trust Deed, to which each letter also referred, which I imagine will have expressly addressed the trustee's discretion in relation to voting any shares within the EBT (with or without protection in respect of its exercise or non-exercise in the form of an "anti-Bartlett" clause).

863. Nevertheless, despite being clumsily expressed, I have concluded that the Company did not do more than make a recommendation as to how Jupiter should exercise its "*full discretion*" in relation to voting and did not consider it was securing any promise that it should act on the recommendation before it transferred the 5.3m. The terms of the letter of 20 June proceeded on the basis that the Trust Deed contained (at clause 12) express provision for the Chairman to make a voting recommendation to the trustee in accordance with what was considered to be the Company's best interests. In my judgment, that is what the letter was doing, and no more, and that is supported by the fact that the 1.7m had already been transferred, the general structure and tenor of the 20 June letter (addressing acquisition and voting recommendation separately) and the Board's recognition of Jupiter's independence (the letter mentioned the trustee's complete discretion three times). By making the recommendation and asking for Jupiter's countersignature of the letter (in the event of it deciding in the exercise of its discretion to accept it), by way of confirmation "*as soon as possible*", the Board plainly wished to know how Jupiter intended to vote at the AGM. Although it was quite quick to do so, Jupiter did not provide that confirmation until 21 June 2018. I think the Company can say that (as with the 1.7m shares) the decision to transfer the 5.3m shares had in principle been made by then.

864. However, that interpretation of the letter, so far as it is not purporting to fetter the trustee's voting discretion is concerned, does not carry with it the conclusion that the proper purposes rule was therefore not infringed. As I have already observed, the rule is really concerned with motive rather than effect (as illustrated by the fact the voting recommendation contained in the letter also addressed the 1.7m shares which I have found were transferred for the proper purpose of meeting the 2015 LTIP entitlements).

865. I have concluded that the decision to transfer the 5.3m was motivated by the primary purpose of securing the trustee's favourable vote because that is what the contemporaneous evidence shows. My conclusion is also supported by my overall assessment of the testimony of the Four Directors referred to above. Once the need to replenish the EBT to satisfy LTIP awards is stripped away as a reason for them making the decision, as I think the fact of the earlier, separate decision over the 1.7m fully justifies, then their desire to secure that vote can fairly be said to be the predominant reason why they made it at that time.

866. As to the contemporaneous evidence, that begins with Mr Wood's email of 24 May, mentioned above, which first raised the possibility of giving the trustee the vote in respect of all the shares then held in Treasury. I accept Mr Wood's evidence that when he said in that email that it might be a "*silly idea*" he meant that he did not know whether it could be done, rather than it signifying some awareness on his part that it would not be right to do so. Nevertheless, in that email of limited circulation, the emphasis was upon the ability to vote the shares. It must be noted that the shares which had been bought back in the market in February 2018 had not soon thereafter been transferred from Treasury to the EBT as the proper receptacle for meeting the LTIP awards that had driven the buy-backs (no doubt for good, dividend-related reasons).

867. The Four Directors picked up on Mr Wood's idea as is apparent from an "action tracker" document for "Shelley actions" which Ms Brace sent by email on 10 June 2018. Item 14 on that document was: "*EBT shares – chase EBT for response on voting. Subject to response, agree with all if transferring ALL treasury shares to EBT*." As Mr Tinkler's counsel submitted, the only correct interpretation of that proposed action is that the transfer would be dependent upon how Jupiter indicated it would vote.

868. On 11 June, Ms Brace was able to tell the Four Directors (and Mr Foster) that the trustee would vote in accordance with the recommendation of the Chairman. It was that message which then prompted Mr Brady to ask Mr Dilworth, two hours later, to arrange for the transfer to the EBT "*so that we can vote them*" because "*2% is a lot in our game*". As with Mr Wood's email, Mr Brady appears to have been operating on the assumption that a Chairman's recommendation (of the kind which the Trust Deed appears to have contemplated) would be persuasive, if not decisive. Whilst highlighting the risk of attempting to force the trustee's hand, Mr Foster's email of 11 June had raised the notion of conditionality in the terms of transfer to Jupiter.

869. At the time of the decision to transfer the 5.3m shares, the Four Directors therefore had every expectation that Jupiter would vote in accordance with the recommendation and that is why they decided to sanction it. The timing of that transfer, made separately from the earlier one in respect of the 1.7m and with voting implications addressed by the terms of the letters analysed above, was therefore motivated primarily by the need to get the Trustee's favourable vote at the AGM rather than any short-to-medium term (as opposed to imminent) obligations to meet employee share entitlements.

