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Case No: FL-2019-000007
Case No: FL-2020-000035
Case No: FL-2021-000022

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: 10/05/2022

Before :

MR JUSTICE MILES

- -

Between :

Allianz Global Investors GmbH and others	**Claimant**
- and -	
G4S Limited (formerly known as GS4 PLC)	**Defendant**

- -
- -

Andrew Onslow QC, Shail Patel and Calum Mulderrig (instructed by Morgan Lewis & Bockius UK LLP) for the Claimants

Laurence Rabinowitz QC, Simon Colton QC and Emma Jones (instructed by Herbert Smith Freehills LLP) for the Defendant

Hearing dates: 30-31 March 2022

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Approved Judgment

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 10 May 2022 at 10:30am.

Mr Justice Miles :

Introduction

1. The defendant has applied to strike out all or parts of the claims and/or for summary judgment in three related actions.

2. The application raises questions about the meaning of the expression "person discharging managerial responsibility" (PDMR) in section 90A and Schedule 10A of the Financial Services and Markets Act 2000 (FSMA).

3. Section 90A and Schedule 10A of FSMA contain a regime for the civil liability of issuers of publicly traded securities for publication of false or misleading or incomplete information and for dishonest delay in publication of information to the capital markets.

4. Liability only arises where a PDMR within the issuer knew or was reckless about the offending statement or dishonestly concealed material facts or a PDMR acted dishonestly in delaying the publication.

5. The defendant was the issuer of relevant securities. The claimants, which were all institutional investors in the securities, have alleged breaches of section 90A by the defendant.

6. The defendant seeks to strike out the claimants' allegations that certain named individuals were PDMRs of the defendant.

7. The defendant contends that on a proper reading of the statute only directors of an issuer can be PDMRs (including de facto and, arguably, shadow directors) and that the claimants do not allege any facts that would enable the court to conclude that any of the contested PDMRs were its directors. The defendant argues that parts of the case should therefore be struck out or dismissed summarily.

8. The claimants contend that the term PDMR is not restricted to directors in the usual English company law sense. They say that, properly construed in its European and English law statutory context, the expression PDMR includes senior executives responsible for managerial decisions affecting the future developments and business prospects of the issuer and/or those business units.

9. They also contend that the issue of construction is not suited to summary determination as it is novel, complex, of wide significance and cannot properly or safely be decided in a factual vacuum.

10. The claimants argue that even assuming the defendant's construction of the statute is right, the claimants have properly pleaded at least a factually realistic case that the contested PDMRs were de facto directors of the defendant and that the case has real prospects of succeeding at trial.

11. The claimants also argue that there are compelling reasons for the court to hold a trial of the issues which the defendant applies to have removed from the case. The claimants have alleged in the second and third actions that one of the defendant's de jure directors had the required state of mind for liability under section 90A. There will

have to be disclosure of documents from and a factual examination of the involvement and knowledge of the defendant's senior management, including the contested PDMRs.

12. As there are actual or potential criminal proceedings concerning some of the events and persons referred to below and the court has imposed reporting restrictions, I shall use the labels P1 to P4 for the four contested PDMRs and P5 for the de jure director identified in the second and third claims.

The Claims

13. There are three sets of proceedings (Cases 1, 2 and 3).

14. The claimants are all institutional shareholders. The defendant was a listed company carrying out security and related outsourcing services.

15. The UK government was and is a major customer of the defendant. Among other things, the defendant provided services to the Ministry of Justice for the electronic monitoring (or tagging) of prisoners pursuant to various contracts (the EM Contracts).

16. The defendant's group was organised as a publicly listed holding company (the defendant) with a board with two or three executive directors (and a majority of non-executives) and the majority of operational functions of the group being run by and through subsidiaries.

17. The EM Contracts were entered by an indirect, wholly-owned subsidiary, G4S Care & Justice Services (UK) Ltd (G4SCJS).

18. In all three actions the claimants contend that information published by the defendant to the market (the Published Information) contained untrue and misleading statements, or omitted required information, and that the claimants are entitled to compensation as a consequence. Claims are also brought for compensation for dishonest delay in publishing information.

19. Case 1 arose as follows. In 2013 the government announced that G4SCJS had been charging under the EM Contracts for prisoners who were never tagged or had died. Further announcements were made and reported in 2013. The particulars of claim in Case 1 calls this conduct the wrongful billing. The alleged wrongdoing was the subject of a settlement in March 2014, by which the defendant agreed to pay the government c. £108.9m plus tax.

20. The claimants contend in Case 1 that the wrongful billing rendered false a number of statements made in the defendant's Published Information. The claimants' case is that PDMRs within the defendant knew statements in the Published Information (as they related to the wrongful billing) to be untrue or misleading, or were reckless as to whether they were untrue or misleading; knew the omissions in Published Information (relating to the wrongful billing) were a dishonest concealment of material facts; and acted dishonestly in delaying the publication of information relating to the wrongful billing. The claimants allege that the relevant PDMRs of the defendant were P1 to P4.

21. Cases 2 and 3 arose as follows. On 13 July 2020 a Deferred Prosecution Agreement (DPA) was announced between G4SCJS and the Serious Fraud Office. The claimants contend in Cases 2 and 3 that the DPA revealed that since 2005 G4SCJS had provided fraudulent financial models to the government for the purposes of the calculation of the costs of providing the EM Contract services. They contend that the intent and effect of that conduct was to overstate the cost of provision of those services by some £70m. The EM Contracts included a mechanism by which the government would share in any unanticipated costs efficiencies. G4SCJS purported to report to the government under this mechanism, but deliberately hid costs efficiencies. As a consequence, the government was overcharged by over £22m. By the DPA, G4SCJS agreed to pay a financial penalty of £38.5m. The claimants call this the financial model fraud. Three employees of G4SCJS (including P3) have subsequently been charged by the SFO with seven offences of fraud.

22. In Cases 2 and 3, the claimants allege that the underlying fraudulent conduct rendered statements made by the defendant in its Published Information untrue; that the failure to disclose it was an actionable omission and constituted actionable dishonest delay; and that PDMRs within the defendant had the requisite knowledge. In Cases 2 and 3 the claimants allege that the relevant PDMRs of the defendant were P1 to P5.

23. As already stated, P5 was a de jure director of the defendant. P1 to P4 were de jure directors of G4SCJS, the trading subsidiary in which the alleged financial model fraud and wrongful billing took place. P1 to P5 were also directors of other subsidiaries of the defendant. I shall return below in more detail to the evidence about their roles within the defendant's group's business.

Procedural history

24. The claim form in Case 1 was issued on 10 July 2019. Amendments were then made to the claim form, to add the claims of certain claimants. Following several agreed extensions of time and service of draft particulars of claim on 15 November 2019, the claim form was served on 30 April 2020.

