Neutral Citation Number: [2018] EWHC 3563 (QB)

Case No: HQ18M02074

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice, Strand,
London, WC2A 2LL

Date: 17 December 2018

Before :

THE HONOURABLE MR JUSTICE NICKLIN

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Between :

William Andrew Tinkler	**Claimant**
- and -	
(1) Iain George Thomas Ferguson **(2) Warwick Brady** **(3) John David Francis Coombs** **(4) Richard John Laycock** **(5) Andrew Richard Wood**	**Defendants**

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Heather Rogers QC and **Jane Philips** (instructed by **KL Gates**) for the **Claimant**
Andrew Caldecott QC and **Jacob Dean** (instructed by **Herbert Smith Freehills**) for the **Defendants**

Hearing date: 17 December 2018

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APPROVED JUDGMENT

MR JUSTICE NICKLIN:

1. This is a libel and malicious falsehood action brought by the Claimant against five defendants. It concerns an announcement made on the London Stock Exchanges Regulatory News Service by Stobart Group Limited ("Stobart") on 29 May 2018 (the "Announcement").

2. The Claimant is an executive director and substantial shareholder in Stobart. He was the Chief Executive Officer of Stobart from 2007 until his resignation on 28 June 2017. The Claimant is also the sole director and CEO of Stobart Capital Limited ("Stobart Capital").

3. The First Defendant, Iain Ferguson, is a director and non-executive Chairman of Stobart. The Second Defendant is Stobart's CEO. The Fourth Defendant, Richard Laycock, is Stobart's Chief Financial Officer. The Third and Fifth Defendants, John Coombs and Andrew Wood respectively, are non-executive directors of Stobart.

4. The Claimant issued the claim form on 8 June 2018. The Particulars of Claim were served on 26 June 2018. The words complained of from the Announcement (with paragraph numbers added in square brackets) were:

> **STOBART GROUP LIMITED.**
> **('Stobart Group' or 'the Company')**
>
> **Update on Annual General Meeting and possible Board changes**
>
> [1] On 25 May 2018 the Company announced that the Board has been advised by Andrew Tinker, Executive Director, that he will be voting at the AGM against the re-election of Iain Ferguson, as a Director and Chairman of the Company.
>
> [2] The Company also announced that the Ongoing Board* confirmed that it had full confidence in Mr Ferguson, both as a Director and as Chairman, and would therefore be recommending to shareholders that they vote in favour of Mr Ferguson's re-election.
>
> [3] The Ongoing Board would like to provide shareholders with some context for this regrettable situation. It is committed to the highest standards of corporate governance and believes that challenge, scrutiny and robust debate in boardrooms are part of the effective oversight of management and the decision-making process.
>
> [4] Under this commitment the Board has been forced to address a number of challenges posed by Mr Tinkler in the recent past. The Board has, throughout these challenges, sought to balance the benefits of harnessing Mr Tinkler's entrepreneurial talent whilst maintaining strong corporate governance on behalf of, and in order to create significant shareholder returns for, all investors.
>
> [5] The Ongoing Board had considered it in the best interests of the Company and its shareholders as a whole, at least until Mr Tinkler's move against Mr Ferguson, to seek to resolve these challenges through negotiation and discussion. However, the Ongoing Board no longer considers, in light of Mr Tinkler's position, such a course of action to be possible. It deeply regrets that Mr Tinkler has destabilised the Group

through his actions at this crucial time for the business and urges all shareholder to support the re-election of Mr Ferguson at the forthcoming AGM.

[6] Further, the Ongoing Board believes that a vote against the re-election of Mr Ferguson would weaken the Company's corporate governance and would not be in the best interests of shareholders:

- [7] It would dilute the robustness and the diversity of opinion on the Board, which contains strong, varied expertise drawn from experience working with leading public and private companies;
- [8] It would impact the Group's planned growth strategy and its ability to optimise shareholder returns;
- [9] It would create instability. The Board had worked together effectively to provide a strong basis for growth, which is reflected in the Group's successful performance. During Mr Ferguson's chairmanship both Andrew Tinkler and Warwick Brady have benefited from a stable platform that has allowed the Company to deliver a total shareholder return of 185% in the three years to 28 February 2018 and provide £74.1m to shareholders through dividends and buybacks in the financial year ended 28 February 2018.

[10] Background to current composition of the Board.

[11] Between 2007 and 2013 Stobart Group received criticism for its corporate governance, principally in relation to engaging in perceived related party transactions. The Company also experienced a number of boardroom changes, in particular in relation to the role of Chairperson. Between 2007 and 2013 Stobart Group shares reached a peak price of 183p per share.

[12] As a result the Company put in place a structure for improved governance and oversight:

- [13] Mr Ferguson was appointed as Chairman and Andrew Wood as Non-Executive Director in 2013 and additional Non-Executive Directors, John Coombs and John Garbutt, were appointed in 2014;
- [14] Mr Ferguson confirmed his remit with key shareholders before appointment which was to:
  - [15] regularise governance, particularly regarding related party transactions;
  - [16] fix the balance sheet;
  - [17] clarify the future strategy;
  - [18] plan management succession.
- [19] In mid-2016 Mr Tinkler:

- [20] advised Mr Ferguson he wanted to organise a successor CEO;
- [21] requested Mr Ferguson to support as positive introduction into the business for Warwick Brady.

- [22] In June 2017, and following six months as Deputy CEO, Mr Brady was appointed CEO, with the unanimous support of the Board.