870. Mr Tinkler relies upon Mr Brady's text message to Ms Brace on 8 July, after the AGM ("*Also you need to send us the result ex EBT so we know properly won*") as confirmation of that motive. Although I accept Mr Brady's answer that this was written in circumstances where he was aware that K&L Gates had intimated a challenge to Jupiter's actions, so he wished to establish what the vote would have been if any such challenge was upheld, in my judgment it further reveals that the second transfer was motivated by the desire to secure the trustee's favourable vote.

871. Mr Coombs said (as did the Company's letter to Jupiter of 20 June 2018) that the voting recommendation was considered to have been in the best interests of the Company. His witness statement referred to legal advice from Mr Foster to the effect that the transfer was "legitimate" provided it was done in the best interests of the Company. Travers Smith had advised that any voting recommendation by the Chairman "*in connection with the matter in question*" would not comply with the Investment Association Principles of Remuneration and, though not binding, they should be taken into account

when considering making a recommendation. However, in his testimony Mr Coombs said that they nevertheless felt that they had a "*strong answer*" for doing so and, it being a judgment they had to make at the time, they considered it was in the best interests of the Company and all the shareholders that they should do so. The same point, about the Company's best interests, emerges from Mr Ferguson's evidence which I have recited above. During his cross-examination, Mr Brady said "*we definitely haven't breached any duties, fiduciary duties*."

872. I readily accept that the members of the Board did act with the Company's best interests in mind and consistently with what they regarded as their duty to the Company when they transferred the 5.3m shares to Jupiter along with the voting recommendation.

873. It also seems to me that there might have been good reason why those with a capital interest in the Treasury shares should have a say at the AGM, which could not be expressed whilst they remained disenfranchised in the "warehouse", on such an important matter as this boardroom dispute. However, and particularly in the light of some open questions I asked Mr Coombs about whether the Corporate Treasurer had any powers in relation to the Treasury shares, there is no indication in the evidence that this was a factor that weighed on the Board's mind at the time. None of the Four Directors indicated in their evidence that they were motivated by the thought that Jupiter might wish to have a say on matters potentially relevant to the value of shares which, sooner or later, were destined to be transferred to the Trust and in respect of which no other person could express a voice.

874. Even though they believed, in my judgment with good cause, that they were acting in the best interests of the Company in causing the 5.3m shares to be transferred to the EBT, I have explained in Section 4(a)(viii) above that the authorities make it clear that the proper purposes duty is not tempered by such wider considerations by reference to that duty of fidelity. The fact that the Four Directors made the decision in relation to the 5.3m shares in what they considered to be the best interests of the Company, a view which I would see no reason to second-guess in the circumstances then facing them, does not mean that it did not infringe the proper purposes rule.

875. As to the voting discretion which Jupiter enjoyed as trustee, Mr Coombs said the shares were transferred for the trustee to take its own decision as an independent trustee.

876. The terms of K&L Gates' letter of 29 June 2018 to Jupiter only serve to highlight the independence of the trustee. Mr Tinkler's solicitors contemplated that it would be necessary to join Jupiter as a party to any proceedings and to impugn Jupiter's proposed action (in voting in favour of Mr Ferguson) by reference to its own independent fiduciary duties under the EBT.

877. Jupiter's letter of 5 July 2018 notified both sides of the change from its earlier position of proposed abstention (as indicated by the letter of 3 July which also expressly recognised the fiduciary duty to act in the best interests of the EBT and its beneficiaries). By the terms of that letter, and the change of position signified by it, Jupiter confirmed that it was exercising its vote independently:

> "*As we explained in our letter of 3 July, as trustee, our wish is for the Company to continue in good standing. In the absence of persuasive concerns with the Company's strategic direction, the disruption and instability that would follow*

from wholesale board changes (for example the removal of the Chairman and the possible resignation of independent Board members) does not appear to us [sic] to be in the best interests of the Company and therefore not in the best interests of the beneficiaries of the Trust (as a whole)."

878. As a separate complaint to that based upon the decisions to transfer shares to the EBT, Mr Tinkler says that the Four Directors acted in further breach of duty by not causing shares to be transferred to the employees respectively entitled to them, under the 22 June vesting, so that those employees might vote them as they wished at the AGM.

879. Mr Coombs' witness statement explained at some length how it would have been most unlikely, if not impossible, that anyone with an LTIP award vesting on that date would have received his shares in time (the cut-off date for registration to vote at the AGM being 4 July 2018). He also said that only seven of the nineteen employees concerned had elected to receive their entitlement in shares and none of them had pressed for a share transfer.

880. In my judgment, there is nothing in this further complaint by Mr Tinkler once it is recognised, as I have, that the shares properly went from the Treasury to the EBT on 19 June. It was argued on behalf of Mr Tinkler that there is no evidence to suggest that the shares could not have been transferred out of the EBT in time for employees to vote. However, even if Mr Coombs' evidence could be ignored, that is not the question I have to decide. I have to decide whether the Four Directors were somehow culpably responsible for delaying the transfer.

