Neutral Citation Number: [2024] EWCA Civ 674

Case No: CA-2023-002610

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Mr Justice Michael Green
[2023] EWHC 2756 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2024

Before:

LORD JUSTICE NEWEY
LORD JUSTICE COULSON
and
LORD JUSTICE PHILLIPS

- -

Between:

THE PERSONS IDENTIFIED IN SCHEDULE 1 TO THE RE-AMENDED PARTICULARS OF CLAIM	**Claimants/ Respondents**
- and -	
STANDARD CHARTERED PLC	**Defendant/ Appellant**

- -
- -

Adrian Beltrami KC and Dominic Kennelly (instructed by **Herbert Smith Freehills LLP**) for the **Appellant**
Graham Chapman KC, Shail Patel KC and William Harman (instructed by **Signature Litigation LLP**) for the **Respondents**

Hearing dates: 8 and 9 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. The question raised by this appeal is whether Michael Green J ("the Judge") was wrong to decline to strike out certain parts of the claimants' pleadings.

Basic facts

2. This section of this judgment is principally derived from an agreed case memorandum and the Judge's judgment ("the Judgment"), given on 8 November 2023.

3. The defendant, Standard Chartered plc ("SC plc"), is a public company listed on the main market of the London Stock Exchange and the Hong Kong Stock Exchange. It is the parent company of Standard Chartered Bank ("the Bank"), a company incorporated by Royal Charter which operates as a global retail, wholesale and investment banking institution.

4. In September and December 2012, the Bank entered into settlement agreements with various US authorities ("the 2012 Settlements") in connection with failures to comply with US economic sanctions. As part of the 2012 Settlements, the Bank agreed to forfeit $227 million and admitted that "[s]tarting in early 2001 and ending in 2007" it had violated US and New York State law by illegally sending payments through the US financial system on behalf of entities subject to sanctions. The Bank also admitted that it had sought to conceal the involvement of sanctioned counterparties by manipulating and falsifying electronic payment information. The 2012 Settlements stated that the Bank had "made the decision to exit the Iranian business" in October 2006, ended its US-dollar business for Iranian banks by March 2007 and suspended all new Iranian business in any currency by August 2007.

5. On 17 December 2012, Brutus Trading LLC ("Brutus") filed a "*qui tam*" action in the US District Court for the Southern District of New York ("the First Brutus Action"). "*Qui tam*" actions are claims brought by private individuals or entities (known as "relators") on behalf of the US Government seeking monetary recovery which is shared between the US Government and the relators. Brutus was founded by a former employee of the Bank, Mr Julian Knight, and an individual who had previously worked with (but not for) the Bank, Mr Robert Marcellus. In the First Brutus Action, Brutus alleged, among other things, that the Bank had misled the US authorities in the run-up to the 2012 Settlements by failing to disclose sanctions violations involving Iranian clients after 2007.

6. From 5 March 2013, SC plc's annual and half-year reports and other announcements contained disclosures about, among other things, ongoing investigations by US and UK authorities. The claimants, however, dispute the adequacy of the disclosures.

7. In October 2014, media outlets reported that US authorities had reopened investigations into the Bank in respect of sanctions violations. In November 2015, SC plc stated that US authorities were investigating sanctions compliance in respect of the period after 2007 and the completeness of the Bank's disclosures to the US authorities at the time of the 2012 Settlements.

8. From April 2016, global news agencies reported allegations that Maxpower Group PTE Ltd ("Maxpower"), a company incorporated in Singapore in which the Group

has held a minority interest, had between 2012 and 2015 engaged in a corrupt scheme to bribe Indonesian government (and other) officials to win or renew contracts or obtain other advantages such as quicker payments ("the Bribery Scheme"). SC plc does not admit that Maxpower engaged in the alleged scheme, but it denies that the group of which it is the parent ("the Group") or its employees made, directed or condoned any improper payments. The Bank voluntarily approached the US and UK authorities to disclose the bribery allegations relating to Maxpower. The allegations were investigated by the US Department of Justice, which closed its enquiry without bringing any prosecution against the Group. SC plc has said that it is unaware of any ongoing investigations into Maxpower by any authority.

9. In February and April 2019, the Bank entered into settlement agreements with US authorities in respect of further non-compliance with US sanctions law and with the UK's Financial Conduct Authority ("the FCA") in respect of anti-money laundering breaches ("the 2019 Settlements"). By these, the US authorities imposed a further financial penalty of some $947 million and the FCA imposed a penalty of £102 million. The US authorities found that, in breach of US sanctions law, the Group had between 2008 and 2014 facilitated payments worth some $600 million from clients resident in Iran and payments worth some $20 million involving entities from other sanctioned countries. The FCA found that there were "serious, and sustained" shortcomings in the Group's financial crime controls, customer due diligence and ongoing monitoring.

10. By this stage, Brutus had sought and obtained voluntary dismissal of the First Brutus Action and, in November 2018, filed a new "*qui tam*" action in the US District Court for the Southern District of New York ("the Second Brutus Action"). As amended on 20 September 2019, the complaint in the Second Brutus Action ("the Brutus Complaint") alleged that the 2019 Settlements addressed "a relatively small subset of the course of conduct by [the Bank] in violation of the Iran sanctions". Brutus' case was supported by declarations by Mr Marcellus, Mr Knight and another former employee of the Bank, Mr Anshuman Chandra.

11. On 21 November 2019, however, the US Government filed a motion to dismiss the Second Brutus Action, explaining that Brutus' allegations had been thoroughly investigated by several government agencies and that they had formed the view that "most of the transactions at issue were legitimate winding-down of the Bank's pre-existing relationships … and the remaining transactions were otherwise not problematic". On 2 July 2020, the US District Court for the Southern District of New York granted the motion on the basis that the Government had given "valid government purposes" for doing so and that Brutus had not shown these to be "fraudulent, arbitrary and capricious, or illegal". Brutus appealed, but the appeal was dismissed in August 2023.

