



Neutral Citation Number: [2019] EWHC 1501 (QB)

Case No: HQ18M02074

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2019

Before :

MR JUSTICE NICOL

Between :

William Andrew Tinkler
- and -
(1) Iain George Thomas Ferguson
(2) Warwick Brady
(3) John David Francis Coombs
(4) Richard John Laycock
(5) Andrew Richard Wood
(No.2)

Claimant

Defendants

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

Hearing dates: 8th May 2019

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.

.....
MR JUSTICE NICOL

Mr Justice Nicol :

1. This is an application by the Claimant for permission to amend his particulars of claim. The proposed amended particulars have been drafted by counsel (Heather Rogers QC and Jane Phillips) but the application was presented to me by Mr Tinkler in person. The Defendants are represented by counsel, Andrew Caldecott QC and Jacob Dean. There are other matters concerning costs, but I shall postpone dealing with them until later in this judgment.
2. The Defendants have indicated in correspondence that they do not oppose some of the proposed amendments, but others are controversial.
3. The claim is in libel and malicious falsehood. It arises out of an announcement ('the announcement') which was made via the London Stock Exchange's Regulatory News Service and on the website of the Stobart Group Ltd ('the Company') on 29th May 2018. The Claimant was at that time a shareholder and an executive director in the company. The 1st Defendant is a director and non-executive chairman of the Company. The 2nd Defendant is the Company's Chief Executive Officer. The 4th Defendant was, until the Company's AGM on 5th July 2018, its Chief Financial Officer. The 3rd and 5th Defendants are non-executive directors of the company. Collectively the Defendants are referred to as the 'ongoing board'.
4. A dispute arose between the Claimant and the ongoing board as to whether the 1st Defendant should continue to be the Company's chairman: the Claimant believed he should not; the ongoing board thought he should. It was in this context that the ongoing board issued the announcement.
5. The claim form was issued on 6th June 2018. Particulars of Claim followed on 26th June 2018. The meanings which the claimant alleged to be defamatory, false and published maliciously were, in brief, that he had acted in breach of his duties as a director by destabilising the board of the Company at a crucial time for the business; that he had done so for selfish reasons to protect his own position following a history of improper conduct including in relation to 5 matters specified in the announcement; and that he had shown himself to be so lacking in integrity that he was unfit to hold the office of company director.
6. The Defendants' solicitors are Herbert Smith Freehills ('HSF'). On 17th July 2018 HSF wrote to the Claimant's solicitors, K&L Gates LLP. They alleged that the pleaded meanings were extravagant and overblown. They also alleged that the serious harm test in Defamation Act 2013 s.1 (see below) could not be satisfied. Thirdly, they said that any defamatory meaning of the Claimant was clearly identifiable as comment. They proposed a trial of preliminary issues as to (a) meaning, (b) serious harm and (c) whether the words were fact or opinion.
7. K&L Gates responded on 18th July 2018 resisting HSF's proposal of a preliminary trial. They drew attention to the fact that their client's claim was in malicious falsehood, as well as defamation and that, in malicious falsehood, the 'single meaning' rule did not apply. There was further correspondence between the parties. Eventually they agreed that there should be a trial of the following preliminary issues: (i) the meaning of the words complained of in the libel claim; (ii) whether those meanings were available meanings for the purposes of the claim in malicious falsehood; (iii) whether the words

were seriously defamatory of the claimant and (iv) whether the words complained of were fact or opinion. On 27th July 2018 the Defendants had formally applied for the trial of preliminary issues. Master Gidden approved a consent order to the agreed effect on 29th September 2018.

8. In the meantime, a claim which the Company had brought against the present Claimant came on for trial in the Commercial Court before HHJ Russen QC, sitting as a Deputy Judge of the High Court. At the conclusion of the trial, Judge Russen reserved his judgment. I shall refer to this as ‘Stobart claim’. Mr Tinkler was the defendant in the Stobart claim, but he counterclaimed for declaratory relief that he had been improperly removed as a director in June or July 2018. He also sought a declaration that Mr Ferguson had not been validly elected as Chairman of the Company and made various allegations of breach of fiduciary duty.
9. However, in the present proceedings, the Claimant wished to rely on various matters which had emerged in evidence in the course of proceedings in the Stobart claim. Consequently, on 11th December 2018 he issued an application for permission to amend his particulars of claim in the present proceedings (‘the first application to amend the POC’).
10. The trial of the preliminary issue came before Nicklin J. on 17th December 2018. He was asked to hear the Claimant’s first application for permission to amend the POC at the same time, but the Judge declined to do so.
11. Nicklin J. gave his judgment the same day – *Tinkler v Ferguson* [2018] EWHC 3563 (QB). He made the following findings:
 - i) The single meaning of the announcement for the purpose of the defamation claim was:
 - a) The Claimant had presented a series of challenges to the Board of Stobart which included the matters set out in the announcement, the most recent of which had been his opposition to the re-election of the 1st Defendant as the chairman of the Company.
 - b) A vote to remove the current Chairman would weaken Stobart’s corporate governance, create instability, present a number of serious risks to the Company, which had been identified in the announcement, and would not be in the best interests of the Company.
 - c) The Claimant’s behaviour was disruptive; and in relation to the challenges identified in (a), unreasonable and his opposition to the re-election of the Chairman was regrettable and risked destabilising the Company.
 - ii) The Judge held that meaning (a) was factual and not defamatory of the Claimant.
 - iii) Meaning (b) was an expression of opinion. It was not in any way capable of being defamatory of the Claimant at common law.