- [23] On Mr Brady's appointment, Mr Ferguson committed to Mr Brady and the Board to continue as Chairman until 202 to ensure stability and a positive transition.

- [24] He also supported Mr Tinkler's wish to remain as an Executive Director and to establish Stobart Capital as an independently owned business outside the Stobart Group, whilst harnessing Mr Tinkler's entrepreneurial skills for the benefit of the Group.

[25] **Management's achievements**

[26] The Company has achieved much since the stabilisation of its governance arrangements:

- [27] the structured sale of Eddie Stobart has resulted in cash proceeds to the Group so far of in excess of £300m over two partial disposals in 2014 and 2017, and gearing reducing significantly to stand at some 9% at 28 February 2018;
- [28] £112.5m of dividends have been paid to shareholders since 1 March 2015;
- [29] £74.1m has been returned to shareholders in the financial year ended 28 February 2018, including dividends of £58.1m and net share buybacks of £16.0m;
- [30] the total shareholder return over the three years to 28 February 2018 is 185% including capital growth, dividends and share buybacks of £16.0m;

[31] Under Mr Brady, there is a clear strategy for growth:

- [32] core focus on execution of the Energy Division business plan and the development of the Aviation Division, particularly London Southend Airport;
- [33] both core operating divisions have ambitious growth plans beyond delivery of previous targets;
- [34] the Board's ambition is to double the value of the business by 2022;
- [35] divestment of non-core assets and investments over the next 18 months to support the dividend until they are replaced by cashflows from operating divisions.

[36] Professional management teams are in place at key operating divisions to drive the business forward.

[37] **Mr Tinkler**

[38] The Board has been forced to address a number of challenges posed by Mr Tinkler in the recent past, including:

- [39] settlement of financial issues arising from a previous related party transaction when Mr Tinkler was CEO;
- [40] a proposed selective buyback of part of his stake in the Company;
- [41] a proposed additional ex-gratia bonus for him of shares then worth some £8m;
- [42] a proposed buy-out of the Company when the share price was in the range of 100p to 120p;
- [43] a proposed related party transaction associated with the recent aborted airline transaction.

[44] Mr Tinkler's threat to vote against the Chairman presents a number of serious risks:

- [45] significant Board resignations, both Executive and Non Executive (Mr Wood and Mr Coombs have now already confirmed that they will resign from the Board if Mr Ferguson is not re-elected);
- [46] sponsor and independent broker resignation;
- [47] operational management destabilisation and distraction;
- [48] potentially weakened corporate governance;
- [49] potential adverse market response and risk to shareholder value.

[50] Mr Tinkler is no longer key to delivery of the current management's operational strategy. His focus, during the 50% of his time which is committed to the Stobart Group, is on the non-operating divisions. The balance of his time is spent on his separate vehicle Stobart Capital, although:

- [51] he is now in dispute with the co-founder of that business;
- [52] in its first year Stobart Capital has so far not generated any significant transactions for Stobart Group.

[53] **Ongoing Board support for Mr Ferguson**

[54] As announced on 25 May 2018, all of the Ongoing Board confirm that they have full confidence in Mr Ferguson, both as a Director and as Chairman, and will therefore be recommending to shareholders that they vote in favour of Mr Ferguson's re-election.

[55] Warwick Brady, CEO said: “Stobart Group now has a clear and focused strategy to drive growth in our core operating divisions in order to double the value of the business by 2022. The strategy was co-created between Andrew Tinkler and myself. I have been very clear that Stobart Group needs a stable board and management team to support the execution of this plan, underpinned by strong and effective corporate governance.

[56] On my appointment as CEO, as part of working with Andrew Tinkler, we all agreed that Iain Ferguson would remain in his role through to 2020, and our strategy for the growth of the business was unanimously validated by the Board. It's in the interest of the shareholders' (sic) that we continue to have stable leadership across the business and the ability to deliver our ambitions, as was the case when Andrew Tinkler was CEO."

[57] * The Ongoing Board comprises all of the Directors other than Mr Tinkler who are offering themselves for election or re-election at the AGM. As announced in the 2018 Preliminary Statement of Results, John Garbutt, the other Non-Executive Director, had decided to step down at the AGM."

5. The Claimant contends that, in their natural and ordinary meaning, the words were defamatory of him in the following meanings:

   a. the Claimant had acted in breach of his duties as a director of [Stobart] by deliberately destabilising the Board at a crucial time for the business and/or

   b. the Claimant had done so for selfish and self-interested reasons to protect his own position, following his history of improper conduct and poor corporate governance which included forcing the Board to deal with unwarranted challenges including:

      i. the settlement of financial issues arising from a previous related party transaction when the Claimant was CEO; and/or

      ii. a proposed selective buy back of part of the Claimant's stake in Stobart; and/or

      iii. a proposed additional ex-gratia bonus for the Claimant of shares then worth some £8 million; and/or

      iv. a proposed buy-out of Stobart when the share price was this the range of 100p to 120p; and/or

      v. a proposed related party transaction associated with a recent aborted airline transaction; and/or

      vi. the Claimant's failure to successfully manage Stobart Capital; and/or

   c. in the premises the Claimant has repeatedly shown himself to be so lacking in integrity that he is unfit to hold the office of company director.

6. The Claimant has also pleaded a claim for malicious falsehood. He relies upon the same meanings that he contends the words bear for the purposes of his defamation claim. He contends that the Announcement was false and published maliciously by the Defendants. Particulars of Falsity and Malice are set out in the Particulars of Claim.

7. On 27 July 2018, the Defendants applied to the Court for an order that the issues of meaning, whether the words complained of made allegations of fact or expressions of opinion be tried as preliminary issues.