The present proceedings

12. The present proceedings involve four claims which are being case-managed together and have been the subject of a single set of consolidated pleadings. The claims are brought by some 230 claimants pursuant to sections 90 and 90A of the Financial Services and Markets Act 2000 ("FSMA"). These sections provide for compensation to be payable in certain circumstances where there have been misstatements or omissions in prospectuses or other published information relating to securities. In the

present case, the claimants, all of whom are said to have held interests in securities issued by SC plc, assert deficiencies in numerous items of published information issued by SC plc between 2007 and 2019. Claimants who participated in rights issues for which SC plc published prospectuses in 2008, 2010 and 2015 also contend that the prospectuses included untrue or misleading statements or had omissions.

13. The claims are in part founded on the Bribery Scheme and on allegations found in the Brutus Complaint. Statements in information published by SC plc are said to have been "rendered false" by the Bribery Scheme and the "Relevant Misconduct". It is also said that the Bribery Scheme and the "Relevant Misconduct" were omitted despite being required to be included. The "Relevant Misconduct" is defined in paragraph 25 of the re-amended particulars of claim (set out in full in paragraph 37 below) to refer to "misconduct described above, insofar as it formed the subject matter of the 2019 Settlements and the Brutus complaint". In this respect, therefore, the claimants are relying both on matters which SC plc admitted in the 2019 Settlements and on matters alleged in the Brutus Complaint which SC plc denies.

14. Following the first case management conference, the trial was given a provisional time estimate of 96 days.

The legislation

15. Section 90 of FSMA is concerned with listing particulars, including prospectuses. Under section 90, subject to exemptions to be found in schedule 10, a person responsible for listing particulars is liable to pay compensation to someone who acquires securities to which the particulars apply and suffers loss in respect of the securities as a result of an untrue or misleading statement in the particulars or the omission from the particulars of required information.

16. Section 90A of FSMA explains that schedule 10A to the Act makes provision relating to the liability of issuers of securities to pay compensation to persons who have suffered loss as a result of "a misleading statement or dishonest omission in certain published information relating to the securities" or "a dishonest delay in publishing such information". Unlike section 90, section 90A and schedule 10A apply to a wide range of published information, including annual and half-year reports. Liability depends, however, on a "person discharging managerial responsibilities within the issuer" having had relevant knowledge or "acted dishonestly". Thus:

    i) Paragraph 3 of schedule 10A includes this:

    > "(2) The issuer is liable in respect of an untrue or misleading statement only if a person discharging managerial responsibilities within the issuer knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading.
    >
    > (3) The issuer is liable in respect of the omission of any matter required to be included in published information only if a person discharging managerial responsibilities within the issuer knew the omission to be a dishonest concealment of a material fact";

ii) Paragraph 5(2) provides:

> "The issuer is liable only if a person discharging managerial responsibilities within the issuer acted dishonestly in delaying the publication of the information"; and

iii) Paragraph 6 explains:

> "For the purposes of paragraphs 3(3) and 5(2) a person's conduct is regarded as dishonest if (and only if)—
>
> (a) it is regarded as dishonest by persons who regularly trade on the securities market in question, and
>
> (b) the person was aware (or must be taken to have been aware) that it was so regarded."

17. Paragraph 8(5) of schedule 10A to FSMA identifies those "discharging managerial responsibilities" in this way:

> "For the purposes of this Schedule the following are persons 'discharging managerial responsibilities' within an issuer—
>
> (a) any director of the issuer (or person occupying the position of director, by whatever name called);
>
> (b) in the case of an issuer whose affairs are managed by its members, any member of the issuer;
>
> (c) in the case of an issuer that has no persons within paragraph (a) or (b), any senior executive of the issuer having responsibilities in relation to the information in question or its publication."

18. In *Allianz Global Investors GmbH v G4S Ltd* [2022] EWHC 1081 (Ch), [2022] Bus LR 566 ("*G4S*"), Miles J concluded that, for an issuer which has directors, the only persons "discharging managerial responsibilities" are "the directors (including persons occupying the position of director, by whatever name called)": see paragraph 140. Miles J noted in paragraph 145 that "the defendant accepted that the term director used in the statutory definition includes de facto and (arguably) shadow directors and not only de jure ones".

The application

19. On 7 July 2023, SC plc applied to have parts of the claimants' pleadings relating to the Brutus Complaint and Maxpower struck out pursuant to CPR 3.4(2) or, alternatively, for summary judgment in its favour as regards those passages pursuant to CPR 24.2. CPR 3.4(2) provides that the Court may strike out a statement of case if it appears to the Court:

> "(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order".

CPR 24.2 allows the Court to give summary judgment against a claimant on an issue if it considers that the claimant has no real prospect of succeeding on it.

20. Before us, SC plc focused on CPR 3.4(2), not CPR 24.2. As was made clear to us, SC plc strongly rejects allegations to which this appeal relates. However, Mr Adrian Beltrami KC, who appeared for SC plc with Mr Dominic Kennelly, accepted that, realistically, the question for us is whether parts of the claimants' pleadings should be struck out, not whether summary judgment should be given. SC plc did not seek to persuade us that the claimants would have no real prospect of success with the relevant allegations.

21. The White Book explains at 3.4.1 that CPR 3.4(2)(a) and (b) "cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence" and that CPR 3.4(2)(c) "covers cases where the abuse lies not in the statement of case itself but in the way the claim or defence (as the case may be) has been conducted". Paragraph 1.2 of Practice Direction 3A gives examples of particulars of claim which could fall within CPR 3.4(2)(a). These include particulars of claim which are "incoherent and make no sense" and those which "contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant". Paragraph 1.3 explains that a claim may fall within CPR 3.4(2)(b) where it is "vexatious, scurrilous or obviously ill-founded".

22. In the Judgment, the Judge concluded that allegations that certain non-executive directors of Maxpower were "persons discharging managerial responsibilities" (or "PDMRs") within SC plc should be struck out, but he otherwise dismissed SC plc's application. SC plc now appeals against that decision.

Pleading fraud and dishonesty

23. CPR 16.4 states that particulars of claim must include "a concise statement of the facts on which the claimant relies" and "such other matters as may be set out in a practice direction". Paragraph 8.2 of Practice Direction 16 provides that "any allegation of fraud" on which the claimant wishes to rely must be "specifically set out".

