



Neutral Citation Number: [2023] EWHC 1289 (KB)

Case No: QB-2022-003928

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/05/2023

Before :

MR JUSTICE KERR

Between :

(1) KEW GREEN GROUP LIMITED

Claimants

**(2) KEW GREEN HOTEL (MANAGEMENT)
LIMITED**

- and -

(1) JAMESON LAMB
(2) ALEX PRITCHARD
(3) AXIOM HOSPITALITY LIMITED
(4) ANAEL PEU
(5) GRAEME PARKER
(6) NICK O'KEEFE
(7) JLAP INVESTMENTS LIMITED

Defendants

Thomas Croxford KC and Sean Butler (instructed by **KWM Europe LLP**) for the
Claimants

Paul Nicholls KC (instructed by **DAC Beachcroft LLP**) for the **First, Second, Third and
Seventh Defendants**

The **Fourth, Fifth** and **Sixth Defendants** did not appear and were not represented.

Hearing date: 16 and 17 May 2023

Approved Judgment

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MR JUSTICE KERR

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 11am on 30 May 2023.

Mr Justice Kerr :

Introduction and Summary

1. Four of the seven defendants bring the present application to strike out or for summary judgment in respect of large swathes of the claims against them brought by their former employers, the two claimant hotel management companies (together, the claimants or, collectively, **Kew Green**). The claims are wide ranging.
2. There are claims for breaches of three different contracts, breaches of fiduciary duties, inducing or procuring breaches of contract, conspiracy to cause harm by unlawful means, knowingly assisting breaches of fiduciary duty, knowing receipt of trust property, the return of sums paid, equitable compensation and an account of profits. There is a counterclaim for sums unpaid.
3. The first and second defendants, Mr Lamb and Mr Pritchard, are former senior managers employed by one of the Kew Green companies. As such, they were directors of numerous Kew Green companies. The third and seventh defendants (respectively, **Axiom** and **JLAP Investments**) are corporate vehicles used by Messrs Lamb and Pritchard in 2020 after they ceased to be employees of Kew Green and resigned their directorships of Kew Green companies.
4. The correct approach where such an application is brought is too well known to be repeated at length. The applicable CPR rules are rule 3.4 and rule 24.2. The correct approach is found in authorities such as *Easyair Ltd v. Opal Telecom* [2009] EWHC 339 (Ch) per Lewison J (as he then was) at [15], dealing with summary judgment.
5. There must be grounds for bringing a claim. Its prospects must be more than fanciful. I must not conduct a mini-trial. I can look at uncontradicted accounts and documents. I take the facts and the law at their highest in the claimants' favour. If a decisive short point of law or construction is suitable for summary determination, I should grasp the nettle and decide it. But if disclosure or testimony is needed to decide a point, there should be a trial on that point.

Facts

6. The following brief account is of facts which are either uncontroversial or matters of record, or are facts pleaded or given in written witness statements by the claimants and

assumed in their favour for present purposes to be true and correct. I include facts pleaded or put in written evidence by the defendants only to the extent that they are accepted by the claimants.

7. Messrs Lamb and Pritchard are experienced hotel management executives and longstanding (since 24 February 2002) employees of Kew Green. Their terms of service were most recently set out in service agreements dated 23 January 2015 (**the service agreements**). I shall return to those terms shortly. They included standard loyalty and fidelity clauses, confidential information obligations and six month post-termination restrictive covenants.
8. On 31 May 2015, the fourth, fifth and sixth defendants (with whom I am not directly concerned) entered into service agreements with Kew Green. They are not party to the present application. In the main action, they are sued because of their roles in a hotel management business subsequently set up by Messrs Pritchard and Lamb, which trades through Axiom.
9. Kew Green's business is quite substantial. In recent years it has been party to about 20 hotel management agreements (**HMA**s) covering about 70 hotels, all or nearly all in the United Kingdom. The average duration of an HMA is about three years, subject to renewal. The longest has a term of five years. Some are for a fixed term, others are terminable on three months' notice. Paragraph 4 of the amended reply and defence to counterclaim (**the reply**) pleads that as at 31 January 2020, Kew Green was managing 31 hotels.
10. In December 2017, Kew Green entered into several HMAs with a company called Starwood Capital (**Starwood**), which was buying a portfolio of seven Hilton hotels. Collectively, these are referred to as the **Dragonglass Management Contract**. Under that contract, Starwood required certain investment by the Kew Green management "core team" of their own money, to contribute to the cost of the portfolio of hotels.
11. Mr Lamb informed Kew Green's principal shareholder, CTS Metropark Limited (**CTS**) that the required investment was 2.8 to 4.8 per cent of the acquisition costs. CTS did not invest. Three core team member individuals were to do so instead. They were Mr Pritchard, a Mr Stephen Desmond and the sixth defendant, Mr O'Keeffe. A company called Dragonglass Bidco Limited was incorporated on 24 January 2018 to facilitate that investment.
12. The terms on which Kew Green consented to the investment were set out in a "Deed of Undertaking" entered into in February 2018 (**the 2018 Deed**). The amount invested by the Kew Green managers, between them, was to be £1.725 million, about 2.89 per cent of the equity in the acquisition by Starwood. Any further investment by the managers in Starwood's project would require the prior consent of Kew Green which would have a right of "first refusal".
13. The investment was, it was agreed, to be made by the three members of the core team and also in part by Mr Lamb. The four investors were named as "the Managers" in Schedule 2 to the 2018 Deed. Mr Lamb was described as director and executive chairman; Mr Pritchard, as director and CEO. That investment was then made in April 2019. Kew Green, led by Messrs Lamb and Pritchard, began to manage the seven Hilton hotels and develop business relations with Starwood's management.

14. By, at the latest, early to mid-2019, Messrs Lamb and Pritchard formed an intention to “set up in competition” (as it is pleaded) with Kew Green. During the first part of 2019, they caused to be inserted into HMAs with certain client hoteliers (for example, Almarose (or Aprirose) in January 2019 and Intriva, in June 2019) a “**key manager**” provision entitling the client to terminate the HMA if Mr Lamb or Mr Pritchard should cease to be employed by Kew Green.
15. An email of 9 July 2020 from Starwood to a lawyer, a Mr Paul Hastings, suggested that Starwood was happy for a key manager provision to be inserted into its proposed HMA with Kew Green, as that would benefit Starwood and could help Messrs Lamb and Pritchard when the level of their bonuses was decided upon.
16. On 1 August 2019, Messrs Lamb and Pritchard jointly wrote to Kew Green giving the required six months’ notice of resignation from their employment, effective from 31 January 2020; though they said “we will continue to act as directors of the Company in the meanwhile”. They cited their frustration that they had not achieved sufficient growth of the business since it was taken over in 2015, reductions in their remuneration and that of other senior managers; and the failure in discussions to agree a more satisfactory package.
17. On 1 August 2019, the day Messrs Lamb and Pritchard gave notice of resignation, Starwood entered into a new HMA with Kew Green. It contained the previously envisaged key manager clause entitling Starwood to terminate should Mr Lamb or Mr Pritchard cease to be employed by Kew Green.
18. On 28 August 2019, Mr O’Keeffe wrote and sent to Mr Lamb a short draft document called “Project XXX”, an “internal discussion document” with some rudimentary ideas about what appeared to be a plan to undertake their own hotel management business and to replace Kew Green, in particular in respect of the management of Starwood’s hotels. It appears to be the twentieth version of the draft document. Kew Green does not have the 19 earlier versions.
19. Following discussions and with legal advice available to both sides, Mr Pritchard and Mr Lamb each entered into a **settlement agreement** (under section 111A of the Employment Rights Act 1996) on the same terms. I shall return to those terms shortly. Broadly, they provided for the two of them to continue their normal duties until the termination date, 31 January 2020; and to provide certain services as consultants for a period thereafter.
20. From 11 November 2019, Mr Lamb (copying Mr Pritchard) emailed various professional advisers, hotel sales agents, lawyers, accountants and consultants informing them of their intention to set up a new management company to manage and co-invest in hotels in the UK and EU and that they intended to start the new business in the new year, i.e. in 2020.
21. They also informed at least two of Kew Green’s existing clients, during November 2019. One of them was Almarose, with whom a meeting was proposed to “talk through our plans”. They also informed a major real estate company called CBRE of their plans, in December 2019.

