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Case Nos: FL-2020-000038
FL-2021-000011
FL-2022-000009
FL-2022-000023

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD)

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

Date: 08/11/2023

Before:

THE HON MR JUSTICE MICHAEL GREEN

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Between:

VARIOUS CLAIMANTS	**Claimants**
- and –	
STANDARD CHARTERED PLC	**Defendant**

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- -

Graham Chapman KC, Shail Patel and William Harman (instructed by **Brown Rudnick LLP**) for the **Claimants**

Adrian Beltrami KC and Dominic Kennelly (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 3, 4, & 5 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON MR JUSTICE MICHAEL GREEN

Mr Justice Michael Green:

Introduction

1. Between 3 and 5 October 2023, I heard the first Case Management Conference ("CMC") in these proceedings that had been started some three years earlier. The bulk of the hearing was concerned with the Defendant's applications for certain parts of the case to be struck out and/or for reverse summary judgment to be entered; and for the Claimants to provide further information of their case pursuant to CPR Part 18. This is my reserved judgment on those applications.

2. I am pleased to say that the other issues on the CMC, including in particular the structure of the proceedings going forward in relation to whether there should be a split trial and if so where the split should be, were resolved by agreement between the parties and I have made an Order dealing with that. It essentially defers a decision on those matters to a second CMC to be held in Spring 2024 when the parties and the Court should be in a better position to deal with them.

3. There are four claims before the Court brought by a total of 230 Claimants against Standard Chartered plc ("**SC plc**") under sections 90 and 90A of and Schedule 10A to the Financial Services and Markets Act 2000 ("**FSMA**"). SC plc is the parent of Standard Chartered Bank (the "**Bank**") and its subsidiaries (collectively, the "**Group**"). Although there are four claims, there is a single consolidated set of pleadings and I have directed that the claims are to be managed and tried together.

4. The Claimants allege that SC plc made untrue and misleading market statements in 3 prospectuses and some 45 other items of published information over a period of 12 years (2007 to 2019) relating to non-compliance with sanctions against Iran, financial crime control failures and alleged bribery by members of the Group. The Claimants, as institutional investors in SC plc, say that they relied on those representations in acquiring, disposing or continuing to hold their securities issued by SC plc and have suffered loss as a result.

5. The Claimants were represented before me by Mr Graham Chapman KC, leading Mr Shail Patel and Mr William Harman. SC plc was represented by Mr Adrian Beltrami KC, leading Mr Dominic Kennelly. I am grateful to them for their clear and well-crafted submissions, both in writing and orally.

6. Mr Beltrami KC had a number of complaints about the claim, some of which were specifically related to the application to strike out, and others in relation to proper case management. These included issues about the standing of individual Claimants about whom he said that there had been inadequate investigation as to whether they were properly Claimants or even whether they exist as a matter of law. Mr Beltrami KC also complained about the lack of information provided by the Claimants as to important parts of their case, including, standing, reliance, loss and limitation. One of the applications I will be dealing with later in this judgment is SC plc's CPR Part 18 Request for Further Information.

7. The main application is SC plc's application to strike out and/or for reverse summary judgment in relation to the following parts of the claim:

(1) The so-called "**Brutus Allegations**" which are to the effect that the Group's non-compliance with the sanctions were far wider and more systematic than it had admitted to in its two settlements with the US authorities in 2012 and 2019;

(2) The allegation that there were "*person[s] discharging managerial responsibility*" ("**PDMR**") in SC plc who knew of or were reckless as to the alleged bribery scheme in a Singaporean company called Maxpower Group PTE ("**Maxpower**") which was approximately 47% owned by the Group; and

(3) The Claimants' individual reliance claims.

8. Before turning to the application I should set out some more factual background and the legal context of the issuer liability regime.

Factual Background

9. There is an agreed summary of the factual background to this dispute set out in the Case Memorandum and List of Common Ground and Issues. The facts and matters set out below are largely derived from those documents.

10. As I said above, the Claimants are 230 institutional investors who claim to have acquired securities in SC plc, via 1,646 individual funds and/or accounts during the period February 2007 to April 2019. 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 the Bank which is a company incorporated by Royal Charter. The Group operates as a global retail, wholesale and investment banking institution through a network of branches and subsidiaries.

11. In September and December 2012, the Bank entered into settlement agreements with various US authorities relating to historic sanctions non-compliance (the "**2012 Settlements**"). 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 US economic sanctions. The Bank admitted that it sought to conceal the involvement of sanctioned counterparties by manipulating and falsifying electronic payment information. The 2012 Settlements also stated that the Bank "*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.

12. 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 called Mr Julian Knight and an individual who previously worked with (but not for) the Bank called 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.

13. From March 2013, SC plc's annual and half-year reports and other announcements contained disclosures, the adequacy of which is disputed by the Claimants, about, amongst other things, the ongoing investigations by the US and UK authorities.

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

15. From April 2016, global news agencies reported allegations that Maxpower had engaged in a corrupt scheme between 2012 and 2015 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 Bribery Scheme and denies that the Group or its employees made, directed or condoned any improper payments. Maxpower was not a subsidiary or member of the Group. The Bank voluntarily disclosed to the US and UK authorities the alleged Bribery Scheme. It was investigated by the US Department of Justice, which closed its inquiry without bringing any prosecution against any member of the Group. SC plc understands that there are no ongoing investigations in relation to this by any authority.

16. In February and April 2019, the Bank and various US and UK authorities entered into further settlement agreements in respect of non-compliance with US sanctions law and in respect of UK anti-money laundering breaches (the "**2019 Settlements**"). By the 2019 Settlements, the US authorities imposed a further financial penalty of some $947 million and the UK Financial Conduct Authority (the "**FCA**") imposed a penalty of £102 million. The Bank admitted that, from at least November 2007 to 2014, the Bank and its New York branch facilitated payments worth $600 million in violation of US sanctions from clients resident in Iran, and payments worth $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.

17. In September 2018, Brutus 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**").

18. Brutus' case in the Second Brutus Action is summarised in a Complaint which was most recently amended on 20 September 2019, and was supported by Declarations dated 10 January 2020 from Mr Knight and Mr Marcellus. Brutus also relies on (among other documents) a Declaration from another former employee of the Bank called Mr Anshuman Chandra dated 10 January 2020.

19. In summary, Brutus alleges in the Second Brutus Action that:

    (1) The Bank's breaches of US sanctions were "*far more extensive and elaborate during the 2001 – 2007 period than had been portrayed*" to various US authorities. Further, the Bank continued to engage in "*U.S. dollar clearing and other financial transactions with and for the benefit of Iranian government entities… until at least 2014*", and the 2019 Settlements "*addressed a relatively small subset of the course of conduct by [the Bank] in violation of Iran sanctions*".

(2) The Bank deliberately designed and implemented a scheme to evade US sanctions "*in a way that would not trigger software programs designed to identify and stop transactions involving sanctioned parties*" or leave a record in the Bank's internal systems. The scheme was "*known internally to high level [Bank] officials as 'Project Green'*". One of the Bank's internal departments, the Originations and Client Coverage Group, was deployed in Dubai to "*create fraudulent records that allowed Iranian-connected clients to open accounts without their Iranian connection being detected*", and a Bank committee known as the Iran Group Risk Committee was mandated to "*develop strategies to evade the Iran sanctions*".

(3) Brutus was the source of information that led to the 2019 Settlements such that Brutus is entitled to (and claims) a share of the financial penalties which were imposed on the Bank by the US authorities as part of the 2019 Settlements.

20. In November 2019, the US Government filed a motion to dismiss the Second Brutus Action. In a Memorandum of Law in support of its application to dismiss the Brutus Action, the US Government alleged that Brutus' allegations had been thoroughly investigated by several government agencies who 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*".