25. On 18 May 2020 the defendant acknowledged service. The Case 1 particulars of claim were served on 15 June 2020, and the defence was served on 13 July 2020.

26. On the same day the defendant served an application to strike out some of the claims on various bases relating to the addition of claimants to the Case 1 claim form before service. The claimants also applied to amend their names to correct a number of errors in the claim forms.

27. Those applications were heard by Mann J over four days in November 2020. Judgment was handed down on 10 March 2021. Various claimants in the Case 1 claim form had their claims struck out. A number of claimants remained.

28. The existing claimants along with further claimants issued Case 2 on 20 October 2020.

29. Case 3 was issued on 17 December 2021.

30. Pleadings closed and the parties were given a CMC listing for two days in the week commencing 28 March 2022.

31. The defendant then issued the present application, and it was agreed that the CMC would be heard in June 2022.

32. The claimants have proposed some further amendments to their pleadings. On 22 March 2022 the defendant agreed some of the claimants' proposed amendments, subject to the outcome of this application.

The principal issues raised by the application

33. The application is brought under CPR 3.4(2)(a) and CPR 24.2(a)(i) and (b). The defendant applies to strike out, or for summary judgment in respect of, the claimants' allegations that P1 to P4 were PDMRs of the defendant within the meaning of section 90A.

34. The application raises two main issues.

35. There is, first, an issue of statutory construction: is the term PDMR within section 90A restricted to the defendant's de jure, de facto or (arguably) shadow directors; or does it also include persons (not being de jure, de facto or shadow directors) who are senior executives responsible for managerial decisions affecting the future developments and business prospects of the issuer and/or those business units?

36. Secondly, on the narrower construction of the statute, do the claimants have a real prospect of establishing at trial that P1-P4 were directors of the defendant?

37. Depending on the answer to these issues there may also be a third issue: is there any other good reason for allowing the allegations concerning P1-P4 to go to trial?

Strikeout / summary judgment principles

38. There was no dispute about the legal tests.

39. CPR 3.4 states that the Court may strike out the whole or part of a statement of case if it appears to the Court that the statement discloses no reasonable grounds for bringing or defending a claim. Practice Direction 3A provides examples of cases where the Court may conclude that there are no reasonable grounds for bringing a claim. These include claims which are incoherent and make no sense, and claims which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim.

40. Before making an order under CPR 3.4 the court must be certain that the claim is bound to fail: see Richards v Hughes [2004] EWCA Civ 266 at [22].

41. CPR 24.2 states that the Court may give summary judgment against a claimant on the whole of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or the issue, and there is no other compelling reason why the case or issue should be disposed of at trial.

42. There is well-known guidance about CPR 24 in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]. The court should not conduct a mini-trial. It is relevant to consider the impact of the potential disclosure and witness evidence on the determination of the issue. The test requires the defendant to show that the claimants' case carries no conviction and is fanciful, as opposed to realistic. If there is a short point of law or construction which can properly be determined the court should grasp the nettle for the simple reason that allowing a flawed case to continue is a disservice to the parties and other litigants.

43. Summary determination is not generally appropriate in a developing or uncertain area of law: see e.g. Begum v Maran [2021] EWCA Civ. 326 at [23].

44. There are cases where a claimant will, before disclosure, have limited access to key information and this asymmetry may affect the court's approach at an interim stage. This approach has been taken in cartel cases (Bord Na Mona Horticulture Ltd v British Polythene Industries plc [2012] EWHC 3346 (Comm)) and in other contexts such as group tort claims against corporate defendants (e.g. Josiya v British American Tobacco plc [2021] EWHC 1743 (QB) at [44], [47] and [58]) and phone hacking cases (e.g. Gulati v MGN Ltd [2013] EWHC 3392 (Ch)). Where the impugned conduct is clandestine or concealed the court recognises that the claimant may need to rely on disclosure of documents to make good its case.

Principles of statutory interpretation

45. There was no dispute here either.

46. As explained in greater detail below, section 90A was enacted in response to the Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers came into force. This is sometimes called the Transparency Obligations Directive (or "TOD").

47. Where the Court is concerned with a domestic statute that seeks to implement an EU directive or falls within the scope of a directive (whether or not it implements the directive, and whether adopted before or after the directive) the Court must interpret national law "as far as possible" in light of the wording and purpose of the directive, to achieve the result pursued by the directive: Swift v Robertson [2014] UKSC 50 at [20]-[22] and [30].

48. The Supreme Court in Swift approved the following principles. (i) The obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. (ii) The Court is not constrained by conventional rules of construction. No ambiguity in the legislative language is required. It is not an exercise in semantics or linguistics. (iii) The court may depart from the strict and literal application of the words which the legislature has elected to use. (iv) The process permits the implication of words necessary to comply with Community law obligations; and the precise form of the words to be implied does not matter. (v) The only constraints on this interpretive obligation are that the meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed". (vi) The recitals of the directive in question are material to understanding the purpose of the directive.

49. The principles applicable to the construction of domestic UK legislation were also agreed. (i) The Court must apply the objectively ascertained intention of Parliament as ascertained from the natural and ordinary meaning of the words. (ii) Where the ordinary meaning is not clear, the Court may construe the language to avoid absurdity or inconsistency. (iii) When construing legislation, the Court’s task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. (iv) The Court should examine the context of the statute and state of affairs which it addressed in ascertaining the purpose of the statute. (v) The Court should seek to identify the mischief that the statute was intended to remedy, and having done so, interpret the statute so as to suppress the mischief and advance the remedy. (vi) Where the same expression is used in two similar contexts, a statutory definition in one context may be persuasive in the other.

The relevant legislation

50. Section 90A of FSMA states that the relevant operative provisions are found in Schedule 10A.

51. Schedule 10A is headed “Liability of issuers in connection with published information”.

52. Paragraph 1 of Schedule 10A describes the securities to which the schedule applies. The definition covers the shares issued by the defendant in the present case.

53. Paragraph 2 describes the published information to which the schedule applies. Essentially it covers all information published by the issuer by “recognised means” or other means where the availability of the information has been announced by the issuer by recognised means.

54. Paragraphs 3 to 5 set out the requirements for the liability of the issuer for misleading statements or dishonest omissions in published information or for a dishonest delay in publishing information.

55. In each case liability depends on showing a particular state of mind of a person “discharging managerial responsibilities within the issuer”. For misleading statements the issuer is liable only if a person discharging managerial responsibilities within the issuer knew the statement to be untrue or misleading or was reckless. For dishonest omissions the issuer is liable only if a person discharging managerial responsibilities within the issuer knew the omission to be a dishonest concealment of a material fact. For dishonest delay the issuer is liable only if a person discharging managerial responsibilities within the issuer acted dishonestly in delaying the publication of the information.