22. On 31 January 2020, the employment of Messrs Lamb and Pritchard terminated at the end of their six month notice period. From that date, they resigned as directors of the relevant Kew Green companies. No written agreement for consultancy services was signed at that stage, but a later consultancy agreement with JLAP Investments to which I will come (**the consultancy agreement**) cited as its start date, retroactively, 1 February 2020, i.e. the day after their resignation as employees and directors took effect.
23. The replacement CEO, Mr Chris Dexter (recruited in August 2019) explains that up to 31 January 2020 he had deliberately kept a low profile, stayed on the sidelines and continued to let Messrs Lamb and Pritchard run the business. In January 2020, they introduced him to Starwood. On 21 January 2020, Mr Lamb discouraged Mr Dexter from attending a meeting two days later with a client of Kew Green called Great Northern Hotels.
24. According to Mr Dexter, Messrs Lamb and Pritchard were in charge of running the business and were in discussions with clients or potential clients including, in January 2020, Starwood, Almarose, Intriva and a potential new client called Archer, the operator of the Meridien Hotel in Piccadilly. Mr Dexter reposed complete trust and confidence in them and regarded them as responsible for servicing existing clients and seeking out new ones.
25. After 31 January 2020, Mr Dexter says, “there were no sudden changes”. They kept access to their Kew Green email accounts and had full access to its servers. Only their “labels” changed and they were no longer authorised to sign contracts on Kew Green’s behalf. Those had to be signed by Mr Dexter instead.
26. On 14 February 2020, Mr Lamb informed (using his personal email address) the fifth defendant, Mr Parker, that he, Mr Lamb, had acquired an employee PAYE reference number and asked whether he could use it to engage a payroll services provider and start paying employees. He then made contact with such a provider to discuss provision of payroll services.
27. On 23 March 2020, Almarose served notice to terminate its HMA with Kew Green, relying on the key manager provision, i.e. on the basis that Mr Pritchard and Mr Lamb were no longer employed by Kew Green.
28. Then on 13 April 2020, JLAP Investments (Mr Lamb and Mr Pritchard’s corporate vehicle) entered into the consultancy agreement, backdated to 1 February 2020. I will return to its terms. It provided only for management by Messrs Lamb and Pritchard of the Meridien Hotel Piccadilly, operated by the new client Archer which was on the point of signing an HMA with Kew Green.
29. On 17 April 2020, Mr Pritchard emailed Mr Nick Chadwick of Starwood suggesting they could “make this work together”; that “we” had “started work on a presentation and business plan” and sought a call “to talk through where we are and get your input and steer”.
30. On 20 April 2020, Archer and Kew Green entered into an HMA in respect of the management of the Meridien Hotel, Piccadilly. It included a key manager provision entitling Archer to terminate it if Mr Pritchard or Mr Lamb should no longer be “central

and integral” to the management of Kew Green; or if the fourth defendant, Mr Peu, should no longer be employed by Kew Green.

31. At some point in April 2020, it is not clear when, the individual defendants or some of them injected funds amounting to £2 million into Starwood’s Dragonglass project.
32. On 1 May 2020, the fourth defendant, Mr Peu, gave Kew Green notice of his resignation, which was to take effect on 31 July 2020. Mr Peu was Kew Green’s revenue, technology and analytics director.
33. Three days later, Mr Lamb, using his personal email address (and copying Mr Pritchard’s personal email address) was in contact with a Mr William Duffey. Mr Lamb responded to an email from Mr Duffey sent to Mr Lamb’s Kew Green address, asking Mr Duffey to use his (Mr Lamb’s) personal address and indicating that they were preparing to have their “platform ready for 1st August”.
34. On 18 May 2020, Mr Pritchard purchased a domain name using the title “Axiom”. On 31 July 2020, Mr Peu’s resignation took effect. The same day, the period of the six month post-termination restraints in the service agreements of Messrs Lamb and Pritchard, expired. Axiom was then incorporated on 10 August 2020.
35. The same day, 10 August, the fifth defendant, Mr Parker, served notice of his resignation. On 18 August, Mr O’Keeffe, the sixth defendant, did the same. Both had to give three months’ notice of termination under their contracts of employment.
36. On 10 September 2020, Starwood served notice to terminate Kew Green’s management agreement for the Dragonglass project on three months’ notice. Starwood and Kew Green subsequently agreed that the termination date should be brought forward to 1 November 2020.
37. On 2 October 2020 Mr Parker, the fifth defendant, forwarded various of his work emails from his Kew Green mailbox to his personal email address.
38. On 12 October 2020, Archer served notice to terminate its HMA with Kew Green on one month’s notice, expressly relying on the key manager provision in the HMA.
39. On or about 1 November 2020, Axiom began to provide hotel management services to Starwood.
40. On 6 and 7 November 2020, Mr Lamb and Mr Pritchard deleted 40 GB of data from Kew Green mailboxes. On 10 November, Mr Parker’s resignation took effect at the end of his notice period. On 18 November, Mr O’Keeffe’s resignation took effect at the end of his notice period.
41. Finally, 31 March 2021 was the latest date mentioned in the settlement agreements of Messrs Lamb and Pritchard in respect of their envisaged consultancy services to Kew Green, under clause 12.1 of those agreements. By the time that date came, the defendants were already trading through Axiom and providing hotel management services to some of Kew Green’s former clients.

42. The present claim was brought in April 2021 and pleadings eventually (after several amendments) closed in June 2022. The present application to strike out or for summary judgment in respect of parts of the claim, was brought on 20 March 2023.

The Parties' Submissions

43. The submissions of Mr Paul Nicholls KC for the four defendants who bring this application focussed mainly on the limited nature of the obligations of former directors and employees and their associates vis-à-vis their former employers. He also submitted that forming an intention to compete while still employed is not, of itself, unlawful. And he contended that the confidential information claim is an abuse because the information is not sufficiently identified.
44. Mr Nicholls submitted, first, that those claims which depend on the existence of a fiduciary duty on the part of Messrs Lamb and Pritchard subsisting after their resignation as directors of Kew Green companies, were unsustainable and bound to fail because they did not, even arguably, owe Kew Green any such duties once they ceased to be directors. He accepted that they owed fiduciary duties, as directors, while they were directors.
45. A point of departure for that argument is the proposition that directors are not obliged to remain as directors as part of their fiduciary duty to the company: *CMS Dolphin Ltd v Simonet* [2002] BCC 600, per Lawrence Collins J (as he then was) at [95]. The fiduciary duty does not, “in general”, he said, continue after resigning the directorship.
46. I interject that the cautionary “in general” is apt because although the decision predates the Companies Act 2006 (**the 2006 Act**), section 170(2) later provided, based on “certain common law rules and equitable principles” (section 170(3)) that the ex-director “continues to be subject” to the duties in (a) and (b) of section 170(2) arising from their time as a director. I will return to this point.
47. That aside, Mr Nicholls submits that the requirements for a fiduciary duty are unlikely to be met, and are not here met, where the parties consciously redraw their contractual relationship and spell out in writing the extent of mutual obligations under it. That is so even where the re-defined relationship includes reposing trust and confidence in the ex-director. He took me to various formulations of the requirements in the cases, only some of which I repeat here.
48. He relied on, among other cases, *Bristol and West Building Society v. Mothew* [1998] Ch 1, per Millett LJ (as he then was) at pp.16-18¹; *Sheikh Al Nehayan v Kent* [2018] 1 CLC 216, per Leggatt LJ (as he then was), at [156]-[159]; *Fujitsu Services Ltd v. IBM United Kingdom Ltd* [2014] 1 CLC 353, per Carr J (as she then was) at [122]-[133]; and *A Company v. Secretariat Consulting Pte Ltd.* [2021] 4 WLR 20, per Coulson LJ at [40]-[42] and [64]-[67].
49. The claimant’s pleaded points relied on in support of a post-directorship fiduciary duty do not, Mr Nicholls submitted, come close to providing a foundation for such a duty. The plea is that (reamended particulars of claim (**POC**) paragraph 23.2A) Messrs Lamb

¹ Millett LJ’s analysis includes at 18C the citation of Dr Finn’s acute observation that the fiduciary “is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary” (*Fiduciary Obligations*, 1977, p.2).

and Pritchard owed “fiduciary duties to Kew Green in connection with the retention and renewal of those HMAs”.