- iv) Meaning (c) was an expression of opinion. Meaning (c) was defamatory at common law. It was an imputation which had, at least, a tendency substantially to affect in an adverse way, the attitude of other people towards him.
 - v) However, the allegation in meaning (c) was not of such a serious nature as to raise an inference of serious harm to the Claimant's reputation, or the likelihood of the same, under Defamation Act 2013 s.1.
 - vi) For the purposes of the malicious falsehood claim, the Judge decided that the available meanings were:
 - a) The Claimant destabilised the Board of the Company at a crucial time for the business and/or
 - b) The Claimant required the Board to deal with challenges, including:
 - i) The settlement of financial issues arising from a previous related party transaction when the Claimant was CEO;
 - ii) A proposed selective buy-back of the Claimant's stake in the Company;
 - iii) A proposed additional ex gratia bonus for the Claimant of shares then worth some £8 million;
 - iv) A proposed buy-out of the Company when the share price was in the range of 100p to 120p;
 - v) A proposed related party transaction associated with a recent aborted airline transaction.
 - vii) Necessarily, as part of his malicious falsehood claim, the Claimant would have to prove that the words were false (as well as that they were published maliciously). Since meaning (a) was found to constitute a statement of opinion that burden would be the more onerous.
12. Nicklin J's comments in relation to 'serious harm' (paragraph 11(v) above) require some further comment. The Defamation Act 2013 s.1 says,
- '(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the Claimant.
 - (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.'
13. Since the Claimant was an individual, he had to satisfy s.1(1), but not s.1(2).
14. In *Lachaux v Independent Print Ltd* [2017] EWCA Civ [2018] QB 594 CA the Court of Appeal considered the meaning and effect of s.1 of the 2013 Act. In his judgment,

Davis LJ (with whom Sharp and McFarlane LJJ agreed) made the following, among other, points¹.

- i) The section did not provide a definition of a defamatory statement. It said what is *not* defamatory; it did not say what *is* defamatory [41];
- ii) Consequently, the common law test of what constitutes a defamatory statement remains important;
- iii) For an individual claimant, it is unnecessary to establish that the publication had caused or was likely to cause serious financial loss;
- iv) No further gloss was to be added to the word ‘serious’ in section 1. It was simply intended to weed out trivial claims;
- v) At first instance Warby J. had said that the claimant had to establish that it was more probable than not that the words had caused (or were likely to cause) serious reputational harm. The Court of Appeal disagreed: it was sufficient that the words had a tendency to cause serious harm;
- vi) The meaning of some words was so serious that they raised an inference that their publication had caused or was likely to cause serious harm to the claimant’s reputation. In the present case, Nicklin J. had held that this was *not* the case in relation to the only defamatory meaning which he held the words bore.

15. However, in principle Mr Caldecott accepted that a Claimant could still satisfy the test in Defamation Act 2013 s.1(1) by evidence that, even though the words did not carry a meaning so serious as to raise an inference that their publication caused serious reputational harm, they had in fact had that effect, or were likely to do so. As Nicklin J. said at [46],

‘The consequence of these conclusions is that, if the Claimant is to continue with his defamation claim, he will have to take on the burden of establishing, by evidence the s.1 requirement of serious harm.’

16. But, Mr Caldecott submitted, a Claimant who put his case in this way must plead the facts and matters on which he relied for that conclusion. As CPR r.16.4(1)(a) said,

‘Particulars of claim must include – (a) a concise statement of the facts on which the claimant relies.’

17. Mr Caldecott also relied on the Practice Direction to Part 53 of the Civil procedure Rules. This Part deals specifically with defamation claims and paragraph 2.10(1) says,

¹ An appeal to the Supreme Court in *Lachaux* was pending at the time a draft of this judgment was distributed to the parties. Judgment was handed down on 12th June 2019. The appeal was dismissed but Lord Sumption (with whom the other members of the Court agreed) did so for the reasons given by Warby J. at first instance rather than that of Davis LJ and the Court of Appeal. My provisional view was that the Supreme Court’s decision did not affect the decisions to which I had come. I invited the parties to let me know (within a necessarily circumscribed time scale) if they wished to submit the contrary. They both told me that they did not wish to make further submissions.