8. On 28 September 2018, Master Gidden, by consent, ordered the trial of the following preliminary issues:

    a. the meaning of the words complained of for the libel claim;

    b. whether the meanings advanced by the Claimant are "reasonably available meanings" for the purposes of the malicious falsehood claim; and

    c. whether the meanings the court finds the words to bear for the libel claim are:

        i. fact or opinion; and/or.

        ii. seriously defamatory of the Claimant (for the purposes of s.1 Defamation Act 2013).

9. No defence has yet been served. The time for service of the defence has been extended until the determination of the preliminary issues.

10. On 10 December 2018, by letter, the Defendants set out the meaning that they contend the words complained of bore as follows:

    a. the Claimant's stated intention to oppose the re-election of Mr Ferguson as a director and chairman of Stobart at the forthcoming AGM was regrettable to the Board as it would be destabilising for Stobart and because retaining Mr Ferguson would be in the best interests of shareholders, including in terms of corporate governance; and

    b. the Claimant's opposition to Mr Ferguson may well have been unreasonably influenced by some or all of various disagreements between the Claimant and the Board of Stobart (and particularly Mr Ferguson) relating to matters which involved questions of corporate governance. The subject matter of those disagreements included issues involving the Claimant and by proposals by the Claimant as listed in paragraphs 39 to 43 of the Announcement.

Legal issues

11. The trial of these preliminary issues raises four legal issues:

    a. the assessment of the natural and ordinary meaning for the purposes of libel;

    b. whether that meaning is fact and/or opinion;

    c. whether the meaning found by the Court raises the inference of serious harm under s.1 of the Defamation Act 2013;

    d. whether the meanings advanced by the Claimant are capable meanings for the purposes of the malicious falsehood claim. (The reason that this is (or may be) different from the meaning(s) for the purposes of the libel claim is that the single meaning rule does not apply to malicious falsehood claims.)

12. It is convenient to deal with the first three issues together as they are all closely connected with the determination of the single meaning of the Announcement for the purposes of defamation.

Natural and ordinary meaning: libel

13. There is no dispute as to the principles to be applied. They are well known and are set out, for example, in Warby J's judgment in ***Doyle -v- Smith*** **[2018] EWHC 2935**, [54]-[56].

14. The common law test for whether an imputation is defamatory is whether the imputation substantially affects in an adverse manner the attitude of other people towards him or has a tendency to do so: ***Thornton -v- Telegraph Media Group Limited*** **[2011] 1 WLR 1985** [96].

Fact or opinion

15. Again, there is no dispute as to the relevant principles. They are to be found in ***Morgan -v- Associated Newspapers Ltd (No. 1)*** **[2018] EWHC 1850 QB** [13]; and also ***Sube -v- News Group Newspapers*** **[2018] EWHC 1234** [32]-[33].

16. If the court were to determine that words complained of conveyed defamatory opinion, then that would potentially limit its capacity to form the basis of a claim for malicious falsehood.

    a. In general, an *unverifiable* statement of opinion cannot be complained of as a falsehood for the purposes of a claim in malicious falsehood: ***Euromoney -v- Aviation News*** **[2013] EWHC 1505** [102].

    b. This may be subject of qualification. One such qualification was, as Ms Rogers QC noted, identified by Tugendhat J in [103]: where it can be shown, as a fact, that the commentator does not hold the expressed opinion: see *Gatley* §21.7 and footnote 55 (12th edition, 2013).

    c. It is perhaps also important to bear in mind that, in defamation cases, it was always open to a defendant to seek to prove that the expressed opinion was true (*Gatley* §11.20). If, in context, a defamatory publication conveyed the meaning, as an expression of opinion, that the claimant was dishonest, a defendant could seek to prove that the claimant had been dishonest, as a matter of fact. Largely the ability to do so would be dependent upon the meaning conveyed and whether the expressed opinion was verifiable or capable of being proved true. In the example given by *Gatley* of a theatre critic stating that the claimant's play was a bad play and not worth seeing is not capable of being proved objectively true, whereas the opinion that someone was dishonest could be.

    d. It seems to me, therefore, that a statement of opinion that is capable of being proved true is, in principle, *capable* of founding an action for malicious falsehood where the opinion can be proved to be false and the claimant takes on the burden of doing so. In such circumstances, however, there may be substantial obstacles in the path of establishing that it was published maliciously.

Serious harm

17. In order to be defamatory for the purposes of a claim for libel, a claimant must now satisfy s.1 Defamation Act 2013 and the serious harm threshold.

18. Serious harm to reputation may be shown either by evidence or by inference. The principles are explained by Warby J in ***Sube***:

> [23] The Claimants' arguments say relatively little about the test for when a meaning is defamatory of a person. The starting point is the common law principle that a meaning is defamatory of the claimant if it '[substantially]' affects in an adverse manner the attitude of other people towards him, or has a tendency to do so': ***Thornton -v- Telegraph Media Group Ltd***... [96] (Tugendhat J). This is the common law 'threshold of seriousness', which requires 'tendency' to affect adversely the attitudes of others towards the claimant, to a 'substantial' extent.
>
> [24] Section 1(1) of the Defamation Act 2013 has raised the bar. It provides that a statement 'is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.' the words 'is likely to cause', as used in this subsection, 'are to be taken as connoting a *tendency to cause*': ***Lachaux -v- Independent Print Ltd*** **[2018] QB 594** [50] (Davis LJ) (my emphasis). The effect of the subsection is to give 'statutory status to Thornton, albeit also raising the threshold from one of substantiality to one of seriousness …': [82(1)].
>
> [25] The approach to be adopted by the Court is explained in Lachaux:
>
> > [69] … If the meaning … established … does not convey a serious defamatory imputation then the claim may, by reason of s.1(1), be vulnerable to being struck out without more ado.
> >
> > [70] If, on the other hand, the meaning so established conveys a serious defamatory imputation … then an inference of serious reputational harm ordinarily can and should be drawn accordingly…
> >
> > [73] … at a meaning hearing … [t]he seriousness of the reputational harm is … evaluated having regard to the seriousness of the imputation conveyed by the words used: coupled, where necessary or appropriate, with the context in which the words are used (for example, in a newspaper article or widely accessed blog)…
> >
> > [79] Whether in any given case the imputation is of sufficient gravity as of itself to connote serious reputational harm … should therefore normally be capable … of being relatively speedily assessed at the meaning hearing.'"

19. Defamatory expressions of opinion are capable of causing serious harm to reputation: ***Morgan -v- Associated Newspapers Ltd (No. 2)*** **[2018] EMLR 25** [18]. The factors that the Court will consider when assessing the capacity of defamatory expressions of opinion to cause serious harm to reputation include those set out in the ***Morgan*** judgment at [31].

    i) The starting point is the gravity of the defamatory meaning that the court has found;

ii) Secondly, there is the question of the gravity of the opinion expressed or criticism of the claimant: criticism can range from being seriously damaging to a person's reputation (leading people to take a seriously adverse attitude towards him/her) to more trivial criticism (and which may fall short of the s.1 threshold);

iii) The significance of an imputation and its capacity (or tendency) to cause serious harm to reputation may be affected by its context and presentation; is the criticism made expressly or by implication?

iv) The fact that the opinion is clearly presented to the reader as such may well mitigate its defamatory impact;

v) If the source of the criticism is identified, does s/he appear authoritative? Is his/her view likely to carry weight and be accepted by the reader? Or is the critic someone whose view the reader is likely to discount in favour of making his/her own assessment? and

vi) Has the criticism been adopted by the publisher, expressly or implicitly: in other words, has the publisher 'put its weight' behind the criticism expressed?"

20. If the Court considers that the seriousness of the defamatory imputation is insufficient to enable an inference of serious harm to be drawn, a claimant would then be required (if he could) to demonstrate by evidence that the publication has caused or is likely to cause serious harm to his reputation: see ***Morgan (No. 2)*** [11].

Parties' submissions

21. Ms Rogers QC submits that an RNS announcement would be seen as a medium by which companies announce facts to the market. It is not a press release on behalf of a company or a letter to shareholders; it is, she submits, a document provided in a regulatory context to provide information.

22. As for the terms of the Announcement, she submits it is divided into four headings:

a. The opening paragraph [1], sets the scene, by referring to the RNS announcement made the previous working day (Friday, 25 May) which announced that the Claimant "*will be voting at the AGM against the re-election of Iain Ferguson as a director and Chairman of the company*".

b. The battle lines, she says, are then immediately drawn by the Defendants in [2] of the Announcement as the "Ongoing Board", the members or which are defined at the end of the Announcement in [57] as "*all of the directors other than Mr Tinkler who are offering themselves for election or re-election at the AGM*". The Defendants confirmed their "*full confidence*" in the First Defendant, and they "*would therefore be recommending to shareholders that they vote in favour*" of the First Defendant's re-election.

c. The Claimant is depicted, she submits, in a discreditable light. The disdain for him and the position he had taken is made very early on in the Announcement (for example):

i. She relies on the reference to "*this regrettable situation*" in [3];

ii. In [3] and [4], the Defendants' commitment to "*the highest standards of corporate governance*", to be contrasted, she submits, with the Claimant's low standards;

iii. In [4], the fact that the Defendants have been "*forced to address a number of challenges posed by Mr Tinkler in the recent past*", a theme returned to in detail later in the Announcement in [38];

iv. In [5], she submits that the description is pejorative of the Claimant's decision to vote against the First Defendant as "*a move against Mr Ferguson*";

v. Also in [5], she relies upon the statement that the Claimant has "*destabilised the Group at this crucial time for the business*", and it is a matter that the Defendants "*deeply regret*"; and

vi. The further references to the fact that the Claimant's position in [6] "*would weaken the company's corporate governance*"; in [7] "*dilute the robustness*" of the Board; in [8] "*impact the Group's planned growth strategy and its ability to optimise shareholder returns*"; and in [9] "*create instability*".

d. The second and third sections of the Announcement are headed, "*Background to the current composition of the Board*" and, "*Management achievements*" In those sections, she contends, the Announcement suggested that the Claimant was responsible for weak corporate governance as CEO, and this is a theme that continues in terms in [11] and [12], with the clear suggestion that it was only the First Defendant's chairmanship from 2013 (and the appointment of the Third and Fifth Defendants as directors) which prevented the Claimant from engaging in "*perceived related party transactions*" and allowed them to stabilise the company. She submits that it suggests that the Claimant was responsible for engagement in "*related party transactions*". That is a theme that is returned to again at [15], [39] and [43]. She submits the effect of this is to suggest that the "*stabilisation of the governance arrangements*" ([26]), and the subsequent success of the company is attributed wholly to the Defendants wrestling control of the company away from the Claimant.