56. Paragraph 6 sets out the meaning of dishonesty.

57. Paragraph 7 excludes certain liabilities. Sub-paragraph (2) provides that a person other than the issuer is not subject to any liability, other than to the issuer, in respect of the losses covered by the Schedule. This is subject to various exclusions in sub-paragraph (3). Subject to those exclusions, the effect of sub-paragraph (2) is that Schedule 10A imposes liabilities on issuers of securities for misleading statements etc., but shields the directors, officers or employees of issuers from liability.

58. Paragraph 8 is an interpretation section. Sub-paragraph (5) provides:

> "(5) 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."

59. It was common ground: (i) that the definition of PDMR in paragraph 8(5) is exhaustive; and (ii) that the relevant part of the definition in these proceedings is that set out in paragraph 8(5)(a) (as the defendant had directors and its affairs were not managed by its members).

60. Section 417 of FSMA provides (so far as material):

> ""director" in relation to a body corporate includes –
>
> a person occupying in relation to it the position of a director (by whatever name called); and
>
> a person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of that body are accustomed to act …"

Legislative context and history

61. Section 90A (in an earlier form) was first enacted in November 2006 by section 1270 of the Companies Act 2006.

62. Before this enactment liability at common law against issuers in respect of statements made in periodic reports or financial statements was limited in negligence by the principle in Caparo Industries plc v Dickman [1990] 2 AC 605, which excluded liability to investors in an issuer's securities except where the defendant had assumed responsibility to a person or a class of persons for the accuracy or completeness of the information.

63. Fraud liability was limited by the requirement that the defendant must have intended the recipient of the statement to rely on it.

64. At the beginning of 2005, the TOD came into force. It remains in force, although its provisions have been amended from time to time.

65. Broadly summarised, the TOD provided for financial disclosures required to be made by issuers whose securities are admitted to trading on a regulated market, namely, annual and half-yearly financial reports and interim management statements.

66. The purpose of the TOD was to promote investor protection and investor confidence alongside market efficiency by requiring issuers of securities to publish information: see especially Recitals 1, 2, 5, 7, 11, 36 and 41.

67. Article 7 of the TOD set out the minimum requirements for a civil liability regime that must be adopted by member states.

68. Recital 17 stated that "Member States should remain free to determine the extent of the liability".

69. The Explanatory Notes to the Companies Act 2006 stated in paragraph 1640 that Member States were given considerable flexibility in the liability regime they chose to adopt in respect of the disclosures covered by the TOD.

70. The Explanatory Notes also stated that the UK Government had transposed the TOD into domestic law, in part, by making a series of amendments to Part 6 of FSMA. These amendments were made in Part 43 of the Companies Act 2006.

71. The liability of issuers for the accuracy of the disclosures required by the TOD was provided for primarily by criminal offences and administrative penalties in Part 15 of the Companies Act 2006 and Part 6 of FSMA (see paragraph 1642 of the Explanatory Notes).

72. The UK Government also introduced a regime for civil liability on the part of issuers in the form of section 90A of FSMA. Para 1643 of the Explanatory Notes said,

> "The Government's intention in developing a civil liability regime has been to provide certainty in an uncertain area and to ensure that the potential scope of liability is reasonable, in relation both to expectations and the likely state of the law after implementation of the Transparency Directive. In particular, the Government was anxious not to extend unnecessarily the scope of any duties that might be owed to investors or wider classes of third parties, in order to protect the interests of company members, employees and creditors. However as the state of the law after the implementation of the Transparency Directive is not certain, the Government has taken a power, at new section 90B, that will enable the provision introduced by section 1270 to be added to or amended if a wider or narrower civil liability regime is deemed appropriate."

73. As originally enacted, section 90A applied to certain specified reports and statements published by issuers of securities (and not to ad hoc disclosures).

74. An issuer to which the original section 90A applied was liable to pay compensation to a person who had acquired securities issued by it and suffered loss in respect of them as a result of: (i) any untrue or misleading statement in a publication to which the section applied, or (ii) the omission from any such publication of any matter required to be included in it. The person suffering the loss had to demonstrate that they

acquired the relevant securities in reliance on the information in the publication, and at a time when, and in circumstances in which, it was reasonable for them to rely on that information. Further, the issuer was only liable if a PDMR within the issuer in relation to the publication knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading, or knew the omission to be a dishonest concealment of a material fact.

75. Section 90A did not change the common law position in relation to negligence. It adapted the common law of deceit by applying it only to issuers (and not the directors) but by removing the requirement that the issuer intended purchasers of its securities to rely on the information in question.

76. After the enactment of the original section 90A, the UK Government commissioned Professor Paul Davies QC to carry out an independent review of liability in respect of damage or loss suffered as a result of inaccurate, false or misleading information disclosed by issuers or their management to the market, or as a result of a failure to disclose relevant information (the Davies Review).

77. The main issues addressed in the Davies Review, on which Professor Davies sought views, included whether the trigger for liability under section 90A should be fraud or negligence, whether the liability regime should extend to ad hoc disclosures, whether there should be liability for statements that are late but accurate, and whether liability should extend beyond the issuers to those who make the statement on behalf of the company.

78. The Davies Review did not specifically consider the PDMR definition in section 90A.

79. The discussion paper of the Davies Review noted (at paragraph 53) that:

> "Only the issuer can be liable to investors under this provision, not directors or advisers. However, a company can only know things if the knowledge of human beings is attributed to it, and the section treats those "discharging managerial responsibilities" as the relevant persons. Normally, this will be the directors. Thus, the section will normally focus on the knowledge, recklessness or dishonesty of the directors, but for the purposes of making the issuer liable to investors…."

80. Professor Davies published a final report in June 2007, with a series of recommendations for extending the liability regime in section 90A.

81. The final report did not comment on the definition of PDMRs.

82. The recommendations were considered and consulted upon by the UK Government and led to various amendments being made to section 90A.

83. These amendments were introduced by the Financial Services and Markets Act 2000 (Liability of Issuers) Regulations 2010, made pursuant to section 90B of FSMA. The 2010 Regulations came into force on 1 October 2010 and enacted Schedule 10A to FSMA.

84. Section 90A was amended and shortened so as to cross-refer to the detailed provisions of Schedule 10A.

85. Schedule 10A expanded the scope of the issuer liability regime. The expanded regime covers (i) additional securities (including those admitted on a UK regulated market or UK multilateral trading facility); (ii) all information published by an issuer by recognised means, regardless of whether the information is required to be published; (iii) sellers and holders of securities, as well as acquirers of securities; and (iv) liability to pay compensation to a person who acquires, continues to hold or disposes of securities and suffers loss in respect of the securities as a result of a dishonest delay by the issuer in publishing information.