50. I interject that the claimants there rely on (i) the duties of Messrs Lamb and Pritchard under clause 12 of the settlement agreements, incorporated into the consultancy agreement; (ii) “the high degree of trust confidence necessarily reposed in them in this regard”; and (iii) the “exceptional degree of vulnerability of Kew Green to any breach of their obligations in this regard”.
51. Mr Nicholls developed in written and oral submissions his reasons for submitting that those factors were not enough. The essence of the reasoning is that it would be wrong to superimpose fiduciary obligations of a different character to contractual ones that have been carefully delineated; particularly in a document required under statute to settle employment claims.
52. The “best endeavours” obligations in the settlement agreements were different from fiduciary obligations, he submitted. An obligation of good faith is not the same as a fiduciary obligation, as Sales J (as he then was) pointed out in *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2012] Ch 613, at [217], rejecting a submission that certain LLP members owed the LLP “a fiduciary duty of good faith”.
53. The consultancy agreement was for provision of services, Mr Nicholls said. Messrs Lamb and Pritchard were not personally parties to it. Neither they nor JLAP Investments exercised any control over Kew Green’s property and affairs. They could not commit Kew Green to any contract.
54. As for the investment in Starwood in April 2020, he accepted that resigning as a director to take advantage of a maturing business opportunity of the company is a breach of the fiduciary duty as director (as in e.g. *Industrial Development Consultants Limited v. Cooley* [1972] 1 WLR 443, per Roskill J (as he then was) at pp.448-451); but only where – which was not the case here - the company was interested in making use of the business opportunity (*Recovery Partners GP Ltd v Rukhadze* [2019] Bus LR 1166, per Cockerill J at [66]-[77]).
55. The 2018 Deed requiring consent from Kew Green for any future investment in Starwood by “the Managers” did not assist the claimants, Mr Nicholls submitted. The consent requirement could not outlast the employment of “the Managers” in their roles as defined in Schedule 2 to the 2018 Deed. It would be an unreasonable restraint of trade for the consent requirement to subsist in perpetuity. The 2018 Deed should be interpreted so as to avoid invalidity.
56. Turning to the claims based on the settlement agreements, Mr Nicholls submitted that it was not clear which terms were relied on but it appeared to be the restrictive covenants, originating in the service agreements and continued under the terms of the settlement agreements. The covenants only lasted until 31 July 2020 when they expired. They did not by their terms prohibit the investment made in Starwood in April 2020.
57. The claim based on solicitation of employees must fail, he argued, because all the relevant employees left after 31 July 2020 and could not have been solicited before that date. Nor were Messrs Lamb and Pritchard prevented from approaching Kew Green

clients after 31 July 2020. All the relevant HMA terminations occurred after that date. No covenant was in force when those clients switched their allegiance to Axiom.

58. As for the plea of wrongfully planning and taking steps to compete with Kew Green, Mr Nicholls submitted that no arguable legal wrong is pleaded in the POC. An employee does not breach their employment contract by deciding to compete with their employer (*Laughton & Hawley v. Bapp Industrial Supplies Ltd* [1986] ICR 634, per Peter Gibson J (as he then was) at 638B-639B).
59. There is no allegation that Messrs Lamb and Pritchard actually competed with Kew Green before their employment ended. The allegation is that they began to compete once Axiom was incorporated on 10 August 2020. No legal wrong is thereby alleged, it is argued. Nor, as directors, did they take preparatory steps to compete while still directors (*British Midland Tool Ltd v Midland International Tooling Ltd* [2003] 2 BCLC 523, per Hart J at [83]-[89]).
60. There is no plea, Mr Nicholls argued, that they had taken such preparatory steps by November 2019 when the intention to compete was, at the latest, formed. By then they had already, in August 2019, given notice to resign, thereby disclosing their intention to compete and avoiding any breach of their duty to disclose their intentions.
61. It cannot, then, have been wrongful for them to make contact with professional advisers and others in November 2019 about a planned business not yet up and running. The claimants have no interest to protect in respect of professional advisers. Their protectable interest was in client connections and employees. That interest was regulated by the covenants that expired on 31 July 2020.
62. As for the claim for misuse of confidential information, Mr Nicholls submitted that it was an abuse because the information, or at least the categories of information, are required to be pleaded with particularity (*Ocular Sciences Ltd v. Aspect Vision Care Ltd* [1997] RPC 289, per Laddie J at p.359). Here, the plea (at paragraph 63 of the POC) is merely that all relevant documents that would be “useful” to the defendants were “wrongfully downloaded”.
63. Mr Nicholls argued that any business must know what confidential information it holds. The claimants also know what information was taken by the defendants. Therefore, the argument runs, the claimants must state which of the documents taken contained confidential information, what that information was and what wrongful use was made of it.
64. The failure to do that is an abuse and is not cured by a witness statement from the claimants’ solicitor providing a short list of miscellaneous documents from among those taken, which are said to be confidential. That only adds force to the contention that the matter could have been and should have been fully pleaded, Mr Nicholls submitted.
65. He then contends that certain other miscellaneous allegations in the POC are untenable, disclose no wrongdoing or are bound to fail. I will take these shortly. It was not arguably wrongful to obtain a PAYE reference number in February 2020, with no allegation that it was used to pay employees at the time it was obtained. It was a mere

preparatory step taken when the relationship was regulated by the covenants, which taking that step did not breach.

66. Various emails sent later in 2020 to potential clients of what later became Axiom, were not arguably wrongful by similar reasoning, Mr Nicholls argued. Nor did the termination of the various HMAs – all but one (Almarose) after 31 July 2020 – evidence any wrongdoing. Nor was any solicitation of Kew Green employees after 31 July 2020 wrongful.
67. Mr Nicholls then attacks the soundness of the claims asserting that the defendants have committed economic torts (procuring breach of contract and unlawful means conspiracy). Those claims are founded, he says, on the false premise that what the defendants caused to be done was wrongful, when it was not. In the case of Axiom, it did not even exist until August 2020. There is no basis for the equitable or other relief sought against any of the defendants.
68. For the claimants, Mr Thomas Croxford KC made the following main points, in my summary. He argued that Messrs Lamb and Pritchard owed a fiduciary duty to Kew Green in connection with the retention and renewal of HMAs, as pleaded in paragraph 23A of the POC, which I have already summarised. To that was added in paragraph 4A.3 of the reply that:

“the basis for those duties is obvious from the position of trust into which [Messrs Lamb and Pritchard] were put by virtue of their duties under clause 12 of the [settlement agreements] to retain and renew HMAs on Kew Green’s behalf and for its benefit, and from the exceptional degree of harm that [they] were able to inflict on Kew Green if (as in fact occurred) they abused those positions... .”
69. The claimants submitted that the two former directors had “undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence” (*Bristol and West Building Society v Mothew* [1998] Ch 1, per Millett LJ at 18). The question is then what role the two undertook to perform for Kew Green’s benefit.
70. It was, Mr Croxford submitted, a “role which requires exercising judgment and making discretionary decisions on behalf of another and constitutes trust and confidence in the loyalty of the decision-maker to put aside his or her own interests and act solely in the interests of the principal” (*Al Nehayan v Kent* [2018] EWHC 333 (Comm), [2018] 1 CLC 216, per Leggatt LJ at [165]).
71. Mr Croxford further relied on the analysis of Newey J (as he then was) in *Vivendi SA v Richards* [2013] EWHC 3006 (Ch), at [139]-[145], where a shadow director who was also a consultant to the company concerned was held (at [144]) to owe fiduciary duties to the company and (at [145]) to be “subject to the duty of good faith” in relation to instructions he gave to the other defendant who was a director of the company.
72. There is no absolute rule, Mr Croxford insisted, that fiduciary duties cannot arise from commercial relationships, as in the case of a commercial agent who owes fiduciary duties to the principal, or (as in *Vivendi SA v Richards*) where a person acts as a consultant. The reason fiduciary duties are unusual in commercial relations outside the settled categories is because (see Snell’s Equity, 34th ed., at 7-005):

“... it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party. But if that expectation is not inappropriate in the circumstances of the relationship between the parties then fiduciary duties will arise ... [I]t is possible for the circumstances ... to justify the imposition of fiduciary duties, provided those circumstances are such that it is reasonable to expect that the fiduciary will subordinate his interests and act solely in the interests of the principal.”

73. It was therefore necessary for the point to go to trial, Mr Croxford submitted, so that there could be a detailed examination of the facts. Asked what more facts a trial could yield beyond those assumed in his favour now, Mr Croxford answered to the effect that a trial might show the impropriety of allowing a conflict to arise between the interests of the two ex-director consultants and those of Kew Green; and the obligation on them to act “in good faith” by, for example, not procuring the insertion of key manager provisions into the HMAs.
74. Mr Croxford also pointed to the evidence of Mr Dexter that there was no substantive difference in the role they played when they were directors and their role after they had ceased to be directors and had become consultants. The same equitable protection should apply in both cases.
75. A consultant in whom special trust is reposed can owe fiduciary duties to their client and that was, the claimants submitted, the position here. It did not matter that the two defendants could no longer sign contracts on behalf of Kew Green. Commercial agents and trustees who owe fiduciary duties often cannot do so. Non-executive directors who owe fiduciary duties cannot do so.
76. The claimants made the following main submissions in relation to the “Dragonglass” related parts of the claim. As developed at the oral hearing, they did not press hard the argument that on its true construction the 2018 Deed imposed a consent requirement in perpetuity before “the Managers”, including Messrs Lamb and Pritchard, could invest further in Starwood.
77. Rather, the claimants submitted in written argument and maintained in oral argument, the opportunity to invest was a maturing business opportunity of Kew Green’s, of which Messrs Lamb and Pritchard intended wrongfully to take advantage after resigning as directors. This is encapsulated in the succinct plea at paragraph 39 of the POC that:
- “... the resignations as directors of JL and AP were prompted by an intention to take advantage of the maturing business opportunity consisting in the Dragonglass investment, thereby resulting in a continuing breach of fiduciary duty.”
78. Mr Croxford pointed out that the claimants’ case rested on an inference from the course of dealing between Messrs Pritchard and Lamb and Starwood (and others such as financial advisers (as pleaded in paragraph 37 of the POC):
- “Given all the matters set out above, it is to be inferred that preferential terms from Kew Green were secured for Starwood, and profitable opportunities were provided to the individual defendants in anticipation of the plan by those defendants to commence a new venture, which became Axiom, and secure the future loyalty of Starwood to the individual defendants on the departure of JL and AP from Kew Green.”

79. The inference is supported, Mr Croxford added, by their conduct in relation to other clients and potential clients (Almarose, Intriva and Archer) and in particular the insertion of key manager provisions in the relevant HMAs, entitling the clients to terminate their HMAs on terms favourable to them and switch their allegiance to Axiom, once it was incorporated. The strength of the inference will be a matter to be determined at trial.
80. The principle to be applied was therefore that stated by Lawrence Collins J in the *CMS Dolphin Ltd* case at [96], the claimants submitted:
- “... the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property. In the case of the director he becomes a constructive trustee of the fruits of his abuse of the company's property, which he has acquired in circumstances where he knowingly had a conflict of interest, and exploited it by resigning from the company.”
81. That principle had since, the claimants submitted, been codified in section 170(2) of the 2006 Act, as explained in a useful discussion of that provision in the detailed judgment of Mr Ashley Greenbank (sitting as a deputy High Court judge) in *Burnell v Trans-Tag Ltd* [2021] EWHC 1457 (Ch) at [402]-[406].
82. As to the claim for misuse of confidential information, the claimants submit that particularity has been impeded by the defendants’ deletion of Kew Green emails; but that as explained by the claimants’ solicitor Mr David Wilman in his witness statement (and pleaded at paragraph 23 of the reply) the confidential information in documents disclosed by the defendants has been wrongfully retained by the defendants. It is identified at paragraph 23 of the reply as:
- “... (for example, the email dated 3 February 2020 sent by AP to Chris Dexter; the draft letter from Kew Green to Gary Jones dated 25 March 2020; and emails between Gary Jones and Chris Dexter dated 9 April 2020).”
83. A slightly fuller account is given in Mr Wilman’s witness statement; he refers to emails and draft letters, internal PowerPoint documents, and copies of the Claimants’ HMAs. These, it is argued, are plainly confidential to Kew Green and it is pleaded or it is sufficient to aver through Mr Wilman’s statement that they have been misused, in breach of the confidentiality terms in the settlement agreements.
84. The defendants should not, it is argued, be rewarded for their misconduct in exporting Kew Green emails to their personal accounts and deleting the data from their Kew Green devices, by allowing them to invoke any abuse doctrine. The position is different from that in cases such as *Ocular Sciences Ltd v. Aspect Vision Care Ltd*, where the need for meticulous particularity and definition was in context acute because it would be used to formulate a prohibitive injunction.
85. As regards the claimants’ case founded on “plans to compete” and the sending of emails intended to “tap up” certain Kew Green clients or potential clients, the claimants submitted that a trial was needed to determine from disclosed documents and witness

evidence exactly when the plan to set up in competition with Kew Green was formulated, what preparatory steps were taken and when.

86. The present state of the evidence is, Mr Croxford argued, incomplete. For example, the claimants have the twentieth version of the “Project XXX” document but not any earlier versions (which, if recoverable, would have to be disclosed). The claimants’ case is, at present, inferential but it cannot be right to strike it out or give summary judgment on it until after disclosure and a trial.

Issues, Reasoning and Conclusions

87. I think the clearest way to determine this application is to address the issues in the approximate chronological order of the events that occurred. I will assume that the facts and the law are at their most favourable to the claimants. Only if, on that assumption, a particular part of the claim is unsustainable, i.e. bad in law or bound to fail for some other reason, should that part of the claim be struck out or be the subject of summary judgment.
88. At each point in the unfolding history I ask myself, first, what obligations were arguably owed by the relevant defendants; second, whether breaches of those obligations are properly pleaded (or could be without radical amendment); third, if so whether these defendants challenge those pleaded breaches of obligation in this application; and finally, if so, whether the claim in respect of those pleaded breaches is sustainable and fit for trial.