24. In *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 ("*Three Rivers*"), the House of Lords, by a majority (Lords Steyn, Hope and Hutton), allowed an appeal against the striking out of the re-amended statement of claim. Lord Hope, with whom Lord Steyn expressed agreement, noted both that "a balance must be struck between the need for fair notice to be given on the one hand and excessive demands for detail on the other" and that, "[o]n the other hand it is clear that as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation", especially "where the allegation that is

being made is of bad faith or dishonesty": see paragraphs 49 and 51. After commenting in paragraph 54 that it was "abundantly clear that what the claimants are seeking to prove is misfeasance in public office", Lord Hope said:

> "55. In my view this point alone is a sufficient answer to the criticism based on Thesiger LJ's remarks in *Davy v Garrett* [(1878) 7 Ch D 473, at 489]. The principle to which those remarks were directed is a rule of pleading. As the Earl of Halsbury LC said in *Bullivant v Attorney General for Victoria* [1901] AC 196, 202, where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Millett LJ said in *Armitage v Nurse* [1998] Ch 241, 256g, it is not necessary to use the word 'fraud' or 'dishonesty' if the facts which make the conduct fraudulent are pleaded. But this will not do if language used is equivocal: *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, 268 per Buckley LJ. In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence.
>
> 56. In this case it is clear beyond a peradventure that misfeasance in public office is being alleged. There is an unequivocal plea that the Bank was acting throughout in bad faith. The Bank says that the facts relied on are, at best for the claimants, equally consistent with negligence. But the substance of that argument is directed not to the pleadings as such, which leave no doubt as to the case that is being alleged, and the basis for it in the particulars, but to the state of the evidence. The question whether the evidence points to negligence rather than to misfeasance in public office is a matter which must be judged in this case not on the pleadings but on the evidence. This is a matter for decision by the judge at trial."

25. In his dissenting judgment, Lord Millett said:

> "184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see *Kerr on Fraud and Mistake*, 7th ed (1952), p 644; *Davy v Garrett* (1878) 7 Ch D 473, 489; *Bullivant v Attorney General for Victoria* [1901] AC 196; *Armitage v Nurse* [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
>
> 185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.
>
> 186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

26. A little later, Lord Millett said:

> "189. It is not, therefore, correct to say that *if there is no specific allegation of dishonesty* it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient,

> the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud ….
>
> 190. In the present case the depositors (save in one respect with which I shall deal later) make the allegations necessary to establish the tort, but the particulars pleaded in support are consistent with mere negligence. In my opinion, even if the depositors succeeded at the trial in establishing all the facts pleaded, it would not be open to the court to draw the inferences necessary to find that the essential elements of the tort had been proved."

27. It is to be remembered, however, that Lord Millett was dissenting. Plainly, he did not agree with the majority about the application of the law to the facts, but I do not understand the majority to have been in complete agreement with him about the legal principles, either. In particular, Lord Millett's comment that "[i]t is not … correct to say that *if there is no specific allegation of dishonesty* it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty" can be contrasted with Lord Hope's observation that "[i]f there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence".

28. In *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) ("*Kekhman*"), after quoting quite extensively from *Three Rivers*, Flaux J said at paragraph 20:

> "The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact 'which tilts the balance and justifies an inference of dishonesty'. At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge."

29. It is to be noted that Flaux J was concerned with *inferences* of dishonesty, not with direct evidence of it.

30. In *Sofer v SwissIndependent Trustees SA* [2020] EWCA Civ 699, 24 ITELR 160 ("*Sofer*"), Arnold LJ, with whom Patten and David Richards LJJ agreed, endorsed in paragraph 23 the following summary of principles governing the pleading of dishonesty which had been provided by counsel:

> "(i) Fraud or dishonesty must be specifically alleged and sufficiently particularised, and will not be sufficiently

> particularised if the facts alleged are consistent with innocence: *Three Rivers DC v Bank of England* [2001] UKHL 16, [2001] 2 All ER 513, [2003] 2 AC 1.
>
> (ii) Dishonesty can be inferred from primary facts, provided that those primary facts are themselves pleaded. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be pleaded: *Three Rivers* at [186] (Lord Millett).
>
> (iii) The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence: *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), [2015] All ER (D) 273 (Oct) (at [20]–[23]) (Flaux J, as he then was).
>
> (iv) Particulars of dishonesty must be read as a whole and in context: *Walker v Stones* (2000) 2 ITELR 848 at 448, [2001] QB 902 at 944 (Sir Christopher Slade)."

31. Arnold LJ went on in paragraph 24:

> "To these principles there should be added the following general points about particulars:
>
> (i) The purpose of giving particulars is to allow the defendant to know the case he has to meet: *Three Rivers* at [185]–[186]; *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 793 (Lord Woolf MR).
>
> (ii) When giving particulars, no more than a concise statement of the facts relied upon is required: *McPhilemy* at 793.
>
> (iii) Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged: *McPhilemy* at 793."

32. Later in his judgment, Arnold LJ addressed a criticism that the particulars of claim which were at issue should have identified which individuals were alleged to have had certain knowledge. After quoting from the judgment of Peter Gibson LJ in *Rigby v Decorating Den Systems Ltd* [1999] Lexis Citation 1791, Arnold LJ said in paragraph 32:

> "Whether or not it is technically binding, I see no reason to differ from Peter Gibson LJ's statement of principle. I do not doubt that, where an allegation of dishonesty is made against a body corporate, it is necessary to plead the relevant state of knowledge of that body at the relevant time. I do not accept,

> however, that a mere failure to identify at the outset the directors, officers or employees who had that knowledge means that such an allegation is liable to be struck out without further ado. Clearly such particulars should be given as soon as is feasible, and there may be situations in which the claimant's unwillingness or inability to give such particulars when requested to do so justifies striking out; but that is another matter."

33. In *Nokia Corporation v AU Optronics Corporation* [2012] EWHC 731 (Ch), where it was alleged that the defendants had participated in a cartel involving unlawful practices, Sales J noted in paragraph 62 that in a case where a secret cartel is alleged:

> "there is an inevitable tension in domestic procedural law between the impulse to ensure that claims are fully and clearly pleaded so that a defendant can know with some exactitude what case he has to meet (and also so that disclosure obligations can be fully understood, expert witnesses given clear instructions and so on), on the one hand, and on the other the impulse to ensure that justice is done and a claimant is not prevented by overly strict and demanding rules of pleading from introducing a claim which may prove to be properly made out at trial, but which will be shut out by the law of limitation if the claimant is to be forced to wait until he has full particulars before launching a claim."