86. The information referred to in (ii) beyond that required to be published is known as ad hoc information.

87. Issuers are obliged to make ad hoc disclosures under separate European instruments concerning market abuse. Directive 2003/6/EC of the European Parliament on insider dealing and market manipulation ("the 2003 Directive") required Member States to enact legal requirements for issuers to disclose inside information (i.e. information to which the price of the securities is sensitive (Article 1(1)) to the market (Article 6). That directive was replaced by the EU Market Abuse Regulation as of 3 July 2016 (which is EU Law retained in the UK post-Brexit). I shall return to the 2003 Directive in a moment.

88. The 2010 Regulations stated that section 90A, in the form introduced by the Companies Act 2006, continues to apply to statements first published before 1 October 2010.

89. Since these proceedings concern statements first published before and after that date, section 90A in its original form and the revised regime under Schedule 10A are both in issue. However none of the arguments advanced by the parties on the present application turned on any differences between the two versions of the statute. For convenience I shall generally refer to the later form of the statute found in Schedule 10A.

The use of the expression "person discharging managerial responsibility" in the 2003 Directive

90. As just mentioned, the 2003 Directive of the European Parliament concerns insider dealing and market manipulation.

91. A use of the expression "person discharging managerial responsibility" was defined in Article 1 the Commission Directive 2004/72/EC of 29 April 2004 implementing the 2003 Directive (see further below).

92. The claimants submitted that the expression PDMR is an autonomous concept of European financial regulation law and that the expression should be given the same meaning under section 90A of FSMA.

93. The defendant argued that the term PDMR is used differently in the UK market abuse legislation and the issuer liability legislation; and that it is wrong to read across into

the issuer liability regime a coinage taken from the (different) European market abuse legislation.

94. To assess these arguments it is therefore necessary to trace the history of this strand of European legislation and its implementation into UK domestic law.

95. Recital 12 of the 2003 Directive stated that market abuse consists of insider dealing and market manipulation.

96. Article 6(1) provided that Member States shall ensure that issuers of financial instruments inform the public as soon as possible of financial information which directly concerns the said issuers.

97. Recital 26 stated that greater transparency of transactions conducted by persons discharging managerial responsibilities within issuers and, where applicable, persons closely associated with them, constitutes a preventive measure against market abuse. The publication of those transactions on at least an individual basis can also be a highly valuable source of information to investors.

98. The transactions referred to in that Recital were dealings in securities in issuers by persons discharging managerial responsibilities in the issuers and persons closely associated with them.

99. Article 6(4) provided for the disclosure of information by such persons concerning such transactions and required Member States to ensure that public access to information concerning such transactions is readily available as soon as possible.

100. The term PDMR was not defined in the 2003 Directive.

101. It was however defined in the 2004 Commission Directive which implemented the 2003 Directive. Article 1 stated,

> "For the purposes of applying Article 6(10) of Directive 2003/6/EC:
>
> 1. 'Person discharging managerial responsibilities within an issuer' shall mean a person who is
>
> (a) a member of the administrative, management or supervisory bodies of the issuer;
>
> (b) a senior executive, who is not a member of the bodies as referred to in point (a), having regular access to inside information relating, directly or indirectly, to the issuer, and the power to make managerial decisions affecting the future developments and business prospects of this issuer."

Further legislative history: implementation of the 2004 Directive and the TOD

102. The 2004 Directive was implemented in the UK by amendments to FSMA in March 2005 (i.e. before the section 90A civil liability regime came into force in November 2006).

103. This was in section 96B of FSMA. This defined PDMR in a manner consistent with the 2004 Directive (section 96B(1)):

> "For the purposes of this Part, a "person discharging managerial responsibilities within the issuer" means
>
> (a) a director of an issuer […]); or
>
> (b) a senior executive of such an issuer who—
>
> > (i) has regular access to inside information relating, directly or indirectly, to the issuer, and
> >
> > (ii) has power to make managerial decisions affecting the future development and business prospects of the issuer."

104. I note that this provision has since been repealed by the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016.

105. Section 96B of FSMA was contained in Part 6 of that act. The definition in section 96B(1) applied at that stage to the whole of Part 6.

106. The next relevant piece of legislation was the TOD (of 15 December 2004). The TOD did not use the term PDMR.

107. As already noted, the TOD set out requirements for the disclosure of information by issuers of securities to promote market transparency. An obligation was placed on issuers to provide various categories of information.

108. As noted above, Recital (17) stated that appropriate liability rules, as laid down by each Member State under its national law or regulations, should be applicable to the issuer, its administrative, management or supervisory bodies, or persons responsible within the issuer. Member States should remain free to determine the extent of the liability. This responsibility is repeated in Article 7.

109. As already noted, Article 7 of the TOD was implemented in part by Part 43 of the Companies Act 2006. This included (at section 1270) the insertion of the original section 90A into Part 6 of FSMA.

110. Section 90A(9) contained the definition of "persons 'discharging managerial responsibilities' in relation to a publication". (This was materially the same as the definition given by the later version in Schedule 10A.)

111. Subsection (9) stated that the definition was "for the purposes of this section".

112. Schedule 15 of the Companies Act 2006 made consequential amendments to Part 6 of FSMA.

113. This included at paragraph 7 an amendment to section 96B: "in subsection (1) for "for the purposes of this Part" substitute "for the purposes of the provisions of this Part relating to disclosure rules"".

114. The disclosure rules are rules to be made by the competent authority under Part 6 of the Act for the disclosure of information by issuers.

115. The upshot is that the definition of the expression PDMR in section 96B was restricted to the disclosure rules (as defined in section 73A of FSMA) while the definition of the expression PDMR in section 90A was restricted in express terms to the provisions of that section.

116. I shall return below to the parties' arguments concerning the expression PDMR in these strands of European legislation.

Issue 1: the construction of the term PDMR for the purposes of liability under section 90A and Schedule 10A

117. The defendant submitted in outline as follows.

118. First, it was common ground that the definition in Schedule 10A paragraph 8(5) was exhaustive.

119. Secondly, the statutory definition of PDMR in Schedule 10A was clear and unambiguous. Reading it naturally it provides that where an issuer has directors the case falls within paragraph 8(5)(a). There is no room or reason to go beyond that and include senior executives; paragraph 8(5)(c) shows indeed that the drafter intended that senior executives could only be PDMRs in cases where the issuer has no directors. The Parliamentary intention is therefore clear.

120. Thirdly, the term "director" is well-known and established in UK law. The drafter used a recognised concepts of domestic company law and there is no reason to adopt another, more esoteric, meaning.

121. Fourthly, there is nothing in the relevant European legislation to suggest a different interpretation. The term PDMR is not used anywhere in the TOD and there is nothing in that instrument to suggest that the definition in Schedule 10A should be read other than in its natural way. The TOD gave Member States a broad latitude to create an issuer liability regime with its own limitations, and that is what has happened with Schedule 10A. The claimants' reliance on the use of the term PDMR in the market abuse context is misplaced. The regimes are separate and indeed the drafter of section 90A deliberately used a different definition from that used in relation to the disclosure rules and section 96A.