‘A claimant must give full details of the facts and matters on which he relies in support of his claim for damages.’

The Practice Direction has not been amended to take account of the Defamation Act 2013. This paragraph is not directly on point, but I agree with Mr Caldecott that it buttresses his reliance on the general duty on a claimant to plead the facts and matters on which he relies to make good his claim. Thus, I agree with Mr Caldecott that, if a claimant wishes to rely on particular facts to make good his case that the publication caused or was likely to cause serious harm to his reputation, he must plead those facts.

18. The Claimant applied to Nicklin J. for permission to appeal his decision. The Judge refused permission. He set a timetable for any application for permission to amend the particulars of claim. The Claimant unsuccessfully sought a variation of that order from Nicklin J. The Claimant renewed his application for permission to appeal Nicklin J.’s order to the Court of Appeal and for a stay of his order setting the timetable for an application for permission to amend the Particulars of Claim. On 8th February 2019 Longmore LJ granted permission to appeal, but he refused a stay.
19. The Claimant did, however, comply with the timetable set by Nicklin J. for making an application for permission to amend his Particulars of Claim (‘the second application for permission to amend’). It is this application which is before me now.
20. On 8th February 2019 Judge Russen handed down his reserved judgment in the Stobart claim – *Stobart Group Ltd v Tinkler* [2019] EWHC 258 (Comm). Broadly, he found against the present claimant and in favour of Stobart (that is a simplification of a complex set of rulings, but it suffices for present purposes.). The present Claimant has sought permission to appeal Judge Russen’s decision, but a decision in that regard is still awaited.
21. The appeal against Nicklin J’s order on the preliminary issue trial was heard by Longmore, Sharp and Bean LJ on 16th March 2019. The Court reserved judgment. At the time of the hearing before me (on 8th May 2019) judgment had not yet been given. However, it was handed down on 15th May 2019 – see *Tinkler v Ferguson* [2019] EWCA Civ 819. The Claimant’s appeal was dismissed. I allowed the parties an opportunity to make further written submissions in the light of the Court of Appeal’s decision and a further opportunity to comment on each other’s submissions. Mr Tinkler’s submissions were undated, but I received them on 22nd May and 28th May 2019. The Defendants’ submissions were dated 16th May and 29th May 2019. The Defendants observed that Longmore LJ had described the single meaning which Nicklin J. had found to be defamatory was ‘very much at the lower end of the scale’ [28]. The Defendants submitted that in such a case a pleaded case that the publication had nonetheless caused serious reputational harm needed to be examined with care to ensure that there was a case fit for trial. The Claimant’s submissions did not really comment on the impact of the Court of Appeal’s decision, but sought an opportunity to provide additional proposed amendments to the particulars of claim. That would need to be the subject of a further application to amend the particulars of claim. I also agree with the Defendants that there is currently no plea of special damage. If the Claimant wished to rely on any such claimed loss, that, too, would need to be the subject of an amendment to the particulars of claim for which permission would be necessary.

22. In their letter of 1st March 2019 HSF explained in detail where they objected to the proposed amendments and why. No substantive reply was received from K&L Gates (at a time when they were still instructed).
23. As I have said, at the hearing before me, the Claimant acted in person. He did not challenge Mr Caldecott's identification of the principles which should be applied on an application to amend particulars of claim. In any event, I agree with Mr Caldecott. The relevant principles are set out in *Hewson v Times Newspapers Ltd.* [2019] EWHC 1000 (QB) at [15]-[17]. Thus, in particular,
- i) The Court should be guided by the overriding principle in the Civil Procedure Rules r.1.1(1) to deal with cases justly and at proportionate cost.
 - ii) That, in turn, will require the court to allow amendments which enable the real dispute between the parties to be adjudicated upon, so far as any prejudice to the opposing party can be compensated in costs. I would add that this is not a case where granting permission to amend would have the consequence that a court hearing would need to be adjourned.
 - iii) The party seeking permission to amend must, though, show that their new case has a realistic prospect of success, using as a bench mark the test which would be applied if the opposing party was seeking summary judgment under CPR Part 24.
 - iv) A plea of malice is subject to more stringent requirements. Since a plea of malice is equivalent to an allegation of dishonesty, it must be pleaded with care and precision. The pleaded particulars must be more consistent with the presence of malice than its absence – see *Yeo v Times Newspapers Ltd (No.2)* [2015] 1 WLR 3031 at [30]-[33].
24. Mr Caldecott also submitted that the inclusion of unnecessary material in a pleading was to be avoided. He argued that such material would increase disclosure obligations, risk the introduction of satellite issues and generally increase the costs and the time of the parties and the Court would have to spend and, if the pleading was superfluous, to no useful purpose. I agree. The purpose of pleadings is to sharpen the identification of the issues which it is necessary for the Court to decide. That exercise is hampered by vagueness or superfluous pleading.
25. For the present hearing, the Claimant had written out his submissions which he wished to make to me and had prepared a bundle of papers to which these submissions referred. No point was taken by Mr Caldecott as to the late production of this evidence. Helpfully, the Claimant provided me with a copy of the text of his submissions. I have considered and taken all of these into account. The amendments, he said, derived either from documents produced in the course of the Stobart claim, or from oral evidence which had been given in the course of the trial before Judge Russen, or were necessarily consequential on Nicklin J's rulings.
26. Rather than address each of the individual points made by the Claimant, in my view it is more fruitful to focus on the Defendants' objections. That is so for several reasons:

- i) To some extent, the Claimant was pushing at an open door in the sense that some of the proposed amendments about which he addressed me were not ones to which the Defendants objected. So far as there is no objection, I will grant the Claimant permission to amend.
- ii) To some extent, the Claimant was seeking to re-litigate the issues already determined by Nicklin J. Thus, for instance, some of his comments were to demonstrate that the statements in the announcement were statements of fact, rather than opinion. Other of the Claimant's comments were to demonstrate the serious nature of the allegations which had been made in the announcement and which he said should lead to an inference of serious harm. However, Nicklin J. has already ruled on those matters. On matters which had already been the subject of adjudication, it would be futile to amend the particulars of claim. It would be for the Court of Appeal to decide if Nicklin J's judgment ought to be reversed or upheld. As it was, and subsequent to the hearing before me, his judgment was, as I have said, upheld.
- iii) To some extent the Claimant's submissions were based on a misconception of the law. He sought to draw to my attention material which he said showed that the Defendants (or some of them) intended the words to have a particular meaning. However, the Court's task is to determine how the words would be understood by the ordinary reader. In carrying out that task, evidence as to the author's intention is irrelevant and therefore inadmissible. Some of the Claimant's comments were to demonstrate that the words concerned were intended to be understood as statements of fact rather than opinion. These comments were doubly objectionable: the author's intention is likewise inadmissible in determining the division between statements of fact and opinion; and Nicklin J. had, in any case, already ruled as to which side of the line the various statements in the announcement came.
- iv) The Claimant's submissions were (understandably) directed to the proposed amendments to the particulars of claim. However, the Defendants also objected to some of the paragraphs of the original particulars. Ordinarily, as Mr Caldecott accepted, a defendant who considered that the *original* particulars of claim were objectionable would need to apply to have those parts of the particulars of claim struck out. Mr Caldecott, submitted, however, that in some cases, the effect of the amendment was to change the proposition which the particulars were said to support. It was legitimate, he argued, for the Defendants to complain that the particulars (whether original or amended) did not support the new proposition or were otherwise deficient in some way. I agree that, in principle, this is a valid line of argument. I will need to consider its application in the individual instances.
- v) At one point, Mr Caldecott submitted the present pleading was deficient because it was insufficiently precise. However, he accepted that the lacuna could possibly be cured by a revised amendment. He accepted that the Claimant should have a (limited) opportunity to address this particular matter.

27. I turn to some of the individual points made by Mr Caldecott:

- i) It is rightly pointed out that the emails from Jonathan Brown, the Company's in-house lawyer, of 28th May 2018 and 30th May 2018 are not referred to in the proposed amendments and I can therefore set aside Mr Tinkler's submissions regarding them.
- ii) No objection is taken to the proposed amendments referring to the email from David Arch of 26th May 2018 (see para 8.8.2.2 – this and the following references are to the draft amended particulars of claim attached to the Claimant's second application to amend the POC).
- iii) The Defendants do not object to paragraph 8.8.1 which refers to the evidence given in the Stobart claim trial by the 1st, 2nd, 3rd and 5th Defendants.
- iv) The Defendants do not object to paragraph 8.4.1.6 which refers to the judgment of Phillips J. in the Claimant's favour in another claim brought against the present Claimant by the Company.
- v) In his submissions, the Claimant referred to the Market Abuse Regulation 9596/2014 of the EU Parliament and Council. This does not feature in the proposed amendments, but in any event, Mr Caldecott submitted, the Claimant's reliance on this appeared to go to the issue of whether the words complained of were statements of fact or opinion and, on this issue, Nicklin J. has already ruled. I agree.
- vi) The Defendants have not objected to paragraph 8.4.2.3 which refers to the 1st and 2nd Defendants' initial support for a proposal made by the Claimant in regard to Eddie Stobart Logistics Ltd.
- vii) The Defendants have not objected to paragraph 8.4.5.3 and remarks made by the 2nd Defendant in his evidence in the Stobart claim.
- viii) The Claimant was concerned about the approach of the Defendants to his expenses claim. That was not a matter mentioned in the announcement. It does not therefore assist the Claimant in relation to serious harm or falsity. The Claimant seeks to rely on the Defendants' attitude to this as part of his plea of malice – see 8.11.13 and the Defendants have not objected to this.
- ix) The references to the 4th Defendant in paragraphs 8.9.4 and 8.9.5 were in the original pleading. The repetition of them in the draft amended particulars of claim is not objected to.
- x) Some further details are given in paragraph 8.9.1. no objection is taken to this.
- xi) The email from the 4th Defendant of 28th May 2018 is not mentioned in the draft amended particulars of claim.
- xii) In his submissions, the Claimant referred to email correspondence between the Defendants about the terms and applicability of their directors' and officers' liability insurance. However, this correspondence does not feature in the draft amended particulars of claim at all.