e. The Claimant is particularly attacked in the section headed, "*Mr Tinkler*". Having asserted in the opening paragraphs that he had deliberately "*destabilised the business at a crucial time*", and had been responsible for the poor corporate governance that was in place before the Defendants took over, the Announcement, she submits, then attacks the Claimant 'head-on', giving him his own section of the Announcement from [37] onwards.

i. The Defendants repeat what is said at [4]: that they have been "*forced to address a number of challenges posed by Mr Tinkler in the recent past*", as to which, Ms Rogers QC draws particular attention to the words:

1. "*forced to*", which she says clearly implies that the Claimant had put them into a position where they had no option but to deal with and dispose of his "*challenges*";

2. "*a number of*", makes the point that the Claimant was a repeat offender in this regard, adding to the picture that the Claimant was making corporate life extremely difficult for the Defendants;

3. "*challenges*" is pregnant with a suggestion none of the "*challenges*" can have been met or else the Board would not have been "*forced to deal with them*". Thus, they were unwarranted, time consuming and contrary to the interests of the company;

4. "*posed by*" immediately puts the Claimant front and centre; these were all matters raised by the Claimant which the Board had no alternative and were "*forced*" to dispose of; and finally

5. "*recent past*" suggests that it was only in the past few months that the Claimant had been causing the Board such difficulties.

ii. Thus, she submits, from the opening bullet point of this section ([38), it is contended that the Claimant has been positioned by the Defendants as a disruptive and selfish influence on the Board.

iii. An example of the challenges posed by the Claimant that the Board had to deal with are given in [39] to [43].

iv. Under [44], the Claimant's threat to vote against the Chairman is said to present several identified "*serious risks*".

v. Finally, in this section it is suggested, she submits, that the Claimant's role in the company is deliberately marginalised ([50]), and he is said to be as difficult and no longer of any value to the company. In particular:

1. the statement that the Claimant "*is no longer key to delivery of the current management's operational strategy*";

2. the statement that his "*focus during the 50% of his time which is committed to the Stobart Group is on the non-operating divisions*";

3. the reference to the fact that he is "*now in dispute*" with his co-founder of Stobart Capital [51]; and

4. the indictment that "*in its first year Stobart Capital has so far not generated any significant transaction for the Stobart Group*" [53].

23. Ms Rogers QC submits that the combined effect of all these statements, in the context of the Announcement as a whole, is clearly to convey to the hypothetical ordinary reasonable reader all of the meanings relied upon by the Claimant.

a. As to the first meaning, it is suggested that it is self-evident that the serving Board's directors' duty is to act in the best interests of the company. For a regulatory announcement to allege that a director had behaved in the way set out in the Announcement amounts, clearly, to an allegation that he was in breach of his duty as a director.

b. The "challenges" posed by the Claimant set out in the Announcement are all said to be clearly without merit. That is why the Defendants have been "forced" to deal with them. They also reflect adversely on the Claimant as they are borne out by his own self-interest, rather than being in the interests of the Company. When set alongside the portrayal of the Claimant as a man whose conduct is improper, and who has been guilty of previous poor governance, the effect is to convey the second and third meaning, she submits.

24. Mr Caldecott QC for the Defendants submits:

a. The Claimant has not relied upon any innuendo meaning. The natural and ordinary meaning falls to be determined by reference to the Announcement only. He argues that the Court may, however, take into account the fact that the Announcement is designed to be and would likely only be read by those who are familiar with and interested in the Company (primarily its shareholders) and who have some knowledge of financial and corporate matters generally. For this proposition, he relies upon principle 6 from ***Jeynes -v- News Magazine Limited*** **[2008] EWCA Civ 130** [14]. That must include, he submits, the knowledge that very serious disagreements can, and do, often arise in boardrooms, relating to company strategy, boardroom composition or arising out of a simple personality clashes, without there being any suggestion that one side or the other in the dispute has acted in breach of his fiduciary duties as a director and/or with a serious lack of propriety and integrity, which is the sting the Claimant attributes the Announcement.

b. The context of the specific words which relate to the Claimant is given in the Announcement itself. On the express terms of the Announcement:

i. The Claimant, an executive director, is voting against the re-election of Mr Ferguson as director and chairman of Stobart. It is implicit that the Claimant is highly critical of Mr Ferguson's ability to carry out the role;

1. the other directors are in favour of Mr Ferguson's re-election;

2. the Announcement seeks to explain to the shareholders the position of the other directors ("*The Ongoing Board would like to provide shareholders with some context for this regrettable situation*" [3]); and

3. ***if*** the other directors were of the view that the Claimant's position represented improper conduct or conduct in breach of duty, they would surely be expected to say so in terms because shareholders would expect to be told and because historic concerns about corporate governance at the company, between 2007 and 2013 are expressly referred to in the Announcement.

c. There are, what he terms, "strong and striking critical epithets or phrases" that appear in the Claimant's pleaded meanings. In the first meaning "acted in breach of his duties as a director" and "deliberately destabilising the Board". In the second meaning "selfish and self-interested reasons", "his history of improper conduct", "his history ... of poor corporate governance" and "unwarranted challenges", and "failure to successfully manage Stobart Capital". Finally, in the third meaning, "so lacking in integrity" and "unfit to be a company director".

d. Save for a reference to "destabilise" (*without* the adverb "*deliberately*") not one of these phrases appears, he submits, in the Announcement. Nor does any synonym for them such as misconduct or lack of honesty appear in the Announcement either.

e. On this ground alone, the Claimant's meanings are wholly strained and far-fetched in a context where such criticisms would be express if they were intended. Mr Caldecott has also made detailed submissions as to several passages which he submits contradict the Claimant's case. On that basis, he submits that the Court should reject the inferential meanings that have been advanced by the Claimant.