122. Fifthly, the narrower definition makes good sense since most of the requirements on issuers to disclose information (in the form of accounts and reports) are imposed on the directors of UK issuers.

123. The claimants submitted in outline as follows.

124. First, the definition of PDMR in Schedule 10A has an autonomous or freestanding meaning found in EU financial regulation. This meaning also promotes the purpose of the issuer liability regime and the TOD which it seeks to implement.

125. Against that background, the term should be given a meaning that reflects its use in the 2004 Commission Directive. The claimants contend that senior executives with

control over substantial business units, or who were responsible for managerial decisions affecting the future developments and business prospects of the issuer and/or those business units are capable of qualifying as PDMRs within the meaning of section 90A.

126. Secondly, this is not a trial of a preliminary issue as to the meaning of PDMR and the claimants' position about the meaning of the statutory definition is at least arguable. The meaning of PDMR should be determined after a full investigation at trial.

127. Thirdly, the TOD was intended to enhance investor protection and improve remedies for the provision of false information to investors. Section 90A is to be interpreted in a manner which furthers that intent. The court should not take an unduly strict view of the language: see SL claimants v Tesco plc [2019] EWHC 2858 (Ch) at [73] where the court rejected an unduly restrictive approach.

128. If the category of PDMRs is limited to a narrow category of "directors" in the strict company law sense, whether de jure, de facto, or shadow, the intention of the statute would be easily defeated, and the issuer liability regime would be open to abuse. Issuers could arrange their corporate structures in such a way that the senior executives with responsibilities for the issuer's financial reporting occupy offices below the level of the board. It is common for UK-listed issuers to have only a small number of executive directors.

129. Fourthly, the language of section 90A supports the purposive approach. Parliament chose to use the expression "person discharging managerial responsibility" as the touchstone of liability. These words have meaning without elucidation, and should not be ignored. They were taken from the market abuse legislation and the decision to do so must be deliberate. Parliament could have used the concept of "director" as the touchstone of liability, but did not do so.

130. The definition in Schedule 10A, paragraph 8(5)(c) is also instructive: instead of seeking to describe someone who might be regarded as in a position akin to a director in a non-company, it refers to "any senior executive of the issuer having responsibilities in relation to the information in question or its publication".

131. Fifthly, in describing the meaning and effect of the original section 90A, Professor Davies noted in the March 2007 Discussion Paper (cited above) that the PDMRs would normally be the directors. That acknowledges the possibility of other people being PDMRs. Similarly, when posing the question of whether liability should be extended beyond the issuer itself so as to include individuals, Professor Davies noted: "[t]his question arises not only in relation to directors and senior managers, but also in relation to advisers".

132. Sixthly, it is irrelevant that the definition in paragraph 8(5) of Schedule 10A is exhaustive. Terms such as 'director' and 'officer' take colour from their context: see Re Paycheck Services 3 Limited [2010] UKSC 51 at [103] and Secretary of State v Deverell [2001] Ch 340 at [35]. Under section 90A there is no personal liability. There is thus no call for a predisposition towards a narrow or technical approach to "director" in paragraph 8(5). Rather, the Court should step back and consider the purpose of the section and how its contours can fairly be drawn so as to further that purpose.

133. I prefer the defendant’s submissions on Issue 1.

134. I reject the claimants’ contention that in defining the term PDMR in Schedule 10A the legislature simply adopted an autonomous concept of European law. Though the expression was used in the 2004 Directive for the purposes of implementing Art 6(10) of the 2003 Directive, it was not used anywhere in the TOD, which is the instrument which was implemented by section 90A.

135. Moreover, Art 6(10) of the 2003 Directive was concerned with the particular case of persons within companies dealing in securities in the issuer. It set out requirements for disclosure by such persons, who are likely to have insider information. That is a quite different context from the civil liability requirements found in section 90A. The disclosure requirements on such corporate insiders and their associates have been enacted in the UK by a separate and distinct set of rules. Since the term PDMR was not even used in the TOD there is no reason to adopt a definition of the expression used in other European legislation (which itself had a different purpose and target) when reading the UK statute.

136. The claimants’ argument also sidesteps the legislative history, which to my mind is instructive. When section 90A was enacted there was already an existing definition of PDMR in Part 6 of FSMA (which reflected Art 1(1) of the 2004 Commission Directive). The drafter deliberately chose not to use that definition, but adopted the narrower, more restrictive, one in section 90(9) - and also made clear the pre-existing definition did not apply. This shows a clear legislative intent to enact a narrow definition than that used for the other purposes of Part 6. The claimants offered no explanation for this legislative decision.

137. For the reasons already given there is nothing in the terms of the TOD (being the European instrument implemented by section 90A) to lead a reader to think that the term PDMR should be given a meaning different from that given in section 90A(9). Nor is there anything in the purposes of the TOD to inspire a broader reading of the definition in section 90A. The claimants argued that the purpose of the TOD was to enhance investor protection and to require civil liability remedies and that these would be promoted by a broader reading. I cannot accept so broad and general an argument. If right it would favour a reading which imposed expansive liability with few if any limits.

138. But that is not what the statute did. As already noted, the Directive gave Member States broad freedom about how to introduce a liability regime. This was indeed noted in the Explanatory Notes published with the UK implementing statute. The Notes also explained that the statute was intended to impose reasonable limits to the liability of issuers with a view to promoting legal certainty. The metes and bounds of liability are set out within the section. I do not think that one can properly approach the section or its components with a predisposition towards the most expansive possible scope for liability; on the contrary all the indications are that Parliament intended to set reasonable limits on liability. Those limits include the requirement of knowledge by a PDMR and the exhaustive definition of PDMR itself.

139. The claimants say that the drafter chose to use the term PDMR rather than simply referring to the directors and must be taken to have done so deliberately. This argument appears to me to be inconsequential. The drafter did indeed use the term

PDMR but deliberately chose not to use the existing definition of PDMR found in Part 6 of FSMA but created instead a new (more restrictive) definition for the purposes (and only for the purposes) of section 90A(9). The reason the drafter did not simply use the term director is self-evident: it was anticipated that there might be issuers not managed by directors. Hence the need for the definition in section 90A(9) to cover such other cases.

140. I agree with the defendant's submission that the definition in para 8(5) of Schedule 10A is clear and unambiguous and should be given its natural reading. Read as a whole it clearly stipulates that where an issuer has directors the PDMRs are the directors (including persons occupying the position of director, by whatever name called).