After identifying the existence of procedural protections to ensure that a claim is fully and properly explained in good time before trial, Sales J said in paragraph 67 that they indicated that:

> "in resolving the tension referred to above and determining whether a cause of action has been sufficiently pleaded in a statement of case (particularly in the claim form and/or the particulars of claim when an action is commenced), the balance is to be struck by allowing a measure of generosity in favour of a claimant".

34. The Bar's Code of Conduct bars a barrister from drafting any statement of case containing an allegation of fraud unless he has both "clear instructions to allege fraud" and "reasonably credible material which establishes an arguable case of fraud": see rule C9. In *Medcalf v Mardell* [2003] 1 AC 120, Lord Bingham commented on a previous version of the rule, then to be found in paragraph 606 of the Code of Conduct, which required "clear instructions to make such allegation" and "reasonably credible material which as it stands establishes a prima facie case of fraud". He said at paragraph 22:

> "at the preparatory stage the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it. I could not think, for example,

> that it would be professionally improper for counsel to plead allegations, however serious, based on the documented conclusions of a DTI inspector or a public inquiry, even though counsel had no access to the documents referred to and the findings in question were inadmissible hearsay."

The Brutus allegations

Introductory

35. As I have indicated, SC plc sought to have allegations relating to the Brutus Complaint struck out, but the Judge concluded that they should be allowed to go to trial: see paragraph 63 of the Judgment. SC plc now appeals against that decision.

The claimants' pleadings

36. Paragraph 24 of the re-amended particulars of claim is of central importance in this context. It reads:

> "24. In July 2019, the financial press reported on whistle-blower allegations in connection with the matters which were the subject of the Initial and Further Investigations. Proceedings were filed by Brutus Trading LLC ('Brutus'), a company incorporated by Julian Knight, the former global head of transaction banking at the Bank. The complaint alleges (among other things that):
>
> 24.1. The 2019 Settlements addressed a relatively small subset of the course of conduct by the Bank in violation of Iran sanctions (Complaint/[66]).
>
> 24.2. In fact the Bank's course of conduct in developing its Iran business was a deliberate, concealed organisational structure, known to high level Bank officials as 'Project Green' [42(a)]. The mandate of those responsible for Project Green was to develop strategies to evade the Iran sanctions [42(c)]. Management Information concerning Iran client transactions and profitability was disseminated in the Bank, from low level employees up to the deputy CEO of SC plc Mike Rees [42(d)].
>
> 24.3. Sanction evasion was achieved not only by wire stripping, but the use of the OLT3 online portal, 'sundry' accounts and other forms of falsification and deliberate errors in names and other customer details so as to avoid detection [43(a-c)]. The Complaint alleges that when such

allegations were first raised in 2013, the Bank hired consultants to wipe the Dubai branch servers of incriminating information.

24.4. The Complaint specifies a number of transactions with named Iranian entities and customers for whom the Bank did business which (a) was unlawful, in breach of sanctions and (b) contradicted the Bank's assurances to the US authorities in 2012 that all new business had been stopped from August 2007. Brutus advanced a conservative calculation of transactions in violation of Iran sanctions between 2009 and 2014 in the sum of $56.75bn.

24.5. The whistle-blowers provided the US authorities with the information needed to investigate the transactions involving Mr Elyassi. The whistle-blowers also provided information relating to many other clients, but the US authorities did not investigate those further. Further (and as set out in Brutus' submissions dated 23 January 2020), the whistle-blowers had provided evidence that senior personnel at the Bank knew about and approved multiple transactions with the companies controlled by Mr Elyassi."

37. There follows a section comprising paragraphs 25 to 27 with the heading, "The Relevant Misconduct". Paragraphs 25 to 27 read:

"25. The claims concern the misconduct described above, insofar as it formed the subject matter of the 2019 Settlements and the Brutus complaint ('the Relevant Misconduct').

26. The Claimants are reliant on the publicly available documents referred to above in understanding the nature and detail of the Relevant Misconduct, and reserve their right to plead further following disclosure.

27. Without prejudice to the generality of the foregoing, the Relevant Misconduct comprised, in summary:

27.1. The deliberate and/or systemic course of conduct in the Bank developing its Iran business in breach of sanctions with a view to evading them;

27.2. The use of online and/or fax banking and/or other techniques as specified in the Brutus

Complaint, by the Bank and/or its clients to evade sanctions laws and regulations;

27.3. Wholesale failures in AML controls, in particular in the Middle-East, and as applicable to customers which might pose financial crime and sanctions risks;

27.4. The continuation of Iranian business in breach or potential breach of sanctions from mid-2007, contrary to the impression given to the US authorities in 2012;

27.5. The misleading of the US authorities during the Initial Investigation to the effect that the Bank had ceased engaging in the transactions complained of in 2007 when it had not done so."

38. In their re-amended reply, the claimants pleaded in paragraph 23.2, "It is denied that the additional allegations of misconduct set out in the Brutus Complaint are false". The claimants added in paragraph 23.2.3, "It is the Claimants' position that the additional allegations of misconduct set out in the Brutus Complaint are accurate and will be found proved following disclosure and oral evidence in these proceedings".

39. In the course of argument before us, Mr Graham Chapman KC, who appeared for the claimants with Mr Shail Patel KC and Mr William Harman, told us that the claimants are not relying on the whole of the Brutus Complaint, which, he said, contains matters that are irrelevant or unnecessary for the claimants' purposes. In so far, however, as the re-amended particulars of claim cross-refer to the Brutus Complaint, the relevant parts are, Mr Chapman confirmed, to be taken as effectively incorporated in the re-amended particulars of claim. That plainly applies to paragraphs 42(a), (c) and (d) and 43(a) to (c) of the Brutus Complaint, which are specifically mentioned in paragraph 24 of the re-amended particulars of claim, but Mr Chapman explained that it is the case also as regards paragraph 43(e) of the Brutus Complaint (which is reflected in paragraph 24.3 of the re-amended particulars of claim) and paragraphs 46 to 51 and 56 to 59 of the Brutus Complaint (which are reflected in paragraph 24.4 of the re-amended particulars of claim). Mr Chapman further said that the statement of truth appended to the re-amended particulars of claim is to be taken as confirming belief in the truth of what is stated in those passages of the Brutus Complaint.