25. Mr Caldecott QC submits that the Defendants' proposed meaning reflects the true message which would be taken from the Announcement by the ordinary reasonable reader.

a. The first part of the Defendants' meaning expresses the Ongoing Board's regret at the Claimants' chosen course, their view that his conduct is destabilising the Company and their view that retaining Mr Ferguson would be in the best interests of the shareholders. All that, he submits, comes easily from the Announcement, without the need for forced interpretation.

b. The second part of the Defendants' meaning reflects the fact that the Announcement treats the challenges represented by the listed issues as "some context" for the Claimant's decision to vote against Mr Ferguson. The most which the ordinary reader would take away from the Announcement in that respect would be that the Claimant's opposition to Mr Ferguson may well have been influenced by some or all of those disagreements, and that the Defendants considered his reaction unreasonable.

26. As to the issue of fact or opinion, Miss Rogers submits:

a. By its nature, an RNS regulatory statement is an announcement of fact, which are so important to the Company's investors from a regulatory point of view that they were required to be issued as an RNS announcement to the world at large;

b. The Defendants' new meaning, with its two elements, has the appearance of being a belated, contrived attempt to circumvent the fact that the Announcement made clear and serious factual allegations of wrongdoing against the Claimant.

27. Mr Caldecott QC responds:

a. The Announcement begins with stating a difference of opinion. The Claimant had announced he was going to be voting against the re-election of Mr Ferguson in [1], but in [2], the "Ongoing Board" had "*full confidence*" in Mr Ferguson. The reader is, therefore, immediately primed to anticipate receiving the views of the "Ongoing Board" on the situation, having been told that these are matters over which there is a disagreement.

b. The Announcement continues with the language of opinion and value judgment. The description of the situation as "*regrettable*" [3] can only be understood as a description of the views of the Ongoing Board. Similarly, in the next sentence, what the Ongoing Board "*believes*" is expressly adverted to.

28. Finally, in relation to serious harm, Ms Rogers submits that the form and content of the Announcement would still be of a sufficiently serious nature so as to cause and/or to be likely to cause serious harm to the Claimant's reputation. The Defendants, she submits, chose to make their allegations in the form of an RNS Announcement, thus immediately signalling to the reader that the matters contained within it were of sufficient gravity and importance to require their immediate communication to the marketplace by the "Ongoing Board". The gravity and importance of the Announcement was all the more pronounced, given that the Announcement followed 'hot on the heels' of the RNS issued by the "Ongoing Board" the previous working day. She submits, on any view, the Announcement would cause its readers to take a seriously adverse attitude towards the Claimant and the position he was adopting. It was presented in an authoritative and unequivocal way, not as the Defendants' own view or as their "beliefs" or comments on the Claimant, but as crucial matters which investors were entitled and required to know before casting their vote at the AGM.

29. Mr Caldecott submits that Miss Rogers impermissibly seeks to rely upon an unpleaded case as to the context within which the Announcement would be read and understood in order to elevate its meaning and seriousness.

30. He argues that, when its true meaning is considered, and the extent to which that meaning is largely, if not completely, presented as opinion is taken into account, it can be seen that the words complained of are hardly, if at all, defamatory of the Claimant at common law and certainly not seriously so for the purposes of the **s.1/*Lachaux*** threshold test.

31. He accepts that the Announcement naturally criticises the course of action chosen by the Claimant. That is in the nature of a document which seeks to dissuade others from the same course of action. The ordinary reasonable reader would expect one side of the boardroom dispute to argue its case forcefully and not to pull its punches about the risk which it believes the opposing case presents. It is submitted that the implicit criticisms acknowledged, he submits, in the Defendants' proposed meaning are substantially opinion and not, in the context, serious enough to pass the heightened threshold of seriousness reflected by ***Lachaux***.

Decision

32. As I always do before being asked to determine meaning as a preliminary issue, I read the words complained of without reference to the parties' contentions as to meaning or their detailed submissions. In that way, I can capture my initial reaction as a reader, unaffected by these extraneous and irrelevant considerations.

33. Mr Caldecott QC has objected to parts of the Claimant's skeleton argument that advanced (or included) submissions that the allegations were false. He is quite right, and it is well-established, that evidence beyond the words themselves is not admissible when determining the natural and ordinary meaning of words. In one sense, that makes the judge's job easier. Judges can be expected to be well able to recognise that submissions as to falsity are irrelevant and just ignore them. Quite deliberately, I have not read the Particulars of Falsehood or Malice in the Particulars of Claim and I have no idea about the underlying facts. That is as it should be. No reader would have had this material available to him or her.

34. Mr Caldecott invites me to say something as a way of discouraging the appearance of this sort of material in the skeleton argument for a meaning trial. It is not for me to issue practice guidance, but what I can say is that the rule is clear. Just as with a statement of case, a skeleton argument should contain only a concise statement of relevant matters. At a preliminary issue trial of natural and ordinary meaning, that means that extraneous material as to alleged intention, falsity and malice is irrelevant. As I have said, however, it has made no impact upon me at all. I know the task I have to perform, and I am well able to do so and ignore the material that is not relevant to the task in hand.

35. In colloquial terms, and in summary, upon reading the Announcement for the first time it appeared to me that it was reporting on a boardroom dispute at Stobart. It alleged that the Claimant was a destabilising influence on Stobart who had presented several challenges to the Board of the company (identified in [39] to [43]), some of which, in relation to the challenge to the re-election of the Chairman, posed a number of serious risks to the Company (identified in [45] to [49]).