141. I am unable also to accept the claimants' submission that sub-paragraph (c) of the definition favours a broader reading of the term PDMR in a case where an issuer has directors. That indeed seems to me an impossible reading of sub-paragraph (c), which applies only in the case of an issuer which has no persons falling within sub-paragraphs (a) or (b). Since an issuer with directors falls within (a), sub-paragraph (c) simply has no application. Indeed, sub-paragraph (c) is actually a firm pointer against the claimants' position. In that sub-paragraph the drafter distinguishes directors from senior executives having responsibility for relevant information. Had the intention been to include such executives for cases within sub-paragraph (a), the drafter would have done so - the very concept being nearby. The structure of the paragraph shows that this was not the intention and that for issuers within (a) the only PDMRs are the issuer's directors.

142. The concept of a director is well rooted in UK law. The drafter indeed echoed the definitions given in closely related legislation, including the Companies Act 2006, when referring to directors and persons occupying the position of a director, by whatever name called. I see no reason for thinking that the expression director should not be given its usual, well-established legal meaning. Moreover, as already noted, the implementation of the TOD was carried out by amendments to FSMA introduced by the Companies Act 2006. The link to the Companies legislation is therefore a close one. A good reason is needed to read such a well-trodden expression in a special, esoteric, sense for the purposes of section 90A. I do not think that the claimants have advanced any realistic reason for departing from the natural meaning.

143. A construction which reads the term director in its usual legal sense, also promotes legal certainty. It does so by adopting a word with an established and conventional legal meaning. As paragraph 1643 of the Explanatory Notes to the Companies Act explained, the Government sought to provide certainty in an uncertain area.

144. The claimants argue that to give the expression director its conventional legal meaning would facilitate abuse and allow issuers to arrange their corporate affairs to avoid liability. I do not think this argument carries any serious weight. As already noted, the legislation was designed to strike a reasonable balance between issuers and investors and set out the limits of liability and promote certainty. If those limits mean that investors are unable to claim compensation that is simply because they are unable to meet the statutory requirements. The argument from abuse is really a complaint that the statute imposes a higher hurdle than the investors would like.

145. I also note 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. On the defendant's interpretation an issuer may therefore be liable under section 90A despite the ignorance of the de jure directors. The net is not as narrowly thrown as the claimants suggest.

146. In any event I find it inherently far-fetched that issuers of listed securities would organise their corporate structures deliberately to avoid civil issuer liability under section 90A for publishing misleading information. Listed issuers like the defendant are subject to regulation and close scrutiny by market analysts and investors. They are required to comply with corporate governance codes. If false information is put out to the markets there are potential administrative, criminal and reputational consequences which go beyond those found in section 90A. As paragraph 1642 of the Explanatory Notes to the Companies Act explained, the primary liability of directors and issuers for the accuracy of the required disclosures comprises criminal liability and administrative penalties under the provisions of Part 6 of FSMA. The civil liability regime imposed by section 90A has to be seen in that legislative landscape. I am unable to accept the claimants' unevidenced assertion – and it is no more than that – that construing the statutory definition as applying only to directors would lead issuers to organise their corporate groups to avoid section 90A liability.

147. I do not think that the potential for elasticity in the concept of a director assists the claimants' arguments. To the contrary it appears to me if anything to point the other way: the court may when considering whether a person is a director within the statutory definition in paragraph 8(5) consider the underlying purposes of the rules contained in the statute (i.e. section 90A). But this does not imply that the court should then go beyond the statutory definition and include persons who are not directors within the definition of PDMR.

148. Professor Davies' comment that the PDMRs will normally be the directors does not assist the claimants (even assuming that this comment could assist the process of statutory interpretation). He was considering the definition in the original section 90A(9) which (like paragraph 8(5) of Schedule 10A) identified the (probably unusual) classes of issuers with no directors and naturally recorded that there might be PDMRs who were not directors. The comment goes no further.

149. I am also unable to accept the claimants' submission that the meaning of the statutory definition involves a novel or developing area of the law or that it would be better determined against the facts as found at trial. The issue involves an exercise of statutory construction. The determination of the issue of construction will not be affected by the facts as found at trial. I also consider that it would assist the parties in their preparations for trial to know the target that must be hit for the claimants to establish their case at trial.

Issue 2: Do the claimants have a real prospect of establishing at trial that P1-P4 were directors of the defendant?

150. The claimants do not allege in their pleadings that P1-P4 were de jure directors and have not advanced a case on this application that they were shadow directors. Their answer to the application is that there is at least a real prospect that they will establish at trial that the P1-P4 were de facto directors of the defendant.

151. The defendant says that this case has not even been pleaded.

152. The first question is whether the claimants have properly pleaded that P1-P4 were de facto directors of the defendant. The second question is whether they have a real prospect of establishing that P1-P4 were de facto directors of the defendant.

153. I start with the pleadings. The particulars of claim in all three Cases allege that the senior management of the defendant included de jure board members of the defendant; a group executive team or committee called the Group Executive; individuals held out as directors or persons occupying the position of a director such as regional finance directors and regional CFOs; and directors of G4S UK Holdings, described as the senior subsidiary of the UK business.

154. In Case 1 the claimants allege that P1-P4 were "executive directors of G4SCJS and PDMRs for the purposes of the present claim". The particulars of claim alleges in addition that (a) P1-P4 were directors of G4S UK Holdings at various times; (b) they had titles such as "Finance Director, UK and Africa," "CFO, Asian and Middle East," "CEO UK and Africa", or "Group COO" and were held out as directors; and (c) P2 and P3 were members of the Group Executive at various times. In Cases 2 and 3 the same allegations are made. It is also alleged that P5, a de jure director of the defendant, was a PDMR with the requisite state of mind. The particulars of claim in each Case refer to P1-P4 as occupying the position of directors and being held out as directors of the defendant.

155. The defendant made a request for further information about the allegations in Case 1 on 24 July 2020. The claimants responded on 17 December 2021.

156. In requests 4, 6, 8 and 10, the defendant asked whether it was alleged that P1-P4 were persons occupying the position of directors of the defendant in the relevant period; and if so, to set out the facts and matters relied on in support of the allegation.

157. Requests 5, 7, 9 and 11 asked whether it was alleged that P1-P4 were persons in accordance with whose directions the directors of the defendant were accustomed to act. The claimants' answers 5, 7, 9 and 11 said that no such case was advanced.

158. Answers 4, 6, 8, and 10 started with a "preliminary" passage which stated that the claimants' case was that the definition in paragraph 8(5) of Schedule 10A was to be construed in accordance with the context of section 90A and not solely by reference to English company law. That preliminary passage contained the claimants' legal contentions as discussed under Issue 1 above. That passage included this:

> "In these circumstances, senior executives who held control over substantial business units within a listed issuer (such as Regional CEOs or Divisional CEOs) and/or were entitled to take managerial decisions affecting the future developments and business prospects of that issuer and/or those business units (and thereby that issuer) were PDMRs. The fact that such individuals are not formally appointed de jure directors of an issuer is not relevant (let alone determinative)."