881. In his evidence Mr Tinkler went so far as to suggest that the shares should have been transferred on the vesting day itself, and with such haste that the Company itself should have paid the tax liability in respect of them. As the Company's counsel remarked, not only would such a process certainly entail a cash-flow detriment to the Company, but it would not have accorded with the chronology of events, as the Company was still receiving information regarding the exercise of awards on 21 June.

882. There is no evidence of culpable delay on the part of the Company, or any members of the Board, and I have referred above to the schedules provided by Remco to Jupiter on 21 June 2018 which indicated the requirements for satisfying each award. As the Company submitted, the relevant points to emerge from Mr Coombs' evidence were as follows:

i) for the purposes of "sell sufficient" – where enough shares are sold to cover tax liability and the remainder are transferred to the participant - the tax calculation could not be conclusively determined until all the sales were complete;

ii) sales commenced immediately on 22 June (the vesting date) and were spread until 28 June, which was considered appropriate given the large number of shares to sell without collapsing the price;

iii) the final tax calculations were then carried out by BDO between 28 June and 6 July. Tax calculations were done as a matter of 'batch processing', by which, once all the sales were complete, BDO carried out all the tax calculations in a single iteration; and

iv) no participant instructed the Company to hurry-up the process so that he could get on the register by 4 July so as to be able to vote at the AGM.

883. In any event, I do not see how the Four Directors, as opposed to Jupiter, can be held accountable for any "delay" after the 22 June vesting. That point is demonstrated by Mr Tinkler's further argument, in his closing submissions, that "*if the shares had vested but were really "stuck" in the EBT, the EBT Trustee should have voted them as directed by the relevant beneficiaries*." I do not know what if any bearing the terms of the Trust Deed might have on that contention, which is different from the abstention from voting urged by K&L Gates in their letter to Jupiter of 29 June 2018 intimating an application for injunctive relief. However, the submission shows that this was a matter for Jupiter not the Board.

884. The next matter on which Mr Tinkler relies within this present Issue 4 is the failure of the Four Directors to put forward for voting at the AGM the resolution (No. 4) for his re-election to the Board. There is nothing in this allegation when Mr Tinkler's election to the Board (on the footing he had been removed from office on 14 June 2018) had been put to the meeting and passed under Resolution No. 14. I have already explained in Section 3 above that the Royal Court of Guernsey was not asked to second guess Mr Tinkler's removal from employment and office on 14 June when it refused his application for injunctive relief over Resolution No. 4. Judge Finch said that was a matter for this court. My conclusions in relation to Issues 7 and 8 below are further reasons why there is nothing in Mr Tinkler's present challenge.

885. Mr Tinkler also challenges the decision, in the purported exercise of a discretionary proxy, to cast votes that would have been abstentions on Resolution No. 4 as votes against Resolution No. 14. As with the last point, it is difficult to see where this issue might lead in circumstances where Mr Tinkler was nevertheless elected. The pleaded allegation is that it was a deliberate breach of the duty owed by Mr Ferguson, as Chairman, to vote those shares in the manner which he best understood to be the wishes of the appointor. Of course, Mr Tinkler would presumably have liked to argue that the almost identical subject matter of invalid Resolution No. 4 and substitute Resolution No. 14 should mean that Mr Ferguson in fact had no discretion in relation to the latter resolution, arising under "AOB", but that would have been an unsustainable argument.

886. As to the way the point is put, Mr Ferguson said he took legal advice from Carey Olsen as to how he was entitled to vote those proxies. This included the advice that he would be entitled to exercise his discretion, acting in good faith and for what he considered to be the best interests of the appointing shareholder, on the basis that the shareholder had not provided any indication as to how to vote on Mr Tinkler's election. This was because the abstention on the invalid re-election resolution might indicate neutrality or because (following the recommendation in the ISS report) an abstention reflected the point that "*this resolution is void*". I see no basis for criticising Mr Ferguson's decision to exercise his discretion to vote against Mr Tinkler. Nor have I seen any evidence that those who gave him the discretion were unhappy about the way he exercised it. My conclusion on this aspect is reinforced by my conclusion under Issue 8 below.

887. The final matter within the present issue in fact overlaps with Issue 10. It relates to the actions of the Four Directors in once more removing Mr Tinkler from office (in reliance upon Article 89(5)). But, whereas Issue 10 focuses upon the proper purposes rule, this present Issue 4 embraces any kind of breach of fiduciary duty.

888. In my judgment, and for the further reasons given in relation to Issue 10, there is no basis to conclude that the Four Directors acted in breach of duty in removing Mr Tinkler from office on 7 July 2018. Their duties were owed to the Company, not to the 51.44% of shareholders who had voted in favour of Mr Tinkler's election. For present purposes, the most relevant fiduciary duty is the duty to act in good faith in what the director believes to be the best interests of the Company. I have addressed the implications of this duty in Section 3(a)(iv) above. In the light of my findings on Issues 1, 3 and 5 to 8, and what I have said about the justification for their actions on 14 June 2018, I see no basis for impugning their decision.