The Brutus Complaint

40. Given the claimants' reliance on them, it is appropriate, I think, to set out in full paragraphs 42(a), (c) and (d), 43(a) to (c) and (e), 46 to 51 and 56 to 59 of the Brutus Complaint. The paragraphs in question are all in section C of the Brutus Complaint, headed "SCB's Course of Conduct Violating the Iran Sanctions". They read:

"42. SCB's course of conduct to develop its Iran-related business and to evade the Iran sanctions was no haphazard affair. That course of conduct was the

handiwork of a deliberate, if concealed, organizational structure.

(a) Since at least 2002, SCB operated a program known internally to high level SCB officials as 'Project Green.' This was a program run by trade finance experts and senior geographical branch chief executive officers, deliberately excluding compliance officers. Project Green was initiated at SCB London Headquarters and was headed by SCB's Iraq and Afghanistan CEO Stuart Horsewood and Managing Director Vikram Kukreja, a trade finance expert. Horsewood considered Iran to be a 'major new market' for SCB. Project Green was designed to assist, conspire with, aid and abet non-United States customers that have been made the subject of United States economic sanctions to evade those sanctions and engage in international financial transactions. SCB continued to operate Project Green at least until 2012, when SCB began the process of winding it down.

…

(c) The Iran Group Risk Committee, which operated within SCB and was often referred to as the 'IRC,' was staffed by people from OCC, Global Cash Operations, and Global Trade Operations. The mandate of the Committee was to develop strategies to evade the Iran sanctions.

(d) The Iran Group was a designation by SCB of Iranian customers for the period 2008 to 2014. SCB maintained separately all of the management information systems ('MIS') concerning all of SCB's Iranian-client transactions and profitability. The MIS disseminated this information throughout the SCB organization, from low-level employees up to the Deputy CEO of SCB, Mike Rees.

….

43. SCB employed various means, beyond the wire stripping or repairing addressed by the 2012 DPA [i.e. Deferred Prosecution Agreement], to aggressively evade the Iran sanctions and conceal the fact that it did so.

(a) Perhaps the most egregious measure SCB adopted to evade the Iran sanctions was the OLT3 system. OLT3 provided online trading for foreign exchange linked directly to the Straight-to-Bank SCB Client

System, the main online portal to SCB's client accounts. OLT3 allowed Iranian clients to enter SCB's computer system on their own and conduct illegal foreign exchange transactions. OLT3 was designed to have no ability to suspend or block a deal potentially violating the sanctions and to create no record of the illegal transaction.

(b) SCB used hundreds of 'sundry' accounts to conceal transactions violating the Iran sanctions. Sundry accounts have also been called 'error' accounts because they were intended to be accounts in which to temporarily book a transaction in which a counterparty was not properly identified, or some other error was made. As a result, such a transaction could not immediately be reconciled with an SCB customer account. Taking advantage of this device for the Iran scheme, SCB personnel would change some small part of the counterparty's name, such as changing a letter or dropping a word, so that the transaction would be executed, but then go into a sundry account. Because these revenues were not properly matched up to the customer, identifying whether the revenues were derived from customers on OFAC's [i.e. the US Treasury Department's Office of Foreign Assets Control's] list of Specially Designated Nationals ('SDNs') or from entities otherwise associated with Iran, and so subject to sanctions, would prove very difficult, if not impossible, for any SCB-NY employee or Government official.

(c) Similarly, Customer Due Diligence records would be manipulated by the misspelling of names to avoid running afoul of the OFAC SDN list.

…

(e) In 2013, after the filing of the predecessor of this action and the related disclosures brought to light for Government authorities the central role of SCB-Dubai in SCB's course of conduct to evade the Iran sanctions, SCB engaged a consultant, Promontory Financial Group, LLC, to clean the SCB-Dubai servers of information that would disclose to investigators the extent and details of SCB's program to evade the Iran sanctions.

….

46. The following are examples (a) of the many trades performed by SCB on behalf of banned Iranian

government entities or Iranian related SDNs after 2007 or (b) of evidence that SCB was performing transactions after 2007 on behalf of clients that were banned Iranian entities, contrary to SCB's representations to representatives of the United States that '[f]rom August 2007, SCB suspended all new Iranian business in any currency.'

47. In or about January 2009, SCB performed an export finance transaction for Bank Tejerat, a bank owned by the Government of Iran. Such a transaction necessarily involved dollar clearing by SCB-NY.

48. In or about January 2009, SCB performed three structured trade finance transactions for National Iranian Tanker Company ('NITC'), an entity owned by the Iranian government and a subsidiary of NIOC [i.e. the National Iranian Oil Company]. Such transactions necessarily involved dollar clearing by SCB-NY.

49. SCB conducted a U.S. dollar letter of credit transaction between Bank Markazi and four exporters in or about December 2009. Bank Markazi-Iran-CB was added to OFAC's SDN list as of October 22, 2008. Such a transaction necessarily involved dollar clearing by SCB-NY.

50. SCB performed a trade finance and cash management transaction for the Iran Ministry of Economic Affairs and Finance in or about December 2009. Such a transaction necessarily involved dollar clearing by SCB-NY.

51. SCB records further show that it performed transactions in August, November, and December 2009 with the Ministry of Energy of Iran Group, an agency of the Government of Iran, with nominal value of $2,546,419, and cash management and trade finance revenues to the bank in the amount of $259,602.77. Significant transactional foreign exchange revenues were also earned from this client during the period from August 2009 through December 2009. Such transactions including U.S. dollar foreign exchange trades necessarily involved dollar clearing by SCB-NY.

….

56. SCB internal reports showed that as of August 2009, the bank enjoyed profits of $4,365,000 from Iranian related transactions and customers.