The service agreements

89. I am primarily, but not only, concerned here with the period from 23 January 2015 up to 31 January 2020. The first source of obligations during that period is the service agreements of Messrs Lamb and Pritchard. I have quotes from them but not full copies. The two defendants accepted the “fiduciary nature” of the position and that it placed them in a position of trust (clause 2.1).
90. Needless to say, they owed the usual implied obligation loyally to serve the interests of the employer and to obey any reasonable instructions. They had to use their “best endeavours” to promote the interests of Kew Green (2.1.2); and to report any “wrongdoing” including their own (2.1.3.1). They also had to report any planned departures from the business including their own and whether anyone departing intended to compete with the business; and to report any misuse of confidential information by any employee (2.1.3.2).
91. Clause 9 (which I do not set out here) was a standard prohibition against using or disclosing trade secrets or confidential information during or after the end of the employment. The usual non-exhaustive list of categories of confidential information was set out under clause 9.2. The employment was terminable on six months’ notice (clause 1.3). I understand the service agreements contained post-termination restraints in clause 10 but I have not seen these.
92. These obligations lasted until 31 January 2020, except that (i) the post-termination restraints did not take effect as they were replaced from 25 October 2019 by those in the settlement agreement, to which I am coming; and (ii) the obligation not to disclose

trade secrets and confidential information continued (arguably, though they may have been subsumed into the later settlement agreement) after the end of the employment, in the normal way.

93. With those exceptions, the contractual duties fell away after 31 January 2020. It is common ground that during the currency of the service agreements Messrs Lamb and Pritchard were directors of various Kew Green companies and as such owed the usual fiduciary duties of directors while employed. Nor is it disputed that those duties continued after they ceased on 31 January 2020 to be directors, but only to the limited extent set out in the backward looking provisions of section 170 of the 2006 Act, already mentioned.
94. The POC deal with “breaches of duty” by Messrs Lamb and Pritchard starting at paragraph 35. Paragraphs 35 to 41 deal with breaches of duty arising from the investment in Starwood’s Dragonglass project in 2018. At paragraph 38 it is alleged that by “so acting”, i.e. in the manner set out in paragraphs 36 and 37, they breached (among other things) their service agreements (“contracts of employment”). These defendants seek to strike out those paragraphs.
95. The wrongs alleged at paragraphs 36 and 37 are from April 2020. They postdate 31 January 2020. That cannot have been a breach of the service agreement obligations unless it be of those that outlasted the service. The only candidate is misuse of confidential information. The post-termination restraints were no longer, in and after April 2020, in the “contracts of employment”. There is a separate claim for misuse of confidential information, of which more soon.
96. The pleading does not say that paragraphs 36 to 38 are for breaches of the service agreement provisions amounting to misuse of confidential information after the end of employment. Those paragraphs therefore do not tenably allege breaches of the service agreement. The reference to “contracts of employment” in paragraph 38 therefore falls to be struck out. That paragraph also asserts other causes of action, to which I am coming shortly.
97. Under the heading “plans to compete”, in paragraphs 42 to 48 of the POC the claimants contend that Messrs Lamb and Pritchard breached (among other things) their service agreements. The particulars of the breaches are set out paragraphs 42-47, while paragraph 48 states that “in so acting”, they were “in breach of their Service Agreements”.
98. First, paragraph 42 asserts no more than that by November 2019 at the latest, they “resolved to set up in competition with Kew Green”. The mere forming of an intention to compete is, without more, not actionable as a breach of the service agreements. There was no breach of the duty to report intended departures, including their own; they had already reported their own impending departure in August 2019. Paragraph 42 falls to be struck out.
99. Paragraphs 42A and 42B are not challenged in this application. They allege the insertion in 2019 and 2020 of key manager provisions into HMAs and their subsequent termination in 2020, in all cases except Starwood’s in reliance on the key manager provisions. This allegation of breach of (among other things) the service agreements is to go to trial. The defendants do not contend otherwise.

100. Paragraphs 43, 44 and 46 allege the exchanges of email communications in November and December 2019 with professional advisers, industry participants and one existing Kew Green client, informing them of their intention to start a new business venture and seeking contact to talk through future business planning. The defendants do not challenge paragraph 45, which asserts contact with an existing Kew Green client.
101. The defendants challenge paragraphs 43, 44 and 46 but in my judgment these paragraphs disclose a reasonable cause of action for breach of the service agreements, are fit for trial and should not be struck out. The duty of Mr Lamb and Mr Pritchard to report their own “wrongdoing” (clause 2.1.3.1) is potentially engaged. The service agreements may have still subsisted at that stage (despite the settlement agreements of October 2019) and there is also an arguable breach of the implied duty of loyalty and fidelity.
102. While the defendants deny that sending the emails was wrongdoing, the point is arguable and should be determined at trial. Paragraph 47 sets out what is to be “inferred” from the matters pleaded at paragraphs 42-46. By the same reasoning, paragraph 47 and its subparagraphs are fit for trial. Paragraph 47A deals with the termination of the HMAs and is not challenged in this application.
103. Paragraphs 50-54 appear beneath the heading “further steps”. The allegations are of acts done in preparation for competing, in February, April, May and October 2020. Rightly, no allegation is made in those paragraphs of breach of the service agreements. They had ceased to have effect, except for the continuing obligation not to misuse confidential information, which is the subject of a separate part of this claim.
104. Paragraphs 55 to 59 deal with solicitation of employees. Of these paragraphs, paragraphs 57 to 59 are challenged. However, the post-termination restraints in the service agreements never took effect because they were replaced by those in the settlement agreements. I will therefore come back to this issue when I consider the settlement agreement later in this judgment.
105. No further issue as to breach of the service agreements arises except for the allegation in paragraph 59 that Mr Parker and Mr O’Keeffe had been solicited back in November 2019. That issue is fit for trial; seeking to entice them away, if it happened, would be an arguable breach of the duty of loyalty and fidelity and to use best endeavours to promote the interests of Kew Green. It is arguable that the settlement agreements did not completely destroy and replace the terms, particularly the implied terms, in the service agreements.
106. The breaches of the service agreement allegedly committed during its currency which I have just mentioned and characterised as fit for trial, can equally be formulated (and are formulated in the POC) as breaches by Messrs Lamb and Pritchard of their fiduciary duties as directors of Kew Green companies, which they were until 31 January 2020. I will come back to the question of fiduciary duties (if any) they owed after that date.
107. Paragraphs 60 to 64 appear below the heading “misuse of confidential information”. The acts relied on are forwarding of Kew Green emails to personal addresses and deletion of Kew Green emails from its servers. Those paragraphs are challenged in this application as an abuse of process because the confidential information is not particularised, as I have explained.

108. These are, properly analysed, alleged breaches of the service agreements because the obligation in clause 9 not to use or disclose trade secrets or confidential information endured both during and after the end of the employment. There is also a separate averment of an equitable obligation of confidentiality (paragraph 34 of the POC, not challenged in this application).
109. In my judgment, the allegations of misusing confidential information are not an abuse of process, should not be struck out and should go to trial. I accept the submission of Mr Croxford that it would be wrong to visit the consequences of failing to give particulars of the confidential information and its misuse on the claimants, where they have an arguable case that the defendants have deliberately put that information out of their reach.
110. The evidence of Mr Wilman and snippets of email correspondence that have passed into the claimant's hands support this thesis; for example, the email of 13 October 2020 pleaded at paragraph 61, in which Mr Peu wrote of creating a "OneDrive folder" and the need for individuals to "save content from Kew Green". There is an arguable case that the disclosure so far given by the defendants, and described by Mr Wilman, is incomplete.
111. The position is unlike the *Ocular Sciences Ltd* case, where the party seeking to protect its intellectual property rights should be able to formulate with precision the content of the prohibitions it seeks to impose on the other party by injunction. The claimants have done their best on the information so far available to them. The pleading could include Mr Wilman's list of disclosed documents, or it could parrot the categories of information appearing in clause 9.2, but neither course would add anything to what the defendants already know.