36. That was what I captured as the overall message from an initial reading. I do not consider that the hypothetical ordinary reasonable reader would have understood the allegations being levelled at the Claimant to imply that he was in breach of his fiduciary duties as a director. That is a technical meaning that might occur, possibly to a company lawyer or those familiar with directors' legal duties. Such an allegation is not stated expressly in the article and nor, in my judgment, is it implied. Whilst it is clear that there is a difference of opinion as to what is in the best interests of Stobart, acting in "the best interests of the company" is a broad concept upon which different directors can take different views. The fact that director A considers that course Y is best for the Company, and that director B considers that course X is better, does not mean that one of them is in breach of his or her duties as a director. If the particular matters identified in the Announcement are said to constitute breaches of the Claimant's duties as a director then that would be something, in my judgment, that (if it could) would have to be advanced by way of innuendo.

37. I agree with Mr Caldecott that a number of adjectives and adverbs have been inserted into the Claimant's meaning which are not part of the natural and ordinary meaning of the words. They are strained constructions of what is being said in the Announcement. For example, if an individual reader thought that the Claimant's alleged behaviour was "selfish", but that would be a personal judgment made by the individual reader. It is neither stated nor implied in the text. Such inferential meanings (that depend upon - and vary between - each individual reader's moral judgment) are not part of the natural and ordinary meaning of words: ***Brown -v- Bower*** **[2017] 4 WLR 197** [54]. In context, a suggestion that the conduct of the Claimant was "selfish" would be an expression of an opinion. If such an opinion is expressly stated by the author, then it can readily be identified as such by readers. I find the notion of an “inferred opinion” conceptually difficult. I suppose it is conceivable that an article may not make express an author's view, but it nevertheless emerges clearly as a result of discernible indications in the text as to what his or her opinion actually is on the given facts. But this is very subjective; and it may be difficult to separate out those cases from cases where what is really happening is simply that the reader is supplying his or her own judgment on the stated facts rather than detecting the author’s opinion by implication.

38. The same appears to me to apply to the suggestion that the Announcement conveys a meaning that the Claimant had acted without integrity or was unfit to be a director. Disagreement, even vigorously so, with the management decisions of a company does not suggest, without more, a

lack of integrity or unfitness. One can be a very difficult, even disruptive, element in a boardroom and still act with integrity. This is a forced meaning and not part of the natural and ordinary meaning. The Announcement is not capable, in my judgment, of conveying a suggestion that that the Claimant lacked integrity or was unfit to be a director.

39. Having borne all of those matters in mind and having reflected on the submissions today, in my judgment, the single meaning of the Announcement, for the purposes of the defamation claim is:

    a. The Claimant had presented a series of challenges to the Board of Stobart which included those set out in [39] to [43], the most recent of which was his opposition to the re-election of Iain Ferguson as Chairman of Stobart.

    b. A vote to remove the current Chairman would weaken Stobart's corporate governance, create instability, present a number of serious risks to Stobart, identified in [45] to [49], and would not be in the best interests of the shareholders.

    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 Stobart.

40. Meaning (a) is factual and not defamatory of the Claimant in a natural and ordinary meaning. None of the matters identified in [39] to [43] of the Announcement suggests misconduct on behalf of the Claimant. It is not defamatory to say of someone that he has presented a series of challenges to the board of a company.

41. Meaning (b) is an expression of opinion. It only indirectly refers to the Claimant and, in my judgment, not in a way that is capable of being defamatory of him at common law. To express the opinion that a suggested course is in the best interests of shareholders does not carry with it that those who are not prepared to support it are therefore acting not in the best interests of the shareholders. That is a non-sequitur.

42. Meaning (c) is also an expression of opinion. Readers of the Announcement will readily recognise and appreciate that this was the view of the "Ongoing Board". The fact that it was contained in an RNS does not prevent it from being seen as an expression of opinion. Indeed, whilst an RNS would be expected to contain facts (and the Announcement does so), that does not exclude the possibility that it will also contain expressions of opinion.

43. Paragraph 50 suggests that the Claimant is no longer key to delivery of Stobart's management strategy; and two reasons are given in [51] and [52]. I have not included these as any part of the meanings above. It did feature as a part of the second meaning at (b)(vi) (see paragraph 5 above). It made no sense appearing as a sub-paragraph of the second meaning, but I do not consider that [50] is capable of providing any meaning defamatory of the Claimant. It simply reflects that Stobart did not regard the Claimant as key to its strategy going forward. The contention in [51] that the Claimant was in dispute with the co-founder, without more, is incapable of being defamatory.

44. Applying the ***Thornton*** common law test (see paragraph 14 above), I consider that meaning (c) is defamatory. It is an imputation that has at least a tendency substantially to affect, in an adverse manner, the attitude of other people towards him.

45. However, I do not consider that the allegation is of such serious as to raise the inference of serious harm the reputation (or the likelihood thereof) under s.1 of the Defamation Act 2013. My reasons for this are as follows:

    a. This is a defamatory expression of an opinion, not an allegation of fact. Considering the factors in ***Morgan (No. 2)*** [31]:

        i. it is not a seriously defamatory allegation. Being alleged to have been engaged on disruptive, unreasonable, even regrettable conduct, even if it clears the ***Thornton*** threshold, is towards the less serious end of defamatory allegations; and

        ii. it would be clear to readers of the Announcement that this was the Board's view. I accept that this may appear as an "authoritative source", but equally the source would be clearly perceived from the context as partisan. Likewise, it would be clear to the reader that this was part of an ongoing battle between rival camps. The reader is likely, therefore, to discount, to a degree, the seriousness of the criticism of the Claimant.

    b. Mr Caldecott QC is right about Ms Rogers QC's submissions as to context. These go well beyond what could properly described as context for the purposes of assessing natural and ordinary meaning. Whilst it can be said that the Announcement would have been read seriously by people who are financially aware, it goes beyond the realm of natural and ordinary meaning to start ascribing to the readers matters that were relied upon by Ms Rogers QC. These are matters that, if they were to be relied upon at all, would have to be pleaded and established under an innuendo.