889. They had the power under Article 89(5) and nothing had been said at the AGM to suggest otherwise. From their perspective nothing had changed in relation to the desirability of removing Mr Tinkler from office, having removed him from employment, since their earlier decision to do so on 14 June. It is true that at the AGM the previous day the shareholder support, which they understood Mr Tinkler had procured, found expression but many of the matters upon which the Committee had relied in dismissing him from employment were relevant to their concerns as to just what it was he had been saying to those shareholders. Taking, for example, WIM's vote of approximately 19.5% in favour of Mr Tinkler, the Four Directors had no reason to think that this reflected a considered or balanced view on the *"serious governance matter"*, with its risks to shareholder value, which Mr Wood had tried unsuccessfully to discuss with Mr Woodford. On the contrary, and as I have already noted in relation to Mr Coombs' evidence, they just could not understand Mr Woodford's position.

890. It therefore follows that, within this present Issue 4, I find that the Four Directors breached the duty to act for proper purposes in deciding to make the further transfer of approximately 5.3m shares but not otherwise.

891. I address the implications of the infringement of the proper purposes rule, in relation to the transfer of the 5.3m shares, under Issue 9 below.

892. **Issue 5**: Was the Committee of the Board properly constituted? If so, did the Committee have authority to dismiss Mr Tinkler?

893. Mr Tinkler says the members of the Committee (Mr Brady, Mr Coombs and Mr Wood) were not impartial and he relies upon what Mr Garbutt said on the point during the Board meeting call on 28 May 2018. He also relies upon the removal from its terms of reference, before they were approved at the Board meeting on 7 June 2018, of the reference to "*the future position of Andrew Tinkler in relation to the Company and its subsidiaries, whether as a director or an employee.*" The Company disputes that either point leads to the conclusion that the Committee lacked authority to dismiss Mr Tinkler from his employment.

894. The parties' disagreement over whether or not the Committee's terms of reference gave it the authority to dismiss Mr Tinkler is also reflected in Issue 6 (which also encompasses the objection taken to Mr Ferguson's presence at its meetings).

895. As to whether the Committee was properly constituted, I see no grounds to question this. Article 96 of the Company's Articles permitted the Board to "*delegate any of their*

powers to committees consisting of such one or more Directors as they think fit." The appointment of the Committee was established by a majority of votes at the Board meeting on 7 June 2018 (and therefore in accordance with Article 91) with Mr Woods acting as Chairman in place of Mr Ferguson for that piece of business. The Board, comprising the Four Directors in the majority with Mr Tinkler and Mr Garbutt voting against, acted entirely within its constitutional right in establishing the Committee.

896. As to the Committee's authority, I have addressed in Section 4(b) above the principles which apply to construing a document where it can be seen that words formerly contemplated came not to be included within it. Caution is obviously required when "interpreting" what through ungainliness might be described as "non-words". As Lloyd J observed in the *The Golden Leader*, there may be all sorts of reasons why the words came not be included.

897. In this case, the evidence of Mr Coombs was that the advice of Travers Smith was that an explicit reference to termination would have been "*superfluous*" and "*inflammatory*". Mr Coombs said: "*a risk of constructive dismissal is different than saying the board didn't have the power*". That advice was given on 3 June 2018 and it is clear that the solicitors had in mind "*the already present risk of a constructive dismissal claim which we rehearsed in the context of the establishment of the Committee*". I infer that the concern was that the very inclusion of an express reference to Mr Tinkler's future as an employee or director would be taken by him to indicate that a decision on the first had already been silently reached.

898. In my judgment, the deletion of the words referring to Mr Tinkler's future within the Company cannot be read as meaning that the Committee lacked the power to address it. Mr Wood's evidence was that Mr Foster of Travers Smith had raised the idea of a Committee on 28 May 2018 so that it might have full Board authority to run matters without the interested Board members who he identified as Mr Ferguson and Mr Tinkler. Within the words that remained in the Committee's terms of reference were that "*the remit of the Committee includes authority to exercise all powers of the Board (without limitation)*". That clearly gave the Committee the delegated power to act on behalf of the Board (and therefore the Company) in connection with Mr Tinkler's employment status. It is important to note that the advice of Travers Smith on 5 June 2018 was that "*if considered necessary*" the Committee's terms of reference could be amended after the AGM to include specific reference to Mr Tinkler's removal. In the light of the general delegation of power to the Committee, by the words quoted above, I do not see why that was necessary when (before the AGM) the Letter to Shareholders and Communication to Employees gave the Committee cause to consider Mr Tinkler's summary dismissal. I also note (having regard to the circumstances in which the Committee was formed) that the three members of the Committee would in any event have been able to carry a full Board resolution for his removal, either with the support of Mr Ferguson if was permitted to vote or without him if both he and Mr Tinkler were precluded from voting under Article 85 by reason of their self-interest in the decision.