I have reviewed the above comments by Mr Caldecott and I agree that they are accurate and correct.

28. I turn to the first head of amendments to which the Defendants *do* object.

Defendants' objections: serious harm

29. Mr Caldecott reminded me that Nicklin J. had already considered and rejected the case that the allegations in the announcement were so serious that there was an inference that their publication had caused serious harm to his reputation. What remained was the (at least hypothetical) possibility that, even though the Judge had found against the Claimant by reference to the inherent seriousness of the allegations, nonetheless, publication had caused, or was likely to cause, serious harm to the Claimant's reputation.

30. Mr Caldecott submitted that paragraph 7.1 was an attempt to re-run the argument that the allegations were serious and from that it was to be inferred they had caused or were likely to cause serious harm to the Claimant's reputation. That was not a permissible approach.

31. To some extent, he submitted, the same criticism could be made of paragraphs 7.2 and 7.3. In addition, these paragraphs pleaded the response to the announcement of people who were supportive of the Claimant, despite the announcement. These were people who thought badly of the *ongoing board* because of the announcement. These particulars did not, therefore, support the case that the *Claimant's* reputation had been seriously harmed.

32. Paragraph 7.4 reads (with the amended parts underlined),

'The publication of the defamatory statement was intended and/or was likely to cause antipathy towards, disapproval of and disdain for the Claimant, as was the case. Paragraph 8 below is repeated.'

As to this, Mr Caldecott submitted,

(i) the reference to intention is irrelevant. The impact of a publication is assessed objectively.

(ii) 'likely to cause' was mere assertion and, in any case so far as this pleaded that the publication was likely to cause serious harm to the Claimant's reputation, it had been rejected by Nicklin J.

(iii) the incorporation of a reference to paragraph 8 was inapt: Paragraph 8 is the pleading of the claim in malicious falsehood and does not advance the case on serious harm.

33. Paragraph 7.5 pleads that the statement is still available online, but that does not help in establishing the case the Claimant has to make in order to show that the publication has caused, or is likely to cause, serious harm to his reputation.

34. Paragraph 7.6 incorporates by reference, paragraphs 9, 10 and 11. As to these;

- i) Paragraph 9.1 is a further cross reference.
- ii) Paragraph 9.2 is not objected to, as such. However, this sub-paragraph does not, it is submitted, assist the Claimant in showing (on evidence) that the publication caused him serious reputational harm.
- iii) Paragraph 10 pleads damage, but, so far as its value for demonstrating serious harm to reputation was concerned, it was mere assertion.
- iv) There are parts of paragraph 11 which are not objected to, as such, but the objection to their incorporation in support of the plea of serious harm is maintained, at least in their present form. The sub-paragraphs 11.3.1 and 11.3.2 are objected to in support of the plea of serious harm to reputation. It is not said that the Claimant has been refused appointment as a director of some other company or refused a position on a charity or similar organisation.
- v) Paragraphs 11.3.3 and 11.3.4 are different. These allege that his ability to attract investment and to recruit high quality people have been adversely affected (11.3.3) and it (the announcement) has led journalists approaching stories about the Claimant to adopt a negative view of him and his reputation (11.3.4). In their present form, Mr Caldecott submitted, these subparagraphs were general and insufficiently particularised. However, he accepted that this deficiency was (in theory at least) capable of being cured, and the Claimant should have a limited opportunity to do so.