21. In July 2020, the Second Brutus Action was dismissed by the US District Court for the Southern District of New York. In its Opinion and Order dismissing the Second Brutus Action, the District Court noted that there was a conflict in the authorities as to whether the US Government has an unfettered right of dismissal in *qui tam* actions (the so-called "***Swift* standard"**) or must establish a valid governmental purpose and rationale behind dismissal, at which point the burden shifts to the relator to demonstrate that the dismissal was fraudulent, arbitrary and capricious, or illegal (the so-called "***Sequoia* standard**"). However, and in the event, the District Court held that it was not necessary to resolve that dispute because the US Government's application satisfied even the more onerous *Sequoia* standard for judicial review. In August 2023, an appeal from this order was dismissed.

22. Notwithstanding the dismissal of the Second Brutus Complaint, the Claimants plead the above allegations made in the Second Brutus Complaint and maintain that those allegations are true. They say that the dismissal of the Second Brutus Complaint was not on the merits. The Claimants refer to the conduct that was the subject of the 2019 Settlements and the allegations made by Brutus as the "**Relevant Misconduct**" in their Statements of Case. SC plc admits the former, but denies the latter and seeks to strike those allegations out.

The Issuer Liability Regime

23. Section 90 FSMA is concerned with listing particulars, including prospectuses. Any person responsible for an untrue or misleading statement included in such particulars or for an omission from the particulars of any matter required to be included is liable to pay compensation to a person who has acquired securities to which the particulars apply and suffered loss as a result. There is a dispute as to whether the Claimants are required to prove reliance on the untrue or misleading statements or any omission from the particulars. The Claimants rely on prospectuses issued in 2008, 2010 and 2015 by SC plc in respect of rights issues.

24. Section 90 FSMA is subject to exemptions provided by Schedule 10 FSMA, including an exemption from liability where at the time when the listing particulars were submitted to the FCA, the person responsible for the listing particulars reasonably believed (having made such enquiries, if any, as were reasonable) that the statement was true and not misleading or the matter whose omission caused the loss was properly omitted. SC plc relies on this defence.

25. Section 90A and (following amendments introduced on 1 October 2010) Schedule 10A FSMA make provision for 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*" (namely, market publications) relating to the securities or a dishonest delay in publishing such information.

26. Under para 3(2) of Schedule 10A FSMA, an issuer is liable in respect of an untrue or misleading statement only if a PDMR within the issuer knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading. Paragraphs 3(3) and 5(2) impose an equivalent PDMR knowledge requirement on claims in respect of material omissions and dishonest delay. It is clear that s.90A FSMA requires dishonesty of a PDMR to be proved.

27. Para 8(5)(a) provides that for the purposes of Schedule 10A the definition of a PDMR of an issuer whose affairs are not managed by its members is "*any director of the issuer (or person occupying the position of director, by whatever name called)*". In *Allianz Global Investors GmbH & Ors v G4S Ltd* [2022] EWHC 1081 (Ch), ("***G4S***") Miles J held that this definition confines PDMRs to directors of the issuer as understood in the context of company law. Accordingly, only *de jure*, *de facto* or (possibly) shadow directors of the issuer are PDMRs. This is relevant to the Bribery Scheme allegations and is dealt with in more detail below.

28. Further, the effect of paras 3(1) and 3(4) of Schedule 10A FSMA is that an issuer is only liable to pay compensation to a person who acquires, continues to hold or disposes of the securities in reasonable reliance on published information to which Schedule 10A applies and suffers loss in respect of the securities as a result of any untrue or misleading statements in that published information or the omission from that published information of any matter required to be included in it.

29. In the case of dishonest delay, an issuer is liable under para 5(1) of Schedule 10A FSMA to pay compensation to any person who acquires, continues to hold or disposes of the securities and suffers loss in respect of the securities as a result of delay by the issuer in publishing the information. In other words, there is no reasonable reliance requirement in dishonest delay claims.

Summary of Parties' Pleadings

30. The Claimants' claims under s.90A FSMA concern approximately 45 items of published information issued by SC plc over a period of 12 years between 2007 and 2019. The information is set out in a 170-page Annex A to the Amended Particulars of Claim. The Claimants have extracted 275 passages from the published information and have alleged that these convey (expressly, or by necessary implication) the 12 representations pleaded at [32] of the Amended Particulars of Claim. These included

alleged representations as to the knowledge of the Bank's senior management from time to time, which the Claimants have termed the "**Bank Knowledge Representations**".

31. The representations are said to have been rendered untrue or misleading in the light of the Relevant Misconduct and/or the Bribery Scheme. Further or alternatively the Claimants allege that the published information omitted to disclose the Relevant Misconduct and/or the Bribery Scheme, and/or that it delayed disclosing these matters.

32. As to the PDMRs, the Claimants allege that at least one PDMR in SC plc knew of or was reckless as to the Relevant Misconduct, the Bribery Scheme and/or the untrue or misleading statements, omissions and/or delay. The Claimants have identified 12 named individuals with the relevant state of mind relating to the Relevant Misconduct. Some of those individuals were, for at least some of the relevant period, *de jure* directors of SC plc. Otherwise, the Claimants contend that they were PDMRs on the basis that they were *de facto* directors of SC plc. SC plc does not seek to strike out those allegations.

33. But in relation to the Bribery Scheme, SC plc does seek to strike out the allegation as to the identification of relevant PDMRs. The Claimants allege that SC plc's Group Executive and four employees of Standard Chartered Private Equity Limited ("**SCPE**") and/or Standard Chartered IL&FS Asia Infrastructure Growth Fund Company PTE Limited ("**SC IL&FS**"), who sat on Maxpower's board as the Bank's nominees, were PDMRs in SC plc with the relevant state of mind relating to the Bribery Scheme. There is no allegation pleaded that those four employees were *de facto* directors of SC plc but the Claimants wish to argue at trial that they were PDMRs in SC plc, despite Miles J's judgment in *G4S*.

34. In relation to reliance, the Claimants plead two forms:

    (1) "***Common Reliance Claims***" which SC plc says are "*legally novel*" and which depend on the notion that, even though the Claimants did not specifically rely on the published information, they did indirectly rely on it by reference to the price at which SC plc's shares traded in the market which the Claimants say was inflated as it reflected the false statements in the published information; and

    (2) "***Individual Reliance Claims***" which SC plc does seek to strike out, alternatively seek further information, because they have been pleaded on a purely generic basis whereby each Claimant is said to have read the relevant published information or to have relied on other unspecified information such as from corporate brokers that acted as some form of conduit for the published information.

35. As I have already said, SC plc admits the conduct which was the subject of the 2019 Settlements, denies that the matters alleged in the Second Brutus Action are true, and does not admit that Maxpower engaged in the Bribery Scheme.

36. In addition by way of defence to the claims under section 90A and Schedule 10A FSMA:

    (1) SC plc puts the Claimants to proof as to whether they have standing, that is whether (a) they have legal personality and (b) acquired, continued to hold or

disposed of securities issued by SC plc (or interests therein) in the relevant period.

(2) SC plc denies that its published information contained the representations pleaded at [32] of the Amended Particulars of Claim (including the Bank Knowledge Representations) and, in any event, denies that any of the published information on which the Claimants rely were untrue or misleading and/or that the published information omitted matters which were required to be included. SC plc also denies that SC plc delayed in publishing true information.

(3) SC plc denies that a PDMR within SC plc had the relevant knowledge in respect of any untrue or misleading statements, omissions and/or delay. SC plc also denies that a PDMR within SC plc was reckless as to any untrue or misleading statements. Further, SC plc denies that any of the individuals who are said to have been *de facto* directors (and, therefore, PDMRs) were in fact *de facto* directors. Further and in any event, SC plc also denies that its senior management had the knowledge which is the subject of the Bank Knowledge Representations.

(4) SC plc denies that the Common Reliance Claims satisfy the requirement of reliance under section 90A and Schedule 10A FSMA and contends that the Individual Reliance Claims are inadequately pleaded and/or in any event do not satisfy the relevant requirements.

(5) No admissions are made in relation to causation and loss.

37. Some of the Claimants also advance claims under section 90 FSMA. In summary:

(1) They allege that the prospectuses published in November 2008, October 2010 and November 2015 for which SC plc was responsible conveyed (expressly, or by necessary implication) the representations pleaded at [32] of and Annex B to the Amended Particulars of Claim (including the Bank Knowledge Representations), and that those statements were untrue or misleading and/or the prospectuses omitted matters which were required to be included in light of the Relevant Misconduct and/or the Bribery Scheme.