899. In my judgment, the Committee was properly constituted and had the authority to dismiss Mr Tinkler from his employment.

900. **Issue 6**: Was the purported 14 June 2018 dismissal of Mr Tinkler invalid and/or unlawful?

901. This is another issue which comprises at least three limbs (as can be seen from its full terms set out in Section 2 above) though my determination of it rests largely upon the outcome of other issues.

902. This issue also raises the scope of the Committee's authority under its terms of reference, which I have addressed in the Company's favour under Issue 6 above.

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.

905. The next matter for consideration is whether the Committee lacked authority to dismiss him. I have addressed the greater part of this question under Issue 5 above, but the present issue also raises the concept of a conflict of interest. This is by reference to the fact, which the Company accepted, that Mr Ferguson attended discussions by the Committee over Mr Tinkler's future even though it was known (by reason of Mr Tinkler's "him or me" stance") that Mr Ferguson had an interest in the outcome. As I have also just touched upon, Mr Tinkler also argued that there was an element of self-interest on the part of Committee members in that (to quote from his opening submissions) they "*each had an interest in supporting Mr Ferguson's position.*" By this he meant they wanted to entrench their own position.

906. So far as Mr Ferguson's presence at Committee meeting is concerned, the Committee's terms of reference included a power to invite non-members to attend and speak.

907. Mr Ferguson accepted that it was agreed at the Board meeting on 7 June 2018 that he would attend meetings of the Committee but he said in his evidence that this was to

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

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

909. As to the wider conflict of interest which Mr Tinkler says Mr Brady, Mr Coombs and Mr Wood each faced, and which caused them to support Mr Ferguson, in my judgment this lacks any proper basis. It is inevitable that individual directors will have their own individual views upon matters which call for a choice to be made and the duty to exercise independent judgment requires that they should. Mr Coombs and Mr Wood (though not Mr Brady) had made their choice clear by indicating in the 25 May RNS that they would stand down if Mr Ferguson was not re-elected. However, provided each of the three, having exercised his independent judgment, acted genuinely in what he believed to be the best interests of the Company, I cannot see how his decision can be said to tainted by some "self-interest" simply because it is consistent with the decision-maker continuing in the office of director. That office is as much a burden as a benefit, but any benefits which flow from remaining in position cannot be the basis for an argument that any decision which might be said to be consistent with that end is somehow infected by a conflict of interest or an improper purpose. On that approach, and as the Company submitted, business at the Board level would become impossible. Mr Tinkler's point appears to come close to saying that the desire to remain in office, or to support a co-director in doing so, in fact precludes the person from being able to do so lawfully and effectively by making decisions which support or are consistent with that aim, regardless of the independent business case for making them.

910. Mr Wood said, of his presence on the Committee, "*I considered myself to be impartial because I believed I was acting in the best interests of the Company*." Although he did not have Mr Tinkler's point directly in mind when saying that, it would have been a good response to it. And there is nothing in the evidence which has caused me to doubt his belief or that of his co-directors.

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".

912. The last basis on which the authority of the Committee is thrown into question by the present issue is one that is premised upon Mr Tinkler either not having been in breach of his Service Agreement or, if he was, his breach or breaches not being repudiatory in nature.

913. In the light of my findings under Issue 3, this ground of challenge to its authority has no substance. I have referred in my determination of that issue to Mr Tinkler's breaches of duty being serious ones. In my judgment, when viewed cumulatively, they were repudiatory in nature. Indeed, the breaches constituted by his Letter to Shareholders and Communication to Employees were, in my view, each repudiatory breaches. By writing in those terms, Mr Tinkler had brought his campaign against the Board, his employer's representative body, out into the open. Those most recent breaches did not land in an empty scale and, by his actions between late January and early June 2018 and the Company was entitled to conclude that Mr Tinkler had abandoned his responsibilities as Executive Director. And acting through the body endowed with the Board's delegated authority – the Committee – the Company was entitled to dismiss him.

914. I should note that Mr Tinkler says that K&L Gates' letter of 19 June 2018 was a clear affirmation of his contract of employment. Had I reached the opposite conclusion on this issue I would have been persuaded to grant Mr Tinkler declaratory relief which vindicated his right to the LTIP share vesting from which he would have benefited, had it not been for the Company's own repudiatory breach in dismissing him without grounds for doing so, but not so as to otherwise support the continuing performance of his Service Agreement against the wish of the Company.