Defendants' objections: falsity

- 35. To make out his claim in malicious falsehood, the Claimant has to prove that the statements were false. As I have said, the single meaning rule does not apply in malicious falsehood. Hence for this claim, Nicklin J's task had the wider canvas of determining what were the available meanings of the words complained of. Necessarily, the burden on the Claimant is to prove that in those meanings the words were false. The available meanings which Nicklin J. found were different from those advanced by the Claimant in his original particulars of claim. Hence, the propositions which the plea of falsity is intended to support are also different. If the particulars, whether new or in the original pleading, are not in fact capable of supporting the new meanings they will not be justified. This was Mr Caldecott's rationale for objecting to some of the existing particulars. I agree that the logic is sound, though I will, of course, consider its application where it is invoked.
- 36. Since the focus had to be on what was said in the announcement and the available meanings which Nicklin J. had found, Mr. Caldecott submitted that the Claimant's earlier and historical contribution to the Company was not material. This explained the Defendants' objection to paragraph 8.1 (including paragraph 8.1.1 and 8.1.2). These particulars were not probative of the falsity of the words in the available meanings which Nicklin J. had found them to bear.
- 37. The Defendants did not object to the opening paragraph of 8.1.3 or 8.1.3.1.
- 38. Paragraph 8.1.3.2 pleads that 'No Executive Member of the Board, sponsor or independent broker had indicated an intention to resign.' Mr Caldecott submits that this

did not demonstrate that the announcement was false since the announcement was dealing with risks in the future, rather than what had happened in the past.

39. Paragraph 8.1.3.3 pleads that any risk of destabilisation would have been attributable to other causes and, in particular, the activities of the Defendants and not in consequence of the Claimant's decision to vote against the 1st Defendant as chairman. Mr Caldecott submits that other potential causes of destabilisation were immaterial. What mattered was whether the Claimant's activities (not just his decision to vote against the 1st Defendant, but also his encouragement of others to do so as well) risked destabilising the Company.
40. The Defendants did not object to the opening paragraph of 8.2 (which pleads that the Claimant's opposition to the 1st Defendant continuing as chairman was based on his legitimate views). I assume that there was an oversight here. As I explain below, the Defendants *do* object to the word 'legitimate' in paragraph 8.2.1. I assume that the same opposition was intended to be expressed to the same word in the opening paragraph of 8.2.
41. In paragraph 8.2.1 Mr Caldecott raises objections which echo elsewhere in the Defendants' resistance to the proposed amendments:
 - i) It is pleaded that the Claimant's opposition to the 1st Defendant continuing as chairman was 'legitimate'. That implies that the Claimant's criticism of the 1st Defendant's performance as chairman was objectively justified, but, if that is his case, the bare word 'legitimate' is insufficient. He would need to plead and, in due course, prove that there was such objective justification.
 - ii) The Claimant embarks on that task by referring to the 1st Defendant's 'poor corporate governance style' but he pleads that this is only an example. Mr Caldecott submits that a word such as 'including' is pregnant with the possibility that other matters may be relied upon. That, he argues, is an impermissible approach to pleading. The Defendants are entitled to know the totality of the case which they have to meet, not just examples.
42. Paragraph 8.3 pleads ways in which the Claimant has been a successful manager of the Company and another associated company, Stobart Capital. That, Mr Caldecott submits, does not fulfil the task which the Claimant has set himself in this paragraph, namely pleading the facts and matters on which he will rely to show that the words complained of in the available meanings were false. The announcement simply did not allege that in the past the Claimant had been an incompetent manager. On the contrary, it praised his past positive contributions to the Company.

Defendants' objections to particulars of malice

43. The introduction to paragraph 8.6 pleads that the Defendants were part of a concerted 'unlawful' campaign. The unlawful character of the campaign is not explained. This paragraph also refers to 'among other things' which is open to the same objection as the previous pleading by way of example.
44. Paragraph 8.6.3 has some of the objections already referred to (it repeats that the Claimant's criticisms of the 1st Defendant were 'legitimate'). Mr Caldecott submitted

that there needed to be clarity as to whether the Claimant was relying on what he genuinely believed and/or whether his beliefs were objectively justified. If the latter, the rational basis for the beliefs needed also to be pleaded. The reference to the newspapers' comments and opinions was irrelevant.

45. In some places the pleader used quotation marks. Sometimes the source of the quotation was apparent (as, for instance, it was in paragraph 8.7.1.2) and the Defendants had not then objected. On other occasions, it was not clear what was being quoted e.g. in 8.7.1.1 and 8.7.1.3. There were several other examples of the same objection elsewhere in the draft. – see 8.8.2, 8.9.5, 8.11 and 8.11.3. K and L Gates had said in their letter of 8th March 2019 that the sources of the quotations would be given, but nothing has so far materialised.
46. In paragraph 8.11.7 the drafter had again used the expression 'among other things' which was open to the earlier objection. The same paragraph alleges that the Defendants issued the Claim Form in order to safely publicise the allegations of wrongdoing by the Claimant in the press. Mr Caldecott did not press the Defendants' objections to other aspects of 8.11.7 or 8.11.7.1.
47. Mr Caldecott accepted that the Defendants' concerns about paragraph 11.2 could be dealt with by requests for further information.