(2) Further, those Claimants say that they acquired securities to which the prospectuses applied and suffered loss as a result of the untrue or misleading statements and/or omissions.

38. SC plc defends the claims under section 90 FSMA on the following broad bases:

(1) Again SC plc puts the relevant Claimants to proof as to whether they have standing, both as to whether they (a) have legal personality and (b) acquired securities to which the prospectuses applied. SC plc says that it is totally unclear which Claimants are pursuing claims under section 90 FSMA.

(2) SC plc denies that the prospectuses contained the representations pleaded at [32] of the Amended Particulars of Claim and, in any event, denies that any of the statements on which the Claimants rely were untrue or misleading and/or that the prospectuses omitted matters which were required to be included.

(3) No admissions are made in respect of causation and loss. SC plc complains that little or no information has been provided as to the Claimants' alleged losses.

(4) SC plc contends that it is in any event exempted from liability because at the time that the prospectuses were submitted to the FCA for approval, each of the then directors of SC plc believed (having made all reasonable enquiries) that all statements were true and not misleading and no matter required to be included had been omitted.

(5) SC plc also requires the Claimants to prove that their cause of action(s) accrued less than 6 years before the relevant claim form was issued and/or that the limitation period has been postponed pursuant to section 32 of the Limitation Act 1980. Again SC plc complains that there is no information about limitation including in particular in relation to the 2008 and 2010 prospectuses which were published 12 and 10 years before the proceedings were commenced.

Strike out / Summary Judgment legal principles

39. There was little dispute between the parties as to the principles to be applied when the court is considering a strike out or reverse summary judgment application. It should not be forgotten that SC plc only seeks to strike out part of the claims and that the remainder will continue on in the usual way.

40. Mr Chapman KC raised the preliminary procedural issue as to whether it is appropriate for the court to consider the application where it would involve prolonged serious argument and where it will not obviate the need for a trial or substantially reduce the burden of the trial. He relied in particular on what Potter LJ said in *Partco Group Ltd v Wragg* [2004] BCC 782 at [27] – [28], which itself built on the House of Lords cases in *Three Rivers District Council v Bank of England* [2003] 2 AC 1 and *Williams v Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 368. Mr Chapman KC referred to the fact that the application did require prolonged argument – in the event it took up two full days – and he submitted that, even if it succeeded, it would not save much time at the trial as many of the issues would have to be explored anyway in the context of the remaining allegations.

41. I heard short argument on this procedural point. Mr Beltrami KC submitted that there would be substantial savings in trial time and preparation, particularly on disclosure without the Brutus Allegations, and without the Individual Reliance Claims. I was persuaded that there was sufficient benefit to hear the application, particularly as 3 days had been allocated to the hearing including the other CMC aspects, which I then proceeded to do. Mr Chapman KC submitted that the points he made in relation to this remained important considerations on the substantive application as to whether it would be appropriate to grant summary judgment or strike out, including whether there may be another "*compelling reason [for] a trial*."

42. As to the legal principles in relation to strike out and/or summary judgment, Mr Chapman KC referred to the helpful summaries in: *Re Regis UK Limited (In Administration)* [2019] EWHC 3073 (Ch) at [22] for strike out; and *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] for summary judgment. Mr Chapman KC emphasised the following, which I accept:

(1) On a strike out it must be assumed that the facts stated in the statement of case are true;

(2) It is not appropriate to strike out a statement of case in an area of developing jurisprudence because novel points of law should be based on actual findings of fact; this may be relevant to the Claimants' plea as to the relevant PDMRs on the Bribery Scheme allegations;

(3) It is not appropriate on a summary judgment application for the court to conduct a "*mini-trial*" to resolve conflicts of evidence – see *Swain v Hillman* [2001] 2 All ER 91;

(4) The court should hesitate before making a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts, following disclosure and cross-examination, would add to or alter the evidence available to a trial judge and so affect the outcome of the case;

(5) Building on the latter point, Mr Chapman KC referred to the information imbalance, a feature of these cases, which means that the facts are primarily within the defendant's knowledge and may only later emerge through disclosure etc; he referred to Rimer J's (as he then was) comments in [44] of *Microsoft Corporation v P3 Com Ltd* [2007] EWHC 746.

43. Mr Beltrami KC did not dissent from the above principles but focused far more on the requirements of properly pleading such a case, particularly one of fraud or dishonesty. He submitted that any facts pleaded in the Particulars of Claim must have a sufficient evidential basis and that it would be improper to plead a speculative case for which there is no evidence: see *Clarke v Marlborough Fine Art (London) Ltd* [2002] 1 WLR 1731 per Patten J, as he then was, at [21].

44. Mr Beltrami KC referred to Warby LJ's judgment at first instance in *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 1245 (Ch) in which he said at [54] that a party:

> "does not need to have sufficient evidence to prove its case in its possession at the time of pleading. It is entitled to gather such evidence through the litigation process. It must (1) believe the assertion to be true; (2) intend to support it with evidence at trial; and (3) either have reasonable evidence for the assertion or a reasonable basis for a belief that the evidence will be available at trial."

45. Mr Chapman KC picked up on point (3) in the above paragraph from Warby LJ's judgment and submitted that the evidence available to the Claimants at the time of the pleading may be inadmissible or privileged, but so long as they reasonably believe that there will be admissible evidence to prove their case at trial, the allegation can be pleaded.

46. However, Mr Beltrami KC seemed to be suggesting that something more was required and the Claimants had either to show that they had taken steps to verify their claims before they pleaded them or to plead fully all the evidence to support the allegation of fraud or dishonesty. He derived this obligation from the requirement for a statement of

truth and the particular strictures in relation to pleading fraud or dishonesty. He relied on the following:

(1) Sales LJ, as he then was, said *in Playboy Club London Ltd v Banca Nazionale Del Lavoro* [2018] EWCA Civ 2025, at [46]

> "Courts regard it as improper, and can react very adversely, where speculative claims in fraud are bandied about by a party to litigation without a solid foundation in the evidence".

(2) The Commercial Court Guide provides that "*Full and specific details should be given of any allegation of fraud, dishonesty, malice or illegality*", and that "*where an inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged must be fully set out*": see para C1.3(c). (PD16 is to similar effect.)

(3) As Lord Millett said in *Three Rivers District Council v Bank of England* [2003] 2 AC 1 [2001] UKHL 16 at [186]:

> "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."

(4) Building on that, Flaux J, as he then was, said in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20] that there must be some pleaded fact "*which tilts the balance and justifies an inference of dishonesty*".

(5) Mr Beltrami KC submitted that the primary facts which must be pleaded were described by Denning LJ, as he then was, in *British Launderers Association v Hendon Rating Authority* [1949] 1 KB 462 at pp 471-2, "*Primary facts are facts which are observed by the witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as original documents."*

47. However, the cases referred to by Mr Beltrami KC are more concerned with whether the pleaded facts are sufficient to found an allegation of fraud or dishonesty or whether they could also be consistent with, say, an allegation of negligence. That is not the issue before me, which is whether there is sufficient evidence for the plea of fraud and dishonesty to be made and whether enough of that evidence has been pleaded.

48. In this respect I bear in mind what Sales J, as he then was, said in the competition case of *Nokia Corp v AU Optronics* [2012] EWHC 731 (Ch) in [62] to [67] that a party pleading fraud (in that case, a secret cartel) is entitled to a "*measure of generosity*" because of the information imbalance and the fact that at early stages of the proceedings, that party does not have access to all relevant information and documents.

However, this was subject to the procedural safeguards that Sales J described for the protection of the party against whom such an allegation is made, including the strict professional obligations on counsel pleading fraud or dishonesty. In *The Federal Deposit Insurance Corp v Barclays Bank plc* [2020] EWHC 2001 (Ch) at [39], Snowden J, as he then was, said that the safeguards referred to by Sales J meant that parties should be reticent about pleading fraud and should not do so without a "*'solid foundation' in the evidence,* [to be] *contrasted with 'speculation and inference'*".