> 57. A report of customer transactions from August 2009, showed eight transactions with Bank Tejerat, 10 transactions with Iranian Tanker Company, seven transactions with Iran & Dubai Co., LLC, and transactions with Pasian High Voltage, Khorasan Steel, and Khouzestan Steel Company.
>
> 58. Between 2009 and 2014, SCB continued its course of conduct to execute illegal clearing transactions for its Iranian-connected or Iranian owned customers such as: Amesco, FZE ($6 billion), Bank Markazi Jomhouri Islami Iran ($5 billion), Bright Crescent Trading Co. ($2 billion), Caspian Petrochemical ($5 billion), Iran & Dubai Co. ($6 billion), Iran Overseas Investment Bank, Ltd. ($1 billion), M& H Trading ($5 billion), Mahan Air General Trading LLC ($2 billion), PICO International Dubai ($2 billion), Piston Trading ($2 billion), and Schlumberger Overseas SA/Well Services of Iran ($6 billion).
>
> 59. A reasonable, conservative calculation of the dollar-value of the clearing transactions in violation of the Iran sanctions that SCB handled between 2009 and 2014 is $56.75 billion."

41. "SCB" is defined in the Brutus Complaint to refer to the Bank, SC plc and Standard Chartered Trade Services Corporation.

SC plc's case in outline

42. As developed by Mr Beltrami, the appeal is rooted in propositions which can be summarised as follows:

    i) a pleading must disclose on its face a solid evidential foundation for any allegation of fraud or dishonesty made in it; and

    ii) where it is alleged that fraud or dishonesty is to be inferred, the pleading must include all the primary facts which are said to support the inference and they must be such as on their face to tilt the balance in favour of fraud or dishonesty.

43. Mr Beltrami accepted that the right question to ask is: would there have been an adequate pleading if the material parts of the Brutus Complaint had been set out in the re-amended particulars of claim? He argued that the answer is "No". Simply piggybacking on the Brutus Complaint, Mr Beltrami said, does not provide the requisite solid evidential foundation for the Brutus allegations and, far from pleading primary facts such as would tilt the balance in favour of inferring fraud, the claimants have not pleaded such facts at all but have instead advanced a series of conclusions drawn from the Brutus Complaint.

Discussion

44. As already noted, a barrister has a professional obligation not to include an allegation of fraud in a statement of case without "reasonably credible material which establishes an arguable case of fraud". Both that rule and the requirement for a pleading to be verified by a statement of truth help to protect defendants against unwarranted allegations of fraud. Neither is, however, of direct significance in the context of this appeal. We would not know enough to assess the basis on which the re-amended particulars of claim and re-amended reply had been drafted and verified even if that were our concern, but it is not. The issue for us is whether parts of the re-amended particulars of claim and re-amended reply should be struck out pursuant to CPR 3.4(2).

45. Understandably, SC plc drew our attention to the fact that the US Government was not persuaded by the Brutus allegations. However, the claimants stressed that the Second Brutus Action was dismissed without the Court making any findings on the substance of the allegations and also maintained that there were indications that the US Government's decision had been based on incomplete information and/or been motivated by extraneous factors. In any event, while SC plc's application invoked CPR 24.2 as well as CPR 3.4(2), only CPR 3.4(2) was pursued before us and we were not asked to conclude that the Brutus allegations have no real prospect of success. What matters in the present context is, therefore, how the Brutus allegations have been pleaded, not their chances of success.

46. A further point is that there can be no question of the claimants being obliged to set out in their pleadings all the evidence by which they might hope to prove the Brutus allegations. Particulars of claim must include "a concise statement of the *facts* on which the claimant relies" (emphasis added), not the evidence relied on to support those facts.

47. There is, of course, a line of authority to the effect that, if it is to be alleged that fraud or dishonesty is to be inferred, the primary facts must be pleaded and such as to "tilt the balance": see *Sofer* and *Kekhman,* following Lord Millett in *Three Rivers*. I do not think, however, that it is always incumbent on a claimant to support an allegation of fraud or dishonesty with additional "primary facts", let alone to detail the evidence it might call to prove it. Suppose, say, that a claimant brought a misappropriation claim on the strength of information from a whistle-blower with personal knowledge of the relevant events. The claimant might be in a position to detail the alleged dishonesty without inviting any *inference* of dishonesty. In such a case, there can be no requirement to specify "primary facts" capable of "tilting the balance".

48. That is by no means to say that there is no need for particularisation where an allegation of dishonesty is made. To the contrary, in *Three Rivers* Lord Hope emphasised the "need for particulars to be given" to explain the basis of an allegation of bad faith or dishonesty, that an allegation of fraud, dishonesty or bad faith "must be supported by particulars" and that "[t]he other party is entitled to notice of the particulars on which the allegation is based". The serious nature of an allegation of fraud or dishonesty makes proper particularisation especially important.

49. However, the Courts also need to beware of imposing such onerous pleading requirements as to make it impractical to bring meritorious fraud claims, particularly

given the limited information that might initially be available to a victim. As already mentioned, Lord Bingham said in *Medcalf v Mardell* that he could not think that it would be professionally improper for counsel to plead allegations, however serious, based on the documented conclusions of a DTI inspector or a public inquiry, even though counsel had no access to the documents referred to and the findings in question were inadmissible hearsay. Neither should a claim brought on such a basis be vulnerable to being struck out for want of particulars or, as SC plc might put it, for failing to disclose on its face a solid evidential foundation. Again, Phillips LJ posited in the course of argument a case in which an apparently reliable bank official told a customer that he had been defrauded of £1 million. The customer should be able to bring proceedings to recover the money even if he can as yet provide only limited information about how the fraud was effected. If the circumstances are such that a freezing order is desirable or a limitation period is expiring, it may be especially important that a claim can be issued at once, without waiting for further information to be obtained. In Sales J's words, "a measure of generosity in favour of a claimant" is to be allowed.

50. One of the allegations made in a passage in the Brutus Complaint on which the claimants rely is that "OLT3 was designed to have no ability to suspend or block a deal potentially violating the sanctions and to create no record of the illegal transaction". Mr Beltrami was inclined to characterise this as an "assertion" and, as I understood him, to suggest that it needed to be supported by "primary facts" comprising "either things people did or documents which were created which implemented the fraudulent conduct". I do not agree. Mr Beltrami was in effect insisting on the provision not just of particulars, but of evidence.