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.

Capable meaning malicious falsehood

47. As I have already noted, the single meaning rule does not apply for the purposes of malicious falsehood: ***Ajinomoto Sweeteners SAS -v- Asda Stores Limited*** **[2011] QB 497** [35].

48. The task for the court is to determine whether a "*substantial number of persons would reasonably have understood the words to have such a meaning*". ***Cruddas -v- Calvert*** **[2014] EMLR 5** [30].

49. The test is effectively very similar to the old 'capable' test in defamation claims before jury trial was abolished: see, for example, the approach of Tugendhat J in the first instance decision of ***Cruddas -v- Calvert*** **[2013] EMLR 4** [63]–[66], [91] and [99]. There, the court was tasked with "*delimiting the range of permissible [defamatory] meanings ...*" A meaning that the Court found that the words were incapable of bearing was to be excluded, leaving only therefore the range of capable meanings. As the assessment is of the meaning the notional ordinary reasonable reader would understand the words to bear "*it is not enough to say that by some person or another the words might have been understood in a defamatory sense*": ***Jeynes*** [14(8)].

50. There have been some submissions as to the appropriate role of the Court in this exercise. I asked the parties for submissions on whether, if I found a meaning (as I have) that was different from the Claimant's malicious falsehood meaning, whether the Claimant was entitled to advance its case on this meaning and, in addition, whether it would be open to the Claimant to advance a wholly new meaning.

51. This is a complicated issue. It is the first time that I have had to consider the consequences of the disapplication of the single-meaning rule in malicious falsehood, and particularly the consequences where the issue of the malicious falsehood meaning(s) is tried as a preliminary issue. I am not aware of a malicious falsehood case in which meaning has been determined as a preliminary issue. The point only arose in argument and has not been fully explored, so I am not going to venture into this territory. There would appear to be important issues to be determined as to what is the cause of action in malicious falsehood. Where there are various meanings that are potentially available under the ***Cruddas*** framework, do each of the 'capable' meanings give rise to individual causes of action? Or is the position like defamation, where it is the publication of the words that gives rise to the cause of action, even if, in a malicious falsehood claim, that might comprise of several "capable" or "available" meanings.

52. In defamation, the trial of the natural and ordinary meaning of the words of a publication as a preliminary issue is straightforward:

    a. the single-meaning rule applies, so the Court is ascertaining that single meaning;

    b. the cause of action for defamation does not require the claimant to show that the publication was false and published maliciously; and

    c. once a defamatory meaning has been determined, it is then for the defendant to decide what (if any) substantive defence he can (or wishes to) advance.

53. By comparison, in a malicious falsehood claim it is for the claimant to identify the 'false' meaning about which s/he complains, which s/he contends was published falsely and the publication of which caused special damage (unless s.3 Defamation Act 1952 relieves the claimant of the need to prove special damage). There seem to me to be objections to the Court simply adjusting the Claimant's meaning into a 'capable' meaning by adding words or changing its substance or effect. The Court would not know whether the Claimant wishes (or is able) to demonstrate that the adjusted meaning is false and was published maliciously.

54. Arguably, at the trial of a preliminary issue in a malicious falsehood action, either the meaning pleaded by the Claimant is held to be a capable meaning for malicious falsehood purposes or it is not. Can the Claimant amend in light of the Court's ruling? I would be inclined to accept Ms Rogers QC's submission that the Claimant's pleaded meaning could be amended to *remove* certain words from so that it is consistent with the Court's ruling, as the greater includes the lesser. In that instance, there would be no need for any adjustment to the plea of falsity or malice. Whether it is open to a Claimant to have 'another go' at pleading a different malicious falsehood meaning seems to me to raise potential problems. Even assuming that the Claimant was willing (and able) to contend that the revised meaning was false and published maliciously, is it permissible to raise a "new case" *after* the preliminary issue has been decided. If that were to be possible, it would potentially raise the prospect of multiple preliminary issue trials of meaning.

That would not be a course open to a claimant if meaning had not been resolved as a preliminary issue but instead was tried with all other issues at a single trial.

55. As I indicated during argument, I am not resolving these issues now. If there is a dispute about what, legitimately, the Claimant can do in consequence of my determination as to meaning, then that will have to be resolved later after proper argument.

56. For present purposes, however, based on the Claimant's current pleaded meaning, and accepting for these purposes that it is open to the Claimant to remove words from it, an available meaning for the purposes of malicious falsehood claim would be:

    a. The Claimant destabilised the Board 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 part of the Claimant's stake in [Stobart];

        iii. a proposed additional ex-gratia bonus for the Claimant of shares then worth some £8 million;

        iv. a proposed buy-out of Stobart when the share price was in the range of 100p to 120p; and/or

        v. a proposed related party transaction associated with a recent aborted airline transaction.

57. To the extent that meaning (a) contains, as I have found, opinion, then, as part of his malicious falsehood claim, the Claimant would have to take on the burden of proving that it was false (see paragraph 16 above).