159. Answers 4, 6, 8 and 10 then responded to the question whether the claimants were alleging that P1-P4 were persons occupying the position of a director of the defendant by saying yes. The claimants stated that they were relying on the facts and matters pleaded in the particulars of claim in support of this allegation.

160. The defendant submitted that there was no pleaded case that P1-P4 were de facto directors of the defendant at the relevant times. It said that Answers 4 etc. had to be read together with the preliminary passage and that the claimants' pleaded case stood or fell with their legal arguments about the interpretation of paragraph 8(5) of Schedule 10A. If those arguments are rejected there is no case advanced that P1-P4 were de facto directors. The defendant pointed out that the pleader was well aware of the various categories of directorship (as shown by the use of the term de jure director in the pleading) and had chosen not to allege that P1-P4 were de facto directors.

161. The claimants submitted that the positive answer to Requests 4 etc. clarified that they were indeed alleging that P1-P4 occupied the position of directors of the defendant even if they did not use the de facto director label. Counsel said that it was the intention of the claimants to advance a case that P1-P4 were de facto directors of the defendant and that these answers expressed that intention. He also submitted that if the court concluded that the pleadings were unclear, the claimants should have a further chance to amend to spell out their case.

162. It seems to me that the pleadings are less clear than they should be. A party alleging de facto directorship is required to set out its case and the facts and matters relied on. There is some force in the defendant's contention that Answers 4 etc. are each to be read as incorporating and depending on the preliminary passage.

163. Though there is some force in this point I have concluded on balance that the claimants have said in terms that they do indeed intend to allege that each of P1-P4 occupied the position of a director of the defendant and that would be sufficient (if established) to satisfy the wording of para 8(5) of Schedule 10A. It seems to me, on balance, that Answers 4 etc do enough to plead a case that P1-P4 were directors of the defendant. Having said that, it is to my mind undesirable for the pleadings to be left in their somewhat ambiguous and uncertain state. In the light of my decision on Issue 1 above it also appears to me that it is desirable for a party in the position of the claimants to spell out in clearer terms than are currently pleaded which category of director of the issuer a relevant person falls into. It also seems to me that (supposing the case is one that should go to trial at all – see below) the claimants should be required to spell out in clear terms that their case does not depend on the preliminary passage, which is at least implicitly incorporated into all of the relevant answers.

164. I also note that counsel for the claimants stated that the claimants might wish to incorporate some of the points made in the evidence served by them on this CPR 24 application (to which I shall return below).

165. The defendant submitted next that, even if the claimants were able to overcome the pleading hurdle, their case that P1-P4 were de facto directors of the defendant at the relevant times lacked conviction and should be dismissed under CPR 24.

166. Before turning to the parties' submissions, it is helpful to say something more about the legal principles. I was taken to a number of the leading cases on de facto

directorships. It will suffice to refer to two helpful summaries by judges who had carefully reviewed the caselaw.

167. In Secretary of State for BIS v Chohan [2013] EWHC 680 (Ch), Hildyard J listed ten characteristics relevant to the question of whether a person was a de facto director, observing that "not everyone is required to be established, and there is inevitably some overlap between them" (at [41]):

> "(1) A de facto director must presume to act as if he were a director.
>
> (2) He must be or have been in point of fact part of the corporate governing structure and participated in directing the affairs of the company in relation to the acts or conduct complained of.
>
> (3) He must be either the sole person directing the affairs of the company or a substantial or predominant influence and force in so doing as regards the matters of which complaint is made. Influence is not otherwise likely to be sufficient.
>
> (4) I am not myself persuaded that an "equality of footing" test is required: I prefer the looser fact-based approach advocated by Jacob J, and consider the indicia to be whether the person concerned has undertaken acts or functions such as to suggest that his remit to act in relation to the management of the company is the same as if he were a de jure director.
>
> (5) The functions he performs and the acts of which complaint is made must be such as could only be undertaken by a director, not ones which could properly be performed by a manager or other employee below board level.
>
> (6) It is relevant whether the person was held out as a director or claimed or purported to act as such: but that, and/or use of the title, is not a necessary requirement, and even that may not always be sufficient.
>
> (7) His role may relate to part of the affairs of the company only, so long as that part is the part of which complaint is made.
>
> (8) Lack of accountability to others may be an indicator; so also may the fact of involvement in major decisions.
>
> (9) The power to intervene to prevent some act on behalf of the company may suffice.
>
> (10) The person concerned must be someone who was more than a mere agent, employee or advisor."

168. The second helpful summary was given by Falk J in Re Keeping Kids Company [2021] EWHC 175 (Ch) at [167]:

> "Attempting to summarise the key points of most relevance to this case:
>
> (a) Guidance should be obtained from looking at the purpose of the provision in question (Holland at [39]). The primary purpose of the disqualification legislation is the protection of the public. Those who assume the status and functions of a company director should be held to certain minimum standards in the public interest. The legislation has both a deterrent element and serves as an encouragement to improve standards of behaviour (see [148] above, referring to the judgment of Lord Woolf MR in Re Blackspur Group). I do not think that the purpose of the disqualification legislation is sufficiently different from the purpose of the legislation considered in Holland materially to affect the force of the observations in that case in a disqualification context.
>
> (b) There is no single test, but an important starting point is the company's corporate governance structure. The court is seeking to identify functions that were the sole responsibility of a director or board of directors, that is, the highest level of management of the company. Those who assume and exercise powers and functions that can only properly be exercised or discharged at that highest level of management will, consistent with the purpose of the disqualification legislation, be within its scope as de facto directors. Those who are subordinate and accountable to that highest level of management will not be.
>
> (c) The test has been described as whether the individual was participating, or had the ability to participate, in decision-making as part of the corporate governing structure (which I take to mean the highest level of management decision-making). Another way of putting it is to ask whether the individual was on an "equal footing" with others in directing the affairs of the company.
>
> (d) There is a distinction between being consulted about, advising on or otherwise being involved in, decision-making in some other capacity (even in circumstances where real influence is exerted) and actually participating in making a decision as a director.
>
> (e) The question is one of fact and degree. It must be determined objectively, by reference to what the relevant individual actually did (including, for example, whether they were held out as a director and whether they took major decisions), and looking at the cumulative effect of the activities relied on in their overall factual context."

169. This passage includes Falk J's observation (not always spelt out in the earlier cases) that the relevant person must participate at the highest, directorial, level of the corporate governing structure. It is not enough to show that the person was involved at some subordinate level in that structure.

170. These two decisions concerned the court's power to disqualify directors, though they draw on cases in other contexts where the question of de facto directorships have arisen. The parties accepted that these cases provided helpful guidance for present purposes.