The 2018 Deed

112. The next source of obligations to consider is the 2018 Deed, signed in February 2018. I do not think it is arguable that the obligations of Messrs Lamb and Pritchard to obtain consent from Kew Green for any further investment in Starwood continued for ever, long after their departure. The claimants advocated that interpretation in written argument, but did not press it strongly in oral argument.
113. The language of the 2018 Deed makes clear that it is wholly bound up with the employment of "the Managers". They were defined in Schedule 2 by their names but also by the positions they held. Recital (D) records their service agreements with Kew Green. Recital (E) notes that they had properly disclosed their intention to invest in Starwood, something they could not be required to do except in connection with employment with Kew Green.
114. Clause 1.1(a)-(g) was a long list of undertakings given by "the Managers" concerning confidentiality, avoidance of conflicts of interest and the like. They make no sense except in the context of the Managers being employed by and owing employment derived duties to Kew Green. They are clearly not apt to last for ever.
115. Furthermore, if they did last for ever, that would be an indefensible restraint of trade and as such the consent requirement would be invalid and unenforceable. The 2018 Deed should be interpreted, as Mr Nicholls pointed out, in a manner that preserves its

validity (as expressed, in days gone by, in the Latin maxim *ut res magis valeat quam pereat*).

116. Breach of the 2018 Deed is, rightly, not pleaded in the POC, but surfaces at paragraphs 10 and 11 of the reply, where the claimants reproach Messrs Lamb and Pritchard with not seeking Kew Green's consent for further investment by them in Starwood in April 2020.
117. There is no application to strike out those paragraphs from the reply, but the question of interpretation of the 2018 Deed was included in the arguments before me. It is therefore worth saying that I do not agree with the interpretation in paragraphs 10 and 11 of the reply. It is not correct, in my judgment, that Messrs Lamb and Pritchard were required in April 2020 to obtain Kew Green's consent under the terms of the 2018 Deed.
118. They had other obligations to Kew Green at that time, as consultants and under the settlement agreements, to which I am coming next. A further separate question is whether making the investment in Starwood in April 2020 was taking wrongful advantage of a maturing business opportunity of Kew Green, as contended in the POC. I will also consider that question later when addressing the topic of fiduciary duties.

The settlement agreements

119. These agreements of 25 October 2019 come next in the chronological sequence, after the resignations in August 2019. The copy I have is Mr Pritchard's but I understand they are materially the same. The settlement agreements compromised the statutory claims Messrs Pritchard and Lamb could otherwise bring under various employment statutes. That was in return for (by clause 4.1) payment of £545,800 (by defined instalments) and certain other payments.
120. Clause 2.1 reaffirmed the departure date, 31 January 2020. Clause 2.2 required continued performance of normal duties up to that date and also "handover duties" defined in Schedule 5 which, however, was blank. On 31 January 2020 they were required to resign from their directorships of Kew Green companies (clause 7.1).
121. By clause 10.1, the post-termination restraints in the service agreements ceased to have effect. Instead, those in Schedule 4 to the settlement agreements applied. Schedule 4, Part I consists of a comprehensive covenant against misuse of confidential information at any time (paragraph 5). It included a prohibition against retaining confidential information or documents and (paragraph 7) an obligation to protect and deliver up any inadvertently retained. Schedule 4, Part II then set out the post-termination restrictions applicable, up to 31 July 2020, in place of those in the service agreements.
122. They could not (paragraph 1(b)(i)) be concerned, engaged or interested in a competing business; nor (1(b)(ii)) say anything that could lead clients to cease doing business with Kew Green on substantially the same terms as previously; nor (1(b)(iii)) attempt to entice away persons who (in the preceding 12 months) had been clients of Kew Green; nor (1(b)(iv)) deal with such persons. They could not (1(b)(v)) solicit nor (1(b)(vi)) deal with suppliers, agents and distributors; nor (1(b)(vii)) employ or solicit or entice away key employees.
123. By paragraph 1(c), each could not:

“at any time after the Departure Date [31 January 2020] represent himself as being in any way currently connected with or interested in the business of any Group Company (other than as a former shareholder, former director, former employee or former consultant if that is the case).”

124. Although it is not entirely clear, I think the better view is that up to 31 January 2020, while they were carrying out “normal duties”, the settlement agreement obligations (in particular the implied duty of loyalty and fidelity) sat alongside those in the service agreements, where the two were not incompatible and except in so far as the service agreement obligations were expressly replaced.
125. Clause 12 of the settlement agreements then dealt with post-termination matters. From 1 February 2020 to 31 March 2021, Messrs Lamb and Pritchard would receive commission of 10 per cent of revenue from the relevant hotels managed by Kew Green. By clause 12.3 each had to “use his best endeavours to ensure that no [HMA] will be terminated before the expiration of its current term”.
126. By clause 12.4, each had to “use his best endeavours to renew each of the [HMAs], in respect of any such contract which expires before 31 December 2020”. And by clause 12.5:

“The Employee shall act as a consultant and not an employee in this regard. As such, the Employee and Company [Kew Green], acting reasonably and in good faith shall enter into a consultancy agreement with the Company for the matters set out in this clause 12 and in respect of the payment of a reasonable consultancy day rate payable to the Employee ... in respect of such arrangement as soon as practically possible but at least before the Departure Date [31 January 2020]”.
127. As for the period after 31 March 2021, clause 12.6, in respect of any hotel management services required from “the Employee” from that date onwards, “the parties, negotiating in good faith, shall endeavour to agree a further consultancy agreement in respect of such ongoing hotel management services.”
128. Those obligations under the settlement agreements, including the time limited restrictive covenants, remained in being and binding on the parties first, during the period down to 31 January 2020 when the two defendants were required to perform “normal duties”; and secondly during (at least) the period from 1 February to 13 April 2020 when JLAP Investments entered into the consultancy agreement backdated to 1 February 2020, to which I will come later.
129. I turn to consider first what claims are pleaded in the POC for breaches of those obligations, which of those pleaded claims are challenged in this application and whether those challenged are fit for trial or not. Paragraphs 35 to 42 of the POC deal with the investments by Messrs Pritchard and Lamb in Starwood, by agreement in 2018 and without agreement in April 2020.
130. Paragraph 38 pleads that by “so acting”, i.e. acting in the manner set out at paragraphs 36 and 37, they had acted in breach of their obligations under (among other obligations) the settlement agreement. It is not said which provisions in the settlement agreement are relied upon, but that could be rectified by a modest amendment. Paragraphs 36 and 37 refer to dealings with Starwood by Messrs Lamb and Pritchard and, from 10 August 2020, Axiom.

131. In my judgment, there is a viable claim fit for trial that in their dealings with Starwood after 31 January 2020, Messrs Lamb and Pritchard acted in breach of their obligations under clauses 12.3 and 12.4 of the settlement agreements to use their best endeavours to ensure that Starwood's HMA would not be terminated before the expiration of its current term and to renew it if it was due to expire before 31 December 2020.
132. It appears (POC paragraph 42B.2) that Starwood's HMA was terminable on three months' notice and terminated by notice given on 10 September 2020 with a subsequently agreed shortened period of notice down to 1 November 2020. It seems to me arguable that the defendants were not seeking to have that HMA renewed with Kew Green but, rather, sought to divert it to Axiom and that in doing so they breached clauses 12.3 and 12.4 of the settlement agreements.
133. Paragraphs 43, 44 and 46 allege, as I have said, the exchanges of email communications in November and December 2019 with professional advisers, industry participants and one existing Kew Green client, informing them of their intention to start a new business venture and seeking contact to talk through future business planning. These acts are said at paragraph 48 to breach obligations under the settlement agreements. The defendants do not challenge paragraph 45, which asserts contact with an existing Kew Green client.
134. Again, it is not said which obligations were breached, but a modest amendment could cure that. The defendants challenge paragraphs 43, 44 and 46 but in my judgment these paragraphs disclose a reasonable cause of action for breach of the settlement agreement obligations under clause 2.2, requiring the two defendants to perform normal duties up to 31 January 2020. It is arguable that holding discussions with potential new business associates was contrary to the obligation to perform normal duties for Kew Green.
135. Paragraphs 50-59 deal with "further steps" to compete and with solicitation of employees. I do not think Mr Lamb setting up a PAYE reference number in February 2020 (paragraph 50), when there was no longer any obligation to perform "normal duties" for Kew Green, was arguably an actionable breach of the settlement agreement; it was preparatory to competing but preliminary; it was far from actually employing workers in a new business.
136. After 31 January 2020, it will be recalled, Mr Lamb was not allowed to hold himself out as currently connected to Kew Green's business except as a former employee or as a consultant (Schedule 4, paragraph 1(c) to the settlement agreements). Setting up a PAYE reference number did not arguably breach any of the restrictive covenants. I do not see how paragraph 50 can sustain an allegation of breaching the settlement agreement of Mr Lamb.
137. The other "further steps" taken as set out in paragraphs 53 and 54 in May and October 2020 do not obviously breach any of the settlement agreement terms either. The restrictive covenants were in force as at May 2020 (paragraph 53) but it is not said that JLL's Hotel and Hospitality Group (the party with whom emails were exchanged) was a client of Kew Green. By October 2020 (paragraph 54) the covenants were no longer in force.
138. Subject to any further considerations below, I would be minded to strike out paragraphs 50, 53 and 54 (with paragraph 51 surviving, but as narrative only rather than stating a