The Brutus Allegations

49. SC plc has advanced a number of arguments for striking out or summary judgment of the Brutus Allegations, some of which fell away in the course of Mr Beltrami KC's oral submissions. What Mr Beltrami KC concentrated on was the sufficiency of the pleading in accordance with the principles set out above and in particular:

    (1) The suggested requirement that the Claimants should have sought to verify the Brutus Allegations if they were intending to plead them in their claims, so as to ensure that there was a sufficient foundation in the evidence for making those allegations; and

    (2) That the "primary facts" in support of the allegations of fraud should have been pleaded.

50. Mr Beltrami KC had originally argued that the Claimants' pleadings were defective because they did not actually make the Brutus Allegations themselves; rather they seemed to be relying on the allegations in the Second Brutus Action as a form of proxy for their own allegations. It was also said that the Claimants' case was therefore based on the inadmissible opinion of third parties, namely the persons behind Brutus. These points were not pursued once it became clear, if it was not before, that the Claimants are making the Brutus Allegations for themselves and averring that they are true. Furthermore, they are not relying on any third-party opinions for making the Brutus Allegations.

51. Mr Chapman KC submitted that the pleading of the Brutus Allegations has been properly done and is sufficiently particularised. He criticised the notion that the Claimants should be required to prove at this stage how they were satisfied that the allegations are properly founded so that they are able to plead them, accepting that they include allegations of fraud and dishonesty. His point was essentially that the Brutus Allegations have been adequately pleaded supported by a statement of truth and there is no basis for suggesting that the Claimants' counsel team have not complied with their professional obligations in relation to pleading fraud and dishonesty. He also said that SC plc has been able to plead a defence to the Brutus Allegations and it has at no time sought further information in relation to them. Accordingly, the application to strike out or for summary judgment in relation to the Brutus Allegations is misconceived and the Claimants have reasonable grounds for making those claims which have at least a real prospect of succeeding at trial.

52. I agree with Mr Chapman KC on the Brutus Allegations and I will dismiss SC plc's application in such respect. I will endeavour shortly to explain why that is so.

53. The structure of the Amended Particulars of Claim is as follows:

(1) In Section C.3, [20] to [24], the Claimants plead the Relevant Misconduct, based on the 2019 Settlements and the Brutus Allegations. [24] sets out the allegations of misconduct in the Second Brutus Action that the Claimants rely on and which makes clear that they go far wider than the misconduct disclosed in the 2019 Settlements, including the operation of a deliberate strategy to evade the Iran sanctions.

(2) In section C.4, at [25] to [27], the Relevant Misconduct is defined and explained. [25] states that the Relevant Misconduct is that which had been set out in the previous paragraphs, being the "*subject matter of the 2019 Settlements and the Brutus complaint*". In [26], the Claimants say that they are reliant on publicly available documents and reserve the right to plead further following disclosure.

(3) Then there is [27] which came in for much criticism by Mr Beltrami KC as being a wholly inadequate plea of fraud. However, as Mr Chapman KC pointed out, the evidential basis for [27] is found in [21] to [24], which is then summarised in [27] as the allegations that the Claimants rely on. It is in the following terms:

> "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."

(4) SC plc only seeks to strike out [27.1] and [27.2]. This was not really explained but it must be based on its supposition that those two subparagraphs are wholly dependent on the Brutus Allegations, whereas the others are supported by the allegations based on the 2019 Settlements.

54. SC plc's Amended Defence at [30] admits the Relevant Misconduct insofar as it is based on the 2019 Settlements but denies it insofar it is based on the Brutus Allegations. At [26.4] of the Amended Defence SC plc pleads that the Brutus Allegations are false and denied. The basis for that denial is principally the reasons why the Second Brutus Action was dismissed and the evidence adduced by the US authorities as to their investigations and conclusions on the Brutus Allegations. As Mr Chapman KC submitted, that defence appears to be based, at least in part, on the opinion of a third party, namely the US authorities, turning one of SC plc's criticisms of the Brutus Allegations back on itself.

55. The important point about the Amended Defence is that SC plc seems to have had no difficulty in understanding the case it has to meet. Nor is there any suggestion that the Claimants have not adequately pleaded the Brutus Allegations or that in some way this was an improper plea of fraud or dishonesty. It would not be uncommon to find in a defence an express reservation of the defendant's right to apply to strike out the allegation, but no such words appear in the Amended Defence. And as I have said above, there was no request for further information.

56. In [23] of the Amended Reply, the Claimants joined issue with SC plc's denial of the Brutus Allegations. They pleaded at [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."

If there was any doubt in SC plc's mind as to whether the Claimants were actually making the Brutus Allegations, this was clarified by this plea in the Amended Reply.

57. Mr Chapman KC also referred to the Agreed Case Memorandum and submitted that the position adopted by SC plc in relation to the Brutus Allegations in this application is even more curious and untenable in the light of what it agreed to in that document. At [8] of the Agreed Case Memorandum the allegations in [24] of the Amended Particulars of Claim were summarised together with the defence to them. In [9], SC plc agreed the following wording:

> "The Claimants allege that the 2019 Settlements and the Brutus Complaint evidence relevant misconduct on the part of the Bank which is further particularised at paragraph 27 of the Amended Particulars of Claim…"

It is difficult to read that as anything other than an acceptance by SC plc that the claim, including the Brutus Allegations, was properly particularised in the Amended Particulars of Claim and that it was adequately pleaded. Furthermore, SC plc has been able to agree the lists of issues for the purposes of disclosure which includes what that would be if the Brutus Allegations remain in to be tried.

58. There has therefore been a rethink of SC plc's position on this and it has decided to pursue this application. Insofar as the application is based on inadequate pleading of the particulars, or "primary facts" as Mr Beltrami KC preferred to put it, I find it difficult to see how that can be properly suggested at this stage.

59. As to the purported requirement that the Claimants scrutinise and verify the underlying evidence that supports the Brutus Allegations, it is unclear where such a requirement comes from but also it potentially puts the Claimants in an awkward position of having to disclose their confidential and privileged investigations that have gone to support their claim. Mr Beltrami KC accused the Claimants of pleading only "*conclusory*" allegations without identifying the facts upon which they are based. But as I have said, it seems to me that this has been adequately particularised and the only further question raised by Mr Beltrami KC is whether the Claimants had available to them sufficient evidence of fraud and dishonesty so as to be able to plead such allegations.

60. The first point to make is that there is no basis for questioning whether the statement of truth was appropriately signed or whether the Claimants' counsel had what they considered to be sufficiently credible evidence to plead fraud and dishonesty at this stage. That should be an end to this matter as this is a substantial procedural safeguard, as Sales J put it in the *Nokia* case, that protects SC plc from unfounded allegations of fraud.

61. Even if more evidence is required on this, the Claimants' solicitor, Mr Neill Shrimpton, a partner in Brown Rudnick LLP, gave an explanation in his witness statement dated 1 September 2023 as to why the Claimants had reasonable grounds for making the Brutus Allegations. This included the following:

    (1) The Brutus Allegations are founded on information provided by Mr Knight and Mr Chandra, former employees of the Bank, and Mr Marcellus who worked with the Bank and had direct knowledge of relevant events. All three made Declarations "*under penalty of perjury*" in the Second Brutus Action containing their evidence supporting that claim. For instance Mr Marcellus gave evidence as to an invitation he received in 2009 or 2010 to attend an event organised by the Bank for its Iranian customers on Kish Island in Iran.

    (2) In Mr Knight's Declaration he referred to Bank documents that he was given when he left the Bank in 2011, and "*enormous volumes*" of records which were handed to Brutus by Mr Chandra between 2013 and 2016.

    (3) Both Mr Knight and Mr Chandra claim to have been subjected to retaliatory acts by the Bank as a result of their whistleblowing activities, assistance to the US Government and pursuit of the *qui tam* actions.