Decision on application to amend the particulars of claim

48. I have considered carefully Mr Caldecott's submissions. I agree with them. The Claimant will have permission to amend the pleading to the extent that the Defendants have not objected. Where the Defendants have objected, permission is refused.
49. As matters presently stand I refuse permission to rely on paragraph 7.6's incorporation by reference of paragraph 11 into the particulars of serious damage. However, as Mr Caldecott accepted that, at least in theory, paragraphs 11.3.3 and 11.3.4 might allude to particulars which are relevant in the context of serious harm, a limited opportunity should be given to the Claimant to plead those matters in support of the serious harm plea. I will leave the parties to try to agree the details, but they should include a timetable with similar stages to that ordered by Nicklin J. and it should include the following stages: (i) service of proposed amendments on the Defendants; (ii) the Defendants to notify the Claimant as to whether they consent to or object to the proposed amendments, and, if they object, why; (iii) a time within which the Claimant must (if he wishes to amend notwithstanding the Defendants' objections) issue an application notice.
50. Since it would be sensible for the Defendants to know the final form of the Particulars of Claim before they are obliged to serve a defence, the time for this should be deferred until a reasonable period after either the Claimant indicates that he is not going to seek any further amendments or, an application for permission to amend is finally determined.

Reserved costs of the trial of the preliminary issues

51. In his order of 17th December 2018, Nicklin J. reserved the costs of the preliminary issues trial 'to the judge'. Normally, that would mean that Nicklin J. himself should

deal with those costs. However, he is on circuit this term. I agree that in the circumstances it would be sensible for me to deal with the matter.

52. At the hearing before me, Mr Dean argued the issues regarding costs on the Defendants' behalf. He reminded me that, by CPRr.44.2(2)(a),

‘If the court decides to make an order about costs (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.’

53. Mr Dean argued that on the preliminary issues trial, the Defendants had been the successful party.

54. He took in turn the issues with which Nicklin J. had had to deal:

- i) *The single meaning of the words for the purposes of the libel claim.* The Judge set out the meanings contended for by the Claimant (at [5]) and by the Defendants (at [10]). I have already referred to the meanings which he found the words to bear for the purpose of the libel claim (judgment [39]). Mr Dean accepted that the Judge had not simply adopted the Defendants' meanings. However, he argued, the central sting of the Claimants' meanings had been rejected and the Judge's meanings were much closer to those advocated by the Defendants.
- ii) *Whether the meanings advanced by the Claimant were reasonably available for the purposes of the malicious falsehood claim.* The Judge observed that the Claimant relied on the same meanings as he alleged the words bore for the purpose of the defamation claim. The judge set out his conclusions on this issue at [56]. Mr Dean argues that the Claimant lost on this issue since it was plain that the Judge had not accepted the meanings he advanced. In particular, he notes, the Judge's available meanings contained no element of breach of duty, selfishness or lack of integrity.
- iii) *Whether the words complained of were statements of fact or opinion.* The Claimant had submitted that they were all fact – see [26]. The Defendants had submitted that they were essentially opinion - see [27]. The Judge found that the only meaning which was defamatory at common law was a statement of opinion – see [42]. Accordingly, Mr Dean submits, the Defendants were successful on this issue.
- iv) The fourth issue, as formulated in the Consent Order approved by Master Gidden was *‘whether the meanings found [for the purpose of the defamation claim] are seriously defamatory of the Claimant.’* Nicklin J., sensibly, if I may say so, treated this as requiring a determination of whether the defamatory allegations were so serious that they led to an inference that their publication had caused serious harm to the Claimant's reputation. As I have already said, the Judge concluded that the only meaning which was defamatory at common law was not sufficiently serious as to raise the inference that his reputation had been seriously harmed – see [45]. Mr Dean submitted that the Defendants had, therefore, been successful on this issue too.