915. It was submitted on behalf of Mr Tinkler that such a result would involve me succumbing to the Company's unprincipled argument based upon *fait accompli* reasoning, and the assumption that what has been done (even if done unlawfully) cannot be undone. However, the conclusion posited above on this counterfactual situation would, in my judgment, have reflected the proper application of the principles addressed in Section 4(b)(iii) of this judgment. For the reasons given there, I would not have been persuaded to exercise my discretion to make a declaration which (in the parties' observance demanded by it) was tantamount to an order for specific performance.

916. **Issue 7**: Did the terms of clause 17.4 of the Service Contract permit Mr Tinkler's removal as a director?

917. I have addressed this question of pure construction in Section 4(b)(ii) of this judgment. In my judgment, on its true construction clause 17.4 conferred upon the Company the right to request Mr Tinkler's removal as a director of the Company.

918. **Issue 8**: Was the purported 14 June 2018 removal of Mr Tinkler as a director invalid and/or unlawful?

919. There is overlap between the matters referenced within the terms of this issue (as set out in full in Section 2 above) and Issues 4, 5 and 6. The only question which is not answered by my determination of those other issues is whether or not the Four Directors were motivated by an improper purpose in taking the further decision to remove Mr Tinkler from the Board, he having been lawfully dismissed as an employee and (as I have found under the last issue) the Company having the right to request his removal.

920. I should point out that, like his summary dismissal the same day, this was a step taken by the Committee and that Mr Ferguson, as the fourth director, was not jointly responsible for it. It was plainly one that the Committee was able to take under its wide terms of reference. Even if it had not had that authority then, as with the dismissal from employment, it seems to me that *Bentley-Stevens v Jones* type reasoning (see Section 4(a)(viii) above) might have come into play, as the Company suggested, in relation to this decision taken by those who (either with Mr Tinkler and Mr Ferguson eligible to vote or not) would have created a majority vote for the purposes of any full Board decision.

921. In my judgment, there is no basis whatever for impugning the decision to remove Mr Tinkler from office by reference to an allegedly improper purpose. On the contrary, his summary dismissal from his employment by the Company as Executive Director, on the grounds identified in the minutes of the Committee's meeting on the morning of 14 June 2018, was plainly a legitimate basis for the decision. That the decision, in those circumstances, was a properly motivated one is almost too obvious a point to justify, but that can be done by simply referring to the fact that Mr Tinkler agreed and recognised that a resignation request might follow when he signed up to the terms of clause 17.4 (as I have construed it).

922. I therefore find that the removal of Mr Tinkler as a director of the Company on 14 June was lawful and valid.

923. **Issue 9**: Was the purported re-election of Mr Ferguson as a director at the AGM on 6 July 2018 invalid by reason of the alleged breaches of fiduciary duty as set out in Issue 4?

924. I address this issue on the basis of my finding (under Issue 4) that the Four Directors did breach the duty to act for proper purposes in deciding on 19-20 June 2018 to make the further transfer of 5,320,425 shares to the EBT. I also do so on the basis of my conclusion (in Section 4(a)(viii) above) that the issue (i.e. transfer) of shares to the EBT for an improper purpose would result in the transfer being voidable rather than void.

925. Mr Tinkler had adduced in evidence (as Annex A to his fifth witness statement) a table which showed that Mr Ferguson would have failed to secure a majority vote in favour of his re-election if all of the shares transferred to the EBT – both the 1.7m odd and the 5.3m odd – were to be treated as deducted from the vote in favour. Apart from pointing out that the calculation impugns both transfers, and not just the second, the Company made a number of criticisms of Mr Tinkler's analysis which would see the vote in

favour of Mr Ferguson reduced from 51.21% to 49.68%. These included the assumptions that Mr Tinkler would have exercised his LTIP awards so as to receive the full entitlement of 1,853,827 shares (despite what he said at the Board meeting on 7 June 2018 and the loss of his 2015 LTIP entitlement on his dismissal) and that he and other opposing employees would have received their LTIP shares before the voting deadline of 4 July 2018.

926. In their closing submissions, the Company's counsel produced a rival table which assumed that the voting deadline would have been met (even though it is the Company's case is that it never would have been) by those exercising their LTIP awards and wishing to vote against but, as has proved to be consistent with my findings above, that only the second transfer to the EBT was impugned and that Mr Tinkler had no entitlement to the 2015 LTIP by reason of his dismissal. On those assumptions, the Company says Mr Ferguson would still have been elected by a vote of 50.15% in his favour.

927. Mr Taylor QC countered not only by saying that the whole of the EBT vote should be ignored, which is a submission now unsupported by my conclusion in relation to the 1.7m transfer, but also that the EBT vote should be treated as re-cast to reflect the wishes of those who had been identified in Mr Tinkler's evidence and submissions as wishing to have voted against.