    (4) As set out at [43.6] of Mr Shrimpton's witness statement, certain aspects of the Brutus Allegations have been proved to be demonstrably correct. For example, the core allegation, that the Bank misled the US authorities when entering into the 2012 Settlements, is accurate. SC plc admitted as much in the 2019 Settlements. Mr Beltrami KC took issue with whether the misleading was deliberate or not, but that misses the point that Brutus had alleged that the US authorities had been misled and this turned out to be true.

    (5) The Brutus Allegations do not have the look or feel of fabrication or speculation. To the contrary, the allegations are specific and display detailed knowledge of the Bank's internal procedures. Mr Shrimpton referred to the evidence concerning "*Project Green*" and the use of the Bank's "*OLT3*" system. Mr Beltrami KC said that this impressionistic assessment by Mr Shrimpton does not prove anything but it seems to me that this is a legitimate consideration when assessing the credibility of the evidence.

    (6) While the Brutus Allegations are very serious in terms of their scale and alleged deliberate policy, the Bank has already admitted engaging in similarly serious misconduct in both the 2012 and 2019 Settlements.

    (7) The Second Brutus Action was dismissed without the District Court making any findings on the substance of the Brutus Allegations. The District Court did no more than find that Brutus had not established the high burden of proving that

the dismissal motion was fraudulent, arbitrary and capricious, or illegal. The District Court reached that conclusion without disclosure (or any response) from the Bank or cross-examination of any witnesses. As set out at [43.8] of Mr Shrimpton's witness statement, Brutus was denied the opportunity to depose a US Government employee, Daniel Alter, who would have testified "*as to whether [the Bank] fully cooperated with the investigation"* and whether the Bank's "*consultant [i.e. Promontory LLC] altered records and computers".*

(8) While the US Government stated in support of its dismissal motion that it had formed the view that Brutus' allegations were inaccurate, there is evidence to suggest that it took that position premised on incomplete information and/or motivated by other factors, including embarrassment at having missed or overlooked information suggesting a much broader fraudulent scheme by the Bank and the potential conflict of having to hand over to Brutus some of the financial penalties imposed on the Bank in the 2019 Settlements.

62. Some of the above points are stronger than others but I consider that the Claimants and those advising them were entitled to take them into account in assessing whether there was sufficiently credible evidence before them to justify making the Brutus Allegations. There will no doubt have been other matters that were investigated and scrutinised before deciding to plead the Brutus Allegations in the way they did. I do not think that the Claimants have to explain what they have done in order to satisfy themselves as to the propriety of pleading fraud and dishonesty, so long as it is adequately pleaded in accordance with the requirements I have set out above.

63. In all the circumstances, I do not believe that the application to strike out or give reverse summary judgment on the Brutus Allegations has any real sustainable basis and those allegations should be allowed to go to trial.

The Maxpower Allegations

64. This part of the application is concerned with the s.90A FSMA claim in respect of the alleged Bribery Scheme. SC plc does not seek to strike out the Bribery Scheme or Maxpower aspects of the s.90 FSMA claim. It is therefore wholly focused on the identification of PDMRs in SC plc and whether the Claimants have adequately pleaded that such PDMRs knew of and acted dishonestly in relation to the Bribery Scheme. As explained above, a s.90A FSMA claim requires proof that a PDMR of the issuer has acted dishonestly.

65. The Claimants have identified the relevant PDMRs for the purposes of the Bribery Scheme allegations as comprising two groups: (1) SC plc's "*Group Executive*"; and (2) four employees of the Group who served as non-executive directors on the Maxpower board, namely Mr Greg Karpinski, Mr Kanad Virk, Mr Benjamin Soemartopo and Mr Nainesh Jaisingh. SC plc's arguments in relation to each group are different and will be dealt with separately.

(1) <u>Group Executive</u>

66. In [75.1] and [75.2] of the Amended Particulars of Claim, the Claimants allege that "*SC plc's Group Executive*" had the requisite guilty knowledge. SC plc's objections to this are twofold: (i) that it is unclear which individuals are within the Claimants' definition

of "*Group Executive*"; and (ii) there is an inadequate plea of knowledge or dishonesty in relation to those individual PDMRs.

67. Looking first at the Claimants' definition of "*Group Executive*", there have been some inconsistencies in this regard and Mr Chapman KC conceded that this was so. He confirmed that the definition relied on is that contained in [36] of the Amended Reply, which referred back to the categories set out in [70.1] to [70.3] of the Amended Particulars of Claim. (In Mr Shrimpton's witness statement, he had limited the definition to [70.1] of the Amended Particulars of Claim, but this was incorrect.) Those paragraphs said as follows:

> "70.1 *De jure* directors of SC plc, including executive and non-executive directors, and who sat on various board committees. In the various settlements the SC plc executive directors are (apparently) also referred to as the "Group Executive" or similar;
>
> 70.2 A Group Management Committee comprising the executive *de jure* directors of SC plc and other senior executives;
>
> 70.3 *De jure* directors of the Bank, comprising executive directors of SC plc and other senior executives in the group;…"

68. It is relevant to note that the Claimants rely on the same individuals comprising the "*Group Executive*" for their s.90A FSMA claim in relation to the Relevant Misconduct. However, SC plc have not sought to strike out that allegation as being too vague.

69. SC plc sought further information in relation to the individuals who are comprised within the "*Group Executive*" for the purposes of the Claimants' allegations of PDMRs in relation to knowledge of the Relevant Misconduct. It also asked whether the Claimants were alleging that those who were not *de jure* directors of SC plc were *de facto* directors and, if so, the basis for such an allegation. The Claimants' response listed, as best they could prior to disclosure, a number of individuals alleged to have the requisite knowledge and then the basis for them being *de facto* directors of SC plc, if they were not *de jure* directors. These responses were given, as I have said, in relation to Relevant Misconduct, but Mr Chapman KC submitted that they equally apply to the "*Group Executive*" against whom the Bribery Scheme allegations are made.

70. So the position reached in relation to the alleged PDMRs in SC plc is that the Claimants say that they are either the *de jure* directors of SC plc or *de facto* directors of SC plc by virtue of being *de jure* directors of the Bank or otherwise members of the Group Management Committee. SC plc has said that this could comprise 62 individuals over the course of the relevant period and the Claimants need to do more to identify those individuals who have the requisite knowledge.

71. Mr Chapman KC said that, prior to disclosure, it is not possible for the Claimants to be more precise over this. Furthermore, they have requested further information from SC plc including in relation to a detailed corporate structure and the identification of those individuals who sat on the Group Management Committee, but SC plc has refused to provide this, saying that the Claimants will have to wait for disclosure or witness statements. However, before that stage has been reached, SC plc is applying to strike out the allegation.

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.

73. As to whether the allegations of knowledge against the individuals said to be PDMRs are sufficiently pleaded by reference to the strict requirements in relation to allegations of fraud and dishonesty, the Claimants say that it is necessary to look not only at [75] of the Amended Particulars of Claim but also at [24] of the Amended Reply. This is said to support the Claimants' case that at least one or more of the PDMRs had the requisite state of mind in relation to the Bribery Scheme. It includes the following:

    (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 "*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.

74. 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.

(2) The Maxpower non-executive directors

75. However, in relation to the four identified non-executive directors of Maxpower, the Claimants wish to take that case to trial despite not alleging, and I assume, not being able to allege, that they are *de facto* directors of SC plc. Accordingly, on the basis of *G4S*, they cannot be PDMRs and insofar as the s.90A FSMA case depends on their knowledge, it is bound to fail.

76. Mr Chapman KC did not seek to persuade me that *G4S* was wrongly decided; indeed he said that the court was likely to follow Miles J's decision. Instead Mr Chapman KC sought to argue that I should not strike out the claims under s.90A FSMA based on the Maxpower non-executive directors' knowledge for the following reasons:

(1) Until after disclosure, the Claimants are not able to plead that the Maxpower directors were *de facto* directors of SC plc, and SC plc has refused to provide further information in respect of the Maxpower directors' roles and responsibilities within the Group.

(2) The meaning of *de facto* directorship in the context of section 90A FSMA has not been investigated by any Court (and Mr Chapman KC referred back to the *In Regis* case and the reference to not striking out a claim in an area of developing jurisprudence). Furthermore, Miles J expressly identified the point that its meaning is specific to the context, that the question of *de facto* directorship is intensely fact specific and that there may be some elasticity in its factual contours (see [174], [175], [179] and [180] of *G4S*).