51. Further, I can see nothing inherently objectionable in a claimant "piggybacking" on allegations made by a third party. The fact that someone else has made an allegation will not necessarily, of course, mean that a drafter has "reasonably credible material which establishes an arguable case of fraud" or that a claimant is in a position to verify with a statement of truth a pleading repeating the allegation. For one reason or another, the allegation may not be thought credible or at any rate to be sufficiently substantiated. On the other hand, I do not think there is any bar on a claimant repeating or adopting an allegation made elsewhere and, if it is made or vouched for by an apparently plausible source, there may be good reason to believe it to be true.

52. Returning to SC plc's contentions and the two propositions in which it is rooted, it will be apparent from what I have said that I do not consider there to be a rule, as such, that a pleading must disclose on its face a solid evidential foundation for any allegation of fraud or dishonesty made in it. Where, as here, the Court is not asked to conclude that a claim has no real prospect of success, the core requirement is that an allegation of fraud or dishonesty is adequately particularised. In so far as the claimant suggests that fraud or dishonesty is to be inferred, there is an onus to plead primary facts such as to "tilt the balance", but even then the claimant need not detail the evidence with which he hopes to prove what he alleges. Further, it can potentially be proper for a claimant to "piggyback" on an allegation made by a third party.

53. In the present case, the Brutus Complaint was made by an entity established by a former employee of the Bank and a person who had worked with it. Each of them has, moreover, made a declaration in support of the Brutus Complaint, as has Mr Chandra, another former employee. There would nonetheless seem to be very considerable

scope for argument about what is alleged, particularly given the US Government's reaction to it. That is not to the point, however. The question for us is whether the Brutus allegations should be struck out on the basis of deficient pleading, not what their chances of success are.

54. Some of the points which Mr Beltrami made during his submissions to us related to paucity of information about the claim. One of the US Government's responses to the Second Brutus Action, Mr Beltrami said, was to the effect that Brutus had not understood US sanctions law, but the claimants had not engaged with that. Neither in the Brutus Complaint nor in the re-amended particulars of claim, Mr Beltrami observed, is there any attempt to spell out quite how US sanctions law is alleged to have been breached by which transactions.

55. There is undoubtedly force in such comments. I have little doubt that SC plc could properly seek further information about the claimants' case in a variety of respects. I have not, however, been persuaded that the claimants' case as regards the Brutus allegations has been so inadequately particularised as to make it appropriate to strike the allegations out. A request for further information may well be justified. The striking out of the allegations is not, in my view. Read in conjunction with the paragraphs from the Brutus Complaint on which the claimants rely, the re-amended particulars of claim and re-amended reply provide a sufficient basis for allowing the claimants to pursue the Brutus allegations.

The Maxpower allegations

Introductory

56. As already indicated, to establish an issuer's liability under section 90A of, and schedule 10A to, FSMA, knowledge/dishonesty on the part of a PDMR within the issuer must be proved. It is SC plc's case that the claimants have failed to plead a sustainable case that a PDMR within SC plc knew of or acted dishonestly in relation to the Bribery Scheme and, hence, that the claims under section 90A and schedule 10A should be struck out in so far as they relate to Maxpower. The Judge concluded that it was appropriate to strike out the allegation that certain non-executive directors of Maxpower were PDMRs of SC plc, but he otherwise rejected SC plc's application.

57. The Judge explained in paragraph 66 of the Judgment that the claimants had alleged that "SC plc's Group Executive" had the requisite guilty knowledge and that SC plc disputed the adequacy of the pleading on the basis that, first, it was unclear which individuals the "Group Executive" was said to include and, secondly, there was an inadequate plea of knowledge or dishonesty in relation to such individuals. The Judge did not accept either contention. With regard to the first of them, the Judge said in paragraph 72:

> "In my view, and despite the unfortunate inconsistencies hitherto in the definition of '*Group Executive*', the allegation that the individuals within the '*Group Executive*' are PDMRs for the purposes of the Bribery Scheme allegations is adequately pleaded at this stage. The Claimants fall within Miles J's definition of PDMR in *G4S* by alleging that the individuals were either *de jure* or *de facto* directors of SC plc."

As for whether the allegations of knowledge against the individuals said to be PDMRs had been sufficiently pleaded, the Judge referred to paragraph 24 of the re-amended reply as well as paragraph 75 of the re-amended particulars of claim before saying in paragraph 74 of the Judgment:

> "I consider that these are adequately pleaded at this stage and that the Claimants advance a credible case that members of the Group Executive must have known about the bribery allegations from the whistleblowers and that this was before the Bribery Scheme was exposed by journalists. They are entitled to take their s.90A FSMA claim in relation to the Bribery Scheme and Maxpower forward to trial insofar as it relies on the knowledge of alleged *de jure* or *de facto* directors of SC plc."

58. The Judge had referred in paragraph 73 of the Judgment to the following matters:

> "(1) An article published in a global regulatory and financial news agency called MLex Market Insight on 25 April 2016 that referred expressly to the Bank being 'aware of the alleged wrongdoing' at Maxpower. Mr Beltrami KC pointed out that this was a reference to individuals at the Bank, not SC plc, but [75] of the Amended Particulars of Claim says that it should be inferred that this is a reference to the awareness of the Group Executive. Mr Chapman KC submitted that that was because those persons were the Bank's senior decision makers, and if a report of bribery had been made it is likely they would have been informed.
>
> (2) Two whistle-blowers raised concerns about the Bribery Scheme directly to the Bank (including but not limited to the Group's Legal & Compliance Department and Group employees on the board of Maxpower) prior to the MLex article. The reports made by each whistle-blower are pleaded in [75.2] of the Amended Particulars of Claim and [24] of the Amended Reply. Again, the Claimants allege that it is to be inferred that the Group Executive would have been made aware of such whistle-blower allegations.
>
> (3) Sidley Austin prepared a report in December 2015 which recorded that remedial anti-bribery measures were initiated at Maxpower in March 2015 when SCPE [i.e. Standard Chartered Private Equity Limited] 'became more involved in the Company's operations', but improper payments continued and Group employees on Maxpower's board did nothing to address serious whistle-blower allegations which had been made. Further, King & Spalding were also instructed to carry out investigations, and PwC were also involved. The Claimants allege that it should be inferred, particularly given the 2012 Settlements and monitoring period which accompanied the 2012 Settlements, that international legal and

> accountancy firms would not have been instructed and/or Group employees would not have failed to act on serious whistle-blower allegations without the Group Executive's knowledge.
>
> (4) In December 2015, Maxpower terminated the contracts of employment of its three founding members. Again, the Claimants infer that such steps would not have been taken without the Group Executive's knowledge."