928. In my judgment, these exchanges (and particularly Mr Tinkler's last submission) highlight the essential difficulty which the court faces in seeking to draw from its finding that the 5.3m transfer was made in breach of the proper purposes rule the further conclusion that the actual vote in respect of those shares should be ignored or reinterpreted. That conclusion might follow if an infringement of the rule resulted in the transfer being wholly void but that, in my judgment, is not the position and I have already noted in Section 4 above that Mr Tinkler (admittedly focussing upon the shares which were the subject of the first transfer and were used to satisfy awards exercised on 22 June) did not suggest it to be.

929. The true position is that the transfer of the 5.3m shares was, at worst, voidable not void and, despite Mr Tinkler and Mr Whawell intimating that they would seek injunctive relief in Guernsey to restrain Jupiter from voting, Jupiter did vote. It did so having given the Company a good receipt for those shares (in the sense of acquiring legal title to them for the benefit of the trust) and, moreover, having quite clearly exercised its independent judgment as to how to vote them. I have already explained under Issue 4 how the Company's letter dated 20 June 2018 did not attempt to fetter the trustee's voting discretion and it is clear that Jupiter did not think it had. The evidence shows how, on 3 July, Jupiter indicated that it intended to abstain from voting only then to later change its mind, on 5 July, in the light of the ISS and Glass Lewis Reports. It was the change of mind that prompted Collas Crill into action on behalf of Mr Tinkler and Mr Whawell.

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.

932. The Company relied upon the decision of the Privy Council in *Gulf Insurance Ltd v Central Bank of Trinidad and Tobago* (9 March 2005), at [47], to illustrate that there will sometimes be cases where it simply too late for the court to step in and make orders in attempt to rewrite history. In such cases the court will instead grant only appropriate declaratory relief. That case also concerned a transfer of shares. The court said:

> "It is now far too late to try to undo what happened that Sunday. But that does not make the original transfer lawful. Gulf are entitled to the declaration as a basis for such other remedies as they may be entitled to claim."

933. This reasoning applies to the present case in relation to Jupiter's exercise of the vote in respect of the 5.3m shares. The fact that the Company can credibly argue that Mr Ferguson would still have obtained a 50.15% vote in his favour, if the vote in respect of the 5.3m is discounted, is a further reason not to attempt an unwinding of Resolution 2 at the AGM.

934. It therefore follows that I am not persuaded to make a finding that the re-election of Mr Ferguson at the AGM was invalid.

935. **Issue 10**: Was the second purported removal of Mr Tinkler as a director on 7 July 2018 invalid, on the basis that the Four Directors were acting for improper purposes?

936. I have addressed the Four Directors' decision to invoke Article 89(5) on 7 July 2018 in the context of all potentially relevant fiduciary duties other than the duty to act for proper purposes.

937. I note again that the parties have been content to proceed (by reference to the Privy Council decision in *Lee v Chou* which I have addressed in Section 4(a)(vii) above) that the power under Article 89(5) of this Guernsey company is one to which the proper purposes rule applies.

938. Mr Tinkler's argument rests upon the "golden thread" mentioned in the very first of many submissions made on his behalf and which I mentioned at the beginning of Section 3 above: that it is for shareholders to decide upon the composition of the company's board and who it is that should manage the company. He says it was wrong

for the Four Directors to usurp the decision of a majority of shareholders, made at the AGM the previous day, that he should be on the Board.

939. I have already said in the course of making findings under Issue 2 that nothing had changed from the majority's perspective so far as the desirability of keeping the recently dismissed Executive Director off the Board was concerned. Mr Tinkler's actions, which had justified his summary dismissal, had not somehow gone away and it was the Four Directors' view that the Company's best interests required that he be removed again.

940. Although I have explained in Section 4(a)(vii) that taking a decision in the Company's best interests will not necessarily meet the charge that it was nevertheless taken in breach of the proper purposes rule, the existence of this separate issue does beg the question as to what improper purpose is said to have motivated the majority. By the time Article 89(5) was invoked on 7 July 2018 Mr Ferguson had been re-elected to the Board and Mr Tinkler had been dismissed from employment, though I recognise that the Four Directors would have then been aware that Mr Tinkler was disputing his dismissal and had both brought and threatened proceedings in Guernsey which had a bearing upon both matters. I have seen no evidence to suggest that, by deciding to remove him from office on 7 July, the Four Directors considered they were improving the prospects for resisting any challenge to those earlier steps.

941. In my judgment, the evidence does not support any conclusion that the Four Directors were motivated by any purpose other than the same one which had driven the Committee's actions on 14 June, and which was not an improper one. It is clear from their evidence that Mr Tinkler's actions were still "*considered to be a threat to [that strong] corporate governance which in turn would be likely to lead to instability of the Company*" (to quote from the minutes of the Committee meeting). The fact that a bare majority of shareholders might have been persuaded otherwise does not mean the majority should have been. As at 7 July 2018, the Four Directors would have had no cause to think that either Mr Jenkinson or WIM had applied their minds impartially to the implications of Mr Tinkler's actions (when they were amongst those with whom he had been having private discussions and they had not benefited from the majority's viewpoint).