(3) The Maxpower non-executive directors held senior positions in the Group and there is reason to believe that a fuller investigation into the facts of the case (including by disclosure and cross-examination) would add to or alter the available evidence.

(4) The Claimants would wish to reserve their right to challenge the conclusions of Miles J in *G4S*, including on appeal. That decision concerns an important point of law and practice in this context. If the claims are struck out now, Mr Chapman KC submitted that they would be unable to do so. He also said that it would be preferable for such an appeal to be on the basis of findings of fact after a trial, rather than at an interim stage.

(5) The Bribery Scheme will be a matter to be investigated at trial, and will form the subject of disclosure, in any event. If the allegations concerning the Group Executive are not struck out (and I have not struck them out) and there is the s.90 FSMA claim in relation to the Bribery Scheme which SC plc has not sought to strike out, both continuing to trial, there will have to be an examination of the facts at trial anyway, including

whether the Bribery Scheme took place and the Bank's knowledge of it. There would therefore not be much of a saving in time or costs in striking out this allegation.

77. Despite the attractiveness of Mr Chapman KC's submissions on this, I do not think that that is the way the system works. As he accepts, the Claimants are unable presently to plead that the Maxpower non-executive directors were *de facto* (or possibly shadow) directors of SC plc. The current state of the law is Miles J's decision in *G4S*, which although not technically binding on me, was not suggested to be wrongly decided or such that I should not follow it. In any event, it does seem to me that the carefully reasoned judgment of Miles J that took into account every possible argument as to a broader definition of PDMR appears unassailable.

78. Therefore, the Claimants' claim in this respect is unsustainable and there is no real prospect of them succeeding in establishing that the four non-executive directors of Maxpower were PDMRs of SC plc. Mr Chapman KC's submissions were really directed at whether there is some "*other compelling reason [for] a trial*" as per CPR 24.2(b). He wants to take the issue further in case evidence emerges that would enable the Claimants to plead *de facto* directorship, or so that he is able to challenge Miles J's judgment either at trial or on appeal.

79. As to the further evidence, it seems to me that if such does emerge following disclosure, then the striking out of the allegation now would not preclude an application to amend to plead that the Maxpower directors are *de facto* directors of SC plc. Mr Chapman KC's arguments about the precise scope of *de facto* directorship in the context of both SC plc's particular corporate structure and also in relation to the s.90A FSMA issuer liability regime will be open to him at the trial in the event that he is able to plead that they were *de facto* directors.

80. In relation to challenging Miles J's conclusion that PDMRs are limited to directors, I do not think that this would be a proper basis for allowing the issue to go to trial, even if there is not much impact on the trial itself. Mr Chapman KC could have addressed me on the correctness of *G4S* at this hearing and invited me not to follow it. If he had done so and was displeased with my decision, the Claimants could have tried to appeal it. But he chose not to attack *G4S* at this stage and basically wanted to keep the issue alive to trial so that he could try to persuade the trial judge not to follow *G4S* and then to appeal.

81. It must not be forgotten that this is a dishonesty case, and the Claimants wish to keep in the four non-executive directors of Maxpower as PDMRs even though the case against them is unsustainable in law. Those directors will have to deal with the allegations of dishonesty made against them and probably appear at trial to answer them, despite the Claimants having no real prospect of succeeding in this respect.

82. I have come to the clear conclusion that I should strike out this allegation that the four named non-executive directors of Maxpower were PDMRs of SC plc. If the Claimants wish to proceed with this aspect of their claim, they must plead a sustainable allegation that they were in some way directors of SC plc at the material time.

Individual Reliance Claims

83. As noted above, SC plc has made a request for further information which includes further information in relation to the individual reliance claims and there has been correspondence between the parties in relation to this. To date, no further information has been provided and that is the reason why SC plc seeks an order under CPR Part 18. However, prior to that being considered, SC plc applies to strike out the individual reliance claims on the grounds that, as Mr Beltrami KC submitted orally, the pleading is, in the circumstances, an abuse of process. This is because the individual reliance claims pleaded in very general fashion in [86] of the Amended Particulars of Claim have no factual basis as the Claimants had not apparently been asked, prior to the Amended Particulars of Claim being served, as to whether each of them had in fact relied on any one or more of the pieces of published information, representations and/or omissions.

84. I agree with Mr Beltrami KC that it is somewhat remarkable that some 3 years after the first claim form was issued there are still no further particulars of both the Claimants' standing to sue and their individual reliance claims. The Claimants' evidence explains the mammoth task facing them with so many Claimants and funds involved together with the overall numbers of published information and representations relied upon. Nevertheless, I would have expected more progress to have been made by this stage in a number of aspects of the claims.

85. I bear very much in mind submissions made to me by Mr Chapman KC as to what is becoming the normal way of managing these sorts of cases, involving multiple claimants where there are common and non-common issues. We discussed at the hearing a split trial and where that split would fall (although this issue was ultimately agreed to be postponed to the second CMC when a more informed decision could be taken). There seems little doubt that there will be a split trial and, if it follows the scheme directed in *Various Claimants v RSA* (unpublished decision of Miles J, 28 February 2022), *Various Claimants v G4S Ltd* [2022] EWHC 1742 (Ch), and *Various Claimants v Serco Group plc* [2022] EWHC 2052 (Ch), both decisions of Falk J, as she then was, the non-common issues of reliance and quantum will be left to a second trial, which will only be held if the Claimants succeed on the common issues in relation to SC plc.

86. Furthermore, it is generally accepted that reliance issues should be tried by reference to a sample of Claimants that would be selected so that they can represent all of the other Claimants. In the *G4S* case, Falk J directed that the sampling process should begin before the first trial together with disclosure and witness statements on that issue. Mr Chapman KC submitted that this case is on a quite different scale to *G4S* and those directions might not be appropriate in this case. But that will be decided at the next CMC. At this stage, it is recognised that the Claimants must give more information about their individual reliance claims, but the context is that this is so that the sampling process can begin.

87. Returning to Mr Beltrami KC's point about whether this has been properly pleaded in the first place, I should set out [86] of the Amended Particulars of Claim. It states as follows:

> "86. In the alternative, the Claimants' claim that they relied on SC plc's Published Information encompasses:-
>
> 86.1 Claimants reading the Published Information;
>
> 86.2 Claimants relying on information communicated indirectly, by means of other sources of information that acted as a conduit for Published Information, including one or more of the following:
>
> [86.2.1…86.2.7]
>
> 86.3 Claimants relying on SC plc's Published Information through the agency of a third party such as a fund manager or investment advisor;
>
> 86.4 Claimants relying on SC plc's Published Information in the operation of their governance and stewardship functions."

88. There is no doubt that this is a very generalised plea. The Claimants have long since recognised that further particulars are required but they see this as just a question of timing as to when such particulars should be provided. They also question the extent of the information that should be provided at this stage, given that it should only be such that is required to perform an effective sampling process.

89. Mr Beltrami KC submitted that this is an inherently objectionable form of pleading. He said that either it is not really a pleading of facts at all, just a theory as to how each Claimant might have relied on the published information; or it is purporting to be a pleading of facts but it was not confirmed to be true by each Claimant before the proceedings were begun and could not have been verified by a statement of truth. He submitted that the case was pleaded on a "*hope and prayer*" and should never have been made.

90. Mr Chapman KC submitted that [86] of the Amended Particulars of Claim was a perfectly proper plea of reliance. The Claimants had made clear at [4] of the Amended Particulars of Claim that they were "*generic Particulars of Claim*" and, even though they initially resisted providing further information on the claims, they agreed to do so in or around August 2022, having seen the decisions of Miles J in *RSA* and Falk J in *G4S*.

91. In the Claimants' solicitors' letter of 5 April 2023, they said as follows:

> "As to paragraph 10 of your letter, and without waiver of any privilege, our firm had proper authority from the claimants to plead the matters contained in paragraph 86 of the Amended Particulars of Claim."