cause of action). I do not think those paragraphs disclose an arguable breach of the settlement agreement but it may be necessary to return to them later in this judgment when considering the remaining potential causes of action.

139. The allegations of soliciting employees, on the other hand, at paragraphs 57-59 (those at paragraphs 55 and 56 are not challenged in this application), are fit for trial. They deal with the resignations in August 2020, after the incorporation of Axiom, of three employees of Kew Green (two of them defendants) who went on to work for Axiom.
140. I do not accept Mr Nicholls' submission that they cannot arguably have been solicited by Messrs Pritchard and Lamb before 31 July 2020, in breach of the restrictive covenant obligation not to solicit Kew Green employees to leave (settlement agreements, Schedule 4, paragraph 1(b)(vi)). It seems to me a question of fact for trial at what stage they were approached. It is a probable inference that they were solicited and their resignations occurred only a short time after expiry on 31 July 2020 of that obligation.
141. The allegations at paragraphs 60 to 64 of the POC, of misusing confidential information, are in my judgment viable as claims for a breach of the settlement agreement obligations (as well as of the service agreement obligations, as already stated above). I have already given my reasons for rejecting the proposition that this part of the claim is an abuse of process.

Fiduciary duties after the end of employment

142. I consider next whether, or to what extent, Messrs Lamb and Pritchard owed fiduciary duties to Kew Green after their employment ended on 31 January 2020. The first point is that, as already noted, they do not dispute that they continued to owe such duties to the extent provided by section 170(2) of the 2006 Act.
143. Those are duties, first, to avoid conflicts of interest as regards the exploitation of any property, information or opportunity of which a director became aware at a time when he was a director and, second, to not to accept benefits from third parties as regards things done or omitted by him before he ceased to be a director. Those duties apply to a former director as to a director "subject to any necessary adaptations".
144. The claimants contend that Messrs Lamb and Pritchard also owed free standing fiduciary duties at common law, over and above the backward looking duties under section 170(2). The scope of the duty contended for is pleaded at paragraph 23.2A of the POC: they "owed fiduciary duties to Kew Green in connection with the retention and renewal of [the] HMAs".
145. These duties are said to be owed by virtue of three things: the terms of clause 12 of the settlement agreements, also incorporated into the consultancy agreement; the "high degree of trust necessarily reposed in them in this regard"; and "the exceptional degree of vulnerability of Kew Green to any breach of their obligations in this regard".
146. The issue first arises from 1 February 2020, before the consultancy agreement came (with retroactive application) into effect. The principal governing documents applying to the relationship as at 1 February 2020 were the settlement agreement and the statutory provision in section 170 of the 2006 Act. It is to those documents that one would expect to look first, to determine the extent of fiduciary duties.

147. The content of the settlement agreement does not clearly point to a free standing general fiduciary duty on top of the limited statutory ones. To state the obvious, there is no express term in the settlement agreement imposing such a duty; in contrast to the service agreements which, until cessation of “normal duties” at the end of January 2020, provided at clause 2.1 that the employees accepted the “fiduciary nature” of the position and that it placed them in a position of trust.
148. I accept that the two former directors were placed by clause 12 in a position of trust and confidence in relation to retention and renewal of the HMAs for Kew Green’s benefit. They had to put aside their personal interests and strive for retention and renewal of the HMAs. However, I see nothing in that role which “require[d] exercising judgment and making discretionary decisions” (per Leggatt LJ in *Al Nehayan v. Kent*, at [165]).
149. What the former directors had to do under clause 12 was to do their best to persuade the clients who were counterparties to those HMAs to stick with Kew Green and not to take their business elsewhere. They were acting on behalf of Kew Green but independently of it. They could not bind Kew Green in contract, nor control its property, nor (see Schedule 4, paragraph 1(c)) hold themselves out as current directors or shareholders.
150. I accept that inability to bind the principal in contract (as in the case of non-executive directors and many agents) is not conclusive against the existence of a fiduciary duty on top of a contractual duty. But I cannot see any reason why the superadding of a fiduciary duty is called for when the obligations are accurately and carefully defined by parties of equal bargaining power in arms’ length negotiations with the benefit of competent legal advice on both sides.
151. The best endeavours duties in clause 12 are classic good faith duties which are adequately expressed as contractual obligations. As Coulson LJ pointed out in the *Secretarial Pte Ltd* case at [64], a fiduciary duty is “freighted with a good deal of legal baggage”, which seems unnecessary and indeed inappropriate here, for several reasons.
152. First, the two defendants were hotel managers by profession and free (as Mr Croxford accepted) as consultants to take on non-Kew Green work in the hotel line of business, provided it did not conflict with their obligations to Kew Green. If their obligations were also fiduciary, there might be little if any hotel management work they could undertake without treading on Kew Green’s toes.
153. A broad and general fiduciary duty would require them to do more than just lobby for retention and renewal of HMAs. At its highest, it would bar them from doing anything that might undermine Kew Green’s business interests during the currency of the settlement agreement. Any fiduciary duty would have to be defined more narrowly as a duty not to do so within the territory of the HMAs which Kew Green had hired them to get renewed and retained.
154. If the duty is defined in that way, it adds nothing to the former directors’ contractual obligations. Furthermore, and importantly, the limits of those obligations, outside the territory of the HMAs, were defined in the post-termination restrictive covenants in Schedule 4 to the settlement agreements. Those lasted only until 31 July 2020 but clause 12 outlasted 31 July 2020.

155. If there was also a fiduciary character to the clause 12 obligations, how could that be squared with the ending on 31 July 2020 of the covenants not to compete, not to deal with Kew Green clients, not to solicit employees, and so forth? The covenants would not then serve fully to define the parties' relationship before and after 31 July 2020.
156. The fiduciary element would have to go beyond the literal wording of clause 12 if it was to have any content over and above the contractual obligations. That points strongly against a superadded fiduciary duty. The case is not like *Vivendi* where it was a shadow director consultant who was held to owe a fiduciary duty. A shadow director is a director of sorts. A former director is not.
157. The position of the latter is generally governed by section 170(2) of the 2006 Act. I can see no reason why it should not be so in this case. This is not a case like *Tulip Trading Ltd v. Bitcoin Association for BSV* [2023] 4 WLR 16 (relied on by Mr Croxford) where the possibility of the law developing to accommodate the pleaded duty is real. Here, the relevant facts are before the court. The conclusion to be drawn from them is clear.
158. The fact that Mr Dexter perceived no significant change in Kew Green's senior management after his arrival does not alter that conclusion. The elaborate contractual structure would not have been created unless it were intended to change the parties' commercial relationship. If the relationship was intended to remain fiduciary after 31 January 2020 in the sense pleaded at paragraph 23.2A of the POC, the contractual arrangements would have had to say so, as they did before the settlement agreements were entered into.
159. For those reasons, the contention at paragraph 23.2A of the POC is unsustainable and should be struck out.
160. I should add that the consultancy agreement in respect of the Meridien Piccadilly Hotel only (to which I am coming) does not alter that conclusion, either before or after 13 April 2020, when it was entered into. There is nothing in the terms of the consultancy agreement that is apt to create any fiduciary duty. It is simply an agreement to manage a hotel.
161. I now turn to consider the sustainability of other parts of the POC in the light of my conclusion that there was no forward looking common law fiduciary duty after 31 January 2020, but there remained the backward looking statutory fiduciary duty (though based on common law and equitable principles) embodied in section 170(2) of the 2006 Act.
162. That brings me back to paragraphs 35 to 40 of the POC, dealing with Starwood's Dragonglass project. At paragraph 38 it is alleged that by "so acting", i.e. in the manner set out in paragraphs 36 and 37, Mr Lamb and Mr Pritchard breached (among other things) their "Fiduciary Duties". As no free standing fiduciary duties were owed post-employment, that allegation can only survive as one of breach of the narrower duty under section 170(1) of the 2006 Act.
163. That is amplified in paragraph 39, where it is alleged that they resigned their directorships "to take advantage of the maturing business opportunity consisting in the Dragonglass investment, thereby resulting in a continuing breach of fiduciary duty".