171. The defendant submitted in summary as follows. The claimants' own case is that the defendant had a board of executive and non-executive directors. P1-P4 were not said to be de jure directors of the defendant. Rather they were directors of subsidiary companies. Their roles, which were subordinate to the board of the defendant, were spelt out in the contemporaneous published materials. The claimants are effectively inviting the court to ignore the separate corporate identity of the subsidiary companies. That is contrary to the approach of the majority of the Supreme Court in Re Paycheck Services. The use of titles like Group CEO or Finance Director is commonplace in listed companies and does not amount to any relevant holding out. The very documents which show the use of those titles also show that P1-P4 were not directors of the defendant itself. Likewise the published documents which refer to the Executive Committee carefully distinguish between individuals who were and who were not also directors of the defendant. The key question is whether the relevant individuals held a directorial role in relation to the defendant and there is nothing in the pleaded case or the evidence filed in opposition to the application that establishes a case that carries any conviction that P1-P4 had such a role; rather the documents relied on point the other way.

172. The claimants submitted in outline as follows. The question whether an individual is a de facto director is intensely fact sensitive. It involves a careful examination of the relevant company's governance structure. Where a company carries on business as a holding company through operating subsidiaries, senior executives of the business may well operate at the same level as the actual directors in formulating the company's strategy and overseeing its business. They may have the same de facto authority as the directors and not be subject to realistic accountability. The information so far disclosed shows that the business of the company was operated by the Group Executive and this is enough to show that the operations and supervision of the defendant's business may have been conducted across the strict lines of corporate personality. There has been no disclosure or cross examination of witnesses and until that has happened a full picture of the corporate governance structure of the defendant will not be available. Generally the question is not suitable for summary determination.

173. I have concluded on balance that the claimants are right to say that the question whether P1-P4 were de facto directors of the defendant should be allowed to proceed to trial and that the court should not dismiss this part of the claims under CPR 24.

174. The cases show that whether a person is a de facto director of a company is intensely fact-specific. It generally requires an assessment of the corporate governance structure of the company in order to decide whether the person has participated or been able to participate at the directorial level of decision making. The question is one of fact and degree and must be determined objectively and cumulatively.

175. The court is also required to consider what the relevant individuals actually did rather than merely considering the roles formally assigned to them in the corporate structure.

It appears to me that in the present case this can only properly be carried out in the present case after disclosure of documents and a trial.

176. In addition to the pleadings (summarised above) the claimants relied on the evidence contained in the sixth witness statement of Mr Warren-Smith (a partner in their solicitors) about the roles of P1-P4. I am satisfied that there is an adequate evidential foundation for the claimants to allege that P1-P4 were involved in important decisions which affected the business of the defendant and were from time to time described as occupying positions including the expression director or equivalent officer (by reference to a region or function). The parties have not yet given disclosure of documents. The full details of the actual activities of P1-P4, their role in decision making, the scope of their authority and accountability, and how they were held out by the defendant have therefore not been revealed to the claimants.

177. I also consider that there is an adequate evidential foundation for the claimants' contention that the corporate governance structure of the defendant and its business was complex and elaborate and that the claimants do not have a full understanding of the structure. The defendant itself was a holding company and the business of the defendant was organised into business units, segments and regions carried on through subsidiaries. There was also the Executive Committee, which included de jure directors of the defendant. Its functions and activities have not yet been revealed to the claimants. Two of the relevant individuals were on the Executive Committee at various times. Their participation, roles and functions within that committee have not been disclosed. The caselaw shows that the court will generally need to examine a company's governance structure carefully when deciding whether it had de facto as well as de jure directors.

178. It seems to me that there is a reasonable prospect that disclosure and witness evidence will throw further light on these issues and that the court at trial will be assisted by fuller evidence than is now available.

179. I also note that none of the existing cases appear to have considered a corporate governance structure of the current kind where the top company is essentially a holding company and the business is operated through various subsidiaries. Most of the existing cases have been concerned with relatively simple corporate structures. The present dispute therefore concerns the application of the concept of de facto directorship to a novel factual scenario. It appears to me that it would be desirable to carry out that exercise in the light of the full facts found at trial.

180. There is also some potential for elasticity in the application of the concept of de facto directorship in light of the purposes of the statute. It appears to me for this reason too to consider the application of the concept on facts as found at trial rather than in a factual vacuum.

181. The defendant may ultimately be right to say that the corporate governance structure distinguished between directors and managers, that none of P1-P4 acted as anything other than senior executives of parts of the group business, and that, while involved in aspects of the business, they did not participate as directors. But that seems to me to be an issue properly to be determined at trial with the benefit of disclosure and witness evidence and with a full examination and scrutiny of the facts after disclosure has been given. I do not think that the court can properly decide the issue on a

summary basis at this early stage. In the light of this conclusion I shall refrain from expressing any views on the respective merits of the parties' positions.

182. I conclude that there are real (as opposed to fanciful) prospects of P1-P4 being held to be de facto directors of the defendant and that this part of the proceedings should not be struck out or dismissed under Part 24.

Should the claims proceed to trial anyway?

183. This issue does not arise. I will therefore address it very briefly. The claimants say that those parts of the cases as rely on the allegations concerning P1-P4 should proceed to trial in any event. They say that the scope of disclosure or the trial would not significantly be reduced by granting the application. It will still be necessary to investigate reporting lines between senior G4SCJS individuals and the board to decide the issue of P5's knowledge. P1 to P4 will be relevant custodians. Moreover, the claim will go to trial in any event, because these applications are not dispositive of all the existing claims. As recognised by the defendant, allegations concerning untrue and misleading information published between about December 2013 and March 2014 will remain.

184. I would have rejected this argument. If the claims concerning P1-P4 were stripped out, the remaining claims would be much reduced in their scope. It is probable that the scope of the trial (and of disclosure) would have been reduced by stripping away the allegations that P1-P4 were de facto directors; indeed the claimants' own submission on Issue 2 was that those allegations required extensive disclosure about the corporate governance structures of the defendant and the actual, cumulatively assessed, conduct of P1-P4. It is hard to see how any of that would have been needed if the relevant allegations were removed. Moreover it seems probable that the periods covered by the claim would have been potentially reduced. I would therefore have grasped the nettle and dismissed the allegations concerning P1-P4.

Conclusions

185. I have concluded that the only PDMRs of the defendant for the purposes of the section 90A claim were its de jure, de facto or (arguably) shadow directors at the relevant times.

186. The defendant has however not persuaded me that the claimants lack a real prospect of establishing at the trial that P1-P4 were de facto directors of the defendant at the relevant times.

187. I will hear the parties as to whether further amendments are required to clarify the nature of the claimants' case that P1-P4 were de facto directors and to introduce anything further from the evidence which is not currently pleaded.