This was before the application to strike out was issued and it was a clear statement that the Claimants had given their solicitors authority to plead the claim and to sign the statement of truth. The point was repeated in Mr Shrimpton's witness statement.

92. In my view, this is a complete answer to the application to strike out the individual reliance claims. Mr Beltrami KC said that the fact that there was authority given to sign the statement of truth does not get over the fact that the Claimants' solicitors have admitted that there was not an information gathering exercise in relation to reliance

prior to the claim form being issued. However, neither he nor I know exactly the steps that were taken behind the veil of privilege to obtain the Claimants' authority (nor should we) except that Mr Shrimpton was so authorised to sign the statement of truth which included the facts contained in [86] of the Amended Particulars of Claim. Actually four Claimants were unable to give authority and they are excluded from the statement of truth (in accordance with a practice endorsed by the Court of Appeal) which rather demonstrates the fact that all the other Claimants did specifically authorise the signing of the statement of truth. As SC plc's solicitor, Mr Rupert Lewis, a partner in Herbert Smith Freehills LLP, accurately said in his witness statement dated 7 July 2023: "*Each Claimant separately has therefore authorised a statement of truth to be signed on its behalf to the effect that it individually relied upon SC's published information, either directly or indirectly*."

93. I therefore do think that it is a question of timing of the provision of further information and I will deal with that when considering the CPR Part 18 application. But the application to strike out the individual reliance claims is dismissed.

The Part 18 Application

94. SC plc's CPR Part 18 application was issued on 30 June 2023, before the strike out/summary judgment application on 7 July 2023. It covers four broad areas as follows:

    (1) Standing;

    (2) Reliance;

    (3) Loss; and

    (4) Knowledge of senior management.

95. The Claimants have agreed to provide further information in relation to standing, reliance and loss and the live issues concern the timing and extent of that further information. In relation to the knowledge of senior management the Claimants maintain that adequate particulars have been provided and SC plc is not entitled to anything more.

96. It is common ground that an order under CPR Part 18 will be confined to what is necessary and proportionate for the party to provide at that stage of the proceedings. The Commercial Court Guide at D14.1(c) states that: "*The Court will only order further information to be provided if satisfied that the information is strictly necessary to understand another party's case.*" Mr Chapman KC submitted that the context and likely progress of these proceedings, including in particular the probable case management directions in relation to sampling of claims and split trials, must be taken into account in deciding whether it is necessary and proportionate to order the further information now.

97. There is a draft order in relation to this application in which much is agreed and the areas of disagreement highlighted. I will deal with the outstanding issues as shortly as possible below.

(1) Standing

98. The Claimants have to have standing to bring their claims. Each one must exist and have legal personality (it is possible that some of the Claimants do not). Further each one must have purchased, continued to hold or sold shares in SC plc in reliance on the published information. SC plc has been asking for some time for further information in relation to these two aspects of standing. And the Claimants have agreed to provide particulars of standing and are proposing to do so by 15 December 2023. SC plc says that this is long overdue and that it should be provided by 30 October 2023.

99. Mr Shrimpton's witness statement explained why it has taken so long. He said that since April 2021 his firm has been heavily engaged in collating not just the particulars of standing but also documentary evidence supporting that for each Claimant. But because the information involved is very substantial and complex having regard to the number of Claimants and funds/accounts and the complexity of the ownership structures involved this has taken far longer than they had originally anticipated. They have kept SC plc informed as to their progress on this issue and Mr Shrimpton maintained that it was unnecessary for the application to have been issued.

100. The Claimants have agreed to provide the following:

> "1. Particulars of Standing, certified by a statement of truth, which state all material facts and matters which each Claimant relies to establish that it has standing to bring claims against the Defendant under s.90 and/or s.90A of [FSMA].
>
> 2. Trading data in relation to any purchase, sale or holding of the Defendant's securities (or interests therein) that are subject of each Claimant's claims in these proceedings."

101. SC plc accepts this wording but wishes to add that the particulars in paragraph 1 should include the information that had been sought in a number of the requests in its original request for further information. Mr Chapman KC resisted this on the basis that SC plc would be getting much more than it would otherwise be entitled to by way of further information because underlying documentation supporting the particulars will also be provided. He said that this is what they have been collating and it is unnecessary to specify or seek to tie it in to the original specific requests. I agree that SC plc's extra wording is unnecessary in the circumstances. If it remains unhappy with the adequacy of the particulars of standing, it can pursue that, possibly at the next CMC. For now, I think that what the Claimants are offering is sufficient and that is what I shall order.

102. The only outstanding matter is timing. I think it is more sensible to have a realistic timetable for the provision of this information that will hopefully ensure that it is as helpful and comprehensive as it can be. I do not think that SC plc are really prejudiced by having to wait until 15 December 2023 for this information and that is what I propose to direct.

(2) Reliance

103. I have dealt with the individual reliance claims above in relation to the application to strike out. Again there is no dispute that the Claimants should provide further

information as to reliance. The Claimants have offered to provide the further information in the form of the responses to an amended questionnaire that has been sent to all Claimants. (The questionnaire has been referred to as "annex 1" because it has been annexed to the draft order; and in fact it was derived from the annex to the Order made by Falk J in *G4S*.) SC plc wants responses to the unamended annex and also to its specific original requests. There is also an issue of timing.

104. Mr Beltrami KC referred to Hildyard J's decision in *Various Claimants v Tesco plc* [2019] EWHC 2858 (Ch) for the proposition that the same rules of particularisation apply to claims brought by multiple claimants and that each claimant has to plead its case. In relation to reliance, Hildyard J said that: "*the court should be properly astute to ensure that sufficient particularity is supplied. That is both in order to ensure that the defendant knows precisely what is alleged, or sufficiently precisely what is alleged, and also to focus the mind of each of the individual claimants, who have brought very serious allegations, as to precisely the basis on which individually they have proceeded.*"

105. A brief chronology as to how this issue has developed is as follows:

(1) On 2 February 2022, SC plc served its first request which included requests for further information regarding the individual reliance claims.

(2) On 1 April 2022, the Claimants stated in their response that it was not necessary to provide further particulars of the individual reliance claims for each Claimant at that stage, but acknowledged that further particulars (and/or evidence) would be required in due course.

(3) On 28 April 2022, the Claimants' solicitors wrote to SC plc's solicitors proposing (among other things) that reliance issues be left until after an initial trial on standing and common issues relating to SC plc's conduct, statements and knowledge. This followed Miles J's case management approach in the *RSA* litigation, mentioned above.

(4) SC plc took issue with that proposal in correspondence and, following the further case management decisions of Falk J in *G4S* and *Serco* (also referred to above), in a letter from their solicitors dated 2 August 2022, the Claimants agreed to consider the logistics of collecting individual reliance information at this stage.

(5) The annex 1, derived from the *G4S* annex, first emerged in SC plc's solicitors' letter dated 28 September 2022 and formed the basis for the further reliance information that SC plc was seeking. Annex 1 was presented as a list of 9 questions but in fact contained some 28 sub-questions. It also envisaged that all Claimants who relied on specific statements would identify the specific statements on which they relied, when and by which individual.

(6) On 30 November 2022, the Claimants' solicitors wrote to SC plc's solicitors identifying the logistical challenges which would be involved in providing the reliance information sought in circumstances where Annex A and B to the Amended Particulars of Claim identified 293 untrue or misleading statements

and these proceedings involved (at that stage) 220 Claimants making claims in respect of more than 1,000 funds.

(7) Nonetheless, and following further correspondence from SC plc's solicitors, the Claimants' solicitors began investigating whether it might be possible to use technology solutions to provide at least some of the reliance information sought by SC plc in a reasonable and proportionate manner. Mr Shrimpton's witness statements explained that this initially involved his firm creating a software-based questionnaire, before subsequently engaging a third-party software company called Finlegal to design an interactive questionnaire and process for providing the questionnaire to the relevant individuals within the Claimant entities and/or their representatives. In a letter dated 5 April 2023, the Claimants' solicitors informed SC plc's solicitors that it would be using an interactive questionnaire and identified the information which would be provided.