That is clearly an allegation of breach of the section 170(2)(a) duty to avoid conflicts of interest as regards information or an opportunity of which they became aware while directors of Kew Green companies.

164. The wrong alleged at paragraph 36 is investing £2 million in Starwood's Dragonglass project in April 2020; negotiating with "lenders" in relation to "various financial provisions"; and providing "further investment" in Starwood. These matters are derived from an email of 21 August 2020 from Mr Lamb to Starwood.
165. At paragraph 37 the wrong alleged is that while directors of Kew Green companies they secured "preferential terms" for Starwood and themselves thereby obtained "profitable opportunities ... in anticipation of the plan ... to commence a new venture, which became Axiom..." and to "secure the future loyalty of Starwood" to them after their departure from Kew Green.
166. There is nothing wrong with the pleading of the breach of the section 170(2)(a) duty. The question is whether it is sustainable on the facts. Mr Nicholls submits that it is not because Kew Green and CTS were not interested, back in 2017 and 2018, in investing in the Dragonglass project; which is why individual investors including Messrs Lamb and Pritchard had to step up and provide the investment, with Kew Green's agreement.
167. After considering carefully Cockerill J's discussion of the authorities relevant to the issues of "maturing business opportunity" and the possible requirement that the principal must have been actively pursuing that opportunity, I have come to the clear conclusion that the sustainability of this plea is a matter for trial and not for summary judgment or striking out. The authorities are varied and the question of what counts as active pursuit is fact sensitive.
168. The extent and content of discussions between Messrs Lamb and Pritchard with Starwood in 2017 and 2018 and then (post-directorship) in April 2020 are not yet known. That Kew Green and CTS decided not to invest in the project in 2017 and 2018 may not be decisive. Kew Green was then led by Messrs Lamb and Pritchard. It was certainly interested in doing business with Starwood: it concluded an HMA with Starwood in September 2019, under the leadership (just after giving notice of resignation) of Messrs Lamb and Pritchard.
169. That reasoning applies *a fortiori* to paragraphs 43, 44 and 46 to 49 under the heading "plans to compete". Those allegations go back to 2019 when the two defendants were still directors of Kew Green companies and admittedly owed fiduciary directors' duties. Some of the allegations (e.g. 47.1, 47.2 and possibly 49) survive as narrative only, not themselves stating any actionable wrong. But together, the allegations in those paragraphs support a case fit for trial of breach of the fiduciary duties owed while still directors of the relevant companies.
170. The same cannot be said, however, of paragraphs 50, 53 and 54, which I have touched on already, indicating that they should be struck out. They allege post-directorship steps in February, May and October 2020 preparatory to and in the course of establishing a competing business, but no more than that. There is no pleaded link back to any improper securing of a commercial advantage or receiving some other benefit arising from their time as Kew Green directors.

The consultancy agreement with JLAP Investments

171. The consultancy agreement, signed by Mr Lamb on behalf of JLAP Investments on 13 April 2020 and on behalf of Kew Green by Mr Dexter on 22 April 2020, records the appointment of JLAP Investments from 1 February 2020 to manage a single hotel, Le Meridien Piccadilly, referred to in Schedule 2, for a fee, by supplying the services of Messrs Lamb and Pritchard to carry out the task.
172. The consultancy agreement also envisages provision of other hotel management services, separately remunerated, on the basis of other requests for assistance on an ad hoc basis. As far as I am aware, no such other requests were ever made. The consultancy agreement may now have lapsed pursuant to clause 2.2(b) as a result of the termination of the HMA between Archer (the operator of the Meridien Piccadilly) and Kew Green.
173. A consultancy agreement such as this was envisaged in clause 12.5 of the settlement agreements, as noted above. The intention recorded in clause 12.5 was that such an agreement would be concluded before 31 January 2020, but that did not happen. The correct interpretation of the consultancy agreement is disputed. The claimants consider that it incorporated and continued the obligations in clause 12 of the settlement agreements, by virtue of clause 12.5. The defendants would not agree with that, but those are matters for trial.
174. The POC includes only one allegation of breach of the consultancy agreement that I can find. It is at paragraph 79.3, summarising the claims against Mr Lamb and Mr Pritchard. However, those two defendants were not party to the consultancy agreement; JLAP Investments was. That could be cured by a modest amendment directing the claim for breach of the consultancy agreement against JLAP Investments, the seventh defendant.

Economic torts, knowing assistance and receipt of trust property

175. I can deal with these briefly. There are claims for inducing breaches of contract (against Messrs Lamb and Pritchard, at POC paragraph 79.5; against Axiom, at paragraphs 80.1 and 80.2); against Axiom for knowingly assisting breaches of fiduciary duty (80.3); against all defendants for conspiracy to cause harm by unlawful means (97 and subparagraphs under it); and against all defendants for knowingly assisting the breaches of fiduciary duties by Messrs Lamb and Pritchard (paragraph 98 and subparagraphs).
176. In so far as brought against Axiom, these claims are only sustainable from 10 August 2020, when Axiom was incorporated. Otherwise, these claims are sustainable and fit for trial in so far as founded on wrongs which I have permitted to proceed to trial in the course of the discussion and analysis above. There is therefore no basis for striking out, or granting summary judgment in respect of, any of the paragraphs I have just mentioned.

Conclusions

177. For those reasons, I have concluded that the following paragraphs (and part of a paragraph) of the POC assert facts and matters that are not capable of generating any

liability on the part of any of the defendants: paragraph 23.2A; the reference to “contracts of employment” in paragraph 38; paragraphs 42, 50, 53 and 54.

178. Some other paragraphs linked to those paragraphs survive but as narrative only, as explained above. Not every plea in a statement of case has to found a cause of action by itself. It was suggested in written submissions on the draft of this judgment that paragraphs 70 and 71 of the POC should be struck out as well. I do not think that is right; they are part of viable causes of action arising from termination of the HMAs and did not feature in the defendants’ draft order stating the paragraphs to be struck out.
179. The claims asserted based on the facts set out in the paragraphs I have mentioned above (23.2A, part of 38, 42, 50, 53 and 54) fall the other side of the line, are bound to fail and suitable for summary judgment or to be struck out. Subject to hearing counsel on consequential matters, I think the most appropriate remedy is to strike out their content rather than grant summary judgment in respect of them.
180. I will consider representations from counsel on that and other consequential matters either at a short oral hearing (probably conducted remotely as I will be away from London) or by way of written submissions. Subject to any further observations from counsel, I propose to take that opportunity, in the interest of efficiency, to give directions (other than for costs budgeting) for a trial in March 2024 of the rest of the claim, if these are not agreed.