The grounds of appeal

59. SC plc challenges the Judge's decision on three grounds:

i) In the light of *G4S*, only de jure directors or other "persons occupying the position of director, by whatever name called" can be PDMRs, but the Group Executive whose members are said to be PDMRs include persons who are not alleged to be either de jure or de facto directors of SC plc ("the *G4S* Point");

ii) It is unacceptable for the claimants to advance allegations of fraud "en bloc" against the many individuals who, on the claimants' definition, would be comprised within SC plc's Group Executive ("the 'En Bloc' Point"); and

iii) The claimants have failed to plead primary facts supporting an inference of dishonesty against any, let alone all, of the individuals constituting the Group Executive ("the Primary Facts Point").

The G4S *Point*

60. It is the claimants' case that the members of the Group Executive were PDMRs. Having regard to Miles J's decision in *G4S*, a person cannot be a PDMR unless he is a de jure director, a de facto director or (perhaps) a shadow director, but the Group Executive is alleged to have included individuals who were not de jure directors of SC plc. In the absence of any suggestion of shadow directorship, those individuals can have been PDMRs of SC plc only if they were de facto directors of the company.

61. SC plc maintains that that is not alleged. When refusing permission to appeal on this issue, however, the Judge characterised it as a "non-point", observing that the claimants had "said that the allegation of de facto directorship on Relevant Misconduct (in response to a RFI) was equally applicable to the Bribery Scheme, about which they had not been asked". In response to a request for further information, the claimants had advanced reasons for considering certain individuals to have been de facto directors and, in the course of argument before the Judge, Mr Chapman said that, while those particulars had been provided in the context of requests relating to "Relevant Misconduct", it had always been "clear that when we were talking about the group executive, as distinct from the four named individuals, we were saying that to the extent that members of the group executive were not de jure directors, then they were de facto directors, and that they would be de facto directors on the similar basis as pleaded here". Mr Chapman went on to tell the Judge that the claimants would amend "if that needs to be expressly pleaded out, by way of amendment, to say group executive are PDMRs because de jure, if not de jure, de

facto". In the event, no amendment was made (or required by the Judge) at that stage, but on 18 March 2024 the claimants' solicitors sent SC plc's solicitors a draft amended response to the request for further information in which this is said:

> "Further, each member of the Group Executive was either a *de jure* director of SC plc or a *de facto* director of SC plc by virtue of their position on the Group Management Committee and/or the board of the Bank in addition to the non-exhaustive list of general matters set out at paragraphs 2.3.1 to 2.3.6 above."

62. In the circumstances, I agree with the Judge that this is a "non-point". The claimants have made it clear that it is their case that any member of the Group Executive who was not a de jure director was a de facto director. It would be preferable if the claimants' position were made explicit on the pleadings (as, in fact, the claimants have proposed), but the point does not justify striking out.

The 'En Bloc' Point

63. Paragraph 32 of Arnold J's judgment in *Sofer*, quoted in paragraph 32 above, is, I think, of relevance in this context. Arnold J said there that, while it is necessary to plead the state of knowledge of a *body corporate* against which an allegation of dishonesty is made, such an allegation is not "liable to be struck out without further ado" on account of a "mere failure to identify at the outset the directors, officers or employees who had that knowledge", albeit that "such particulars should be given as soon as feasible".

64. The present case is not on all fours with *Sofer* since liability under section 90A of, and schedule 10A to, FSMA depends on knowledge/dishonesty of PDMRs within the issuer, not simply the issuer. On the other hand, what is in the end at issue is the liability of the issuer, not any PDMR, and it may at first be difficult or impossible for a claimant to assess the roles of particular individuals within an issuer. That, indeed, is said by the claimants to be the situation with SC plc, whose structure they have described as "somewhat opaque". Mr Chapman told us that SC plc had provided additional information in relation to the "Relevant Misconduct" allegations, in the light of which the claimants had clarified their case. In contrast, Mr Chapman explained, SC plc has not supplied comparable information in relation to the Maxpower allegations.

65. Plainly, it is desirable the claimants should spell out what they say as regards individual PDMRs as soon as they can. However, I do not think it would be appropriate to strike out any of the claimants' pleadings at this stage on the basis of the "en bloc" point. If a sufficient basis for an allegation that one or more PDMRs had the requisite knowledge/dishonesty has been pleaded, that, it seems to me, will suffice for the time being.

The Primary Facts Point

66. In my view, the Judge was justified in concluding in paragraph 74 of the Judgment that the claimants' allegations of knowledge are "adequately pleaded at this stage and that the Claimants advance a credible case that members of the Group Executive must have known about the bribery allegations from the whistleblowers and that this was

before the Bribery Scheme was exposed by journalists". Mr Beltrami pointed out that the Judge spoke of members of the Group Executive having known of the bribery "allegations" rather than actual bribery, but I do not regard that as of any significance. The claimants allege in paragraphs 76 and 77 of the re-amended particulars of claim that "the Bribery Scheme" was "known to at least one PDMR" and that "one or more PDMRs" had knowledge that statements on which the claimants rely were untrue or misleading and of dishonest concealment of material facts. Reading paragraph 74 of the Judgment in the context, I do not think the Judge was meaning to say that there was a credible case of knowledge of the bribery "allegations" as distinct from the bribery itself. It seems to me, moreover, that the matters to which the Judge had referred in paragraph 73 of the Judgment, which were derived from paragraph 75 of the re-amended particulars of claim and paragraph 24 of the re-amended reply, lent adequate support to the allegation that at least one member of the Group Executive must have known of the bribery which the claimants allege.

Conclusion

67. I would dismiss the appeal.

Lord Justice Coulson:

68. I agree.

Lord Justice Phillips:

69. I also agree.