(8) However, SC plc continued to press for further reliance information to be provided immediately, and ultimately issued the Part 18 application and then the strike out/summary judgment application in July 2023.

106. The current position is, as I understand it, that the Claimants' solicitors have sent out the questionnaires in September 2023 and that this is basically the questions in their amended annex 1. The Claimants have deleted most of the sub-questions in annex 1 on the basis that the only necessary and proportionate information that should be provided to SC plc at this stage are answers to the main questions as to whether each individual Claimant relied on statements in the published information in acquiring, holding or disposing of shares in SC plc. The Claimants say that it would be disproportionate to ask the detailed sub-questions as to specifically what statements were read, when and by which individual. They suggested that asking all those questions would alone cost £500,000.

107. Mr Chapman KC submitted that the information received in response to the questionnaire is all that is necessary to be able to start the sampling process that will inevitably take place, probably before the first trial. It would enable the Claimants to be sorted into cohorts or sub-cohorts, from which it should be possible to select the representative Claimant for that cohort or sub-cohort. The further granular information that is covered by the sub-questions would then only need to be directed at those Claimants who have been selected in the sampling process. He submitted that this is a far more manageable, practical and proportionate way to proceed.

108. It does seem to me that that approach makes sense. Mr Beltrami KC's insistence on pursuing the provision of not only the unamended annex 1 information but also the Claimants' responses to the original requests, is unnecessary and disproportionate at this stage of the proceedings. I understand that SC plc is frustrated that after 3 years very little information has been forthcoming from the Claimants but it must also recognise the scale of the task and the likely case management of these proceedings. The original request was effectively superseded by the request to provide the information in response to the annex 1 questionnaire. It would therefore not be justified in returning to the original requests in the order that I make.

109. The questionnaire has gone out, with a deadline for responses in early November 2023 but Mr Shrimpton has anticipated that there will be some Claimants that will not be able to respond until the end of the year. On timing the Claimants have therefore suggested 31 January 2024, whereas SC plc wants 1 December 2023. There is no point having an unrealistic timetable for the provision of this important information and I will therefore direct that the responses to the amended annex 1 questionnaire be provided by 31 January 2024. Again, as with standing, if SC plc considers the information provided to be inadequate, it can seek to persuade me at the next CMC that more should be provided in accordance with the case management directions that will then be made.

(3) Loss

110. In relation to quantum, there is only an issue as to timing. The Claimants have always said that they would be providing particulars of quantum. Mr Shrimpton has again described the difficulties of gathering such information from so many Claimants and the investment that has been made in the significant resources that are required to complete this task. He has sought to keep SC plc updated as to how the Claimants were progressing on this front.

111. The difference between the parties is as to one month: the Claimants ask for 29 February 2024; SC plc wants 31 January 2024. Given that quantum issues will definitely only be tried in a second trial, there is clearly less urgency for this information. Having said that, the information does need to be provided as it may affect the parties' decision-making, particularly in relation to settlement. As I have already directed the reliance information to be provided by 31 January 2024, it would make sense to have a staged process with not everything being required at the same time. Accordingly I will direct the Claimants to provide their particulars of quantum by 29 February 2024.

(4) Bank Knowledge Representations

112. As referred to above, the Claimants plead the so-called Bank Knowledge Representations which are essentially that there were representations in the published information that the Bank did not know of any material failures in its programmes or systems or of the risk of further action in relation to sanctions or anti-money laundering breaches. Those representations are alleged to be untrue or misleading because the Bank's "*senior management*", whose knowledge should be attributed to the Bank, knew of the Relevant Misconduct and the Bribery Scheme and therefore of the material failures and risk of further action by the authorities. The plea clearly overlaps with PDMR knowledge and is actually somewhat circuitous because if the Claimants establish PDMR knowledge of the falsity of a representation, they do not need to prove the extra layer of PDMR knowledge of the falsity of the Bank Knowledge Representations. Furthermore, if they do not prove PDMR knowledge of failures, it is difficult to see how they will prove PDMR knowledge that the Bank's senior management knew of those failures.

113. Nevertheless, the Claimants do wish to proceed with this allegation but they say that they are unable to provide any further information at this stage, in particular as to the identity of the individuals comprising the Bank's senior management. When SC plc sought further information in relation to this, the Claimants refused to answer on the basis that it was not "s*trictly necessary*" to understand the Claimants' case. They now say that, before disclosure, they simply cannot further particularise their case.

114. Mr Chapman KC relied quite heavily on the Court of Appeal decision in *Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699. At [32] of his judgment, Arnold LJ endorsed what Peter Gibson LJ had said in *Rigby v Decorating Den Systems Ltd* (unreported decision of two-judge Court of Appeal, dated 15 March 1999) and said:

> "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".

115. The Claimants have pleaded the knowledge of the Bank, through the attribution of the knowledge of its senior management. On the basis of the *Sofer* decision, that is an adequate plea at the outset. Mr Chapman KC submitted that the Claimants are still effectively in the same position, two years on from the Particulars of Claim, and can provide no further particulars as to the individuals included in the term "*senior management*" and why their knowledge should be attributed to the Bank. SC plc has said that this could comprise over 250 individuals. In relation to PDMRs' knowledge, the Claimants have been able to provide further particulars, but Mr Chapman KC said that this was because they had received further information from SC plc as to the job titles and specific roles of potential PDMRs in SC plc that the Claimants had identified. The Claimants have not, however, sought further information from SC plc as to who might be classed as senior management in the Bank.

116. It is an unsatisfactory position to be in. Mr Chapman KC says that this is adequately pleaded to enable the parties to deal with disclosure on this issue. He showed me how the parties have been attempting to agree the relevant custodians, date ranges and search terms for this disclosure issue. There will shortly be a hearing on disclosure issues where if the parties are not agreed, the court will have to determine how these allegations are dealt with. But for now, if it is simply impossible, pending that disclosure, for the Claimants to provide further information, it would not be right for me to order them to do so. Unfortunately, I will therefore not be making any order in this respect at this stage.

117. I should not leave this subject without expressing my concern and disappointment that the proceedings have generally moved at an extremely slow pace in the 3 years since the first claim form was issued. As I have noted above, I understand the vast scale of the undertaking on both sides but it should be particularly incumbent on the Claimants to have got their house in order and to have at least provided some further information on such fundamental issues as the Claimants' standing to sue and their individual reliance claims. There are extremely experienced solicitors and counsel acting for the Claimants and the fact that there are so many Claimants and funds, and so many separate items of published information relied upon, should not detract from the need for the Claimants properly to plead their individual cases so as to ensure that SC plc knows the case it has to meet and that there can be sensible case management of the proceedings leading to a fair trial.

118. It may seem as though I have generally sided with the Claimants in my rulings as to the timing of the provision of information but this has been driven by the reality of the position that the parties are in at this present moment and to ensure that things can proceed as smoothly as possible from hereon in. Having given them the extra time that they have asked for, I would also encourage the Claimants to proceed with more urgency generally so that the parties will definitely be ready for a trial of whatever matters are directed in 2026. I recognise that much of the burden before that trial will be on SC plc in terms particularly of disclosure and witness statements, which is why it is so important to have the pleadings and further information sorted as soon as feasibly possible.

Conclusion

119. So by way of short summary of my conclusions to the points I have considered in this judgment:

(1) I dismiss SC plc's strike out/summary judgment application in relation to the Brutus Allegations and the individual reliance claims;

(2) I dismiss SC plc's strike out/summary judgment application in relation to the s.90A FSMA claim in respect of the Bribery Scheme and Maxpower, save that I will strike out the allegation, contained in [75.3] of the Amended Particulars of Claim, that the four non-executive directors of Maxpower were PDMRs in SC plc;

(3) I order that further information in the form discussed above be provided by the Claimants in relation to standing, reliance and loss, by the dates set out above;

(4) I refuse to order the Claimants to provide further information on the Bank Knowledge Representations.

120. I hope that, in the light of the above, an order can be agreed between the parties. If there are any consequential matters that cannot be agreed, either I can deal with them on paper, or they could perhaps be dealt with on the next occasion this case is before me.