942. The improper purpose relied upon by Mr Tinkler is therefore really one which is said to arise as a matter of principle rather than by reference to a discrete piece of evidence as to the Four Directors' motives as at 7 July 2018. It really amounts to saying that the Board cannot properly decide something which is contrary to what has been decided by the shareholders in general meeting. My general observations which attempt to set the context at the beginning of Section 3 above will indicate why that strikes me as a questionable submission. The court generally respects the executive function of a board of directors on the basis that it is the board that the shareholders have decided to appoint to manage its affairs.

943. If I have, perhaps unfairly, reformulated Mr Tinkler's submission in terms that are too general, and it is only the members' decisions as to the composition of the Board that should not be second-guessed afterwards by the Board, or, perhaps, not too soon afterwards, then it still runs up against the point that the majority (of all directors bar one) was still armed with the Article 89(5) power from the moment the Board was constituted at the AGM. One cannot read into that power a limitation that it will not be

exercised, or, perhaps, not exercised too soon against a newly appointed director, or that it will only be exercised against him on "new" grounds arising after his appointment (though it is clear that the majority thought the threat posed by Mr Tinkler to the stability of the Company was a continuing one).

944. The difficulty with the "golden thread" argument, therefore, is that Mr Tinkler seeks to apply it in a way from which only he benefits. This is illustrated by his counterclaim for "*an injunction restraining the Board from purporting to remove Mr Tinkler as a director of the Company pursuant to Article 89(5)*". As the Company has questioned, why should Mr Tinkler (on the assumption he is back on the Board) benefit from such special protection against the exercise of a power that the members have agreed to confer upon the Board (and not revoke)? Of course, Mr Tinkler is forced to seek that relief to protect himself against the remainder of the Board (now differently constituted but with the Four Directors still on it) doing again that which was done on 7 July 2018.

945. Yet the decision of members at the AGM was to appoint the whole Board, including the Four Directors who chose to exercise the Article 89(5) power available to them. If the golden thread runs, it runs for the benefit of all directors whose appointment reflects the shareholders wishes. As Mr Coombs made the point in evidence, when making the point that the outcome at the AGM had not really resolved the problem when the other directors felt unable to work with Mr Tinkler:

> *"Well, so what's supposed to happen? You have a board that's been elected by shareholders and four or five people have to stand down because they can't work with the one? I got 60-odd per cent votes. I got more votes than Mr Tinkler. Why should I step down? Or am I less of a director than him?"*

946. In my judgment, there is no basis for concluding that the Four Directors exercised the Article 89(5) power on 7 July 2018 for an improper purpose. Its exercise was therefore a valid and effective one.

SECTION 6: DECISION

947. In the light of my findings above, I determine the Issues as follows (noting once again that the expenses claim against Mr Tinkler – originally the fourth of eleven Issues – has since been abandoned).

948. **Issue 1**: Mr Tinkler did not hold or express to the Board "concerns" about any of the matters identified in paragraphs 15 or 16 of the Amended Defence in a way or to a degree that might be material to my determination of any of the other Issues.

949. **Issue 2**: The Company has not established its claim of an unlawful means conspiracy.

950. **Issue 3**: Mr Tinkler acted in breach of his fiduciary and contractual duties in the following respects (but not the others identified within this issue): (1) speaking to the Company's significant shareholders and criticising the Board's management and the Group's business and agitating for the removal of Mr Ferguson; (2) improperly sharing

confidential information in the form of the Duranta budget with Mr Day; (3) writing the Letter to Shareholders and the Communication to Employees; and (4) orchestrating the ELT letter and the "petition". Each of these constituted a serious breach of duty.

951. **Issue 4**: The Four Directors breached the duty to act for proper purposes in deciding on 19-20 June 2018 to make the further transfer of 5,320,425 shares to the EBT, but did not otherwise act in breach of duty.

952. **Issue 5**: The Committee was properly constituted and had the authority to dismiss Mr Tinkler from his employment.

953. **Issue 6**: The dismissal of Mr Tinkler on 14 June 2018 was a lawful and valid act.

954. **Issue 7**: On its true construction, clause 17.4 of the Service Contract did permit Mr Tinkler's removal as a director of the Company.

955. **Issue 8**: The removal of Mr Tinkler as a director of the Company on 14 June was a lawful and valid act.

956. **Issue 9**: The resolution to re-elect Mr Ferguson at the AGM on 6 July 2018 is not to be treated as invalid.

957. **Issue 10**: The exercise of the Article 89(5) power on 7 July 2018 was valid and effective.

958. I will hear the parties further as to the appropriate form of Order to reflect the above findings and any consequential matters.