55. Overall, therefore, Mr Dean argued that the Defendants had been the successful party and should get their costs of the preliminary issue trial.
56. The Claimant argued that the costs should be in the case, so that the Defendants should only get their costs if they were ultimately successful in the action.
57. In my judgment, Mr Dean is right. The Defendants were the successful party in the trial of the preliminary issues. A trial of those issues was directed by agreement and because those issues were severable and it would be beneficial to have them determined at an early stage. In those circumstances, I agree with Mr Dean that the Defendants' entitlement to costs should not be dependent on them also being successful in the remaining parts of the action. Nor do I consider that it would be right that the Defendants should have to wait until the conclusion of the action for them to be paid their costs. Accordingly, the Claimant will be ordered to pay the Defendants' costs of the trial of the preliminary issues.
58. Ordinarily, where, as in the present case, the hearing took a day or less, the Court's practice is to assess the costs summarily – see Practice Direction to Part 44 paragraph 9.2(b). That is what Mr Dean invited me to do in the present case.
59. The total costs in the schedule of costs for the Defendants for the trial of the preliminary issues was £107,256.96. This was a substantial amount for a one day trial, but I note that the Claimant's costs for the same trial totalled £135,375.35.
60. Mr Dean also invited me to note that the Defendants' approved costs budget for the preliminary trial was £77,528 plus VAT. That had also been broadly comparable to the Claimant's approved costs budget of £107,000 for the preliminary issues trial.
61. By CPR r.3.18 when (as I am) assessing costs on the standard basis, I must have regard to the receiving party's last agreed budgeted costs for each phase of the proceedings and not depart from the agreed budgeted costs unless there is good reason to do so.
62. In his submissions, the Claimant observed that the hourly charge for a clerk of £368 was extravagant. Mr Dean responded that this was part of the agreed costs budget.
63. While the costs are high, they have been agreed in the costs budget. I see no reason to depart from the amount in the Defendants' budget. I will summarily assess the Defendants' costs of the preliminary issues trial which the Claimant must pay as £77,528 plus VAT.
64. Since the Court of Appeal has now dismissed the Claimant's appeal, there is no need or justification to stay that order pending the result of the appeal.

Reserved costs of the application for the trial of preliminary issues

65. As I have said, Master Gidden's order of 28th September 2018 on the Defendants' application was made by consent. Paragraph 6 of his order said, 'Costs of the application reserved, to be determined at the outcome of the preliminary hearing'
66. The preliminary hearing has been determined. Mr Dean submits that the Defendants should have their costs of the application as well.

67. HSF's letter of 17th July had proposed a preliminary trial of the issues which HSF identified. In their response of 18th July 2018 K & L Gates had said that such a course was inappropriate since the Claimant was relying on malicious falsehood as well as libel and there were not clearly severable issues appropriate for a trial of preliminary issues. Further correspondence ensued and, eventually, as I have said, the Defendants issued their application notice on 27th July 2018. The order which the Defendants then sought identified three of the issues which were eventually tried. Following yet further correspondence, it was agreed that they should also include the fourth issue (i.e. the range of available meanings for the purpose of the malicious falsehood claim). Mr Dean accepts that an order for such a trial would have been necessary even if there had been earlier agreement, but, he argues, the exercise would have been considerably cheaper. It would not then have been necessary, for instance, for his solicitor to file a witness statement (at least not in the same detail).
68. On this issue, it seems to me, that the right order is 'no order as to costs'. As Mr Dean conceded, an application would have been necessary, even if the parties had been in agreement at an earlier point. Further, the Defendants had initially been resistant to including the fourth issue to which I have referred above. The Claimant did eventually agree to the order which Master Gidden then made by consent.

VAT on the costs ordered to be paid in consequence of the Claimant's application on 3rd May that the hearing on 8th May 2019 should be adjourned

69. I raised a question as to whether VAT was (a) payable and (b) not recoverable by being offset against other VAT liabilities of the Defendants. Mr Dean confirmed, without contradiction from the Claimant that (a) VAT was payable; and (b) it was not recoverable by being offset against other VAT liabilities of the Defendants. In those circumstances I agree that the amount of costs which I ordered the Claimant to pay as a result of his unsuccessful application to adjourn on 3rd May 2019 should be increased by the amount of VAT on those costs.

Overall conclusions

70. (a) The Claimant has permission to amend the particulars of claim in those respects where the Defendants did not object.
- (b) Permission to amend is refused in relation to the proposed amendments to which the Defendants have objected.
- (c) In view of the amendments to the Particulars of Claim which the Claimant wishes to make, permission is conditional on him also deleting those parts of the original particulars of claim to which the Defendants have objected.
- (d) The Claimant may propose revised amendments under what is paragraph 7.6 of the draft amendments so as to rely in relation to the allegation of serious harm on a revised proposed amendment 11.3.3 and 11.3.4, but a time table will need to be set for (i) the Claimant to serve draft revised amendments for this purpose; (ii) the Defendants to give notice as to whether those amendments are acceptable and if not why; and (iii) for the Claimant, if he so wishes, to issue an application notice. I will ask the parties to try to agree an appropriate time table.

- (e) The time for service of the Defence will be extended until the Particulars of Claim are in final form plus an appropriate period for the Defendants to consider them.
- (f) The costs of the trial of the preliminary issues are to be paid by the Claimant to the Defendants summarily assessed as £77,528 plus VAT.
- (g) There will be no order as to costs of the application for the trial of preliminary issues.
- (h) The costs of the adjournment application which was heard on 3rd May 2019 and which are to be paid by the Claimant are to be increased by the amount of VAT on those costs.